Breathing Life into the Constitution: Human Rights Lawyering in India

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*Human Rights Lawyering in India*

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Dedication


“I am not a religious person but the only sin I believe in is the sin of cynicism.”

Parvez Imroz, Jammu and Kashmir Civil Society Coalition (JKCSS), on being told that nothing would change with respect to the human rights situation in Kashmir.
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Introduction

Though India is a democracy in form, its socio-economic hierarchies and inequalities continuously challenge the promise of equal citizenship for all guaranteed under its Constitution. Dr. Ambedkar, speaking in the Constituent Assembly on the day the Constitution was adopted, appositely referred to the India as henceforth entering into “a life of contradictions.” In his opinion in politics you recognized the “principles of one man one vote however in social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.”

The ‘contradiction’ that Dr. Ambedkar pointed to, implied that democracy in India was a far from accomplished reality. In fact in Dr Ambedkar’s view, “Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.”

Democracy in the Indian context is thus at best a work in progress. The movement from the form of democracy (parliamentary) to the content of democracy (social and economic) is not a state-driven project but rather one that is driven by grassroots level activism. It is in that sense that the Constitution must be brought to life for a range of groups and communities. The meaning of constitutional notions, such as equality and dignity, is authored by a range of social movements often against a recalcitrant state. These notions reach a wider public when they are rearticulated by the organs of the state.

Professor Upendra Baxi describes the Indian Constitution as the modern world’s first post-colonial constitution that combines four concepts: governance, social development, pursuit of rights and justice. He asserts that these four ideas remain in dynamic tension, at times even in contradiction, with each other. While governance is grounded in the right of the people to adult suffrage (to contest and to vote at elections), with representation as the key to the idea of just governance, the idea of human and social development are derived from the founding values of the Preamble, the Part IV Directive Principles of State Policy, and now Part IV-A, which enshrines the fundamental duties of all citizens. According to Professor Baxi, a rights culture, enunciated by Part III – fundamental rights – is always crisis-ridden, and often places Parliament in opposition to the Supreme Court of India, and the peoples of India in opposition, at times, against the executive/judicial combine. The question here is not merely about the distribution of the law-saying power of legislatures and courts, but the contestation about the justness of rights, especially when the constitutional-haves

claim all the rights while the have-nots are deprived of enjoying basic human rights and freedoms.\footnote{Ibid}

In the past few decades, the gap between the haves and have-nots has only increased, despite the constitutional directive of socio-economic justice, equitable distribution of wealth and resources for production, and the duty of the state to care for the marginalized sections of society. It has been observed that the rule of law in India stands normatively not just as a “sword” against State domination, but also as a “shield,” empowering a “progressive” state intervention in civil society.\footnote{Upendra Baxi, ‘The Rule of Law in India’, Sur vol.3 no.se São Paulo 2007}

As lawyers, the focus is often on litigation culminating in the pronouncement of the judgment, as a yardstick of what can be achieved. This is also true in the field of socio-economic justice, where the tendency has been to (rightfully) celebrate the achievements of the human rights movement through positive judgments. However, Dr. Amartya Sen provides an alternative way of viewing the project of social justice, not in binary terms – as either achieved or not – but evaluated along a continuum – as a matter of degree.\footnote{Amartya Sen, The Idea of Justice, The Belknap Press of Harvard University Press, Cambridge, 2009.} Landmark judgments undoubtedly further the social cause and are a shot in the arm for socio-political movements. Nevertheless, as this book will illustrate, human rights lawyering assumes broader and more holistic approaches, where engaging with courts of law is one of the multi-pronged strategies adopted and implemented.

In its broadest sense, human rights lawyering is about giving content to Indian democracy and about shifting the understanding of democracy from majoritarian to constitutional. Democracy in a diverse and plural country like India cannot merely mean that the party with a majority governs, it has to also be about hearing the voices which do not have a space in a majoritarian set up. The concern running through this book is how do you make a place for dissenting voices in Indian society, small voices which might not be heard in the din of a majoritarian democracy.

Specifically, human rights lawyering amplifies the voices of minorities of many stripes and hues, from disabled people, religious minorities, and Dalits to LGBT persons. In a majoritarian set up, these voices are seen as threatening the unitary fabric of the nation and hence are either ignored or actively suppressed. In such a context, when concerns of unpopular minorities are ignored by the majority and a government which enjoys a parliamentary majority has no compunctions in riding roughshod over minority rights where does the besieged and embattled minority turn to?

It is in such contexts, that the role of the judiciary becomes vital. The judiciary has an important role to play as its legitimacy does not come from representing the majority but rather from allegiance to the Constitution. The framework of the Constitution guarantees the protection of the rights of all persons regardless of the opinion of the
majority. As such, the judiciary is a very important forum for ventilating the grievances of the minority and a way in which the minorities’ fundamental rights can be protected. Human rights lawyers are the agents for bringing before the judiciary concerns of many oppressed and subjugated minorities, which may not have representation in parliament.

However, this is not to say that raising this concern before the judiciary necessarily results in corrective action that remedies the majoritarian bias. Assuming that the same bias that affects the parliamentary majority also infects judicial institutions then what is to be done? It is these complex questions which this book seeks to answer by laying out the practise of human rights lawyering in India.

This book is divided into three sections.

The first part, which is titled, Motivations of Human Rights Lawyers, seeks to explore the reasons why people become human rights lawyers. The answer has historical, psychological and sociological dimensions. By a concrete exploration of the lives of human rights lawyers in India, this section seeks to shed light on the complex question of human motivation.

The second part is titled, Strategies and Approaches in Human Rights Lawyering and forms a major part of the book. In this section, the key question of what human rights lawyers have done in response to the complex problems of socio-economic inequality in the Indian context will be explored. The sheer diversity of deeply challenging issues from mass crimes to disability rights, LGBT rights to children’s rights, among others, have brought forth an inventive and innovative range of responses from human rights lawyers. Some of the responses have succeeded in ensuring immediate benefit to suffering communities while other responses have the long term effect of changing the terms of discourse, enhancing emancipatory possibilities and deepening Indian democracy.

The last section titled, Challenges of Human Rights Lawyering seeks to lay out some of the key challenges which human rights lawyers face. If human rights lawyering and the inventive series of strategies employed by human rights lawyers are key to enriching, sustaining and nourishing democracy, then its important that we understand the challenges facing human rights lawyering and collectively seek to redress them.

Methodology

This book is based on material selected from over a 100 interviews conducted with human rights lawyers from Maharashtra, Gujarat, Tamil Nadu, Andhra Pradesh, Madhya Pradesh, Chattisgarh, Jharkhand, Jammu and Kashmir, West Bengal and Manipur over a span of two years (2012-13).

The interviews were conducted by a team which included Siddharth Narrain, Santanu Chakraborty, Darshana Mitra, Saumya Uma and Arvind Narrain. Transcription of the interviews was undertaken in 2014. The details of the interview are noted in Annexure I. In the main text, in order to avoid needless repetition, only the name of the person interviewed is referenced. The details of the interview itself are in Annexure I.
Upon transcription of the interviews we realized that we had compiled an incredibly rich and diverse materials, most of which related to lawyering experiences which had not been documented before. We initially classified and compiled the material into three dossiers comprising motivations of human rights lawyers, strategies undertaken by human rights lawyers and challenges faced by human rights lawyers.

However, we realized that this material, though rich in scope and content, made no sense if it was not properly contextualized within a wider understanding of Indian democracy as well as within the wider history of human rights in India. This book uses the interview material to illustrate points and raise issues, placing the material within a broader understanding of human rights.

As human rights law researchers, advocates and educators, we have felt an acute need for documentation that would bring to light the rich contribution of human rights lawyers to the project of Indian democracy itself. Such documentation would help ground the study of human rights in a strong empirical context.

One of the limitations of this project is that we were unable to conduct many interviews in some crucial jurisdictions, including Delhi, and this accounts for the fact that some significant voices in the human rights lawyering field are not represented in this volume.

While interviews were planned in northern, southern, eastern, western, central and north eastern parts of the country, we realized that, given the limited human resources and the paucity of time, it was impossible to undertake a comprehensive study based on interviews with human rights lawyers from all parts of the country.

The other major conceptual limitation is that this book deals with those who have a degree in law and hence are able to practise in courts. There are an entire group of people who may be what may be called ‘barefoot lawyers’ who are not covered in this study.\(^7\) The most eloquent tribute to this breed of lawyers is perhaps Mumia Abu Jamal’s marvelous documentation of the incredible work by prisoners who are often not educated in the law, but who educate themselves in the course of their prison term and begin to advocate for prisoners rights.\(^8\) We are not aware of significant work of this nature in India.

This study merely indicates the gigantic scale of the work still to be done.

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7 See Mark Ralph West, Barefoot lawyers and the arts of caste resistance in Rural South Asia, unpublished dissertation, 2009. This dissertation points to the rich histories of human rights lawyering which is still to be documented.

1. Motivation of Human Rights Lawyers

It is difficult to answer the question as to what makes an individual take on the challenge of working for social justice issues. One way of approaching this question is by considering human choices as being made within a wider historical canvas. Thus the historical context of terrible incidents of colonial oppression such as Jallianwala Bagh, caste violence such as the mass killings of Dalits in numerous incidents in post independence India, horrific sexual violence, or the total deprivation of civil rights during the Emergency\(^9\) plays a role in structuring human choices to work against injustice.

Veena Das articulates this within the framework of what she calls “critical events”. To define a “critical event” Veena Das adopts Francois Furets’ assertion that the French Revolution was an event par excellence – a critical event – because it instituted a new modality of historical action which was not inscribed in the inventory of that situation. In her analysis, Das states that after a critical event, “new modes of action came into being which redefined traditional categories.”\(^{10}\)

In terms of the interviews we did with human rights lawyers, the ‘critical events’ which gave birth to new modes of thinking as well as new modes of action were events such as the Quit India movement (1942), the Emergency (1975-77), the demolition of the Babri Masjid (1992), the Bhopal Gas leak (1984), anti-Sikh pogrom (1984), the Kashmir Azadi Movement (1990s) and the Gujarat pogrom (2002). Hence the birth of human rights lawyering is closely linked to critical events in the life of the subcontinent. We have surveyed only a small range of major events that were deeply influential in forming a consciousness around human rights concerns. The survey only alerts us to the range of ways in which history has a way of generating responses that cannot always be anticipated.

Nevertheless, responses to critical events do not exhaust the various ways in which human rights lawyering begins. Prior active participation in people’s movements has played a significant role in inspiring a range of persons to take to law to defend people’s struggles or movements. A leftist ideological orientation inspired by the writings of Marx has also played an inspiring role. The framework of a radical interpretation of religion with an emphasis on justice to the poor has also influenced lawyers from explicitly religious backgrounds to take to law. There are also those who have experienced suffering and humiliation and have sought in law a tool to fight

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\(^9\) The emergency was imposed by the then Prime Minister, Indira Gandhi from 1975-77 during which the fundamental rights including the right to life was suspended. The period was characterized by mass violations of human rights.

\(^{10}\) Veena Das, Critical Events, Oxford University Press, New Delhi, 1995, p. 5.
for their dignity. Some deeply empathetic individuals have also responded to human suffering they have witnessed, by deciding to take to law to alleviate it.

An environment which foster critical inquiry such as a university or a collective of fellow professionals committed to social justice issues are institutional mechanisms which have the potential for converting an initial spark into a more long standing motivation to do human rights work. Beyond this, there are also family environments that foster a human rights concern, as well as the role that a few individuals have played in inspiring others to take to human rights practise. Sometimes its not possible to isolate any single factor as the reason why some people decide to take to human rights lawyering because their involvement in the field is due to a combination of factors.

There can be no magic key to understanding the structure of human motivation let alone motivation to do human rights lawyering. Outlining these individual narratives will hopefully give us some clues into why people take to human rights lawyering as a profession. One hopes that some readers are compelled by these narratives thereby enticing curious bystanders to undertake similar journeys in their lives.

**Critical Events in the Collective Life of the People**

**Quit India movement 1942**

The only pre-independence event to figure in this listing of critical events is the Quit India movement of 1942. There is a reference by Justice Hosbet Suresh to being a participant in this movement and then moving on to pursue his law degree. While there were many matters of chance which resulted in Justice Suresh becoming a lawyer and then finally a judge, what is clear is that the imprint of the thinking that underscored the Quit India movement has continued to make its way into Justice Suresh’s work as a judge sensitive to human rights concerns.

As J. Suresh recalls:

> We were part of the Quit India Movement and experienced independence and the assassination of Mahatma Gandhi. A close friend of mine who was a senior to me by a year and was active like me had joined Belgaum Law College. He quietly filled up an application form for me as well by forging my signature and I got admission. So then he wrote to me that I’ve got you admission in LLB and then I joined the course....

**The Emergency (1975-77)**

Perhaps the ‘critical event’ in the life of human rights lawyers in India has been the Emergency, which was imposed by Indira Gandhi from 1975-77. Many of those who went on to become prominent human rights lawyers took to human rights law during the period when the right to life was suspended by the executive and the prisons were teeming with political prisoners. One of India’s most important human rights lawyers, K.G. Kannabiran emerged as a staunch defender of human rights during the Emergency. He filed hundreds of habeas corpus petitions during that dark time to
ensure state accountability. Apart from Kannabiran, a range of human rights lawyers, including Nandita Haksar, V. Suresh, Pradip Prabhu, Colin Gonsalves, Mihir Desai, Indira Jaising, P.A Sebastian, Girish Patel and a range of others, were of the generation which took to human rights lawyering in the light of the Emergency.

