SOCIAL JUSTICE LAWYERING AND THE MEANING OF INDIAN CONSTITUTIONALISM: A CASE STUDY OF THE ALTERNATIVE LAW FORUM

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> "On 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequalities. In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else

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> those who suffer from inequality will blow up the structure of [our] political democracy . . ."
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> B. R. Ambedkar, final speech delivered in the Indian Constituent Assembly[1]

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I. INTRODUCTION

The stark contradiction of citizenship in the newly independent India, where all Indians had the right to vote yet remained socially and economically unequal, was presciently captured by Dr. Ambedkar in this statement drawn from his final speech delivered in the Constituent Assembly. Though India is a democracy in form, its socio-economic hierarchies and inequalities continuously challenge the promise of equal citizenship guaranteed under its Constitution. Constitutional democracy

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[1] CONSTITUENT ASSEMBLY DEBATES, Vol. XI, 25 Nov. 1949, pp. 972-981(India) [hereinafter CONSTITUENT ASSEMBLY DEBATES].

as a mode of collective living guaranteeing the equal rights of all is, at most, a work in progress in the Indian context. Nurturing and sustaining the idea of constitutional democracy as equal and dignified life for all is a grassroots project undertaken by a range of social movements often against a recalcitrant state. The framework which motivates some of the work on behalf of those excluded by formal Indian democracy is the Indian Constitution. Consequently, lawyers and law groups working on behalf of those at the margins of Indian democracy have an important role in converting the democratic demands of the excluded into the language of the law.

In this article, we explore some of the ways by which Indian constitutionalism is rendered meaningful through a focus on the work of a single organization of public interest lawyers in India: the Alternative Law Forum, Bangalore ("ALF"). By doing so, we aim to identify particular aspects of these challenges as well as some of the socio-legal strategies adopted to give content to the constitutional idea of India. We recognize that even though the focus is on the work of ALF, the work of ALF itself represents only a tiny fragment of a much larger effort by a range of people's movements, lawyering groups and NGO's to define and sustain a grassroots vision of democracy. Our second purpose is to obtain insights, through a contextual understanding of ALF's work, into the process by which a public interest law practice can contribute towards a larger democratic vision. In short, can alternative lawyering contribute towards deepening constitutional democracy?

The concept of "alternative lawyering" advocated by ALF parallels that of "cause lawyers" employed by Sarat and Scheingold to describe a particular set of lawyers in their multi-volume studies of this phenomenon. Sarat and Scheingold's definition of cause lawyers seeks to distinguish them from conventional lawyers who focus on client-centered advocacy and treat legal professionalism as a set of technical skills that are provided on a fee-for-service basis to individual and institutional clients.[2] Conventional lawyers often end up providing their services to the highest bidder, leading to the critique of their adherence to the "lawyer as hired gun" approach which sees them as willing to fight for any client and advance any interest. As Sarat and Scheingold note, conventional lawyers often claim that their commitment to professionalism means that they should eschew pursuing normative ends,

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[2] AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (1998).

focusing instead on merely providing professionally competent service. Cause lawyers, in marked contrast, see themselves as reconnecting law and morality, and pursuing the idea that "lawyering is a 'public profession,' one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills."[3] In Sarat and Scheingold's description, cause lawyers view lawyering as a deeply moral and political activity, a kind of work that encourages the pursuit of the right, the good, or the just.[4] This fits well with the idea of alternative lawyering that the founders of ALF wanted to advance in opposition to mainstream understandings of lawyering in India.

In his comparative study of public interest law and human rights lawyering in six jurisdictions, Charles Epp asserted that, in spite of having a vibrant, rights-friendly Constitution and a powerful Supreme Court, India has experienced only a weak rights revolution.[5] According to Epp, the primary reason for this is the lack of an adequate "support structure" for rights advocacy before the courts.[6] Epp defines this support structure as "consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing."[7] Epp contends that the relative failure of the "rights revolution" in India is directly linked to the fact that the "Indian interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively, and the availability of resources for noneconomic appellate litigation is limited."[8]

While the support structure for mobilization for rights is indeed weak in India, it is important to acknowledge that there are individuals and organizations who have sought to make a difference against heavy odds. Epp's analysis of rights advocacy in India begins in the 1970s, when a number of rights organizations formally came into existence, especially during the turbulent period from 1975-77 which is referred to in India as "the Emergency." This period witnessed the imposition of an internal emergency by the Indira Gandhi Government, which was characterized by governance through authoritarian policies that consisted

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3 *Id.*

4 AUSTIN SARAT & STUART SCHEINGOLD, THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 1 (2005).

5 CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 90- 100 (1998).

6 *Id.* at 90-108.

7 *Id.* at 3.

8 *Id.* at 95.

of censoring and closing down media outlets, detaining opposition politicians, and generally sanctioning the use of violence and intimidation on a daily basis by State agencies. While Epp is justified in focusing on the Emergency period, the commitment to a political practice of law - and to addressing issues of social and economic injustice through law - has deep roots in the history of the anti-colonial struggle in India. The experiences of lawyers like Mohandas Gandhi and other nationalist leaders who used their knowledge of the law to devise ingenious strategies to oppose and ultimately defeat the forces of British colonialism are well documented in India.[9] Their strategies have been adopted by successor human rights activists and organizations in post-independence India, including by lawyers in ALF. Acknowledging the continuing influence of older roots of human rights lawyering in India provides an important corrective to Epp's analysis.

Upendra Baxi's scholarship covered the emergence of Public Interest Litigation ("PIL") in India around the same period, and identified some pivotal figures – from the judiciary, the bar, legal academia, and the law student community in India - who were instrumental in ensuring that the higher judiciary in India became continuously engaged in addressing social and economic problems in India through the use of PIL.[10] In later work, Baxi noted how the PIL movement in India, being "judge-led and even judge-induced," proved to be susceptible to the forces of globalization and neo-liberalism that swept India in the 1990s.[11] Baxi's more recent skepticism about Indian PIL can be said to be in line with Epp's analysis, both of which were published around the same time.

We argue that Epp's analysis of rights-activism and cause lawyering in India is incomplete, and does not sufficiently recognize the substantial achievements of human rights lawyering in India, given the special challenges involved. By focusing on an organization that came to life soon after the publication of Epp's analysis (in 1998), we seek to show how contemporary social justice lawyers seek to engage with, and

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[9] YVES DEZALAY & BRYANT A. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOWS OF EMPIRE 62-75 (2010) (a recent study which focuses on the role of legal elites in the Indian nationalist movement).

[10] *See generally* Upendra Baxi, *Taking Suffering Seriously*, *in* LAW AND POVERTY: CRITICAL ESSAYS 387 (Upendra Baxi ed., 1988). See also, UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS (1980).

[11] Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice*, *in* FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156-209 (S.K. Verma & Kusum Kumar eds., 2003).

overcome, the challenges identified by Epp. In the conclusion of our paper, we seek to set out the insights gained from our study for securing human rights in contemporary India, which we argue also has a bearing on the struggle for human rights in other contexts.

Epp compares the slow progress of rights-activism in India with the more tangible progress achieved in three other jurisdictions: the United States of America, Britain, and Canada. As our three case studies will hopefully make clear, the challenges confronting human rights lawyers in India are far more formidable than those that exist in these three societies. India is a much larger, much poorer society than those that Epp compares it to, and the patterns of human rights abuses that are prevalent within it are much more deeply entrenched, dating back across several centuries. Moreover, patterns of governance in India are shaped by the legacy of colonial rule, which has left a deep imprint on the nature and motivations of systems of justice delivery in India. The capacity of Indian state institutions to respond to social injustices is qualitatively different from those in the societies that Epp draws comparisons with. When assessing the action taken to achieve the constitutionally entrenched rights in India, one has to consider that progress across six decades will necessarily be restricted by the longstanding issues that beset governance and systems of justice delivery in India. Against such a backdrop, Epp's argument about the weak rights revolution in India, while correct, has to be supplemented by a broader understanding of issues that affect the practice of human rights law on the ground in India.

The scheme of this article is as follows: in Part II we focus on the origins and methods of ALF. This is followed in Part III by a discussion of three specific case studies from ALF's work. The case studies address three persisting fault lines – caste, religion, and sexuality - in contemporary Indian society. Through a detailed examination of these cases, we seek to highlight the social problems which confronted ALF lawyers, the legal processes and strategies that they adopted in response, and the reasoning behind the choices ultimately made by them. In Part IV, we draw insights from the case studies to address broader debates in Indian and comparative public interest law, returning to some of the themes addressed here.

II. DOING SOCIAL JUSTICE LAWYERING: CONTEXTUALIZING ALF'S WORK

ALF was founded in 2000 in the southern Indian city of Bangalore (itself located within the state of Karnataka) by a group of young lawyers, most of whom were in their mid-twenties and early thirties. It was founded, in part, because of a felt need for a law-centred social justice organization in Bangalore.

Several of the founding members were recent graduates of the National Law School of India University, Bangalore, where their legal education had exposed them to the idea that there must be a link between the practice of law and the quest for justice. The National Law School had, at least in its initial years, focused on the idea that "law could be employed as a tool for social engineering."[12] Its curriculum featured courses on Law and Development, Law and Poverty, human rights, child rights, and refugee law – all of which sought to inculcate a social justice orientation in students. Towards this objective, it set up a legal aid clinic where law students were encouraged to understand the problems confronted by poorer and marginalized sections of society. Students were also encouraged to adopt initiatives that would enhance their exposure to societal realities. As we note later in our paper, one such student initiative on LGBT rights had profound implications for many ALF lawyers. Significantly, not all the founding members were graduates of the National Law School. Indeed, some were not even lawyers, and instead came from a social movement or activist background. Of this group, some went on to obtain formal qualifications in the law after becoming aware of the potential power that can be wielded by those who practice law. Some others in the founding group were idealistic and committed activists who were educated at various other law schools from across India, and had some experience in the practice of law. Over time, ALF's constitution has become varied. Today, ALF owes as much to the energy of those who came to the law through social struggle as to those who came to ALF because of the impact of progressive legal education.

The beginnings of ALF were rooted both in a certain legal education as well as in the concrete needs of the activist community in

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[12] There is some literature that chronicles the founding and evolution of the National Law School. *See generally* N.R. MADHAVA MENON, THE STORY OF A LAW TEACHER: TURNING POINT (2009); Jayanth K. Krishnan, *Professor Kingsfield goes to Delhi: American academics, the Ford Foundation and the Development of Legal Education in India*, 16 AM. J. LEGAL HIST., Oct. 2005, no. 4, at 447, 484.

the city of Bangalore. These twin factors have propelled the way ALF has evolved in both academic as well as activist directions. ALF at its inception had a core team of members who worked on a full-time basis, while others have provided support in various ways including by working on a part-time basis. However over a period of time, ALF became more 'professional' and now consists of ten full-time lawyers and one activist who is currently studying law.

ALF has arrived at an understanding of the salience of issues pertaining to caste, class, gender, sexuality, and disability, while being aware that newer issues might emerge which will not fall within traditional categories.

The mandate ALF has given itself is very broad, allowing for different social issues to be articulated depending upon the passions and interests of its members. As a key supplement to the self-driven and self-motivated nature of the work undertaken by ALF are the activist networks of which ALF is a part and which enable the raising of different social and political issues.

In formulating the issues they would work on, and the strategies they would adopt, the lawyers in ALF looked towards their predecessors in the human rights movement in India. Among such individuals are K. Balagopal and K.G. Kannabiran, both of whom established reputations for taking on state lawlessness in the state of Andhra Pradesh. Both were key figures and played significant roles in establishing and sustaining non-funded and independent human rights groups like the People's Union for Civil Liberties ("PUCL") and the Human Rights Foundation ("HRF").[13] Later, securing a funded, institutional focus for human rights lawyering became possible due to the pioneering efforts of lawyers such as Indira Jaising, Colin Gonsalves, Mihir Desai, and Flavia Agnes, who established law-based human rights NGOs working on a range of human rights issues.[14]

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[13] K. Balagopal was the General Secretary of the HRF, while Kannabiran was the President of the PUCL. The HRF was established by Balagopal after breaking away from the Andhra Pradesh Civil Liberties Committee (APCLC), while the PUCL was established in 1976 under the inspiration of Jayaprakash Narayan, with Kannabiran being the president from 1995 until his demise in 2010. Non-funded groups in the Indian context have been perceived to be more independent in terms of agenda and working as compared to funded groups.

[14] Indira Jaisingh established The Lawyers Collective in 1981; Colin Gonsalves and Mihir Desai founded the Human Rights Law Network in 1989; and Flavia Agnes established Majlis in 1991. *See History*, LAWYERS COLLECTIVE, http://www.lawyerscollective.org/about-lawyers-collective/history.html (last updated Feb. 21, 2012); *History*, HUMAN RIGHTS LAW NETWORK,

An important legacy deriving from the work of the earlier generation of human rights organizations was the belief that the work of activist lawyers could never be limited to litigation alone. Instead, human rights activists donned a series of hats: from writing in the press to appearing before the media to addressing public meetings on issues of concern to drafting petitions to governments and international bodies. This thinking was internalized by the members of ALF. Consequently, litigation has never been the sole focus of the organization. As the ALF website emphasizes:

> ALF perceives itself simultaneously as a space that provides qualitative legal services to marginalized groups, as an autonomous research institution with a strong interdisciplinary approach working with practitioners from other fields, as a public legal resource using conventional and unconventional forms of creating access to information, as a centre for generating quality resources that will make interventions in legal education and training, and as finally a platform to enable collaborative and creative models of knowledge production.[15]

ALF's members have sought to live up to this mandate by simultaneously engaging in legal advocacy, legal research, and legal education and training. The use of multiple strategies to arrive at a particular result, often in close collaboration with a range of activist organizations, has been the preferred mode of functioning for ALF. As a result, its work has extended to: participating in *fact-finding teams*; engaging in legal education and training; working closely with movements to organize protests and demonstrations; and writing widely for both the popular press as well as in academic spaces.

The everydayness of what it means to have a multifaceted understanding of legal work is brought to life by a vignette shared by ALF lawyer Lawrence Liang at the celebration of ALF's tenth anniversary in 2010:

> From the sexuality movement, we learnt to see issues of law and justice as questions of Eros, corporeality and desire not as outside of law, but as being intertwined with the reason of law. From the sex workers and domestic workers collective we learn that shared solidarities are created not just out of an experience of violence, but through a sharing of songs, jokes and compassion. And from cultural

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http://www.hrln.org/hrln/about-us/history.html (last visited Jan. 30, 2014); *About Us*, MAJLIS http://majlislaw.com/en/top/about-us/about/ (last visited Jan. 30, 2014).

[15] *About ALF*, ALTERNATIVE LAW FORUM, http://altlawforum.org/about/ (last visited Dec. 26, 2013).

> theorists and artists, we have learnt that even the driest legal text can become the most fascinating cultural document. This has helped us understand the abstract world of law as one that is simultaneously political, personal, cultural and legal.[16]

A considerable portion of the court room based work of ALF includes seeking justice for individual clients, be it women in situations of domestic violence, domestic workers who have not been paid their wages, or sex workers arrested for soliciting. The value of individual cases in building credibility, as well as sharpening one's legal skills, cannot be underestimated. The challenge has always been to position cases so that they move from securing the interests of an individual to addressing the needs of a community. This can take different forms, ranging from petitioning the authorities, to organizing protests, to engaging in public interest litigation. At the same time, ALF lawyers have also been involved in research and policy work on issues that broadly relate to human rights.

Since 2000, ALF has recorded and compiled annual reports which provide a sense of the substantive issues addressed by ALF institutionally and across time. The report for the 2003-04 year notes that the litigation team handled cases involving sex workers' rights, child labor, women's rights in family court cases, and general civil liberties issues. ALF lawyers also assisted marginalized groups by sending out legal notices and by seeking to mediate cases. The research component of ALF focused on the issues of intellectual property rights, labor rights as a component of urban studies, corporate accountability, and minority rights. ALF engaged with local communities of slum dwellers and sex workers and organized a series of talks and public presentations on issues relating to human rights. ALF lawyers also wrote on legal and human rights issues in various forms of publications aimed both at scholarly and mass audiences.[17] As the report for 2009-10 documents, a number of these initiatives have been expanded and further developed while newer initiatives have been adopted afresh.[18]

The organizational structure that ALF has adopted is of a collective in which decisions are taken by the entire group acting together. The group arrives at decisions through a regular Monday morning meeting where all members report on the work completed in the

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[16] Transcript of proceedings of meeting to mark the 10th anniversary of the Alternative Law Forum, held on June 12, 2010 (on file with authors).

[17] Alternative Law Forum, Annual Report 2003-04, (2004).

[18] Alternative Law Forum, Annual Report 2009-10 (2010).

preceding week and put forward proposals which need to be decided collectively. This is coupled with a decentralized decision-making model, where the group delegates work to individuals, who then take the necessary decisions.

In the next section, we outline three specific case studies which illustrate the kinds of human rights issues that ALF lawyers engage with. In each of these, the strategy of collaborating with well-known human rights organizations such as the Peoples Union for Civil Liberties-Karnataka (PUCL-K), to produce *fact-finding reports* was used to critical effect. This is a concrete example of a strategy that was adopted by emulating the practices of predecessor human rights organizations. We now dwell on the importance of this single strategy as a way of demonstrating the link between the work of ALF and that of activists from the period of the anti-colonial struggle.

In modern India, the strategy of using the *fact-finding report* was popularized by the PUCL, and has since been successfully advanced by other human rights organizations in India.[19] One can, however, trace the origins of this strategy to the struggle for independence against the British led by Mahatma Gandhi. Gandhi's use of the forum of the colonial courts to expose the illegitimacy of colonial rule is well documented.[20] What is less known is the effective use by Gandhi of the instrument of the *fact-finding report.*

The first human rights report in the Indian context may well have been the report authored by Gandhi after the Jallianwala Bagh Massacre in Amritsar in 1919. The massacre refers to the brutal attack carried out by colonial troops under General Dyer upon a peaceful assembly of people which included women and children. Estimates of the number of people killed ranged between the official figure of 379 and the unofficial figure of over a 1,000. Historians regard this event as one of the decisive events that eventually led to the end of colonial rule in India. What this report did, very powerfully, was innovate the basic methodology of the fact-finding, i.e., to place a fact within a larger socio-political context. Gandhi's report debunked the theory that General Dyer's action was "in

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[19] For a select compilation of fact-finding reports up to 1986, see the three volumes of VIOLATION OF DEMOCRATIC RIGHTS IN INDIA (A.R. Desai ed., 1986). Following this compilation, the volume of fact-finding reports has increased exponentially. To get a sense of some of the human rights issues in contemporary India, the fact-finding reports of the PUCL, PUDR and the HRF would be vital.

[20] *See,* e.g., MAHATMA GANDHI, *The Great Trial, in* 23 THE COLLECTED WORKS OF MAHATMA GANDHI 118 (Mar. 1922 – May 1924).

singular and sinister isolation."[21] Instead, it viewed the massacre as emblematic of the enterprise of imperial rule, and provided a wider critique of colonial rule which persisted in presuming Indian lives cheap and sought to perpetuate its rule by periodic overwhelming acts of terror.[22] It is this methodology of careful attention to detail, reconstruction of facts, and historical contextualization which has been followed in *fact-finding reports* by civil society groups in contemporary India, and also by ALF as is documented in the next section of this paper.

III. THREE CASE STUDIES OF THE WORK OF ALF: ADDRESSING THE FAULT-LINES OF CASTE, RELIGION, AND SEXUALITY IN INDIAN SOCIETY

Indian society remains a social body "perpetually traversed by relations of war."[23] Of great significance in the fault lines of Indian society are caste, class, gender, religion, and sexual orientation. This is, of course, not a complete list; factors such as nationality, language, and disability, among others, also contribute to the complex hierarchies and divisions stratifying Indian society. We believe that these three cases give a sense of the complex mix of factors that any human rights practice in India will have to contend with.

The three cases relate respectively to: the death of sewage (manhole) workers in Bangalore; the specter of Hindu majoritarianism in Karnataka in relation to attacks on Christian churches; and the reading down[24] of the law making homosexuality a criminal offence in India (Section 377 of the Indian Penal Code). Our hope is that a close engagement with the nuances of these three cases will shed light on the potential of creative engagements with law to confront socio-political injustices.

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[21] This is the phrase used by Winston Churchill, the Secretary of State for War, in the British House of Commons to defend General Dyer's actions. 8 July 1920, PARL. DEB., H.C. (5th ser.) (1920) 1725 (U.K.).

[22] *See,* e.g., *Congress Report on the Punjab Disorders, in* 20 THE COLLECTED WORKS OF MAHATMA GANDHI 1-182 (Mar. 1920 – June 1920).