This was also the period when prominent human rights organisations, such as the People’s Union for Civil Liberties (PUCL), Lok Adhikar Manch, Organisation for the Protection of Democratic Rights (OPDR), Committee for the Protection of Democratic Rights (CPDR) etc., were formed. The narratives below, while not representative, are indicative of how the Emergency brought about a new way of thinking about the law for an entire generation.

P.A. Sebastian was a lawyer associated with the Committee for the Protection of Democratic Rights (CPDR) based in Bombay. He described his experience during the Emergency as follows:

I completed my law during the Emergency. I was one of the people who used to meet and talk about political issues during the Emergency. When the Emergency, which was imposed in 1975, was lifted in 1977, we formed the Committee for the Protection of Democratic Rights. I was part of it right from the beginning. After the Emergency was lifted, I became a practicing lawyer.

Sudha Ramalingam is a human rights lawyer based in Chennai. She said:

I was doing law during the Emergency. So I was naturally attracted towards the call of Jayaprakash Narayan. I would go attend all these meetings stealthily as my parents were against me attending these meetings. This was because I was a girl as well as because these meetings were to do with the opposition to the Emergency. I became quite actively involved in my own small way and so naturally when I came to practicing I was also interested in all this work. I got myself associated also with All India Democratic Women’s Association and started taking up women’s issues. I was also associated with the PUCL and another women’s rights organization called Pennurumaiyakam.

Geeta Ramaseshan, a women’s rights and matrimonial lawyer based in Chennai said:

As a woman, I needed to prove that I could be a successful lawyer, and that was one part of me. Besides, you know, I am from the 1970s. The 1970s movements of all kinds have influenced me, whether it was the Jayaprakash Narayan movement, the anti-emergency movement or the women’s movement of that time. I grew up in Bihar in the 70s, now part of Jharkhand. That whole region is very political in many ways. So all that influenced me.

The mobilisation against the Emergency itself had a background as the case study of Gujarat illustrates. In Gujarat, mass mobilisation began with the teachers movement (1973), which in turn led to the Navnirman (1974) movement and finally culminated in

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11 See a documentary by Deepa Dhanraj on the life and work of K.G. Kannabiran called, ‘The Advocate’, https://www.youtube.com/watch?v=haGd9ICmD8w (accessed on 10.4.15)
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the mobilisation against the Emergency (1975-77). Each of these forms of mobilization resulted in the development of new forms of thinking and action in Gujarat. From a deep immersion in social movements emerged human rights group such as the PUCL and the Lok Adhikar Manch. The origins of these groups are most powerfully articulated by Girish Patel, who is the doyen of the human rights movement in Gujarat. In Gagan Sethi’s words, ‘he (Girish Patel) carries the history of the story of human rights in Gujarat on his shoulders, so to speak.’

Girish Patel articulates the human rights movement as emerging out of the two earlier movements, the teacher’s movement and the anti-corruption movement. The teacher’s movement was a struggle for the autonomy of teachers from the management. The teacher’s movement was eventually successful in its objective of ensuring that teachers had a right in the management of the university. The successful mobilization of the teacher’s movement in turn led to the Nav Nirman movement, which was a mass movement against corruption. The Nav Nirman movement found a focal point in asking for the resignation of the then Chief Minister Chinmanbhai Patel and succeeded in ousting Chinmanbhai Patel. It was the political consciousness fostered by these two movements which paved the way for the Human rights movement.

The human rights movement began in the context of the imposition of the Emergency. The Emergency led to the establishment of organisations such as the PUCL and the Center for Democracy. Girish Patel provided insight into who joined these organizations, and why, stating:

[many] leftists thought that civil liberties were a useless bourgeois luxury and we’re not concerned with that. It was the Emergency, which made them realize that it was the poor who needed civil liberties more than the rich. For the rich, wealth itself is a protection; it is the poor people who have to fight for socio-economic rights. To get socio-economic rights, they need civil liberties.

It was this realization that led Girish Patel with the support of about “150 people from Ahmedabad, broadly of a left-to-center persuasion” to establish an independent organisation, Lok Adhikar Sangh in 1977. The reason why another independent organization was required was because the PUCL focused on only civil liberties and was not focused on socio-economic rights. Speaking about this divide, Patel said:

The principle basis of this organization [Lok Adhikar Manch] was that civil and political rights must go together with socio-economic rights of the people. Both the struggles are equally important and one supplements the other. Our basis was the oneness and interdependence of these movements. We started working on two fronts— one was on the legal front as I was a lawyer, and the other was on social issues. It was not an organised movement. We were unregistered, as many of us believed that we don’t need any registration or incorporation. It would be a loose organisation with most of us coming from a left-of-center persuasion. On one side, we participated in all socio-economic struggles, including workers, teachers, other marginalized people, Scheduled Castes and Scheduled Tribes. On the legal side,
we also started filing cases. [When] I started practice in 1975, I decided that certain principles must be observed. That I would fight for poor people. We would not take up cases for the employers or landlords. We would fight for the workers, tribals, SCs, children.

**Bhopal Gas Leak and Anti Sikh Riots (1984)**

Amitav Ghosh in an essay titled ‘The ghosts of Mrs. Gandhi’ observes that:

> Nowhere else in the world did the year 1984 fulfill its apocalyptic portents as it did in India. Separatist violence in the Punjab, the assassination of the Prime Minister, Mrs. Gandhi; riots in several cities; the gas disaster in Bhopal- the events followed relentlessly on each other. There were days in 1984 when it took courage to open the New Delhi papers in the morning.\(^\text{12}\)

While clearly 1984 was an extraordinarily violent year, the extraordinariness of the violence imprinted itself on the memory of some people as a call to action. Through their experience of working with the victims of the Bhopal tragedy as well as with the victims of the anti-Sikh riots some activists took to the formal study of the law. One such example is the work of an extraordinary human rights lawyer now based in Chattisgarh, Sudha Bharadwaj.

Sudha Bharadwaj, who is one of the few human rights lawyers working in the troubled state of Chattisgarh, described how she entered into human rights activism:

> For our generation of activists, basically there were two very important incidents of 1984. One was the Sikh riots, and the other was the Bhopal gas tragedy, which I think changed and inspired a lot of people. I particularly remember going to the colonies of the victims in both the anti-Sikh riots and the Bhopal gas tragedy. So basically, we were that generation. And I’ll say one thing- at that time we were very fortunate that there were not so many NGOs. So basically we had only two options- one was to make a career, and the other was to simply go and join people’s movements. Actually, it is not as difficult as it looks. I think when you are 25, there are a lot of changes that you can make and you are quite resilient.

**The pogrom following the destruction of the Babri Masjid (1992-93)**

The pogrom following the destruction of the Babri Masjid was another critical event. To those who were Muslim and believed in the promise of equal citizenship contained in the Indian Constitution, it told them in no uncertain terms that the state was capable of bypassing the promise and in fact aiding and abetting a pogrom against a minority community. This realization lead directly to lawyers championing the cause of human rights. Yusuf Muchhala, Shahid Azmi as well as lawyers from non-minority faiths, such as Manjula Pradeep, decided to take to human rights law to redress what they felt was an injustice.

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Yusuf Muchhala who is a designated Senior Advocate in the Bombay High Court spoke about how he came to human rights work:

My involvement with the issue of human rights violations was only after the 1992 riots. Before that I was involved in the issues of educational rights for minorities and the issues relating to the identities of the minority like the maintenance of the personal law of the minorities. I was concentrating more on those issues and not directly involved in the issues of human rights violations. What shocked me was when the 1992 riots, which occurred in Bombay. State terrorism that was unleashed on the minorities commencing from January 1993 completely shocked me and the normal refrain from even the balanced Muslim youngsters was if you are going to die, why don’t you kill them and die. It is a kind of frustration in the minds of the youngsters and they felt the whole system is hostile to us. Therefore when the Srikrishna Commission was established I volunteered myself to appear for the riot victims.

Shahid Azmi’s story of how he took to the law is a moving testimony to what individual human beings can decide to do, when facing the brunt of a discriminatory state. Shahid Azmi, after a brief career as a human rights lawyer, was assassinated by unknown persons in his office. His story has now reached a wider audience with the remarkable film called Shahid by Hansal Mehta on his life.

Shahid Azmi entered the legal profession following a crucible of experiences which few people have had. At the age of sixteen, in the midst of the Mumbai communal violence of 1992-93, he faced violence from the mob, courageously confronted a policeman who was threatening to shoot a woman and conducted relief work in the Muslim community. Disillusioned by the way Muslims were targeted in Mumbai 1992-93, he then left to Kashmir with the aim of joining the militants. Unhappy with that experience, he returned to Mumbai.

In December 1999, he was arrested by the Mumbai police and taken to Delhi where he was implicated in a plot to assassinate politicians, including Bal Thackeray. He was in jail for five years, during which he experienced various forms of physical and mental torture as well as several months of solitary confinement. According to Shahid’s brother, Khalid Azmi, in Tihar jail, Shahid Azmi was told by one of his co-prisoners: “There are two ways in life: one is to take to the gun to assert your rights, but that is the wrong path. You can also take a pen and fight your enemies till your death. Which path you decide is in your hands.” Shahid was also encouraged by Kiran Bedi to finish his studies. He completed his twelfth standard as well as a B.A. while in Tihar jail. He was subsequently acquitted by the Supreme Court. Upon his release, at the age of twenty-two, he was determined to continue the struggle against injustice. For this reason, he studied and completed a course in both journalism and law.

Shahid Azmi’s journey from the Mumbai slums to courts is unique. His life in Govandi in Mumbai, where he was raised in a lower middle-class woman-headed...
family with four brothers, taught him the meaning of poverty and deprivation; the communal violence in Mumbai made him conscious of the vulnerability of Muslims in a climate charged with religious fundamentalism; his experiences in the Tihar jail gave birth to a feeling, that perhaps law was a tool in the struggle against oppression. Shahid Azmi did not have the advantage of an affluent family, a law degree from a renowned university or clientele which was passed down from other family members. He stepped into the helms of the legal profession with a baggage of disadvantages, including the fact that his Muslim identity and the history of imprisonment put him on the radar of the police for several years after his release from jail.  

Manjula Pradeep who is a well known Dalit and women’s rights lawyer and activist who heads the NGO Navsarjan working on dalit rights spoke about how she came to human rights work:  

It was in 1994 after meeting this lady Balima whose son was beaten up in 1993. (That I decided to take up law]. [My] first experience of violence was during the Babri Masjid demolition. We decided to help the families of the Muslim communities living in Surat. We were a very young team at that time. Most of us were between 20 and 25, and Martin [Macwan] was the most senior and he was in his 30s. We went and did a study in the area of how much people had lost in terms of wealth and family members. We helped 750 families by distributing hand-pushed carts to them because that was their major occupation. They used to use it for selling crockery, etc.

Kashmir movement (1990 onwards)

The Azadi Movement of the Kashmiri people, demanding the right of self-determination has influenced generations of Kashmiris to take to human rights lawyering. People’s participation against what they term as Occupation by India has been met by brutal repression by State and non-state forces, especially with the emergence of the armed uprising in the Kashmir Valley in the 90s. This has necessitated a taking to law in an attempt to protect the rights of those unfairly detained by the state and to ensure that those who have been killed by arbitrary state violence are held accountable. In turn this has made human rights lawyers out of many commercial, civil and criminal lawyers, and continues to influence the younger generation to take to human rights practice. Kashmiri lawyers uniquely contribute a style of political lawyering that espouses a collective dream of the Kashmiri people’s right to self-determination.

One of the foremost lawyers in Kashmir and the former president of the Jammu and Kashmir Bar Association, Mian Qayoom, outlines the political context in which human rights lawyering took birth.

In 1976 when I joined the bar there was already a law, which permitted the government to make these detention orders to detain a person if he was guilty of

indulging in activities, which are prejudicial to the security of the state or public order. The position in the state is that right from 1947, there is turmoil going on. We feel that India has occupied us forcibly. [In] 1947 we were an independent country; we were not part of India. India brought its forces into the State of Jammu & Kashmir on 27th of October 1947. Since then we are under Indian Occupation and everything has been tried by India to suppress us.

In order to ensure that the people of Jammu & Kashmir do not raise their voice against injustice, preventive detention laws were used to detain many people including leaders such as Sheikh Abdullah who was detained in Delhi for a number of years...People were also detained under draconian laws such as TADA (Terrorism and Disruptive Activities Act), POTA (Prevention of Terrorism Act) and colonial laws such as the Enemy Agents Ordinance, which was enacted in 1947. Under the Enemy Agents Ordinance, people can be sentenced to life imprisonment or death penalty, without their being a provision for appeal. Under the Public Safety Act you can detain any person for a period of two years without any trial anywhere in the country. People are being detained under these laws with the sole objective of subjugating them. This is what is happening against the people of Jammu & Kashmir. We have been fighting these cases right from then.

G.N. Shaheen, the former secretary of the Jammu and Kashmir Bar Association, shared his thoughts on how civil liberties lawyering is closely connected to the policies of the Indian state in Kashmir.

In Jammu & Kashmir, lawyers generally deal with all matters. I dealt with service matters, criminal matters and civil matters. Beyond all this I particularly dealt with writ matters in the High Court. From 1990 onwards when the situation became worse, there was a huge influx of Habeas Corpus matters. Since thousands of people were detained unlawfully, we had to take these briefs. Almost all the other fields of work came to a halt and it was only Habeas Corpus matters, which were the mainstay. The fact that I did these detention matters, which we were facing, meant I developed an interest in liberty matters. I had done more than 10,000 briefs in the past 20 years in the High Court and we have thousands of these bail applications before the subordinate courts including TADA, POTA and other criminal courts. Almost 80-90 percent of the litigation was habeas corpus and detention matters. There was no civil dispute, no other criminal cases except these political detention and political trials. That is how we came in touch with these Habeas Corpus matters.