[23] *See generally* MICHEL FOUCAULT, 'SOCIETY MUST BE DEFENDED': LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976 23-33 (Arnold I. Davidson ed., David Macey trans., 2003).

[24] "Reading down" refers to an interpretive move where a court gives an over-inclusive statute a sufficiently narrow interpretation to bring it into line with the demands of the Constitution.

A. RESPONDING TO THE PERSISTENT CHALLENGE OF UNTOUCHABILITY: CASTE AND SEWAGE/MANHOLE WORKERS IN BANGALORE

The social and economic inequality that B. R. Ambedkar adverted to finds its most painful manifestation in the condition of the Dalit community, who are at the very bottom of the graded and hierarchical social system called caste.[25] Caste is a deep-rooted social reality structuring the relationship between communities, condemning certain communities to an existence at the receiving end of oppression, exclusion, and stigma. The Indian Constitution was fully cognizant of the reality of deep inequality in society and explicitly addressed the issues of caste discrimination. Though the Constitution prohibits discrimination on grounds of caste,[26] has criminalized untouchability,[27] and has made reservations for the Scheduled Castes in education and employment,[28] the Indian State itself has not succeeded in eliminating the practice of untouchability or caste-based discrimination.

It is important to emphasize that the failures of the Indian state in this respect extend beyond its unsuccessful efforts to eliminate caste discrimination; rather, the entrenchment of the system of caste in Indian society has permeated the functioning of the machinery of the Indian state. The experience of the post-colonial Indian state illustrates that, in many instances, the state has functioned as an arm of society, reflecting the biases and prejudices of Indian society. As an academic observer aptly stated: "in no sphere of its activities has the state managed to eradicate the practice of untouchability within its own structures, leave alone in society at large."[29] The Indian state thus embodies the hierarchical division of labor which is an essential feature of the caste system. The most poignant illustration of this reality is that virtually the entire population of those who sweep the streets of urban India are Dalits (as those who were formerly called untouchables prefer to describe themselves);[30] while those in the higher reaches of the caste system

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[25] CONSTITUENT ASSEMBLY DEBATES, *supra* note 1.

[26] INDIA CONST. art. 15.

[27] INDIA CONST. art. 17.

[28] INDIA CONST. art. 15, §4, art. 16, §4.

[29] GANSHAM SHAH ET. AL, UNTOUCHABILITY IN RURAL INDIA 71 (2006).

[30] The term 'Dalit' literally means 'ground' or 'broken into pieces' and refers to the oppression that the former untouchables faced at the hands of upper caste Indians. In the entire upper caste opposition to reservation for the Scheduled Castes, it is often forgotten that there is a de facto

populate the upper layers of the bureaucracy. Caste remains a governing principle of modern Indian society; it is a reality which no human rights group can afford to ignore.

In the global city of Bangalore, those who keep the city clean through their labor are largely invisible. They become visible to the media only when manhole workers die while cleaning manholes. Typically, some newspapers carry a short article outlining that a worker died while cleaning a manhole. However, these articles are generally lost among the host of other incidents deemed more newsworthy.[31] Some of the lawyers at ALF including Maitreyi Krishnan, Raghupathy and Clifton D'Rozario felt strongly that the deaths were unconscionable and that there must be action upon the newspaper articles. Hence they got in touch with PUCL-K and proposed that joint fact finding missions be conducted whenever such deaths occurred.

As a result of this decision, since 2008, in response to newspaper accounts of deaths in manholes, lawyers from ALF along with PUCL-K have undertaken fact-finding missions to ascertain the actual cause of deaths.[32] These *fact-finding reports* depict an ugly reality of contemporary India. As one of the Reports states:

> The sewage powrakarmikas [workers] are those who clean the underground drains and manholes often with their bare hands. Though the practice of manual scavenging is banned in India, its urban avatar persists even sixty years after independence. The sewage powrakarmikas have to handle urine and faeces with their bare hands and wade through rotting sewage in clogged underground drains and manholes. This can be seen in every single town and city across the country. . . . The death of sewage powrakarmikas is due to the fact

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'reservation' for the Dalit community in the occupation which Hindu society has traditionally considered unclean and polluting, namely cleaning the streets and sewers of urban India. The practice of cleaning the sewers of India by Dalits in inhuman and degrading conditions is also in violation of the constitutional abolition of untouchability in Article 17. INDIA CONST. art. 17.

[31] There are various estimates of the number of sewage workers who die in manholes every year across India. These range from at least 1000 workers per year as per Kamdar Swasythya Suraksha Mandal, an NGO in Ahmedabad, to about 22,327 Dalits per year according to S. Anand. This may seem incredible to some but is supported by data. According to information procured under the Right to Information Act ("RTI') for the years 1996 to 2006, the Safai Kamgar Vikas Sangh has found that, in Mumbai alone, at least 25 deaths occur every month. The chairperson of the National Commission of Safai Karamcharis, Shri Santhosh Choudhary, has asserted that at least 2-3 workers must be dying every day inside manholes across India. S. Anand, *Life Inside A Black Hole*, TEHELKA MAG. (Dec. 8, 2007), http://archive.tehelka.com/story_main36.asp?filename=Ne081207LIFE_INSIDE.asp.

[32] As of now this informal group comprising both members of the PUCL-K and ALF has undertaken five fact finding missions in the case of the deaths of over 10 manhole workers since 2008.

> that the network of sewers, underground drains and manholes, the workplace of these workers, are extremely dangerous. These are confined, oxygen-deficient spaces where the decomposition and fermentation of sewage produces noxious gases including hydrogen sulphide (known as sewer gas), methane, carbon monoxide, etc., all of which cause death by asphyxiation. The long-term neurological effects of exposure to these noxious gases are also very severe and debilitating.[33]

The fact-finding exercises undertaken by ALF with other human rights groups revealed that these accidental deaths occurred due to the criminal negligence of the state. As a complaint filed by ALF before the State Human Rights Commission noted:

> There is a complete lack of any safety equipment or any training that is provided to the workers. It is important to note that the contracting out of works of such a hazardous nature further increases the dangers involved, as there is no means to ensure that safety equipment or training is provided to the workers. This has forced workers to come up with their own methods of checking the concentration of noxious gases in the manhole before entering them. After opening the manhole cover, they let it vent a while, then light a match and throw it in. If there's methane, it burns out. Once the fire abates, the worker prepares to enter. In the present instance (of the death of three persons due to asphyxiation) no safety equipment or training was given to the workers. Further, the workers who entered the manhole were not regular sewage cleaners, but were construction workers who were asked to perform this task by the contractor, and were therefore neither aware nor informed of the safety precautions to be taken before entering the manhole.[34]

Significantly, all those affected by the practice belong solely to one caste, the Dalits, and mainly to the sub-caste of Madigas.[35] It is impossible to find a Brahmin or an upper caste person performing the

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[33] Death of two more dalits-The tragic fate of UGD (Underground drain) workers in KR Nagar, Report dated Apr. 12, 2008. (on file with the Alternative Law Forum)

[34] Complaint to the SHRC in regard to the deaths of three persons due to asphyxiation in a manhole in Yelahanka on November 14, 2008 (on file with the Alternative Law Forum).

[35] There are 101 Scheduled Castes in Karnataka. The Adi Karnataka, Madiga, Banjara, Bhovi, Holaya, Adi Dravida and Bhambi sub-castes together constitute 85.0 per cent of the SC population of the state. The Madigas in particular are at the very bottom of the graded and hierarchical system of caste, and are treated as 'untouchables' by the Holiya community. The contention of the Madiga community in particular is that the benefits of state policies of reservation have disproportionately benefited only the Holiya community. This accounts for demands of sub-reservation within the larger reservation for the Scheduled Castes. For an insightful analysis of a similar phenomenon in the neighboring state of Andhra Pradesh *See*, K. Balagopal, *Justice For Dalits Among Dalits: All the Ghosts Resurface*, ECON. & POL. WKLY., July 16, 2005, at 3128.

task of sweeping Bangalore's streets. Tragically, while the Constitution (in Article 17) makes the practice of untouchability an offence and prohibits discrimination on the basis of caste (in Article 15), the state still allows for a form of inhumane and degrading employment, reinforcing the stigma of untouchability and thereby blighting the lives of a section of its citizens.

ALF in conjunction with PUCL-K conducted four fact-finding exercises to address four separate incidents of deaths of manhole workers. All four reports were submitted to the State Human Rights Commission. A ground level presence at the scene of the 'accident' ensured that the families of the victims were compensated by the state authorities. The reports themselves spanned a period of about a year, during which the documentation regarding manhole deaths was systematically built up. ALF, in concert with other human rights groups, then used the *fact-finding reports* which documented the deaths of ten persons over a period of one year to make a representation before the highest ranking bureaucrat within the state of Karnataka (the Chief Secretary, Government of Karnataka) in relation to such deaths. The representation urged the Government to take measures to ensure that its street sweepers did not die in the course of performing their duty.

While the *fact-finding reports* documented a people's truth of what was actually happening to manhole workers, the ALF lawyers felt it important to understand how the state perceived the situation of manhole workers. The Indian bureaucracy has traditionally been highly resistant to sharing information which documents the way the state functions in many realms. What has altered this situation is the enactment of the Right to Information Act in 2005 which gave ordinary citizens avenues to see how the State perceives issues. Using the right under this Act, ALF accessed records of what the government was doing to protect the rights of manhole workers.[36]

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[36] The inquiry by ALF lawyers revealed that the government was required to adhere to the following guidelines:

The following materials have been provided to the sanitary workers as safety measures: 5 Nos of half bar soap for washing clothes to each worker per month; 4 Nos of Mysore sandal soap for bathing to each worker per month; 2 Nos of Dettol soap for disinfection purpose to each worker per month; 1 No of 500 ml coconut oil to each worker per annum; 2 sets of uniform clothes to each worker per annum; 2 sets of shoes to each worker per month; 2 sets of sandles to each worker per annum; 2 Nos. of towel to each worker per annum; 1 no. of sweater to each worker per annum; 1 no. of monkey cap to each worker per annum; Carrom Board for entertainment.

Field level investigations showed that the so-called safety facilities that the government claimed to have set up failed to ensure that workers did not die in the course of their employment. Thus the government policy was one of continued neglect of the condition of manhole workers combined with a failure to implement their own safety measures. Faced with this situation of state failure, ALF represented the People's Union for Civil Liberties (PUCL-K) in a PIL action before the High Court of Karnataka. With PUCL-K as the petitioner, the PIL was filed well over a year after the first *fact-finding report*, with the objective of compelling the state to fulfill its constitutional obligations.[37]

The petition approached the issue at three levels. First, it narrated the instances of deaths of sewage workers documented through the *fact-finding reports*. To substantiate the factual point that the state was employing street sweepers to clean manholes, with the sweepers entering the manholes wearing only a single layer of clothing, ALF submitted photographs taken to document the entire process of being lowered within a manhole into dirty, swirling waters. Secondly, the petition asserted that, as a matter of law, the continuance of this practice of routinely employing individuals to physically clean blockages in the sewage networks was in violation of the constitutional guarantees of the right to live with dignity (in Article 21), the prohibition against untouchability (in Article 17) and the right to equality (in Article 14).

The constitutional claim was buttressed by an analysis of statutory law. ALF lawyers argued that the manual cleaning of sewers violated the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.[38] Further guidelines were annexed by other responsible state institutions such as the National Human Rights Commission, outlining the safety precautions to be followed when workers go into manholes (seen as a measure of last resort). Finally, the petition also annexed judgments of the Delhi, Madras and Gujarat High Courts – all of which outlined measures to be taken by the state. The

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In addition to the above, the following equipment is provided to the workers: Gas mask set; Bamboo sticks; Cotton waste; Manhole lifting key; Crow Bar; Mumty; Coir Rope; Tralley; Rest Room with Bathing facilities

Bangalore Water Supply and Sewage Board responded to a series of questions regarding safety measures in a letter from the Bangalore Sewage and Water Supply Board (BWSSB) to Maitreyi Krishnan, Alternative Law Forum dated March 21, 2009.

[37] *PUCL v. State of Karnataka*, Writ Petition 30221/2009.

[38] It bears emphasizing that this enactment was itself the result of a sustained grassroots level struggle against the practice of manual scavenging, which finally led the state to pass the law prohibiting manual scavenging.

petition further referenced guidelines from municipalities in other countries and their manner of dealing with the safety of manhole workers. The petition thus had a strong factual component, which unequivocally demonstrated that the deaths had occurred due to state apathy. It also had a strong legal component through its reliance upon supporting judicial decisions of other High Courts, thereby demonstrating that a violation of fundamental rights had occurred.

Although the case is still pending before the Karnataka High Court, it has already obtained some measure of success. The Court has issued a series of interim orders which have brought about some changes in the *status quo*. The High Court constituted an expert committee to delve into the various issues raised by the petition. The Committee was formed in part by representatives nominated by the petitioner, and thereby allowed the petitioner to suggest ways through which this practice could be phased out.[39] After its Report was submitted to the High Court by the Committee, the High Court ordered that machines be procured by the Bangalore Water Supply and Sewerage Board within six months to ensure that, for routine work, workers would not go into the manholes. Furthermore, when manhole workers continued to die during the course of the petition, and such deaths were brought to the notice of the Court by the petitioners, the High Court issued orders directing the payment of compensation.[40]

As a result of the PIL, the Court has served as a forum for making visible the hitherto largely invisible issue of manhole workers.[41] What was previously, at most, a three column article in a newspaper now has a salience which directly reaches the government. The Court has, through a series of interim orders, forced the government to acknowledge the problem. The state government has in turn begun to take steps to

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[39] The extensive networking which had preceded the petition allowed for the suggestion of some very competent and committed persons to be a part of the Committee.

[40] As per an affidavit filed by the PUCL-K on Nov. 29, 2012, thirteen family members of those who died were paid a compensation amount of Rs 5,00,000.

[41] One moment of high visibility was when the Chief Justice summoned the Chairman of the Karnataka Urban Water Supply and Drainage Board in the context of the continuing deaths of manhole workers, and asked him to either take measures to prohibit manual cleaning of the manholes or be prepared to go down the drains himself. As the Express observed: "A moved Chief Justice said the officials concerned, including the chairmen of both the Boards, should go into the sewerage themselves and take photographs: 'If they are genuine, let them get into the sewerage lines themselves and get the photographs. Let them experience the plight themselves. We will forget contempt proceedings against them,' he said." *Manual Scavenging: HC Lashes Out at Government*, THE NEW INDIAN EXPRESS (May 16, 2012 6:21 PM), http://www.newindian express.com/states/karnataka/article335753.ece.

address the issue. Admittedly, this process is slow, and does not admit of any easy solutions. The court has not disposed of the petition by laying down the law on the question; instead it has sought to exercise a supervisory jurisdiction over the matter. This has allowed for continuous monitoring of the progress made by the state towards complete prohibition of the entry of sewage workers into manholes to physically handle the filth. As noted before, the fact that it is an ongoing matter has also allowed for the filing of applications for compensation with respect to manhole workers, who continue to die even as the matter is *sub judice*.[42]

Through this PIL, ALF hopes to replicate the success enjoyed by the "Right to Food" PIL, whose achievements have been widely noted and acclaimed.[43] The right to food petition was filed in 2001; although it has not yet come to the judgment stage, extraordinary relief has been provided on the ground level by the grassroots campaign, which capitalized on the interim orders passed by the Court and the supervisory mechanism set up through Food Commissioners. While it may be premature to assert that the PIL relating to sewage/manhole workers will attain a similar degree of success, it is the hope of lawyers at ALF that the PUCL-K petition on manhole workers can similarly be used to pressure the state to fulfill its obligations through a series of interim orders and a continuing supervisory jurisdiction.[44]

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[42] While the case was being heard, there were nine incidents reported in which sixteen deaths were recorded. See, Affidavit dated Nov. 29, 2012 filed by the PUCL-K (on file with authors).

[43] *PUCL vs Union of India and others*, Writ Petition [Civil] No. 196 of 2001. For instance, the Supreme Court has passed orders directing the Indian government to: (1) introduce cooked mid-day meals in all primary schools, (2) provide 35 kgs of grain per month at highly subsidized prices to 15 million destitute households under the Antyodaya component of the PDS [Public Distribution System], (3) double resource allocations for Sampoorna Grameen Rozgar Yojana (India's largest rural employment program at that time, now superseded by the Employment Guarantee Act), and (4) universalize the Integrated Child Development Services (ICDS). *Legal Action, Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN, http://www.righttofoodindia.org/case/case.html (last updated March 12, 2012). For a discussion of the facts of the case, the strategies adopted by the civil society groups that led the campaign, and an assessment of the achievements of the litigation *see generally*, SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 130-33 (2008); Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realising the right to food in India*, 31 MICH. J. INT'L L. 691-764 (2010).

[44] As the case continues in the High Court, more manhole workers continue to die, emphasizing the importance of an ongoing campaign.

B. QUESTIONING MAJORITARIANISM THROUGH THE LEGAL PROCESS: RESISTING ATTACKS ON CHRISTIAN CHURCHES IN KARNATAKA

The growth of Hindu fundamentalism, as manifested in sustained and serious violence against followers of minority religions in India (specifically Muslim and Christian communities), poses a significant challenge to the contemporary Indian polity. The destruction of the Babri Masjid in 1992, as well as the genocide in Gujarat in 2002, were moments of extraordinary violence against India's Muslim population. While the electoral fortunes of the Bharatiya Janata Party ("BJP"), a right-wing Hindu political party (which is backed by Hindu fundamentalist forces), have declined at the national level since 2004, the opposite trend has occurred in the state of Karnataka, where the BJP has received growing support. Since the rise of the BJP as a serious electoral force in the first decade of the twenty-first century and the formation of the first BJP government in Karnataka in 2008, communal sentiments have received the explicit backing of the state. While communal incidents occurred even under the previous Congress and Janata governments, they were relatively isolated incidents not tied to the explicit agenda of the party in power.

The BJP administration in power in the state of Karnataka from 2008 to 2013 moved on numerous fronts to consolidate its majoritarian agenda.[45] The state government provided implicit support to evidently unconstitutional attacks on churches throughout Karnataka in 2008, and an attack on women in a pub in Mangalore in 2009.[46] At the policy level, the Karnataka legislature passed bills prohibiting what it called "conversion by inducements" as well as a bill prohibiting cow slaughter. These two bills were, respectively, attacks on the right to religious freedom of the Christian community and on the food habits of the Muslim community.[47] In order to map out the strategic response of ALF along with other civil society groups, our focus here is on the issue of attacks on churches.

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[45] The BJP lost power in 2013 to the Congress and the defeat was perceived to be a result of popular dissatisfaction with a corrupt administration as well as dissatisfaction with the communal policing in the coastal districts.

[46] *See Cultural Policing in Dakshina Kannada*, PEOPLE'S UNION FOR CIVIL LIBERTIES – KARNATAKA (March 30, 2009), http://puclkarnataka.org/?p=72.

[47] The two Bills are not yet law, because of the unwillingness of the Governor of Karnataka to give assent to them. The Governor, appointed by the Union government where the Congress had a dominant presence, has apparently taken heed of numerous apprehensions voiced both by political parties as well as civil society groups regarding the discriminatory nature of these laws.

i. The Basic Facts

Since 2007, the Christian community in the district of Davangere in central Karnakata has been targeted by right wing vigilante elements. Fundamentalists have attacked assemblies of Christians at prayer in the confines of their own churches. In documentation filed before the Justice Somasekhara Commission of Inquiry, seven pastors filed detailed submissions about the manner in which their right to practice their religion had been curtailed by right-wing vigilante elements through attacks upon prayer assemblies. The documentation before the Commission revealed that the attitude of the state was indifferent at best and biased at worst. In all such cases, the police ignored the serious constitutional ramifications; at most, the authorities registered minor offences under the Indian Penal Code, investigated the charges tardily, and allowed the perpetrators to go scot-free.

Against this background of the state's criminal negligence of its constitutional responsibilities, the pastors of Davangere approached ALF for legal redress. On behalf of the pastors, ALF advised and drafted complaints about this unconstitutional state of affairs to various authorities. The pastors complained about the government's serious constitutional infringements to the District Administration, but no action was forthcoming. They then complained to a range of higher authorities including the Governor, the Chief Minister, the Home Minister, the State Minorities Commission and the State Human Rights Commission about the failure of the state to guarantee constitutionally protected rights. Significantly, apart from the (ineffectual) responses of the Governor, the State Minorities Commission, the State Human Rights Commission, no state authority with power to remedy the distress i.e. – the Chief Minister and the Home Minister – responded to the desperate pleas and petitions issued by the pastors in Davangere. The failure to act began at the very top and permeated all the layers of the administration.