**Role of Ideology/ Peoples Movements**

It’s interesting to note that many human rights lawyers have not come out of a liberal tradition but rather have emerged out of a radical tradition. The leftist tradition, trade union movements, and people’s movements have all been great incubators of human rights lawyers. This, in a sense, seems to be a natural fit as invariably both leftist groupings as well as people’s movements have been subjected to state repression. In
the context of unremitting state repression, with very little overt and public support, the courts have become the arena through which basic civil rights such as the rights to expression, assembly and organization are sought to be safeguarded.

In fact, if there is one reason why India has a vibrant human lawyering community, it is only because there have been strong social movements as well as radical leftist movements. There is a symbiotic relationship between human rights lawyering and peoples movements and struggles. The following presents some of the key experiences of those whose path to human rights law was inspired by leftist movements.

Mihir Desai, a senior advocate from Bombay spoke about the relationship between Marxist thinking and his entry into human rights lawyering.

I come from a far left Marxist tradition. Both my parents were leftist scholars and a lot of people used to come home to discuss these issues. Even when I was 6 years old, instinctively I used to support a strike against the management. Both my parents were Marxist academicians. Both were sociologists. When I went into college (St Xavier’s, Mumbai), I used to be active in both professional and amateur theatre. That exposed me to a number of progressive issues because of the kind of theatre that was happening at that point of time. I was also a voracious reader. The first leftist book I started reading was Capital-Volume 1, though I used to get frustrated for not understanding anything.

After finishing college, I joined a trade union as a full time activist. I knew I did not want to become an engineer or a doctor or a professor, so then I joined law. It was not a conscious choice of any kind. When I joined law, I was simultaneously working at the trade union for 3 years. Four of us (Sandhya, Rao Wilfred D’costa and myself) then started a pavement dwellers organization.

When I started working with the trade union, the plan was that it would become a lifetime choice. By 1984-85, with the collapse of the Bombay textile workers strike, there was a general downward trend in class struggles. A lot of us felt that full time organizing was not viable. Maybe it was out of disappointment or maybe it had to do with the pull of a degree of comfort in life. Anyway, some of us felt that one way we could contribute was through law. So six of us got together- Indira [Jaisingh], Anand [Grover], three others and myself - and started the Lawyers Collective in 85.

Amaranth Pandey, a senior advocate practising in Chattisgarh and Madhya Pradesh, who is associated with the Communist Party of India, shared the dramatic story about his entry into law:

In 1988, The Indian Communist Party [CPI], started a bhoomi andolan (land revolution) in Ambikapur. On the 17th of September, 1989, the police here took away two of my friends who were members of the Communist Party of India (CPI) and shot them. We informed everyone in the city about the incident. I was a student at that time and I planned to give speech at four places, speaking against the policemen who have killed two of my friends.
By the time I got to the second venue to give my speech, I realized that the venue was surrounded by the police. So, halfway through my speech, I announced, “friends, I want to go and pee, but I will come back, you guys please don’t go away”. Then I ran behind the stage, where my friend was waiting with his bike, and I escaped. [However we were charged with crimes based upon the speech we gave]

This was the first important event of my life. I along with two of my friends was charged for two crimes on 19th September 1989, because we had abused those who filed cases against us. Everyone forgot the instance of the police killing two people but all that they remembered was that, we abused an influential person. In our society, killing two people who are poor is a small thing, but abusing someone influential is a big crime. I got anticipatory bail and then ran away and decided to do my law. I joined the law college in Bilaspur and eventually passed the law exam in 1989 and completed the whole degree by 1991.

I decided that on becoming a lawyer, I would never take fees from poor people. I committed to not take money from poor clients and I have followed these principles till date.

Sudha Bharadwaj’s route into legal activism was via her involvement with the Chattisgarh Mukti Morcha led by the charismatic Shankar Guha Niyogi. She recalls:

I had no idea that I would become a lawyer. I basically joined a trade union, Chhattisgarh Mukti Morcha, which was led by the legendary trade unionist of Chhattisgarh, Shankar Guha Niyogi. I came to Chattisgarh in the year 1986 with the idea of helping in the schools in which the union was working but then I ended up joining the union. Gradually I got drawn into movement building, particularly when the movement in the 90s shifted to Bhilai. After that, Niyogiji was assassinated in 91. However, in spite of this assassination, there was a huge movement of the contract labour in Bhilai and the struggle was taken forward. In 1993, the then Congress government referred all the labour cases to the industrial court. The agitation in Bhilai, which was an agitation of contract workers, was basically for very basic things: the right to form a union, living wage, eight hours day, minimum wages, proper documentation and gate passes, hazari card and all that kind of stuff. At that time, the movement in Bhilai covered sixteen industries, and most of them belonged to five big industrial houses—Simplex, Kedia, BK, BC and Bhilai Wires. So, basically these were the matters which were referred to the Industrial Court. It was at this point at which I became a sort of paralegal, because being one of the few educated people in the union, I was perceived as someone who could deal with lawyers, who could document things and so on and so forth.

Sudha Bharadwaj then spoke about how it became necessary for social and trade union movements which engaged with the law to have in-house lawyers they could implicitly trust.
It was very difficult for the workers to get lawyers who would honestly represent them. Further the workers complained that they had to pay the lawyers’ fees, which the contract labour union, being a very poor union, could ill afford. So the workers persuaded me to become a lawyer. I can tell you that I did not attend more than one lecture in my college and all I did was to give my exams. Somehow I passed. In the year 2000 I became a lawyer, at the ripe old age of 40. So, basically, I became a lawyer out of necessity.

Parvez Imroz is the founder and President of the Jammu and Kashmir Civil Society Coalition (JKCSS) and a key human rights figure in Kashmir.

I did my law from Aligarh Muslim University around the time that emergency was imposed and the time that in India the civil society movement had started. Post the Emergency the Supreme Court led by Justice Bhagwati and others had started judicial activism through the widening of locus standi in SP Gupta’s case. Earlier only the person aggrieved could go to court of law, but after locus standi was widened, then any public spirited person could go to court. We were very influenced with all of these developments. The other reason was that we had a leftist background. We were with the socialist movement and we wanted to promote the rights of downtrodden people so we were very active in the court. We were politically also very active. We were for the downtrodden people, the dispossessed sections of the people and we wanted to use the judiciary as an institution to address these issues.

Mukul Sinha was a labour lawyer who shot to national fame as one of the fearless activists who sought to ensure accountability for the pogrom of Gujarat 2002.

I basically come from a trade union background, though I had a Ph.D. in Physics. In 1978 I was a visiting scientist at Physical Research Laboratory in Ahmedabad. My interest in labour issues began when I saw a supervisor kick a helper. When I raised the issue with my faculty, I was told that I was a student and that I should behave as a student. The issue anyway snowballed into a protest by employees and turned into a major confrontation between the managers and the employees. By 1980, the management made sure that I would not get a job anywhere because of my activism.

In fact, when they first dismissed me, I challenged the dismissal right up to the Supreme Court. I still remember the judge in the Supreme Court asking a question to my counsel (who were Girish Patel and Soli Sorabjee). The judge asked: “If the petitioner is a scientist, why is he a member of a trade union?” Finding no answer, my petition was dismissed. I remember that Girish Bhai was very upset and had tears in his eyes. I consoled him and said well at least it is clear now that I have no place in scientific establishments there is no relationship between science and trade unions.

In my trade union work I started organizing the educational sector, in particular, workers connected with research. I then became a part of the Gujarat Federation of
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Trade Unions. In 1986 I started doing my law as I felt my Ph.D. was not giving me a direction of work. In 1987 I finished my law and in 1989 I got my sanad. That time onwards I assumed the identity of a lawyer.

V. Suresh is a human rights lawyer based in Tamil Nadu and the General Secretary of the Peoples Union of Civil Liberties. V. Suresh worked with the Kashtakari Sangathan, a grassroots movement based in Maharashtra, before returning to his home state Tamil Nadu and becoming a full time criminal lawyer. He said:

I wanted to come back to Tamil Nadu from Maharashtra where I had been working with the Kashtakari Sangathan, a grassroots movement working with the tribal community. From 1985 onwards when I was with the Sangathan, I was appearing in courts. I was also leading struggles as part of a militant movement. I began to think of the role of law in our work as both a shield and as a sword. This was of thinking about law came from a nascent struggle in a faraway places which I implemented in my work in Tamil Nadu.

Role of Religion

Latin America is best known for the birth of liberation theology where priests have taken to law in the defence of human rights. The religious motivation or impulse which is to redress forms of social suffering has some overlap with a political practice of law. While the best known exemplars of a religion motivated commitment to redress suffering is the work of people like Mother Theresa, there is another tradition which has a more political understanding of the ways one can redress suffering. The story of Sister Sevati Panna who works in Chattisgarh is one example of a person who comes from a religious tradition but seeks to redress human suffering through law.

I am a nun. I am also known as a social activist in this area. I became a lawyer, not because it is my profession, not because I want to earn money out of it, but, to represent the local issues in court and to help people. There are a lot of human right violations in this area. One big issue is the trafficking of women from these areas who are then taken to Delhi and Mumbai to work as domestic workers. This is done through middlemen and agencies. These girls don’t get the promised money, but they experience every form of torture. So, I started working for these girls and they are the reason why I became a lawyer.

Individual Experience of Humiliation and Suffering

Individuals also take to being activist lawyers due to their personal experiences of suffering and humiliation. Three famous individuals who had been subjected to terrible forms of humiliation and who subsequently took to an activist use of law are Nelson Mandela, B.R. Ambedkar and Mahatma Gandhi.

Mandela, in his autobiography, detailed what it means to live in apartheid South Africa:

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15 Sanad is an enrolment license that allows law graduates to practice in courts of law.
An African child is born in an Africans-only hospital, taken home in an Africans-only bus, lives in an Africans-only area and attends Africans-only schools, if he attends school at all [...] When he grows up he can hold Africans-only jobs, rent a house in Africans-only townships, ride Africans-only trains and be stopped at any time of the day or night and be ordered to produce a pass, without which he can be arrested and thrown in jail. His life is circumscribed by racist laws and regulations that cripple his growth, dim his potential and stunt his life.16

The young Mandela found a resource in the law to combat discrimination. In one instance, Mandela and his friend having violated done of the apartheid laws, found themselves in front of a Magistrate. The Magistrate was very angry and said that he would have them arrested. Mandela argued his innocence before the Magistrate using the law he had studied in college. As he put it:

I immediately rose to our defence. From my studies at Fort Hare I had a little knowledge of law, and I put it to use. I said that we had told him no lies, that was true. But we had committed no offence and violated no laws, and we could not be arrested simply on the recommendation of a chief, even if he happened to be our father. The magistrate backed down and did not arrest us, but told us to leave his office and never to darken his door again.17

In Mandela’s life as a political activist, the knowledge of the law played a key role in addressing humiliation he and his people experienced at the hands of the white masters. In fact, Mandela, chose to take to the law as a profession and open a law office along with Oliver Tambo which became a huge resource for numerous black people who found themselves on the wrong side of the apartheid regime. The reason why Mandela was invested in the practise of law, in spite of the fact that the law was so closely tied to the regime was because as Mandela puts it:

The court system, however, was perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply...”18

Dr. Ambedkar and his trajectory to becoming an activist and a lawyer similarly follows from the indignity of humiliation based on caste which he experiences from childhood. He vividly describes one episode when he was ten years old which brought home to him the humiliations of being Mahar in India. He describes how at that tender age, how when he and his siblings were at railway station waiting for a ride to their final destination, nobody would drop them because they were untouchable. Neither would anybody offer water to these young children who were dying of thirst.

Ambedkar goes on to say that,

This incident has a very important place in my life. I was a boy of nine when it happened. But it has left an indelible impression on my mind. Before this incident

17 Ibid. 68.
18 Ibid.
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occurred, I knew that I was an untouchable, and that untouchables were subjected to certain indignities and discriminations. For instance, I knew that in the school I could not sit in the midst of my classmates according to my rank [in class performance], but that I was to sit in a corner by myself. I knew that in the school I was to have a separate piece of gunny cloth for me to squat on in the classroom, and the servant employed to clean the school would not touch the gunny cloth used by me. I was required to carry the gunny cloth home in the evening, and bring it back the next day...¹⁹

Very similarly it is the experience of second class citizenship in South Africa at the hands of the racist regime, which turned Gandhi first towards a more political practice of law and finally to becoming the skilled practitioner of civil disobedience. Gandhi arrives in South Africa to service the interest of rich Gujarati merchants, but quickly finds that in South Africa, “that as a man and an Indian, I had no rights. More correctly I discovered that I had no rights as a man because I was an Indian.” ²⁰ In his autobiography Gandhi describes how he took up the case of a Tamil labourer who was beaten badly by his employer and got the labourer released from his indenture. ²¹ Based upon this case, Gandhi’s fame as a lawyer grew and he began taking up more and more cases of Indians subjected to brutal assault, wrongful arrest and detention. Gandhi in the initial part of his career does what we would today would be described as human rights lawyering. ²²

The experiences of Gandhi, Ambedkar and Mandela and their consequent turn to the law, is mirrored in the lives of contemporary human rights lawyers. As noted above, both Shahid Azmi and Yusuf Muchhala experienced the sting of second class citizenship following the pogrom perpetrated after the destruction of the Babri Masjid. The deeply personal experience of humiliation and injustice, because of being a Dalit woman was also powerfully articulated by Manjula Pradeep, who went on to become a human rights lawyer at Navsarjan Trust, in the following words:

I am from the Dalit community. My father was a government servant from Uttar Pradesh. I was born in Baroda and realized that my father had changed my surname to Pradeep to hide the identity of the caste from which we come from. That created a lot of problems for me and my brothers and sisters in school. People in school would ridicule us and ask us what our caste was, but my father would not tell me. When I went to my native village for vacation, I saw my cousins bring a dead buffalo and asked my uncle, “What are you doing with this?” and they laughed and said, “Don’t you know this is our caste based occupation?” It was then that I understood that we are like that. I was really angry with my father because he

¹⁹ http://www.ambedkar.org/ambcd/53.%20Waiting%20For%20A%20Visa.htm (accessed on 14.5.15)
wanted to hide our identity, and [because he seemed to feel that] there was a guilt attached to the fact of being lower caste.