The fact that these complaints by the pastors elicited no effective response at all from any constitutional authority emboldened the communal elements within the state administration even further. They moved to legally prohibit prayers in four churches in Davangere by sealing the churches themselves. Both the police and the Davangere Municipal Corporation issued notices to the pastors of these four churches before subsequently padlocking the churches. In the background of these actions against churches, the District Magistrate, instead of taking any action to protect the right to worship, ordered a

survey of all churches and prayer halls in the district of Davangere. This action by the District Magistrate only deepened suspicions among the Christian community that they would be further targeted by the state. Further complaints by the pastors to all relevant state authorities were once again met with stony silence.

When the entire route of petitioning the government fails in a democracy, citizens take to the time-tested route of organizing protests and demonstrations in order to force the government to listen to their grievances. The Christian community followed this well-established democratic tradition, and organized protests against the denial of their right to worship. While these protests were well-attended, and while they did succeed in organizing the affected community to publicly express their grievance, they did not succeed in moving the state to act. Public pressure, expressed both through street-level action and through representations to various authorities, had no impact on the state administration.

ii. The PIL before the High Court and the Proceedings before the Justice Somasekhara Commission

It was at this stage, when all other options had been tried and had failed, that the pastors once again approached ALF. On this occasion, they sought to take the matter to the High Court of Karnataka through a PIL. ALF filed a writ petition seeking to quash the notices issued by the police and the Davangere Municipal Corporation as well as to quash the order directing that a survey of churches and prayer halls in Davangere district be conducted. The matter possessed particular urgency for the petitioners; they were concerned that the closure of the churches in September of 2008 would be extended thereby hampering Christmas celebrations.

Even when the petition was filed, it was doubtful whether the matter would be admitted before Christmas day, due to the time lag between the filing of the petition and when it would be taken up for hearing by the High Court. It was in these circumstances of doubt that an opportunity arose to try another concurrent strategy: to appear before the Justice Somasekhara Commission of Inquiry set up by the government to inquire into the attacks on churches in Karnataka. The pastors seized this opportunity.

These types of commissions are constituted under the Commissions of Inquiry Act, 1952, and are meant to ascertain the "truth"

in the case of controversial events where human rights abuses are alleged. However, the reports of such commissions are not binding on governments, a fact that allows them considerable leeway in deciding the final course of action to be adopted. The Justice Somasekhara Commission of Inquiry had been set up to inquire into the attacks on churches in Karnataka. These attacks principally occurred in 2008, with their epicenter in the district of Dakshina Kannada. However, the mandate of the Commission was broad enough to consider the attacks on the churches in Davangere, and the Commission had already accepted a number of petitions from the affected Christians. The Commission proposing to hold its hearings in Davangere presented an opportunity to try to get relief from the commission.

A lawyer from ALF was required to travel from the state capital of Bangalore to Davangere. The office where the hearings were held had a battery of lawyers from the Hindu Right or Hindutva parties, all of whom had donned their lawyers' coats as well as a red tilak (religious mark worn on the forehead) identifying themselves with the Hindutva movement. The atmosphere was intimidating; the sheer number of supporters in attendance lent a majoritarian overtone to the proceedings.[48] The arguments proceeded in this threatening atmosphere, which Justice Somasekhara, head of the one man Commission, was unable or unwilling to control. After the submissions were made regarding the illegality of the closure of the churches with a request for keeping the churches open, Justice Somasekhara pronounced the interim arrangement. The simple answer as to "whether the memorialists in the petitions can be permitted to conduct prayers and other activities in the places of worship" was in the affirmative. As Justice Somasekhara put it, "This Commission recommends to the District Administration, Davangere to issue appropriate orders and implement this interim arrangement as indicated herein."

While Justice Somasekhara recognized the fundamental right to profess and practice religion guaranteed in article 25 of the Constitution of India, the substantive recognition was rendered hollow by the series of nineteen conditions imposed by Justice Somasekhara on all those seeking to exercise such a right. The most egregious of these conditions were Conditions 1 and 2:

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[48] This is how Clifton D Rozario, the lawyer who represented ALF before the Commission, described the proceedings.

> 1. The memorialists or persons seeking permission to conduct prayers etc., shall file an affidavit disclosing the facts categorically, name and addresses, name of the church or place of worship in which they are attending prayers, the persons in charge of the church or place of worship with details of addresses, the place of worship or church with details and ownership, possession etc., and the approximate time schedule of time prayers etc.
>
> 2. The district administration shall consider such affidavits and accord permission subject to the conditions in the interim arrangements. [49]

The memorialists rightly concluded that these conditions, rather than safeguarding the fundamental right under Art. 25, were in effect legalizing the curtailment of this right. In its practical effect, the effort to ensure that the churches could be opened before Christmas through the Justice Somasekhara Commission was a grand failure.

This failure of the Justice Somasekhara Commission to deliver satisfactory results left the writ petition before the High Court as the final option. The petition finally came up for hearing before the High Court on December 24, 2008. The High Court passed an interim order directing that all but one of the churches should be permitted to conduct their religious festivities until January 4, 2009.[50] At the next hearing, the lawyer representing the District Magistrate argued that the churches and prayer halls were attacked because the churches were conducting forcible conversions. After ordering the police to investigate, the High Court found that "a careful reading of the above report discloses that there is no forcible conversion whatsoever."[51] The High Court thus concluded that "the authorities, both the police and revenue, instead of taking action against the miscreants who have [been] involved in anti-social activities causing social disorder, have chosen to lock up the churches and prayer halls, which in our considered opinion, is totally unwarranted and also lacks jurisdiction."[52] After the High Court order, the state government

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[49] Interim Arrangement passed by the J. Someshekar Commission dated Dec. 17, 2009 (on file with authors).

[50] One church remained locked; the state made submissions that, since a high tension electricity wire was going over the prayer hall, it would be hazardous to open the same (on file with authors).

[51] *Pastor Rajshekar and others vs. District Magistrate Davangere and others*, Writ Petition No. 15845 of 2008 (on file with authors).

[52] *Id.* All the churches were opened after the High Court order including the church with the high tension wire running over it. The logic of only picking and choosing one prayer hall when the high tension wire went over a whole range of properties was conceded to be unfair by the government advocate on persistent questioning by the Bench.

withdrew the circular requiring local bodies to conduct a survey of churches; it also undertook to investigate complaints made by the petitioner and to proceed in accordance with the law.

Significantly, the text of this judgment of the High Court was very low on rhetoric; it did not lay down any legal doctrine on the constitutional right to freedom of conscience. The judges proceeded by trying to get the government to fulfill its constitutional obligations by withdrawing orders and circulars which the judges held to be without jurisdiction. The judgment, while unremarkable for its precedential value, was enormously effective at the ground level. The Christian community of Davangere felt an immediate and palpable sense of relief in its aftermath. The weekly harassment of assemblies of Christians in prayers and church halls throughout Davangere came to a dramatic halt. The order of the High Court achieved what no amount of public pressure, lobbying, and petitioning had been able to achieve.

This case threw up the larger question of how a democracy working on a majoritarian premise can hope to fulfill the mandate of protecting the rights of all. The system of democracy with its free press, representative institutions, and elections is by itself no answer to the problem of majoritarianism. As the Davangare case demonstrates, even a government sworn to upholding the Constitution may not hesitate in shredding the fabric of the Constitution and making a mockery of the right to practice and profess one's religion. The only check on majoritarian impulses was not the government, which itself fell prey to majoritarianism, but the judiciary.

The High Court judgment provided a measure of relief from unremitting persecution. However, it did not provide accountability for the attacks on churches or grant compensation for the damages suffered. To address these questions, the proper forum was the Justice Somasekhara Commission, which was established with a mandate to fix responsibility on who was behind the attacks. The question of whether the Justice Somasekhara Commission even had the potential to deliver on its mandate was resolved, in the negative, by its very structure and composition. The fact that the Government picked a retired judge did not inspire confidence in the impartiality or effectiveness of the Commission.

The proceedings of the Justice Somasekhara Commission rapidly vindicated prior skepticism regarding the possibility of justice through its offices. The proceedings turned into a sustained cross-examination of the victim pastors by lawyers representing the Government of Karnataka as well as the Hindu Right. The victims were re-victimized; they were

subjected to questions on conversion, the supposed incitement to hatred in the Bible, and secular matters (including the registration details of the various church groups). Even as ALF participated in the proceedings, it was apparent from the tenor of the proceedings that Justice Somasekhara was not truly interested in addressing the core question of his mandate: that is to say, identifying who was behind the attacks. In spite of voluminous evidence pointing to the role of the BJP – in collaboration with other Hindu affiliated organizations like the Bajrang Dal, Sri Ram Sene and Hindu Jagran Vedike – the Commission focused its attention, not on probing questions examining the relationship of these organizations *inter se* or in investigating their links to the state, but rather on the fabricated charge of conversion leveled against the pastors.[53] Despite these clear indications, ALF lawyers continued to be a part of the Commission's proceedings for over two years. Their sole objective was to put on record materials which would show the involvement of the Hindu Right while trying to demonstrate the motive behind the church attacks. If the ALF lawyers had vacated the space of the Commission, the Hindutva lawyers would have been given a clear path to use the Commission to push for an anti-conversion law. When the Commission did release its findings, it did not present any surprises. The Commission absolved, as expected, the State Government and the various Hindu fundamentalist groups of any responsibility for the attacks on churches.

In light of this experience, how can we reflect upon these twin interventions – that of the High Court and the Justice Somasekhara Commission – one of which was a qualified success while the other was an unqualified disaster? Of course, there are many cases in which the judiciary has also endorsed the actions and mindset of the larger majoritarian culture, and has hence neglected its duty to protect the rights of the minority.[54] Therefore, it might not be possible to definitively assert that the judiciary is the one bulwark against majoritarianism. Instead, it can only be tentatively concluded that the judiciary has the potential to be less susceptible to the pressures of majoritarianism; its failure in this

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[53] Arvind Narrain & Jagadeesh B.N, *Betrayal of a Mandate?*, TEHELKA MAG. (Feb. 12, 2011), http://www.tehelka.com/story_main48.asp?filename=Ne120211PROSCONS.asp; Arvind Narrain & Jagadeesh B.N., *Somasekhara Commission Report: Inconsistencies and Contradictions*, ECON & POL. WKLY., Feb. 26, 2011, at 13-18.

[54] *Id.* This typically happens when the State invokes its powers of preventive detention and other emergency powers to detain people, including religious minorities. In such cases, the higher judiciary in India has typically refused to intervene, or has interfered very weakly. *See generally* Arun K. Thiruvengadam, *Asian Judiciaries and Emergency Powers: Reasons for Optimism?*, *in* EMERGENCY POWERS IN ASIA 466-94 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010).

respect makes the project of sustaining Indian democracy significantly more difficult.

C. NAZ FOUNDATION AND THE EMERGENCE OF LGBT CITIZENSHIP

ALF has had a long and multifaceted engagement with the issue of LGBT rights. This engagement began in 2000 when there was limited public support for LGBT rights and continued right through the period of increasing support as seen in the pride marches held in multiple cities in India from 2008 onwards. In 2000, when ALF was founded, its initial mandate included the protection of people marginalized on grounds of sexual orientation. Members of ALF were alert and sensitive to the issue of sexual orientation due, in part, to a seminar on gay rights organized at the National Law School in 1997 by some of those who later became a part of ALF. The first few years of ALF coincided with a period in which the issue of sexual orientation began to make its presence felt on the Bangalore activist scene due to the work of organizations for sexual minorities such as Sabrang and Sangama[55]

The first important task undertaken by ALF in 2000 was to partner with other human rights organizations and undertake a *fact-finding report* on the status of sexual minorities in Bangalore. This partnering with the PUCL-K, People's Democratic Forum, and Sangama led to the first PUCL-K Report on Human Rights Violations Against Sexuality Minorities, which sought to place the discrimination suffered by sexuality minorities within a human rights framework.[56] The first report was followed by another PUCL-K Report focusing specifically on the rights violations suffered by the male to female transgender community in India.[57] Both these reports documented the horrific

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[55] Sabgrang was an activist collective formed in 1997 dedicated to making sexual minority issues visible in Bangalore. Sabrang organized a series of events on sexuality related issues in Bangalore from 1997-2000.

Sangama is "a sexual minorities, sex workers and people-living-with-HIV human rights organization for individuals oppressed due to their sexual preference. Sexuality minorities include, but are not limited to, hijras, kothis, doubledeckers, jogappas, lesbians, bisexuals, homosexuals, gays, Female-to-male/male-to-female transsexuals and other transgenders." *See* SANGAMA, http://sangama.org/ (last visited Dec. 25, 2013).

[56] *Human Rights Violations Against Sexuality Minorities in India,* PEOPLE'S UNION FOR CIVIL LIBERTIES, http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf (last visited Dec. 25, 2013).

[57] *Human Rights Violations Against the Transgender Community,* PEOPLE'S UNION FOR CIVIL LIBERTIES, http://www.pucl.org/Topics/Gender/2003/transgender.htm (last visited Dec. 25, 2013); *Human Rights Violations against the Transgender Community,* UNIV. OF MICHIGAN AI

violations suffered by sexual minorities in India while also identifying the role played by structures such as the family, the law, the media, and the medical establishment in perpetrating such extreme forms of violence.

The documentation of human rights abuses was an urgent necessity as an invisibility still surrounded the most serious forms of violation of the rights of LGBT people. The rape of transgender people, the suicides of lesbian women, and other forms of everyday violence occurred with impunity, given that a *silence* still prevailed in relation to these issues. This cloak of invisibility allowed violence to continue unrecognized and unnamed. Systematic documentation and analysis enabled recognition that the homophobic violence of the state is complemented by deep societal codes of intolerance, which legitimize and render invisible the very nature of such violence. The documentation of the two PUCL Reports was important in placing the various forms of persecution suffered by LGBT persons within the framework of human rights.

While the PUCL Reports established credible documentation to place the suffering of LGBT persons on record, ALF's credibility in this area of work was also built through consistent work at the ground level in redressing human rights violations. ALF lawyers assisted numerous persons experiencing harassment or torture by the police due to their sexual orientation. ALF was also part of numerous local level campaigns to ensure police accountability for acts of brutal torture and rape by the police of transgender persons.[58] ALF also participated in a national level *fact-finding report* outlining the arrest of gay men under Section 377 in Lucknow in 2004.[59]

Lawyers in ALF also sought to communicate the nature of legal issues affecting the LGBT community to a wider audience by writing widely and accepting invitations to speak on the rights of LGBT persons at many public fora. Members of ALF wrote not only in journals and magazines, but also in newspapers on human rights issues confronting

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LAB PEOPLE, http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html (last visited Jan. 30, 2014).

[58] See the public campaign around the brutal rape of Kokila, a hijra in 2004 initiated by Sangama. *India: Rape and Police Abuse of Hijra in Bangalore; Call for Action by SANGAMA*, INTERNATIONAL GAY & LESBIAN HUMAN RIGHTS COMMISSION (June 24, 2004), http://www.iglhrc.org/content/india-rape-and-police-abuse-hijra-bangalore-call-action-sangama.

[59] *Report on the arrest of 4 men in Lucknow*, YAWNINGBREAD.ORG (Jan. 11, 2006), http://www.yawningbread.org/apdx_2006/imp-249.htm.

the LGBT community. While wider public communication was important for creating a space within society for discussion of the issues of LGBT persons, ALF also worked on focused interventions with law students to ensure that a pedagogic space could be created within law schools for discussions around sexual orientation and gender identity. For this reason, ALF lawyers offered a series of courses at the National Law School, including an important (in hindsight) final year elective seminar course on the Illegal Citizen.[60] The course included a module on sexual citizenship, with a focus on citizenship and its interface with markers such as sexual orientation. Some students who took this course are now key lawyers working in collaboration with ALF in the *Naz Foundation* case. While the initial objective was a simple one – introducing law students to some of the work of ALF – a fortuitous side effect was that it contributed towards building a critical mass of individuals who would become involved in LGBT rights activism.

This work of research, documentation, ground level activism, and teaching over the course of five years found a focal point with the petition filed by Naz Foundation challenging Section 377 of the Indian Penal Code in the Delhi High Court in 2001. Section 377 of the Indian Penal Code criminalizes homosexual acts, and has served to legitimate the discriminatory acts of harassment and vilification practiced by the police and other state authorities. As the petition wound its way through the Delhi High Court, other parties filed interventions to support the government and assert that Section 377 should be retained. One of the interveners, B.P. Singhal (a former Member of Parliament for the BJP), argued that homosexuality is not a part of Indian culture. The other intervener, Joint Action Committee, Kannur, argued that HIV does not cause AIDS. Both interveners made arguments in favor of the retention of Section 377 and joined forces with the Union of India in opposing the Naz Foundation's prayer for the reading down of Section 377. At that point, Voices Against 377, a Delhi-based coalition of child rights, women's rights, and LGBT rights groups, decided to file an intervention

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[60] The idea of the course emerged from the various projects that ALF was engaged in, dealing with illegality and land, intellectual property and piracy, as well as ALF's litigation and support work with sex workers. The course was conceptualized as having modules on slum citizenship, sexual citizenship, cinematic citizenship as well as religious, caste and refugee citizenship. *See* ALF Annual Report 2003-04 (2004).

in support of the Naz Foundation.[61] Voices Against 377 requested ALF to be its lawyers; ALF took on the brief, and its pre-existing body of work over five years on LGBT rights crystallized through this petition.

When ALF lawyers began the process of drafting the petition justifying the intervention of Voices Against 377, the value of its prior work on LGBT rights became immediately evident. ALF was able to demonstrate the impact of Section 377 through affidavits based largely on the testimonies gathered in the PUCL Reports and other *fact-finding reports*. ALF's efforts in networking with other LGBT and human rights groups, through various human rights and LGBT rights conferences, meant that it was possible to work with LGBT organizations to get affected LGBT individuals to file affidavits from other parts of the country as well. The experiences that ALF lawyers had garnered from working very closely with LGBT groups enabled them to engage better with the critiques of the Naz petition advanced by the LGBT community.

One of the important criticisms advanced by grassroots groups was that the then predominant legal argument (that section 377 violated the right to privacy) made no difference to large sections of the LGBT community, as the poorer sections of the LGBT community, living in very small tenements, did not have access to private spaces. The privacy to which the petition referred to was, in fact, a privilege of a small section of the community. The ALF lawyers felt it was important to address these concerns around privacy. This resulted in a closer look at debates in international law on redefining the very notion of privacy. Case law in the United States recognized that privacy had zonal as well as a decisional component.[62] Emerging jurisprudence in South Africa emphasized the links between privacy and dignity.[63] The ALF lawyers

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[61] For more information on the individuals and organizations that constitute Voices Against 377, *see generally* VOICES AGAINST 377, http://www.voicesagainst377.org (last visited Dec. 25, 2013).

[62] See Griswold v Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services International, 431 U.S.678 (1977).

[63] *National Coalition For Gay and Lesbian Equality v. Minister of Justice, 1998* (12) BCLR 1517 (CC), at ¶ 117 (Sachs, J., concurring) ("autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.") It

felt that this separation of the notion of zonal and decisional privacy and the stress on how decisional privacy was intrinsically linked to dignity might be one way of addressing the concerns around privacy. Thus, the argument adopted in the petition emphasized that the notion of privacy was broader than merely the notion that the state cannot interfere with consensual sexual activity in the home. Building on this jurisprudence, ALF lawyers sought to extend the notion of privacy to the idea of autonomy of decision-making about intimate aspects of one's life, including the choice of one's sexual partner. Through this process, critiques from the community were fed back into the process of legal drafting, playing a role in developing a more nuanced notion of privacy in the arguments.

Even though the petition was posted for final arguments in October 2008, this did not mean that the Court was the exclusive theater for the articulation of the demand for LGBT rights. Perhaps the most striking demonstration of the way events outside the Court interfaced with events within the Court were Pride marches, held for the first time in 2008 and 2009 in the major Indian cities of Delhi, Bangalore, Kolkata, Mumbai, and Chennai.[64] During one court hearing, one of the counsel contended that gays and lesbians were a Western phenomenon and had nothing to do with India. The judges responded by drawing attention to media reporting of Pride Marches in which thousands of gay people marched in the streets.[65]

The other significant public event, which marked a shift in public opinion, was an open letter issued by well-known individuals (including Amartya Sen and Vikram Seth). In 2006, Vikram Seth, one of India's best known authors writing in English, wrote an open letter condemning Section 377 as a law which "punitively criminalizes romantic love."[66] Amartya Sen, in a supporting letter, argued that:

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should also be noted that Justice Sachs' opinion was cited extensively in the decision of the Delhi High Court eventually delivered by Justices Shah and Muralidhar in *Naz Foundation vs NCR Delhi*, 2010 Cr L.J. 94.

[64] ALF worked closely with Bangalore based sexuality groups to organize the pride marches, both in 2008 and in subsequent years.

[65] See statement by Vivek Divan in a documentary about LGBT issues. T. Jayashree, *Many people, Many Desires*, CULTURE UNPLUGGED, http://www.cultureunplugged.com/play/4790/Many-Peaople—Many-Desires (last visited Dec. 25, 2013).