What Navsarjan [The NGO founded by Martin Macwan] has helped me say is that I am proud of myself. We have redefined power. We say that power doesn’t come from being born of a certain caste, village or gender. But power comes from knowledge. If you have knowledge, you have power. Most of us who’ve started this organisation are from Dalit communities, and we all came with a lot of anger. I was also discriminated as a girl. I faced sexual abuse when I was 4.

**Individuals as Inspiration**

Human beings are complex and many diverse reasons can account for their structure of motivations. One characteristic of human beings is their ability to be inspired by the example of another person. The narratives of leaders like Mahatma Gandhi and Nelson Mandela lies precisely in this ability to inspire. Within the human rights movement the iconic figures of people such as Mukul Sinha, Kannabiran, K.Balagopal and Shahid Azmi are similarly lives which continue to inspire.

Among the lives of human rights advocates which continue to inspire, perhaps of seminal importance is the short life of Shahid Azmi (1977-2010). It was also a life which was tragically cut short, when Shahid Azmi was assassinated at the age of thirty-three.

As a lawyer in his brief but impressive career of seven years, he represented those who were falsely accused of terror charges by an Indian state that was all too willing to tar innocents with the brush of terrorism. The most iconic case in Shahid Azmi’s legal career was the trial in the Mumbai terror attacks of 26 November 2008. Shahid Azmi represented Faheem Ansari who was a co-accused along with Ajmal Kasab. Shahid Azmi’s sharpness and brilliance as a criminal lawyer was instrumental in securing the acquittal.

Unfairly named as a “terrorist’s lawyer,” he did not confine his work to anti-terror cases, but worked for asserting the rights of the poor who were ousted when Mithi river was beautified and the houses of the slum dwellers were demolished. The numerous people who sought his legal assistance and the late hours which Shahid Azmi kept are testaments to his commitment as well as his courageous advocacy.

Emblematic of the impossibility of extinguishing the ideal for which Shahid Azmi stood is the path taken by his youngest brother Khalid. Khalid was inspired to study law by Shahid Azimi, who told him that sooner or later he would be killed and that “if something happens to me you should carry forward the work.” Barely four months after Khalid completed studying law, Shahid Azmi was shot dead in his office in Kurla. The responsibility fell on Khalid to take up his brother’s cases and complete them.

The time following Shahid Azmi assassination was a time of fear, causing many

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advocates to become unwilling to take on Shahid Azmi’s cases. However, Khalid ensured that there was continuity in his brother’s work, first by appointing counsel after much difficulty, and thereafter arguing the cases himself. He simultaneously built a team of young and committed lawyers to carry forward the sensitive and life-threatening work. Khalid himself is in his mid thirties and seems too young to discharge such an enormous responsibility. When asked whether he was ever afraid that he too could be killed, Khalid responded: “I have never felt a fear because I have nothing to lose. I have lost my brother – that means that I have lost everything.”

Shahid Zama’s story also spoke directly to film director, Hansal Mehta and producer Anural Kashyap, who have made a film on Shahid Azmi’s life, titled “Shahid.” A Shahid Azmi memorial lecture was commenced in February 2012. The assassination of Shahid Azmi, instead of ending the work that he had undertaken, has only multiplied the quest for justice in innumerable hearts and minds.

The other contemporary figure who has inspired a range of lawyers from around the country is the founder of the Human Rights Law Network, Colin Gonsalves. Colin Gonsalves’s boundless energy, courage, indomitable spirit and commitment to use the law to make a difference in the lives of the marginalized have inspired at least two generations of human rights lawyers. A range of human rights lawyers including Monica Sakhrani, Jane Cox, Maharukh Adenwalla and Faisal Qadri acknowledged the role that Colin Gonsalves played in getting them on the path to human rights lawyering.

As Maharukh Adenwalla who is a lawyer based in Bombay specializing in child rights put it:

How I got into this field is quite interesting. I was working with a solicitor’s firm and my work was good there but I was not really happy doing what I was doing. So I did my law practice with the firm, but I began working closely with an organization called Indian Council for Mental Health and Hygiene which was working on mental health issues, counseling children in schools and running centers for autism.

Then I met, “The Colin” (Colin Gonsalves, founder of the Human Rights Law Network) and “The Colin” was walking with posters under his arm and he asked me “Do you want to see what I have here?” And I didn’t know who this man was. So I said, ‘Okay, I will see what you have there.’ Then he showed me one of those rights based posters and I got interested. He then called me one day to his office and it was really interesting because Flavia (Flavia Agnes) and Irene Sequiera (now a human rights lawyer in Bombay) were also there. Colin kept talking to us about how we must do a different kind of law and that’s how I got involved in this work.

Faisal Qadri is a lawyer with the Human Rights Law Network based in Kashmir.

I still remember the day I met a man called Colin Gonsalves for the first time. Afzal Guru’s case was going on in the Delhi High Court and I saw him arguing
that matter. There was only him and Ram Jethmalani arguing for Afzal Guru, with the entire Delhi Bar Association on the other side. The way he was portraying and arguing his case was inspirational. He was targeting the death penalty clause itself in the CrPC. So after he finished arguing, I somehow managed to contact him. I really got interested in that work, because I had this human rights ka kida (obsession) at the back of my mind all the time. He gave me an appointment, and I think we met, for just five or six minutes in his office. And he readily agreed to offer me a job, on one-eight of the salary which I was getting. I was getting Rs 32,000, and he offered me Rs 4,000. We bargained and agreed on around Rs 6,500. Since the work was interesting, I agreed to it. That’s how, in 2005, I was asked by Colin to go back to Kashmir immediately and start human rights work here.

V. Suresh attributes some of the choices he has made due to having met and worked with two giants in the field of human rights lawyering, K. Balagopal and K.G. Kannabiran.24

My wife Saila (who is a lawyer) and I met Balagopal when he had come to Chennai. He said two things and these two things I keep repeating everywhere. He said that the greatest tragedy for the Indian left movement and the Indian human rights movement is that we talk more than we do. So he told us to stop talking and let your work talk. The second thing that he told us was that we need full time lawyers in criminal law because we do not have good criminal lawyers [who do work on human rights issues]. It was a stray remark by him but it stuck in the head. So in 1993 after I finished my PHD, I decided to work as a criminal lawyer. At that time the word human rights was not coined, but I saw my work in terms of criminal law and civil liberties.

My instinct was to be a criminal lawyer who was also an activist in orientation. That’s the time I had met Kannabiran. Kannabiran said “Do 2-3 years of mainstream lawyering. Don’t go to an activist lawyer. Go to a full-fledged lawyer who doesn’t talk rights. Learn your ropes. Swallow your pride. Carry books. Do all the things that I did when I was young and learn.” It was not easy at 34... But I joined a very mainstream office of a senior lawyer called Mr. Gopinath who was a full-fledged criminal lawyer.

Nupur Sinha is a lawyer who has been associated with the Center for Social Justice ever since its inception. She said:

Funnily enough, I met the people who work on social issues after college and not during my time there. I have been fortunate enough to have mentors who have helped shape me. For me, it has been Gagan Sethi and Martin Macwan.
Post my graduation, I worked with a child rights NGO in Bangalore for about three months. I was frustrated while being there as the work did not seem real. At the time, the Centre for Social Justice (CSJ) was being established. Gagan Sethi was setting it up and was on the lookout for interested people. I was associated with the organization, SMILE, and they put me in touch with Gagan. I raised some money with help from friends in Samvada (an NGO in Bangalore), with whom I was associated since my third year in college. I then got onto a bus and went to Bombay to meet Gagan (Sethi). I was grilled for about two to three days, and then I decided to join them. I then left for Ahmedabad, lock, stock and barrel, which consisted of a box and a bag. I have been here ever since, that is since 1994.

The other figures who have inspired younger people to take to human rights lawyering include veteran human rights lawyer, P.A. Sebastian and M. Raja. P.A Sebastian’s spartan life and undimmed commitment as part of Committee for the Protection of Democratic Rights (CPDR) was an inspirational force as far as Maharukh Adenwalla, Monica Sakhrani and Shahid Azmi were concerned. In the context of human rights lawyering in Tamil Nadu, M. Raja who in 1975, founded the Tamil Nadu State Legal Aid, a registered society devoted to activist legal work was an inspirational presence. M. Raja inspired a range of human rights lawyers who worked with him including Anna Matthew, R. Vaigai, Geeta Ramaseshan, S.K. Priya and Sudha Ramalingam.

As Justice Krishna Iyer in his tribute on the death of M. Raja noted:

I have never found such a fighter, campaigner and man of mission and vision as M. Raja. He was a historic figure in making poverty jurisprudence a reality in practice. He retired years ago ... but his heart and soul were completely on the side of the handicapped humans, inspiring numberless admirers like me. But when the story of legal aid for the poor in India comes to be written, Raja’s name will fill glowing pages. I bow before him and his service-minded days.25

**Being moved by Human Suffering**

While human beings can be inspired by the example of others, there is also the incredible human capacity to be moved by human suffering. Bertrand Russell, in his autobiography, observed that three passions have governed his life, the search for love, the search for beauty and what he called ‘pity ’ for the suffering of human kind. As he put it,

Love and knowledge, so far as they were possible, led upward toward the heavens. But always pity brought me back to Earth. Echoes of cries of pain reverberate in my heart. Children in famine, victims tortured by oppressors, helpless old people a burden to their sons, and the whole world of loneliness, poverty, and pain make a mockery of what human life should be. I long to alleviate this evil, but I cannot, and I too suffer.26

It is this sentiment which Russell called pity but which can also be called empathy which is one motivating factor for people to take to human rights lawyering. Human rights lawyers including Justice Suresh (a human rights lawyer who went on to become a judge), Sharief Sheikh, Khan Abdul Wahab and Manjula Pradeep, have articulated this notion of the need to redress human suffering.

J. Suresh recalled:

Krishna Iyer rightly said that if you cannot shed a tear when you see human misery than you are unfit to be a judge. Some years ago I went to Calcutta where there were starvation deaths. Justice Sen, Justice Bannerjee and myself had gone. We had a huge meeting where a mother explained how she lost her child because of hunger. We recorded all of this and we were going back to Calcutta (from another part of West Bengal). Justice Banerjee who had just prepared the report asked as to, “why should we believe that the child died because of starvation deaths?” I said, “why would the mother depose falsely before us?” When the mother said that he was so hungry that the child consumed something poisonous and died, the judge said there was no concrete evidence. I told him bluntly that, “if you cannot shed a tear on human misery then you are not fit to be a judge” and walked away. He is a popular judge in the High Court but has no idea what happens in the society. A judge should know how to mould the law to see that justice is promoted.

Khan Abdul Wahab is a practising criminal lawyer in Bombay. He reflects upon how he how he came to defend those accused of terrorism:

One day I was sitting in the court and I saw one of the advocates defending some of the accused at the remand stage before trial commenced in the Gateway of India Zaveri Bazaar blast case. The advocate was not from our bar, he was not known to me. He also seemed to be too young for the profession and the way he was making submissions disturbed me. I had the feeling that a man should not ever feel that if I was defended by a good advocate I would have survived. I asked him whether he would not mind if I accepted his brief. He said that he would be happy and that he would try to pay me. I filed the vakalath after getting the NOC (No Objection Certificate) from the advocate. I started defending him.

Sharief Sheikh, a practising criminal lawyer in Bombay who handles cases of those accused of terror related offences, explained how he came to taking on these matters:

Prior to taking up terrorist-related matters I used to take up only IPC related matters. One day, I was standing in front of the Sessions Court and I saw an old man weeping and I asked him why he was weeping. He told me that he had engaged an advocate for his brother who was shown to have planted a bomb in a case pertaining to the Ghatkopar blasts of 2002. Apparently, his advocate was

saying that until and unless he deposited Rs. 5 lakh in the advocate’s account, he
would not appear in the case and his brother would be hanged. At that time it
occurred to me that I should do something for him. I asked about his family and
he told me that could not afford such a huge amount. I assured him that I would
take his matter and I took it. By the grace of God, I conducted the matter fairly well
and I got an acquittal.

Manjula Pradeep stated as follows:

I remember this incident in 1993 where this man was brutally beaten up in the
police station after being accused of stealing a bicycle for Rs. 200. When he went to
the community health centre, the doctor called up the police to ask what happened
to the man, and the police said “Don’t treat him.” So they just treated him as an
outpatient, gave him a penicillin injection and sent him home. The next morning
he was found dead at his house. There were strangulation marks but I didn’t
know how to identify injuries, so I asked Martin [Macwan]. He gave me a book on
medical jurisprudence and I started reading it. Then I got the post mortem report
and for the first time I was looking at the meaning of terms like contusion, abrasion
etc. and I was very confused as to what they meant. At that time, I felt I should
learn the law, and began my law degree in 1994 and finished in 1997.