[66] Vikram Seth, Amartya Sen, et al., *Same-Sex Love in India: Open Letters against Section 377*, MONTHLY REVIEW (Sept. 16, 2006), http://mrzine.monthlyreview.org/india160906.html.

> Gay behaviour is, of course, much more widespread than the cases that are brought to trial. It is sometimes argued that this indicates that Section 377 does not do as much harm as we, the protesters, tend to think. What has to be borne in mind is that whenever any behaviour is identified as a penalizable crime, it gives the police and other law enforcement officers huge power to harass and victimize some people. The harm done by an unjust law like this can, therefore, be far larger than would be indicated by cases of actual prosecution.[67]

Together these two letters signalled a significant mobilisation of public opinion against Section 377.

As these events show, the Naz petition came up for hearing at a time of momentous transition in public attitudes towards LGBT persons in India. It was fortuitous that the Court was hearing the matter during a period when LGBT people were more visible in the public eye. Events outside the court set the agenda and undoubtedly had their impact upon the more formal proceedings within the Court. Because of ALF's unique position of being both lawyers as well as activists involved with the struggle for LGBT rights, ALF lawyers were very conscious of their responsibilities, not just to their clients but also to the wider LGBT community. This was exemplified by the awareness of ALF lawyers that it was important to keep the wider LGBT community informed of the court proceedings. For this reason, the oral arguments from each day's proceedings were carefully transcribed and posted on the LGBT-India listserve.[68]

Coincidentally, the judgment of the Delhi High Court pronounced on July 2, 2009, was preceded by pride marches in five cities in India on the previous weekend. This fortuitous coincidence pointed to the fact that the struggle against Section 377 was simultaneously a political demand as well as a legal battle. In its operational logic, the *Naz* judgment read down Section 377 of the Indian Penal Code to exclude from its ambit consenting sexual intercourse among adults. What was remarkable about the judgment is that it went beyond the thinking that the state will not interfere with consenting sex in the privacy of one's bedroom. It went on to assert that privacy was closely connected to

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[67] *Id.*

[68] The full transcript of the court proceedings before the Delhi High Court have now been published, and are also available online at the website of the Alternative Law Forum. ALTERNATIVE LAW FORUM, THE RIGHT THAT DARES TO SPEAK ITS NAME, (Arvind Narrain & Marcus Eldridge eds., 2009), *available at* http://altlawforum.org/publications/the-right-that-dares-to-speak-its-name/.

dignity; Section 377 was held to affect a person's sense of dignity, privacy, and equality, and was hence read down.

The Delhi High Court's judgment was a remarkable assertion that LGBT persons are indeed a part of the Indian nation as well as a declaration that the judiciary remains an institution committed to the protection of those who might be despised or repressed by a majoritarian logic. The *Naz* judgment also triggered a wider conversation on LGBT rights in living rooms, offices, and tea shops across the country. LGBT persons were out of the closet and out in the public spotlight. The Delhi High Court decision was, therefore, an important moment in the struggle of LGBT persons to be recognized as full citizens.

Unlike the two cases discussed earlier in this article, the *Naz* judgment laid down extensive legal doctrine detailing the links between the intimate lives of LGBT persons and the right to privacy, dignity, and equality.[69] The powerful language of the judgment provided an ethical and moral compass for the LGBT movement by literally inventing LGBT citizenship in India.[70] The power of the *Naz* judgment went beyond the narrow point of decriminalization; its deployment of the language of the law has the potential to change the way society views LGBT persons. [71] The law sometimes can serve, as Justice Sachs put it, as a "great teacher," and can help to establish "public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse."[72]

The Delhi High Court's judgment held sway for nearly four years, between July 2009 and December 2013. During this period, while the appeal from the judgment was being heard and decided before the Supreme Court of India, India's LGBT population enjoyed a rare and unprecedented degree of legal acceptance. Shortly before the final

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[69] *Id.* at 23. Naz concluded that, "In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual."

[70] *See* LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW (Alok Gupta & Arvind Narrain eds., 2011) (further analysis of the Naz judgment).

[71] To underscore the importance of the judgment, ALF published a booklet on the Naz judgement, summarizing the arguments on which the judgment was based and collating some commentaries by eminent persons in the wake of the judgement. THE RIGHT THAT DARES TO SPEAK ITS NAME, *supra* note 68. This booklet was also translated by ALF into Kannada, the majority language in Karnataka, and later on by other groups into Tamil, Hindi and Bengali. It continues to be used as an advocacy tool.

[72] *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19, ¶ 138.

version of this article went to print, on December 11, 2013, the Supreme Court of India delivered its judgment in the case of *Suresh Kumar Koushal v. Naz Foundation ("Koushal")*.[73] The judgment of the Supreme Court overruled that of the High Court of Delhi in the *Naz* case, and held that Section 377 of the Indian Penal Code "does not suffer from any constitutional infirmity."[74]

Constraints of space and time prevent us from engaging in a detailed analysis of this recent decision of the Supreme Court of India. For now, we restrict ourselves to setting out some important reactions to the decision which appears to have had some remarkable consequences already. The judgment sparked outrage amongst a range of commentators, including, interestingly enough, among Cabinet ministers of the Union government, who promised to bring about legislative amendments to repeal Section 377.[75] Several of the parties to the case filed review petitions before the Supreme Court seeking a re-hearing of the *Koushal* case on various grounds. The most significant of these actors was the Union government, which set aside its equivocal position before the High Court and strongly urged the Court to hold Section 377 to be unconstitutional on several counts.[76] ALF and Naz Foundation filed separate review petitions that supplement and complement the arguments of the Union government.[77] On January 28, 2014, the Supreme Court rejected the eight review petitions against its judgment in the *Koushal* case. ALF lawyers are currently conferring with other activists and lawyers in charting the way forward on this issue. As should be clear, the story of the *Naz* case is yet to be concluded.

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[73] 2013 (15) SCALE 55; MANU/SC/1278/2013.

[74] *Id.* at ¶ 56.

[75] A collation of early responses to the Supreme Court verdict in the Koushal case published in newspapers, magazines and blogs can be found online/. *Articles analyzing the verdict*, ORINAM SECTION 377, http://orinam.net/377/articles-analysing-verdict/ (last visited Jan. 30, 2014).

[76] The full text of the review petition filed by the Union government can be found online. *Review Petition filed by Union of India,* ORINAM SECTION 377, http://orinam.net/377/wp-content/uploads/2013/12/377_ReviewPetition_UnionofIndia.pdf (last visited Jan. 30, 2014).

[77] The arguments from both the ALF and Naz Foundation review petitions can be found online. *Review Petition filed by ALF on behalf of Voices against 377*, ORINAM SECTION 377 http://orinam.net/377/wp-content/uploads/2013/12/VoicesreviewFinallfiled_Jan102014.pdf (last visited Jan. 30, 2014); *Naz Foundation files review petition against the Supreme Court judgment on Section 377*, ORINAM SECTION 377, http://orinam.net/377/naz-foundation-files-review-petition-supreme-court-judgment-section-377/ (last visited Jan. 30, 2014) (summarizing the Naz Foundation's review petition).

IV. CONCLUSION: PURSUING SOCIAL CHANGE THROUGH LAW

As students, some of the ALF lawyers were grounded in an academic critique of the law. Schools of legal thought emphasising interdisciplinarity, which looked at the law contextually and addressed its limitations, had a particular attraction for many of them. The works of Critical Legal Studies ("CLS") theorists such as Duncan Kennedy undoubtedly played a significant radicalising role, allowing some of them to see that law could not be understood outside the context of politics.

After practicing law for fourteen years, how do ALF lawyers now relate to those academic critiques of the law? In particular, how does the work of ALF speak to the broad critiques of the law offered by CLS theorists? Has the process of being immersed in a certain kind of practice anything to do with their opinions of the law? Acknowledging that the cases narrated above are only three out of the hundreds of cases handled by ALF, do these three cases nevertheless have anything to say about the role of law in social transformation? Can a theoretical understanding of the possibilities of law, as well as its limits, emerge through these three cases?

A. THE ROLE OF THE COURTS

All three cases relate to minority populations though of different hues. In the case of the Dalits who clean manholes, the state was very reluctant to implement its constitutional obligations. As for the Christian pastors of Davangere, the state administration actively interfered with the freedom to practice any religion of their choice. And finally, in the case of LGBT persons, the state initially declared on oath that gays and lesbians did not exist in India. In all three episodes, the state exhibited a dangerous majoritarianism. The biases and prejudices to which the majority community was prey to were unthinkingly reiterated by the state, resulting in either an inability to act against - or an active connivance with - majoritarian prejudices.

The judiciary played different roles in all three cases. In the case of the manhole workers, the role of the Court was to ensure supervision and issue directives to the Executive so as to move it towards constitutional compliance. For the pastors of Davangere, the role of the Court was to cajole and persuade the state that the actions it had undertaken were illegal and therefore had to be withdrawn. And finally,

in the *Naz* case, the Delhi High Court came forth with a judgment which was to become a moral and political anchor of the LGBT movement. In the first two cases, the judiciary emerged as a bulwark of counter-majoritarianism, serving to safeguard democracy and preventing it from degenerating into a mere expression of majority sentiment. In the third case, the Delhi High Court's judgment in the *Naz* case served a similar purpose, but its overruling by the Supreme Court in the *Koushal* case is clearly a setback. However, as we noted briefly above, even an adverse judicial ruling can have positive consequences: in this case, it forced the Union government to shake off its earlier ambivalence and assert categorically that it will take steps to remove the offending provision from the statute book. The government's actions in filing a review petition against the ruling of the Supreme Court where it strongly defended the judgment of the Delhi High Court in the *Naz* case have provided a source of strength for the LGBT community. While the story of the *Naz* case is still unfolding, ALF lawyers have learned important lessons from their engagement with the law and courts on this issue.

B. USE OF STRATEGIES OUTSIDE OF LAW

For ALF lawyers, these three cases emphasized the importance of work outside the court. In the case of the manhole workers, it would have been impossible to even contemplate a well thought out litigation strategy without first undertaking detailed fact finding missions on the deaths of manhole workers. In the case of the Davangere pastors, the petitions filed before various state authorities, as well as the public protests of the Christians affected, made clear to the judiciary that these were not frivolous litigants; rather, they were litigants who had exhausted every possible option before approaching the Court. And finally, in the *Naz* decision, the Court gave judicial imprimatur to a changed Indian polity with respect to LGBT rights. Prior to the judgment, a decade of grassroots work by organisations around the country had created an awareness about LGBT lives. This was the foundation upon which the judges of the Delhi High Court erected the edifice of the *Naz* judgment.