G. Ramapriya is a labour lawyer based in Chennai. She narrates:

It’s very difficult to answer this question [as to why do you do human rights
lawyering]. It’s got to do with the question of why you believe that you are there
on earth. It sounds like such an egotistic thing but I feel that I can’t work in a
 corporate set up because I always feel that my work should benefit somebody,
otherwise I’ll feel that my life is useless. I feel that I should do something to make
the world a better place, a more equitable place. . . Of course for me my work is fun
and interesting, I may crib and all and I may say that I may never do this again but
I’ll read something in the morning or something will happen and I’ll get up in the
morning and it will be another day.

Yug Chaudhry is a lawyer based in Bombay who has passionately followed up cases
of the death penalty in India. Prior to becoming a lawyer, Yug Chaudhry was an
academic who had written on the Irish poet William Yeats. Chaudhry alludes to the
compelling reasons which led him to study law.

I was an academic in English literature. That’s all I ever wanted to do. Finish my
doctorate in England and come back and continue teaching in Delhi. At some
point I started thinking about what was the use of teaching English Literature in
India? What will it achieve? What will it change? That question kept coming back
to me... At that time I felt it (English Literature) served no purpose, I’m not so sure
today. At that time I felt I would be able to achieve a lot more through law. I’m not
so sure today.

But it was for these very utilitarian considerations that I moved away from
academics and came to law. I finished my doctorate in English in Oxford and then
I went to Cambridge and did my law degree. Then I came back to India. There’s always some soul searching, introspection and discomfort with what’s happening. You ask yourself why do I do this. Is it because I think I can save them? Is it because I feel I should save them? Because I can and they need it? Do they need me or do I need them? Why am I doing this? Why do I feel obligated to help people in prison? Very difficult to attribute it purely to my commitment to the cause. I’m not so sure. . . I [sometimes] think how can a commitment to a cause result in such delusions? The kind of delusions perhaps I am suffering from. Why do I feel responsible for all these cases? Is this not utterly deluded? So it’s usually something extremely personal. You could rationalise it by saying I believe in due process or that I don’t want to live in a country which executes people. It’s something more innate, it’s something inside you. Or maybe you think I have nothing more worthwhile to do. I don’t know.

**Legal Education**

Young persons, particularly in their early years in law school, if exposed to social justice concerns and to the culture of thinking and questioning, can potentially turn out to be human rights lawyers, as Veena Gowda and Nagasaila’s experience shows.

Veena Gowda is an independent feminist lawyer who worked with pioneering feminist lawyering group, Majlis for a number of years. She narrated as follows:

> I’ve always wanted to be a lawyer and I’ve always wanted to do women’s rights. With this aim, I studied law in the National Law School. I didn’t even think of any alternative when I graduated. At that time Flavia Agnes was teaching us ‘Women and the Law’ seminar course. Then I interned with Majlis when I was a student. After my graduation when Flavia asked me to join, I agreed and began working on a starting salary of Rs 3000.

Nagasaila is a labour lawyer based in Chennai who is with the PUCL. She said:

> As students in the Madras Law College, we did not attend classes. But I think, the Madras Law College, for all its other academic demerits really prepares you to be a lawyer, to question. So you question your teachers the principal, as well as others in authority, regardless of whether your questioning is rational, whether it is based in any law, or whether it is just the youth mentality. So while you did not have much of progressive politics within the campus, one thing it does train you is to question, and especially to question police authority. [You begin to] realize that there is no authority which cannot be questioned.

Nagasaila also expanded on how sometimes a legal education can be about what happens outside the classroom.

> Even as a student, I was active with the construction workers’ union, then with women’s groups such as the Pennurmaiayakam. So I used to attend their rallies, their discussions etc. We began student’s related activity of creating awareness and looking at law from a political dimension. You also had Ossie Fernandes, who
used to conduct workshops as a part of an NGO and that helped us look at law from a political perspective.

Role of Bar Associations

The Bar Associations which are part of the apparatus of the state have conventionally not been seen as conducive spaces for human rights lawyers. However, the one utterly unique exception to the perceived indifference of the Bar to socio-political justice related issues is the Jammu and Kashmir Bar Association.

The fact that such a mainstream body has come out unequivocally against the occupation speaks to the widespread and pervasive discontent in the Kashmir valley. As the website notes, ‘The Bar Association has always been on the forefront for fighting for the legal rights of the people of the State of J&K and is committed to help in the amicable settlement of the Kashmir problem to end the conflict situation. The members of the Bar have willingly given sacrifices of their life and liberty for the cause of people of the state, and they strive to achieve the goal of a free, fair, impartial and independent judiciary in the State.’

G.N Shaheen, the current president of the J & K Bar Association, spoke about the unique role played by the J &K High Court Bar Association. He described the Bar Association as ‘almost been a human rights group, for the past twenty years.’ He cited the example of the Bar having taken up the Shopian murder and rape case. He himself had gone to the spot, collected witnesses and obtained a first-hand report. Based upon his findings he had held a press conference in which a report was released, but the government never registered a First Information Report (FIR). It was only on filing a Public Interest Litigation before the High Court and on the directions of the High Court that an FIR was lodged in the Shopian case.

Zafar Qureshi who was a Vice President of the J & K Bar Association observed that:

It was in 1989 that we, i.e. the Kashmir Bar Association, passed a resolution that the Bar will work for the movement. The Bar will find a solution for the Kashmir issue. The Bar will not work for the Government because they were instrument in massacring the people. So we took an oath and post that I resigned my position as standing counsel for J&K Bank. Mian Qayoom was president, I was vice-president at the Bar Association and we did maximum Habeas Corpus petitions. During that period of time, we projected the human rights violations occurring in Kashmir widely. Our first report was sent to the United Nations.

Then we started formulating more fact-finding reports, going to places where violations happen, investigating, coming back and publishing reports on behalf of the Kashmir Bar Association. The kind of cases we took up were related to human rights violations such as disappearances, and we filed a lot of habeas corpus petitions. In particular you are more concerned about your own people, especially when you find and you see that, yes, they have been killed unnecessarily, there is

http://www.jkbarassociation.com (accessed on 15.6.15)
no encounter, they are not involved. You pick up a person and kill him, brand him as a foreign militant and [use that murder to] to claim for your promotion. This is common in Kashmir.

**Organizations as Incubating Human Rights Lawyers**

Human rights organizations and lawyering groups committed to a political practise of law play a key role in fostering human rights practise from generation to generation. Human Rights Law Network which was begun by Colin Gonsalves and Mihir Desai has been one space which has nurtured human rights thinking and motivated many persons to become human rights lawyers.

As Mihir Desai recalled:

Many of us did law at a later stage in life like Flavia [Agnes] and Colin [Gonsalves]. None of them did their law immediately after graduation. We realized right from the beginning, especially because we came from a certain social background, that unless we work in close touch with movements, our legal strategies may turn out to be faulty. In 1989 we started the Human Rights Law Network. It actually began as a meeting that we called of various human rights activists, something like the Panchgani conference, 29 but on a smaller scale where around 400 people working on various human rights issues had come. At the end of that meeting we formed the Human Rights Law Network.

Vijay Hiremath is a practising human rights lawyer in Bombay who has been associated with the Human Rights Law Network for a number of years. He said:

I was slightly inclined [to do social justice work]. I did legal aid camps and went to the slums in Pune to find out what legal issues they faced. I then joined India Centre [a sister organisation of Human Rights Law Network] which was a good organisation. It made us think. There was less guidance but they didn’t interfere with our work. It was a fantastic set-up in terms of work for any beginner in Human Rights Law.

Veena Gowda is an independent feminist lawyer based in Bombay. She said:

My entire politics comes from Majlis. Though my father was a lawyer, many of my relatives were zamindars, so my family wasn’t clued into these kinds of politics. Flavia (Agnes) who co-founded Majlis has a great mind. My views on the Uniform Civil Code, identity politics, violence, dowry, law and gender were shaped at Majlis. Both Madhu (Madhushree Dutta) and Flavia were important influences on my viewpoints.

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29 This was an eight-day long “national conference on human rights, social movements, globalisation and the law” was organised at Panchgani, in December 2000 which brought together over 1500 human rights activists, lawyers and judges, media persons, artists, singers, actors, people from diverse circumstances, from different parts of India and abroad. www.hrln.org/hrln/images/.../HRLN%20Compendium%20Part-1.pdf. (accessed on 12.10.14)
In the context of Tamil Nadu, the establishment of the Tamil Nadu State Legal Aid and Advice Board by M Raja played a key role in incubating human rights lawyers. The Board was a registered society which took the mandate of legal aid seriously. As noted before, the Tamil Nadu Legal Aid and Advice Board inspired a range of human rights lawyers who worked with it including Anna Matthew, R. Vaigai, Geeta Ramaseshan, S.K. Priya and Sudha Ramalingam.

**A Liberal Understanding of the Role of Law**

As noted before, the main impulse of human rights lawyers has been the connection to radical politics, trade union struggles and peoples movements. What ‘movement people’ have seen in the law is its possible emancipatory potential. However, there is another strand, (admittedly less influential), which sees in the law a way of defending the values of a liberal order. Within this understanding, becoming a lawyer is a way of defending the values of rule of law, democracy and separation of powers. R.K. Shah, who was a remarkable public prosecutor responsible for convictions in the Bilkis rape case post the pogrom in 2002 as well as a range of other prosecutions in cases of Dalit atrocities, is one such person. In his words:

> In the true concept of Public Prosecutor (PP), the PP does not represent the government but the state, and the society at large. Since both the victim and accused are members of society, the PP is duty-bound to be fair to both the victim and accused, and not focus only on securing convictions even if the case does not warrant it.

**Role of Literature**

Can literature inspire young people to take to the law? Lawrence Liang argues that Harper Lee’s, To Kill a Mocking Bird which is set around the trial of a black man for the rape of a white woman had that kind of impact. The ethical lawyer defending the black man is Atticus Finch who Liang argues,

> More than any other person, has arguably been responsible for inspiring many young people to become lawyers, harbouring a romantic notion that legal practice was one of the key sites for struggles for justice and equality, a notion which often gets quickly corrupted with an actual encounter with the legal system, and yet as the epigraph (from Charles Lamb) in Lee’s book reminds us “Lawyers, I suppose, were children once.”

Literature which communicates the sense of injustice perpetrated by both society and state can inspire people to take to the law. As Nupur Sinha opines:

> There was this powerful book I read called Mrityunjaya, by the Marathi author Shivaji Sawant, which is a re-telling of the life of Karna. Then there was a seven part series by Narendra Kohli where he has re-written the Mahabharata from the

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perspective of the female characters like Draupadi and Urmila. I also read a lot of Bengali and Hindi literature, such as works by Premchand, Ashapurna Devi, and Mahashwetadevi. These books always questioned the official story line and this had an influence on me.
Against a backdrop of a constant crisis between the people and the state, as well as the people and corporate forces in the present times, how do human rights lawyers enable a rights culture? What approaches help them ensure that the constitutional guarantees of life with dignity, liberty, equality and fundamental freedoms do not merely remain on paper but are followed in spirit, and empower the lives of lay persons? What strategies have been employed to push the horizon of rights a notch higher? When have these strategies borne fruit and when have they failed? What is the relationship between human rights lawyering and socio-economic/political movements of the present day? These are some of the questions which will be addressed in this part of the book.

In many ways the legal strategies are formulated in the context of specific issues at hand. For example, the context of armed conflict and insurgency, which epitomizes the brute power of the state to perpetrate violence with impunity, would warrant a set of legal strategies that are distinct from a context of forced land acquisition in the name of development, where forest and land rights, and the rights to life and livelihood of ordinary people are trampled upon by the corporates in collusion with the state. These, in turn, would be vastly different in the context of matrimonial law, often considered a “private sphere” where contestation of rights is between individuals, and the state plays a legislative, adjudicatory and implementing role. By contrast, in the context of communal violence, acts of omission and commission by state institutions and officials are rampant, blatant and direct. For this reason, in its analysis of the strategies formulated and employed by human rights lawyers, this section of the book categorizes the same in terms of varied contexts and issues.

### A. MASS CRIMES

“Mass crimes” is not a legal term. For the purpose of this report, “mass crimes” connotes:

- multiple incidents of violence in any one given context; and/or
- offences committed in a widespread manner; and/or
- offences committed over a prolonged period in a given area; and/or
- offences that are perpetrated with a systematic, common, or consistent pattern, even though they appear to be individual in nature.

31 Article 7 of The Rome Statute of the International Criminal Court defines crimes against humanity as any of the listed acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The acts listed include murder, extermination, enslavement, torture, rape, persecution and enforced disappearance of persons.
While the essence of such crimes is captured by the term “crimes against humanity” in international law, the term “mass crimes” is more popularly used in India.

Mass crimes point to a profound crisis of the various institutions that regulate social and political interaction. Distinguishing features of mass crimes, as opposed to crimes against individuals, include the following:

- They are, frequently but not always, perpetrated by state actors or by non-state actors with state complicity through acts of omission and commission;
- More often than not, they are pre-meditated crimes committed with planning and preparation, executed in a systematic manner;
- They are usually committed by a number of perpetrators, though masterminded, planned, or authored by one or few person(s) in a leadership role; and
- They are often perpetrated in contexts of a breakdown of democratic processes to varying degrees, an undermining of rule of law, democratic principles as well as a guarantee of equality, non-discrimination and justice.

These distinguishing features indicate the challenging context in which human rights lawyers work. A key challenge faced by legal activists is in ensuring that the legal system delivers justice in contexts of mass crimes, particularly when institutions that are intended to provide justice become embedded with prejudice and hatred for a community, leading to a grave dereliction of legally mandated duties of public officials. When those within the institutions intended to enforce justice seek to scuttle justice processes, how do human rights lawyers strive for justice for the victims and survivors and achieve accountability of the perpetrators?

Two key aspects of mass crimes in the Indian context pertain to the willful and deliberate targeting of Dalits as well as religious minorities. Interviews with human rights lawyers across the country have highlighted innovative and courageous ways in which they have sought accountability for mass crimes.

A1. Addressing Atrocities against Dalits through the Law

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. 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, has criminalized the

33 Constituent Assembly Debates, supra note 1.
34 INDIA CONST. art. 15.
practise of untouchability,\textsuperscript{35} and has made reservations for the Scheduled Castes in education and employment,\textsuperscript{36} the Indian State itself has not succeeded in eliminating the practice of untouchability or caste-based discrimination.

The laws meant to tackle caste based discrimination and violence against Dalits\textsuperscript{37} such as the \textit{SC/ST Prevention of Atrocities Act (POA), 1989, Protection of Civil Rights Act, 1955} and the \textit{Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013} face enormous challenges when it comes to the question of implementation as they go against a dominant caste based notion of morality. Law is a deeply weakened instrument in such a context, because, to succeed, the law must overturn millennia of caste-based thinking.

Keeping in mind the difficulties in implementing such a law, it is still a deeply relevant instrument which can be deployed to question caste bias and prejudice at a normative level. Law in this case functions as a counter-majoritarian instrument which seeks to check and control a majoritarian prejudice. State law becomes even more relevant--in spite of its many limitations--because the law seeks to act on behalf of a geographically scattered and weak minority. In Dr. Ambedkar’s analysis, the coercive power of the law is a force which should be mobilized to counteract the culturally and socially sanctioned prejudice of the majority community.

As he puts it,

\begin{quote}
Sin and immorality cannot become tolerable because a majority is addicted to them or because the majority chooses to practise them. If untouchability is sinful and an immoral custom, then in the view of the depressed classes, it must be destroyed without any hesitation, even if it was acceptable to the majority.\textsuperscript{38}
\end{quote}

In this context of majoritarian bias, the coercive force of the law must be mobilized on the side of right and morality. Speaking of the most insidious form of violence faced by the untouchables, namely the social boycott, he says:

\begin{quote}
We do not know of any weapon more effective than the social boycott which could have been invented for the suppression of the untouchables. The method of open violence fades before it, for it has the most far reaching and deadening effects. It is more dangerous because it passes as a lawful method consistent with the freedom
\end{quote}

\textsuperscript{35} INDIA CONST. art. 17.
\textsuperscript{36} INDIA CONST. art. 15, §4, art. 16, §4.
\textsuperscript{37} 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 ‘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.
Breathing Life into the Constitution

of contract. We agree that this tyranny of the majority must be put down with a firm hand if we are to guarantee to the untouchable the freedom of speech and action necessary for their uplift.

We highlight below some of the strategies utilized by human rights lawyers for dealing with the ‘tyranny of the majority’.

A1.1 Social Mobilization combined with Effective Prosecution

The Golana massacre of 1986 ignited the struggle for justice for Dalits in Gujarat. On 26 January 1986, four Dalits were killed by upper caste Darbars (Rajputs) in the village of Golana, situated off Bay of Khambat, state of Gujarat. The immediate motivation for the attack was the loss of social power faced by the feudal landlords (Darbars) of the village pursuant to an allocation of government land to the Dalits. The killings were a part of a mass attack on the Dalits of Golana during which eighteen Dalits were seriously wounded and several Dalit houses were set on fire.

The Golana massacre was considered a defining incident that shaped the work of several human rights lawyers we interviewed. Martin Macwan, a human rights lawyer and founder of the Ahmedabad-based Navsarjan, and Gagan Sethi, a social activist responsible for establishing a network of law centres that support human rights lawyers and provide legal aid for socially vulnerable groups throughout Gujarat, say that the Golana massacre set the tone for the work that they would do in future.

Martin Macwan speaks of the dismal situation prior to the massacre as encompassing two stages. In the first stage, members of upper caste communities would commit atrocities on the Dalits with complete impunity and there would be no police complaint lodged as the affected persons did not know that they could lodge a complaint, and because they did not think crimes had been committed. At a later stage, the Dalits knew that what was perpetrated was a crime but were frightened to approach the police station.

However, with the Golana massacre, something changed. Dalits mobilized thorough the legal process and filed complaints in the police station. In addition to initiating the legal process, Dalits also vocally protested against the massacre and demanded justice on the streets. They thus brought visibility to the issue of Dalit atrocities throughout the state of Gujarat.

Martin Macwan emphasized the importance of social mobilization:

What Navsarjan has done is use law as one strategy. However, at the same time, we also mobilized people across villages, which is part of our social strategy. We brought these two together, and that is what produced an impact. Social mobilization by itself cannot bring about an impact, neither can law by itself. But the two together can.

In the context of the Golana massacre, social mobilization was done by getting people from hundreds of villages to Golana thereby demonstrating that what happened in Golana mattered to Dalits around the state. Martin Macwan points out that since Dalits are a minority in most villages, there is a necessity to create a physical majority by mobilizing Dalits from other villages to visit the affected village, and to identify with the cause. This has
a psychological impact on the minds of the upper castes as there is a visual representation of the enormous number of people contesting their power. In Martin Macwan’s words,

The upper castes undergo a sense of powerlessness from a sense of omnipotent power. You have to create that feeling that you don’t have that power today. And then the law works. The police come under pressure once they see the mobilization. At one time, we have also filed cases against the police officers (who have not discharged their duties).

This process of demonstrating that Golana mattered included raising resources from people from around the state who not only donated food and clothing but also gave money to support the litigation. Navsarjan established a local committee which raised Rs. 2 lakh and in fact after the thirteen year legal battle ended, there was still a balance of about Rs. 64,000. According to Martin Macwan, the fact that people from all over the state contributed donations and supported the Dalit cause was of great importance.

After the massacre, members of upper castes would use it as a form of threat in all the villages: “Be careful or else we will do to you what was done in Golana!” However the use of Golana as a threat by the upper castes changed after the decision thirteen years later in which eleven of the accused persons were sentenced for life. After the sentence, it became possible for Dalits to say that if you perpetrate atrocities like Golana, you will go to jail. Termed as the biggest conviction that Gujarat witnessed on the caste question, Martin Macwan opines that the response to a single incident was responsible for the decrease in incidents of Dalit atrocities and age-old oppression across Gujarat.

A1.2 Pressing for Immediate Relief through Interim Orders

Sudha Ramalingam, civil liberties advocate from Chennai, former President of the People’s Union for Civil Liberties (PUCL) – Tamil Nadu and Puducherry, spoke of her experience in engaging with the issue of justice for atrocity against Dalits in Sankaralingapuram and Challichettipatti in November 2001. These were major incidents of atrocity against Dalits in Tamil Nadu. The police, which directly participated in the atrocities, arrested over a hundred Dalit men, women and children at random, tortured many of them in custody, and thereafter lodged 168 cases against them. Sudha Ramalingam said that first, she and other social activists conducted a fact-finding on the issue of Dalit atrocities in Thirunelveli


40 Sankaralingapuram and Challichettipatti villages based in Thuthukudi district of Tamil Nadu, were sites of a bloody attack by a combination of caste Hindus and the local police in November 2001. Although the immediate provocation for the police action was the death of a constable while handling a road blockade agitation by Dalits of the two villages on November 16, 2001, it is widely believed that the root of the conflict arose in the panchayat elections held a month earlier, when a Dalit contested the election for the post of panchayat president against a caste Hindu in the general constituency. After the police official’s death, at least 180 persons, including a large number of women, children and even infants were arrested and allegedly beaten up. Their houses were set on fire, household articles, valuables and ration shop looted, their common well poisoned, and their vital documents burnt. For more details see S. Viswanathan, ‘Police in the Dock’, Frontline, Vol. 19 – Issue 07, Mar. 30 – Apr. 12, 2002

41 For more details see ‘Cases Withdrawn against Sankaralingapuram Dalits’, The Hindu, 12 April 2002
and Thoothukudi districts of Tamil Nadu, which included the attack mentioned above. For various reasons, the report of the fact-finding could not be published. Thereafter, the Communist Party of India (CPI) District Secretary of the Thoothukkudi district, Mr. Appadurai,\(^{42}\) and the Communist Party of India (Marxist) (CPI-M) – Thoothukkudi district filed separate writ petitions in the Chennai High Court. The remedies sought from court in the CPI-M petition included the following:

a) disciplinary proceedings and criminal proceedings against the police personnel responsible for the assault on the residents of Sankaralingapuram and destruction of their property;

b) to pay suitable compensation to the affected families including interim compensation; and

c) to constitute a Committee consisting of a District Judge, a lawyer and a representative of an NGO working in the sphere of human rights to enquire into the assault and ill-treatment of the affected persons and destruction of their properties by the police personnel, and to submit a report within a time to be stipulated by the court.

Aware of how delays in the litigation, could render justice for the victims illusory, Sudha Ramalingam and her team of lawyers pressed an application for interim orders. They obtained an interim order on issues including for immediate water supply, restoration of transport amenities, opening up of the ration shop, medical help and relief for the affected persons and families. In her words, “all these writ petitions are like knee-jerk reactions... Once you get interim orders, everything calms down.” She emphasizes the importance of obtaining relevant and timely interim orders to help the affected persons, as once that is done, the time delay in final hearing and disposal of the case cannot adversely affect the victim-survivors.

**A1.3 Atrocities against Dalit Women**

Atrocities against Dalit women reinforce caste and gender norms. The fact that there is a social legitimacy for these acts means that the perpetrators often go scot free. A report on atrocities against Dalit women and access to justice in the state of Tamil Nadu analyzes the barriers faced by Dalit women while seeking legal and judicial redress for violence.\(^ {43}\)

The report found that the police continued to act with caste and gender biases and collude with the perpetrators who belong to dominant castes, while the judiciary has failed to deliver justice in many cases.\(^ {44}\) A preliminary report of the National Tribunal on Violence against Dalit Women, held in Delhi in September 2013, recommended

\(^{42}\) Writ Petition in the Chennai High Court in WP No. 5709 / 2002


\(^{44}\) Ibid at pp. 42-43
that the criminal justice system has to be urgently monitored so as to redress its utter failure in the case of Dalit women.\textsuperscript{45}

Due to the obstacles faced by Dalit women in accessing justice, the role of human rights lawyers who assist such women, and the legal strategies they formulate, become undoubtedly significant. A well-known incident is the Patan rape case of Gujarat.\textsuperscript{46} Manjula Pradeep, the Director of Navsarjan, recalls how she assisted the victim-survivor:

The first time, I met this girl was in a civil hospital in Ahmedabad; because of the way she was treated, she just clutched me and I realized I had to help her. Her father was not ready to help her and he was not ready to take our assistance either... I stayed with her and the women police officer in a small room for one month, because she needed protection. She used to get faint whenever she saw the accused. Then we talked about the incident and I succeeded in making her strong. We followed all the steps including appointment of woman public prosecutor and asking for the trial to be in a Fast Track Court. In 13 months, we obtained the judgment in the girl’s favour.

The woman Public Prosecutor who argued the case, Nayana Bhat, said:

The parents of the girl put immense pressure on her not to give her testimony in court. However, we managed to convince her otherwise. The statements were recorded properly by the police (SP) as required under the Prevention of Atrocities Act. I used S. 3(2) (5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) (POA) Act 1989.\textsuperscript{47} But the conviction was not under the POA, as the judge felt that there was no intention to humiliate her because of her caste... To secure such convictions, competent investigation and a capable, committed prosecutor are essential.

\textsuperscript{45} Preliminary report of National Tribunal on Violence Against Dalit Women, held in Delhi, 30 September – 1 October 2013, available at http://www.dalitweb.org/?p=2293, (accessed on 2 July 2014)

\textsuperscript{46} In this incident, six male teachers were accused of repeatedly raping a 19 year old Dalit girl student of their all-girls college in Patan, state of Gujarat, over a period of six months. The incidents came to light in February 2008 when the girl confided in her parents and relatives. The repeated rapes had taken place with the threat that they would fail her in exams. A Fast Track court had convicted all the six accused persons and sentenced them to life imprisonment in 2009. Conviction for all the six persons was upheld by the Gujarat High Court in November 2013, though the punishment was reduced to 10 years imprisonment for one convicted person. For more details, see ‘Patan Gangrape Case: HC Upholds Life Term for 5 Teachers’, Outlook, 30 November 2013

\textsuperscript{47} Sec 3 (2)(v) gives a higher punishment for IPC offences if committed by a non SC/ST on an SC/ST person. Section 3(2)(v) reads:

Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,- commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;
Geeta Ramaseshan of Chennai High Court narrated the difficulties involved in ensuring justice for sexual assault of Dalit women. In a case handled by her in the 1990s, the Dalit woman had been raped in police custody after her husband was taken to the police station and charged with theft. The incident took place in Tiruchirapalli district of the state of Tamil Nadu. There was tremendous pressure on the couple to withdraw the complaint of custodial rape. The couple succumbed to the pressure exerted by the Public Prosecutor handling the case, a former public prosecutor, police officials and others, accepted a bribe and turned hostile on the day of their testimonies. Subsequently, they confided in social workers supporting them and were determined to pursue justice. The couple was taken to Chennai, and Geeta Ramseshan was approached for getting that part of the evidence quashed on the ground of coercion. Geeta Ramseshan argued the matter before the High Court, explained the circumstances under which the couple had been coerced, and obtained an order quashing the relevant part of the evidence, with an order of a re-trial. Subsequently, this was the first case that ended up in a conviction under the human rights courts established under the Protection of Human Rights Act 1993.