Other stakeholders outside those immediately affected were involved to differing extents in all three cases. Perhaps the most successful of the three in building wider coalitions was the *Naz* case. By the time the case came up for hearing, there was significant support for decriminalisation in the wider society, including in the legal fraternity,

the intellectual community, the media, and in sections of the public who knew someone who was LGBT. What is striking about the Union government's review petition against the Supreme Court ruling in the *Koushal* case is how much it relies upon the groundwork done by several activists in the realm outside of the law, especially those relating to fact finding reports on harassment of LGBT and transgender communities under the guise of Section 377.

In the case of the manhole workers, once again, it was networking among human rights organisations that allowed for a wider group to research and create the *fact-finding reports*. The litigation process drew on the strengths of numerous human rights groups. By contrast, the case of the pastors exhibited the lowest level of involvement of groups outside those immediately affected. All three cases unequivocally demonstrate the importance of work outside the law. It is never possible to bring about change at the grassroots level if the legal petition is not supplemented by work outside the courts, in the media, with government authorities, and with efforts to create receptive public opinion.

C. LAW'S ROLE IN FASHIONING INDIVIDUAL SELVES

The three cases also demonstrate that legal strategies do not consist solely of the use of the courts as a forum for securing social justice. While courts may sometimes be the end point, the role of the law is also as a language or a discourse operating in society. The language of entitlements frames social issues so as to present injustice as a violation of the rights of individuals.[78] Beyond the obvious point of explaining violence, the *fact-finding reports* serve the role of promoting an understanding of violence as a violation of individual personhood. The language of rights used in activist discourse has had an impact beyond the courts; it empowers victims to think of themselves as rights bearing

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[78] Of course one has to acknowledge that it is this precise role of law in fashioning subjects which has otherwise been subjected to extensive critique. *See* Duncan M. Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE (Janet Hally & Wendy Brown eds., 2002). While it might be impossible to fully respond to these critiques in this article, the emphasis here is on rights language in the cases above that is contextualized within the struggles of LGBT persons, religious minorities and the 'untouchable' community in India. 'Rights' become a way of asserting equal claims to citizenship for those otherwise despised within majoritarian traditions.

subjects. It also enables the clear framing of demands against the state as well as against non-state actors.

The language of rights, as used by religious minorities, LGBT persons, and Dalits, ultimately allows for assertions of equal constitutional claims to dignity. In effect, these claims are a form of grassroots democracy asserting the right to equality from the bottom. These struggles for equal citizenship have a transformative character, converting as they do people who perceive themselves as being mere objects of scorn, derision, and ridicule into empowered subjects who assert an equal claim to citizenship. This elusive concept has been called "moral citizenship" by Justice Edwin Cameron of the Constitutional Court of South Africa:

> Rights and rights-talk serve a further important function. They can confer the dignity of moral citizenship. Moral citizenship is a person's sense that he or she is a fully entitled member of society, undisqualified from enjoyment of its privileges and opportunities by any feature of his or her humanhood. It does not consist in mere freedom from criminal penalties and other legal burdens, but is something richer, subtler and perhaps deeper: it is a state of mind produced by the absence of criminal penalties and legal burdens. It is the sense of non-disqualification, of non-exclusion, and of positive entitlement that freedom from disqualification and from official sanction engender. If all this seems impossibly abstract, let me recount my first experience of the heady sense of moral citizenship.[79]

Cameron goes on to describe the first gay pride march on African soil as a moment when he experienced this sense of moral citizenship. Our case studies illustrate that the sense of moral citizenship is claimed by Dalits, Christians, and LGBT communities based upon a reading of the notion of equality and dignity in the Indian Constitution.

D. THE ROLE OF LAW IN SOCIAL TRANSFORMATION

The question with respect to the role of the law in social transformation has often been answered in polemical terms, with strong positions being taken either for or against the role of law.[80] The burden of

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[79] Edwin Cameron, *What you can do with rights*, LAW COMMISSION OF ENGLAND AND WALES (Jan. 25, 2012), http://lawcommission.justice.gov.uk/docs/Scarman_2012_Justice_Cameron_What_you_can_do_with_rights.pdf.

[80] The literature on this issue is vast, especially dating from the early 1990s with Gerald Rosenberg's scathing critique of Warren Court era decisions that sought to bring about social change. *See* GERALD ROSENBERG, THE HOLLOW HOPE (1991). This generated a considerable

the submissions of the CLS school might be to suggest that it is unrealistic to expect anything at all from any engagements with the law. On the other hand, there might be uncritical appreciation of the role that law can play in social transformation in the law and development movement or for those who see the law as a simple and direct instrument of social engineering. The question is: can our series of case studies offer any path beyond this "law or nothing" approach?

In our reading, the role of the law in all three cases has had two particular aspects. First, it played the important role of providing relief through the exercise of forms of sovereign power. In both *Naz* and the church attacks cases, the role of the judiciary was to provide immediate relief to a community under siege. In both cases, the counter-factual can be posed as to what would have transpired had the judiciary, with all the weight of its sovereign power, decisively rejected the prayers of the LGBT community and the Christian community. Should the prospect of this possible result have deterred the two groups from approaching the Court?

With respect to the Christian community, it was not possible to talk of a space outside the law as that space – the space of politics untrammelled by legal codes – was decidedly majoritarian. The utilization of the political space of protest, debate, and discussion had produced no tangible result in favour of the Christian community, leaving the judiciary as the last hope. With respect to the church attacks case, one can state that this position of a space outside law was illusory in its potential; approaching the judiciary was a last gamble with its failure being, in effect, the failure of the constitutional promise to a section of India's citizens.

With respect to the demand for the reading down of Section 377 in the *Naz* case, it is possible to make an argument of timing. One can argue that the case could have been filed later, after building sufficient favourable public opinion on the ground. This is a critique not of the substantive decision to go to the courts, but of the timing of the legal demand to ensure it had the maximum chance of success. Another critique might suggest that, instead of turning to the courts, activists

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debate on the role of courts in bringing about social transformation. For one perspective arguing that courts do play a significant role in furthering social change, *see* Michael McCann, *Reform Litigation on Trial* 17 LAW & SOC. INQUIRY 715 (1992); MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). We lean, as should be clear, towards the position taken by McCann, though we have sympathy for Rosenberg's caution that one shouldn't expect courts, by themselves, to be effective.

should have begun the patient work of lobbying Parliament to ensure repeal of the law. If this had been the chosen strategy, the objective of immediate relief would have had to be sacrificed; law reform moves at a glacial pace in India.[81] Ironically, it took the adverse ruling of the Supreme Court in the *Koushal* case to make the Union government declare that it would repeal Section 377.[82] On the manhole workers case, it is clear that the sovereign power of the judiciary was inadequate to eliminate manhole deaths in Karnataka.

Nevertheless, it is insufficient to assess the role of law purely in terms of the immediate results. This, in our view, is also a failing of Epp's analysis of rights activism in India. He does not appreciate the radiating effects and achievements of rights activism initiated by PIL campaigns seeking to develop a culture of respect for constitutionalism and human rights. Our critique of Epp's narrow focus draws support from the work of US socio-legal scholars such as Michael McCann, who has conducted studies of legal mobilization to show how law provides both "normative principles and strategic resources for conduct of social struggle."[83] As Rohit De's impressive recent work on rights litigation before the early Indian Supreme Court has shown, "litigation is not just about victory or loss, but also creates focal points for larger mobilizations."[84] In a critique which has strong parallels with ours but examines a separate set of issues relating to welfare rights in India, Sanjay Ruparelia has noted that Epp's narrow focus on court cases leads him to neglect the larger social and political mobilization around socio-economic issues that occurred in the 1990s, and was itself facilitated by the Indian judiciary's PIL activism in the 1980s.[85]

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[81] The recommendation of the 172nd Law Commission Report that Section 377 should be repealed, made in 2000, is yet to be acted upon by the Indian parliament.

[82] *Homosexuality ruling: Government promises urgent steps*, NDTV (Dec. 12, 2013), http://www.ndtv.com/article/india/homosexuality-ruling-government-promises-urgent-steps-457943 ("We will have to change the law. If the Supreme Court has upheld that law, then we will certainly have to take firm steps. Change has to be made fast and any delay cannot take place. We will use all means available to make changes at the earliest") (statement of Union Law Minister, Kapil Sibal, on the Supreme Court's Koushal judgment).

[83] Michael McCann, *Introduction*, in LAW AND SOCIAL MOVEMENTS xi-xxvi, xvi (Michael McCann ed., 2006).

[84] Rohit De, The Republic of Writs: Litigious Citizens, Constitutional Law and Everyday Life in India (1947-64) (unpublished Ph.D. dissertation, Princeton University) (on file with authors).

[85] Sanjay Ruparelia, *A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court*', KELLOGG INSTITUTE, Working Paper #391 (Feb. 2013), *available at*: https://kellogg.nd.edu/publications/workingpapers/WPS/391.pdf (last visited Dec. 25, 2013).

We argue that the act of filing a case in the courts can, given the right circumstances, have the greater effect of shifting the signposts of the debate and taking the discussion to a public level. Arguably the most important contribution of the *Naz* case was to take the discussion around Section 377 to a nationwide level. Regardless of the decision, the act of filing the case and the relentless media coverage itself burst open the closet door within which the discussion of Section 377 was otherwise confined.[86] That is why we believe that the *Naz* case remains a pivotal legal event despite its overruling by the Supreme Court in the *Koushal* case. The chain of events and societal conversations that the *Naz* case unleashed have now taken on a logic and life of their own. Similarly, it can be argued that the manhole workers' petition continues to be a tool of public education by keeping the spotlight on the plight of manhole workers.

We can conclude that the law is a potential tool for all those interested in a politics of social transformation. It can sometimes have a direct impact arising from the coercive power associated with the law; in other instances, the law becomes one of the tools through which wider and deeper shifts in public opinion can be created. However, the potential of law to be used in this fashion is significantly diminished if the creative links between law and social and political activism are not constantly kept alive. The potential of law is never divorced from activism, and politics and the success of law depend upon the extent to which one is able to link the wider world of activism to the law's domain.

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[86] Till the *Naz* litigation, the discussion of LGBT issues was confined to the self-publications of the LGBT community, radical or alternative journals, in addition to the emerging public discussion around HIV/AIDS as well as representations of LGBT issues in popular culture.