While technically this case was a victory, Geeta Ramseshan narrated to us the concerns she had as a human rights lawyer. In this particular case, in order to access justice from the court of law, the couple had to be re-located to Chennai because it was impossible for them to continue living in Tiruchirapalli. In Geeta Ramseshan’s words:

"We had to bring them over to Chennai, we had to look at alternate ways in which we could provide them with some kind of a livelihood, and then take the litigation forward. So that’s why I am very cautious about the legal strategy I adopt. I always look at two things. I look at the immediate consequence, but I also look at the long-term consequences once the struggle for justice through the legal process is started, which I feel that a litigant must know. It is important that the affected person can sustain that period on her own…"

**A1.4 Responding to Challenges faced by Sewage / Manhole Workers**

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.” 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; while those in the higher reaches of the caste system populate the upper layers of the bureaucracy. Caste

48 This section is based upon the work of the Alternative Law Forum and is extracted from Arvind Narrain and Arun Thiruvengadam, Social justice Lawyering and the meaning of Indian Constitutionalism : A case Study of the Alternative Law forum, Wisconsin International Law Journal, Vol 31, No.34, Fall 2013.

49 GANSHAM SHAH ET. AL., UNTOUCHABILITY IN RURAL INDIA, SAGE, NEW DELHI, 2006.
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 labour to keep the city clean 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.⁵⁰ Some of the lawyers at the Alternative Law Forum (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 Peoples Union For Civil Liberties - Karnataka (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.⁵¹ 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 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.⁵²

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⁵⁰ 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 Chaudhry, 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.

⁵¹ 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. The last incident in which manhole workers have died was as recent as 19.08.15. http://indiatoday.intoday.in/story/bangalore-workers-die-cleaning-manhole-outside-ministers-house/1/459669.html (accessed on 2.09.15)

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.\(^{53}\)

Significantly, all those affected by the practice belong solely to one caste, the Dalits, and mainly to the sub-caste of Madigas.\(^{54}\) It is impossible to find a Brahmin or an upper caste person performing the 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 “accidents” 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. This was used 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.

\(^{53}\) 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.

\(^{54}\) 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 neighbouring state of Andhra Pradesh See, K. Balagopal, Justice For Dalits Among Dalits: All the Ghosts Resurface, ECON. & POL. WKLY., July 16, 2005, at 3128.
An application was also filed under the Right to Information Act, 2005 to access records of what the government was doing to protect the rights of manhole workers.  

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 even implement their own safety measures. Faced with this situation of state failure, public interest litigation (PIL) was filed 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.

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, photographs taken to document the entire process of being lowered within a manhole into dirty, swirling waters were submitted. Second, 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 inquiry revealed that the government as per its own notification was required to adhere to the following guidelines:

1) The following materials have been provided to the sanitary workers as safety measures
   a) 5 Nos of half bar soap for washing clothes to each worker per month.
   b) 4 Nos of Mysore sandal soap for bathing to each worker per month.
   c) 2 Nos f Detol soap for disinfection purpose to each worker per month.
   d) 1 No of 500 ml coconut oil to each worker per annum
   e) 2 sets of uniform clothes to each worker per annum
   f) 2 sets of shoes to each worker per month
   g) 2 sets of sandals to each worker per annum
   h) 2 Nos. of towel to each worker per annum.
   i) 1 no. of sweater to each worker per annum.
   j) 1 no. of monkey cap to each worker per annum.
   k) Carrom Board for entertainment.

In addition to the above, the following equipments are provided to the workers.

1) Gas mask set
2) Bamboo sticks
3) Cotton waste
4) Manhole lifting key
5) Crow Bar
6) Mumty
7) Coir Rope
8) Trolley
9) 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 21.03.09.

The constitutional claim was buttressed by an analysis of statutory law. The petition argued that the physical cleaning of sewers violated the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. Further guidelines were annexed by other responsible state institutions such as the National Human Rights Commission, which outlined the safety precautions to be followed when workers go into manholes, which even the regulations viewed 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 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 already 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. After the 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.

As a result of the PIL, the court has served as a forum for making visible the hitherto largely invisible issue of manhole workers. What was previously, at most, a three column article in a newspaper now has a salience that directly reaches the government. The court has, through a series of interim orders, forced the government

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57 It bears emphasising 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.

58 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.

59 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 5,00,000.

60 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, http://www.newindianexpress.com/states/karnataka/article335753.ece. (accessed on 20.12.13)
to acknowledge the problem. The state government has in turn begun to take steps to 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 claimants to continue to file applications for compensation with respect to deaths of manhole workers, even as the matter is sub judice.\footnote{While the case was being heard, there were nine incidents reported in which sixteen deaths were reported. See, Affidavit dated Nov. 29, 2012 filed by the PUCL-K.}

It’s an open question as to whether the petition can replicate the success enjoyed by the “Right to Food” PIL, whose achievements have been widely noted and acclaimed.\footnote{PUCL vs Union of India and others (Writ Petition [Civil] No. 196 of 2001).(verbatim from website, reword). 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, (3) double resource allocations for Sampoorna Grameen Rozgar Yojana (India’s largest rural employment programme 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).}

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 manhole workers will attain a similar degree of success, lawyers at ALF hope 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.\footnote{As the case continues in the High Court, more manhole workers continue to die, emphasizing the importance of an ongoing campaign. As noted above the last incident in which manhole workers have died was as recent as 19.08.15. http://indiatoday.intoday.in/story/bangalore-workers-die-cleaning-manhole-outside-ministers-house/1/459669.html (accessed on 2.09.15)}

A1.5 Obtaining Clemency for Death Penalty to Dalits

D. Suresh Kumar, based in Hyderabad and an advocate with Andhra Pradesh Civil Liberties Committee (APCLC), narrated a case of two young Dalit men (Chalapathi Rao and Vijayavardhana Rao) on death row for whom clemency was obtained. They had been convicted in the Chilakaluripet bus burning case in Guntur, Andhra Pradesh in 1993.\footnote{Two Dalit men – Chalapathi Rao (20) and Vijayavardhana Rao (22) belonged to poor families of Guntur town; they decided to rob a bus, and while they were in the process, the bus accidentally caught fire, killing 23 persons. They were convicted by the Sessions court, which was confirmed by the Andhra Pradesh High Court; the Supreme Court dismissed the appeal in 1996. For more details, see mercy plea to the President of India drafted in 1996, reproduced in K. Balagopal, Of Capital and Other Punishments, Navya Printers, Hyderabad, 2012. at pp. 54-59} K. Balagopal described the tenuous trial experience of those two men by saying,
The eventual imposition of the death sentence is more a function of the inadequate legal assistance that the accused have been able to secure than of the nature of the crime itself. For example, two young boys from Andhra Pradesh were convicted of murder and sentenced to death by every court, while the conviction itself arose on the basis of a clearly vitiated process of identification. The vitiation in the identification process, a technical point, was discovered quite late. It had not been pointed out at the trial. It is frightening to think of how random the whole process can be. Of course it is the poorer sections that are most likely to suffer the consequences of this randomness.65

APCLC, Human Rights Forum and other like-minded groups and individuals formed a Joint Action Committee for the Commutation of Death Sentence of Chalapathi Rao and Vijayavardhana Rao. Suresh Kumar played an active role in the process of securing their clemency. The caste-class angle pertaining to the identity of the offender was highlighted in the clemency petition. Finally, after a sustained campaign, their death sentence was commuted to life imprisonment. They have served more than 18 years in prison.

A1.6 Facilitating a Compromise

While litigation can be one strategy, it cannot be the only strategy. This is because the question of caste is not the case of a few oppressors, but rather a whole socio-political system. Indian society is structured by and runs according to the rules of caste. In such a context, when as rightly put by Dr. Ambedkar, the ‘organized force of an entire people’ is behind caste rules, how does one take the struggle against the caste system forward?

Dr. Ambedkar strongly believed that it might be difficult, if not impossible, to implement the law when offenders are not a few persons but the entire society.

Rights are protected not by law, but by the social and moral conscience of society. . . . But if the Fundamental Rights are opposed by the community, no law, no parliament, no judiciary can guarantee them in the real sense of the word. What is the use of the fundamental rights to the Negroes in America, to the Jews in Germany and to the Untouchables in India? As Burke said, there is no method found for punishing the multitude. Law can punish a single, solitary recalcitrant criminal. It can never operate against a whole body of people who are determined to defy it. Social conscience is the only safeguard of all rights-fundamental or non-fundamental.66

It is in this context, when positive law has clear limits, that the strategy of compromise effected by Navsarjan needs to be appreciated. In instances of minor offences and oppressive practices against Dalits, the Navsarjan strategy is to facilitate a compromise between the Dalits and the upper caste communities. Since most villages are divided

65 Ibid at p. 51
by their caste affiliation, Navsarjan has ensured that in the compromises facilitated by it, the members of the upper caste would go to the Dalit area, accept the commission of the crime and apologize in writing, and return Dalit lands where relevant. In exchange, the same document would also state that the Dalits have listened to the plea and pardoned the concerned perpetrators. This signed agreement would then be signed by the concerned parties and be penned in the language of forgiveness. However, it would also carry with it a guarantee of non-repetition of the offence, motivated by the fear of law.

**A2. Countering Impunity for Communal Violence**

The efforts to bring justice to victims of communal violence face the same challenges as faced in efforts to bring justice to victims of caste violence. Victims face enormous pressure to abandon their quest for justice and the institutional bias of the various stakeholders of the criminal justice system is a deterrent factor in the struggle for justice.

One distinguishing feature between caste and communal violence is that communal violence is often perpetrated for political gains – the perpetrators enjoy political clout, have political affiliations, or hold public offices; the struggle for justice in cases of communal violence thus brings the human rights lawyers in direct confrontation with the state and its political might.

Moreover, unlike challenges to Dalit atrocities, where one can work towards the application of a specific law, i.e. the SC/ST Prevention of Atrocities Act, in the context of communal violence, the struggle is made more difficult by the fact that there is no specific law that one can work with. The Indian criminal law is geared towards crimes against individuals rather than crimes against collectivities. Yet communal violence involves criminal offences committed against collectivities, targeted on the basis of religious identity. The provisions of the Indian Penal Code that are applied to murder, rape, riot, unlawful assembly, arson, trespass and other offences committed in contexts of communal violence, fail to capture the gravity of the offences committed against the entire class.

Further, in contexts of communal violence, state institutions abdicate their statutory duty to govern in accordance with their Constitutional mandates. Crucial stages of the criminal justice system – such as registration of complaint, investigation, preparing a charge sheet and prosecution – often stand compromised.

In addition, specific evidentiary and procedural hurdles exist, such as an inability to register a complaint with the police and to gain access to medical assistance immediately – which the ordinary criminal law does not take note of. It is for these reasons that human rights defenders and other concerned citizens have been advocating for a special law on communal violence since 2004.

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Features of state complicity and connivance in contexts of communal attacks have been aptly summed up by the Supreme Court as follows:

- the police officers deliberately make no attempt to prevent the collection of crowds;
- half-hearted attempts are made to protect the life and property of the minority community;
- in rounding up people participating in the riots, most of the time it is the victims rather than the assailants who are picked up;
- there is an attempt not to register cases against the assailants; and where cases are registered loopholes are provided with the intention of providing a means of acquittal to the accused;
- investigations are unsatisfactory and tardy and no attempts are made to follow up complaints made against the assailants; and
- the evidence produced in Court is often deliberately distorted so as to ensure an acquittal.  

Seen in this light, the practice of using existing criminal law for situations of communal violence reduces criminal trials to a farcical exercise and makes a mockery of justice.

Yet, human rights lawyers have persistently worked to hold the perpetrators accountable and secured their convictions despite the challenging socio-legal and political context, as the below narratives concerning the Gujarat pogrom (2002) and communal violence in Mumbai (1992-93) illustrate.

**A2.1 Relief and Rehabilitation**

Govind Parmar, who studied and worked in Surendranagar district, was called by Behavioral Science Centre to Ahmedabad in 2002, soon after the Gujarat pogrom to work on legal aid. He spoke of how he provided legal aid to victim survivors in the relief camps - he drafted affidavits on their behalf, accompanied them to lodge FIRs, followed up with authorities regarding compensation to families for death of family

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68 Harendra Sarkar vs. State of Assam 2008 (7) SCR 589: 2008 (9) SCC 204. The judgment relates to a killing of members of a Muslim family in Assam in the context of anti-Muslim violence subsequent to the destruction of Babri Masjid in 1992. See para 14 of Justice H.S. Bedi’s judgment.

69 Gujarat pogrom of 2002 was characterized by anti-Muslim communal violence, which witnessed targeted killing, torture, rape and other forms of sexual violence, and destruction of property in various parts of Gujarat, perpetrated in a widespread and systematic manner. According to official figures, the riots resulted in the deaths of 790 Muslims and 254 Hindus; 2,500 people were injured non-fatally, and 223 more were reported missing. Other sources estimate that at least 2000 Muslims were killed. The significant aspects of the violence were the brutalities perpetrated on women and the complicity of state institutions and officials in the carnage, through acts of commission and omission.

70 Mumbai witnessed anti-Muslim communal violence in 1992-93 subsequent to the destruction of Babri Masjid. Approximately 900 people died in the violence, a majority of who were Muslims.
members, and lodged missing complaints with the police when the family members could not be traced after the pogrom.

Although there were many persons doing relief and rehabilitation work, there were very few who were helping with legal aid work, he observed. He said that as a strategy, he had to build rapport with the survivors and win their confidence before he could provide them legal aid. This was more so as he was a Hindu, and the survivors had lost confidence in Hindus after the pogrom that was perpetrated mostly by Hindus.

Gagan Sethi reflected on the interventions made by him and the team of lawyers he had supported through the creation of Centre for Social Justice, Ahmedabad. He said that when the Gujarat pogrom took place in 2002, there were no funds available and yet, relief for the affected people was a dire necessity. He was forced to borrow money from different organizations, based on his personal rapport and credibility of work that he had built up over decades.

He spoke of the moral dilemmas faced by him.

For instance, we worked with Jamaat-e-Islami, a Muslim religious group. Women’s groups were angry with us due to the anti-women and regressive stands taken by the outfit, but then we made sure that the houses built with its money were in the joint names of the husband and wife, insurance and compensation would include women.

I know that the Jamaat does not believe in gender equality. But at times of crisis, one makes new friends and there are new common spaces. There is usefulness in working on relief and rehabilitation with faith-based organizations such as Jamaat-e-Islami and Jamiat Ulema-e-Hind as they have tremendous outreach, which was required at that point in time. From being an ideological puritan, I became more strategic and related with a larger space. And this is what I think the communal violence taught me.

Gagan Sethi and his team’s efforts have also been channeled towards advocating for rights of Internally Displaced Persons (IDPs) and adapting international standards into the Indian law and policy framework.71

Gagan Sethi speaks of how his team of lawyers approached the High Court to seek implementation the Prime Minister’s package for compensation, as for about three years after the pogrom the affected people received no compensation from the state government and faced undue hardships from the same. In the High Court, the state government argued that the central government was not sending the financial resources to pay compensation, and the petition was dismissed. Thereafter, on behalf

71 According to the UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February, 1998, the term Internally Displaced Persons refers to “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”
of the survivors, a petition was filed in the Supreme Court, which remains pending today.

Sophia Khan speaks of her work in the relief camps in the initial months after the violence. She says:

I could not go to work for about three months (after the violence); we used to work in the relief camps. In the camps we used to collect information, lodge FIRs and fill out forms for claims of compensation. The knowledge of law helped in this work. There were many volunteers but there were few Gujarati activists who knew the language of law, and this is where we played a crucial role. I used to have help from many volunteers from outside Gujarat and I was associated with different groups and organizations. We worked with religious organizations as well as relief committees.

Sophia Khan felt that the equations with Muslim religious organizations changed for the better following the communal carnage. While she has always advocated for Muslim women’s rights, she was not considered a Muslim prior to the pogrom of 2002, as she did not look like a conservative Muslim woman. Further, the Muslim religious organizations were willing to have a dialogue on communalism, but when it came to speaking on Muslim women’s rights within the family, it was “not easily palatable,” and hence Muslim religious groups did not engage with her. However, after the pogrom, Sophia Khan was accepted as a Muslim and trusted by such religious groups including Gujarat Sarwajanik Relief Committee, a group funded and supported by Jamaat-e-Islami. This created space for entering into a dialogue on Muslim women’s rights, she observes.

Sophia Khan further says that despite the passage of thirteen years since the Gujarat carnage, many resettlement colonies continue to exist, and rehabilitation of the victim-survivors of the carnage remains a major issue. These are colonies where houses were constructed by Muslim religious organizations to provide shelter for Muslims – a large number of who refused to return to their original homes due to fear of further attacks. She continues to engage with the inmates of these resettlement colonies on issues such as water and electricity supply, and negotiate with the government to make these basic facilities available.

As in the case of Gagan Sethi, Sophia Khan too speaks about the dilemma she faces on the issue of education for Muslim girls. In the resettlement colonies, schools were started by religious organizations, which required the girls to be covered from head to toe. When Sophia Khan tried to dialogue with them on that issue, the organizations apparently told her that if she found the dress code objectionable, she should send the children to a convent instead. She says that it is a real dilemma, as on one hand, the schools within the resettlement colonies have adopted an extremely conservative approach towards education of Muslim girls; on the other hand, state apathy has resulted in the existence of no government schools for Muslim girls. “Religious organizations have their own agenda, and I have to make compromises because education is so important for these children. It is difficult for Muslim children to get into mainstream schools due to the extreme prejudice and ghettoisation, and many of
them have to hide their religious identity,” she narrated. The state bias is evident in its numerous policies. What is only emblematic of this bias is the decision of the Gujarat Government to not implement a central government scheme which gave scholarships to students from minority communities on the ground that implementing them would violate the principle of secularism.72

It is in this difficult context, wherein state education becomes almost impossible to access for minority students that the dilemmas of Sophia Khan have to be placed.

A2.2 Justice through Courts of Law

Making legal interventions to ensure unbiased investigation, efficient prosecution and convictions of perpetrators in the context of communal violence is not an easy task. At the institutional level, Gagan Sethi explains his strategy on making legal interventions through the criminal justice system on behalf of victim-survivors of the communal pogrom:

Our strategy was to shortlist 10-12 cases to closely follow... Naroda Patiya, Sardarpura, Bilkis Bano and Mehsana were some of them... The cases we took were arson, looting and large-scale murder. We covered the more ghastly cases where politicians were involved and the more gruesome instances of rioting. We picked such cases to prove our point (of state culpability and accountability). We only took up a small number of cases as we did not have the resources to take on all cases. I believe that we cannot take cases to just watch them. One has to pick as many cases as one can handle and then work well on them... Our strategy has been much better than promising the world to everyone and not being able to deliver on anything... I am running an institution, and every legal intervention requires huge financial resources as well as the ability to service and handle these cases professionally. It is not a game of numbers. It is unfair to create false hope among the victim-survivors...For example in the Naroda Patiya case, we had over 200 witnesses whom we had to support and protect... I think our strategy worked, and we have achieved some convictions. We have done better than the anti-Sikh violence of 1984 and the Mumbai communal violence of 1992-93 when it comes to making the perpetrators accountable through the law. Considering the working combination of the civil society-State-media, let us celebrate the fact that such impunity can no longer be brushed away so easily. It has also taken [the struggle to ensure accountability] one notch higher.

However, like many strategies, the strategy followed by Gagan Sethi and his team had a flip side too, as he explains:

The strategy has also worked against us. The Gujarat government now says that justice has indeed been done! But, at what cost? At every stage we have faced a hostile State. Nobody has the gumption to say that. This hurts deeply. This is ambivalence and ambiguity. The state trumpets that human rights of the IDP’s are

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72 For more details, see ‘HC Asks Modi Govt to Implement Minority Scholarship Scheme’, The Hindu, 15 February 2013
protected; heads I win, tails you lose. This is a very sad way of conducting public affairs, because the State, it seems, can never go wrong.

In order to intervene and monitor numerous criminal cases at the trial court level across the districts of Gujarat, starting from the stage of lodging of the FIR to investigation, to supporting victims and witnesses during the trial to the judgment, and thereafter, at the stage of appeal, a concerted effort of civil society actors was essential. Gagan Sethi explained how a network of activists helped provide ground level support to the victims and witnesses, which complemented the legal interventions made through a collaboration between human rights lawyers from within Gujarat and from outside the state.73

Gagan Sethi emphasized that working against the might of the state was not easy, and specific strategies had to be formulated for this. In his words,

Operating as a human rights lawyer while working within a state and with a state machinery which is so nasty, is very difficult compared to [being outside the system]. The relationships inside the police force and other spaces are very important to build and maintain. We were fortunate to have the cover of the NHRC and that allowed us to operate with less fear, though there were times when we had to face the brunt of the state… As a policy we in CSJ and Janvikas do not come into the media. We have always underplayed our work, as a strategy.

Mihir Desai, who also engaged with the justice system on specific cases, corroborated Gagan Sethi’s viewpoint when he said:

In Gujarat we’ve had to fight on every point because the judges are by and large hostile. But we have succeeded in most of the cases because the kind of phenomenal groundwork that Teesta Setalvad and others have done. Her work helped keep the witnesses together and helped keep a constant watch on the prosecution and the judges…At the same time, due to her rapport with top lawyers in Mumbai and Delhi, she was able to get such lawyers to argue important issues in the Gujarat High Court and the Supreme Court free of cost. For instance Sanjeev Bhat’s suspension was struck down when Seervai went from Bombay to argue the matter based on his trust in her.

Mukul Sinha, a renowned human rights lawyer who subsequently passed away in May 2013, explained to us the interventions made by him and his team of lawyers at Jan Sangarsh Manch, a non-funded group founded by him. He said that subsequent to the Gujarat carnage 2002, he and his team did not limit themselves to claiming compensation on behalf of the victims and survivors. They questioned the role and responsibility of the government. According to Mukul Sinha, there are two aspects to the role of the government: a) culpability; and b) Constitutional liability of the elected government. He opined that with respect to culpability there has been some amount

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73 For example, in Bilkis Bano’s case, ground level support Bilkis and her family, including their protection and shelter, were provided by activists such as Farah Naqvi, Huma Khan, Madhavi Kuckreja, Malini Ghose and Gagan Sethi.
of good work, but that little progress has been made in ensuring the constitutional liability of the government as “all parties are opposed to making the government constitutionally liable.”  

*Naroda Patiya case*

Mihir Desai also spoke of the years of ground work that led to the historic conviction of 30 people for offences committed against the Muslim population of Naroda Patiya. He said that in 2002, after the incident took place, FIRs were not properly recorded – the names of the accused were not mentioned in it. He and other like-minded lawyers and activists wrote letters on behalf of various victim-survivors, asking for modifications in the FIRs, and brought the names of kingpins like Maya Kodnani and Babu Bajrangi’s names on to the record. He said that Teesta Setalvad played an important role in getting National Human Rights Commission (NHRC) chairperson Justice A.S Anand to visit Gujarat and to ensure that the officials carried on investigation in a proper manner. Due to this, Maya Kodnani’s and Babu Bajrangi’s names were added to the chargesheet but subsequently, their names were dropped on the pretext that there was no prima facie evidence against them. With respect to eight criminal trials, Mihir Desai along with other human rights lawyers and activists sought a stay on the trials from the Supreme Court due to biased and shoddy investigation.

For about six years, the trials were stayed and in 2008 the Supreme Court appointed the Special Investigation Team (SIT) to begin the investigation anew. The SIT was comprised of some officers from Gujarat who were complicit in the pogrom through acts of commission and omission, which compelled Mihir Desai and other lawyers to seek the Supreme Court to remove them from SIT, and to ensure that a more objective investigation team would be constituted. Mihir Desai also helped in briefing the witnesses who had to be taken to the SIT to give evidence. He said that there was a group of four full-time lawyers who sat in the court throughout and took notes; he said that the presence of these lawyers made a difference as the court felt it was being monitored, and was under pressure to act fairly.

After Maya Kodnani’s name was excluded for a period of six years, she was again added by SIT as an accused. Thereafter, Mihir Desai and other lawyers and activists had to work on building the evidence pointing to her guilt. However, the application made by Mihir Desai to add police inspector Mr. Mysorewala, who was complicit in the pogrom, as an accused under S. 319 of the Criminal Procedure Code was not successful.

Mukul Sinha spoke of how evidence was gathered to strengthen the Naroda Patiya case. The analysis of phone call records (discussed in detail below) guided further

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75 Under Section 319 Cr. PC, the court has the power to proceed against other persons appearing to be guilty of offence.

76 Naroda Patiya massacre took place on 28 February 2002 in the Naroda area of Ahmedabad. It was estimated that around 125 people had been killed in the violence in a brutal manner. The incident is considered to be the “most gruesome of all post-Godhra violent incidents” and “the largest single case of mass murders” and mass rapes.
investigation. In the Naroda Patiya judgment, all those at the scene of the crime – as indicated from the call records – were arrested. The statements of witnesses also played a key role in ensuring arrests. Due to the work of numerous persons, now there are one hundred persons who remain convicted of their role in the 2002 riots, Mukul Sinha said.

In addition to the work of Gagan Sethi and Mukul Sinha, Sophia Khan’s work on ensuring access to the criminal justice system for the Gujarat pogrom victims illustrates the varied roles and responsibilities played by human rights lawyers. Her narrative highlights the essential nature of victim-witness support. She says:

I used to meet victims and prepare them for the trial. Think about the trial in Naroda Patiya case. There would be around 60 persons sitting in the court, and one lone witness would have to identify the perpetrators. Sometimes, in the middle of the proceedings, the accused persons would change their shirts just to confuse the witness. I helped prepare the victim-witnesses to identify the accused by face, and to be alert. The defense also posed questions that the victim-witnesses found were very confusing. For instance, was the bullet coming from the mosque or headed towards it? This would be asked in Gujarati, but the witnesses were Hindi-speaking people from Belgaum in Karnataka. So preparing them to pay attention to the question and answer cautiously was necessary...

My small team used to work with the lawyers who helped the prosecutors, as well as those lawyers such as Mukul Sinha who worked with the Commission of Inquiry. The office of the Commission was situated in a Hindu area and it was very frightening for the Muslim witnesses to reach the venue to participate in the proceedings. So we used to accompany them and assure them that we would be with them. I know most of the women victims from Naroda Patiya and Gulbarg Society because of the relief work that I used to do. While there were full time lawyers handling the trial, people like us would pitch in for the peripheral work. I mostly worked with women, but sometimes also with men in cases of compensation.

Govind Parmar who had appeared in the Naroda Patiya case as victims’ lawyer to assist the Public Prosecutor, said that he helped prepare the witnesses for testimony in court, and submitted written arguments in court. He further spoke of a positive effect of Naroda Patiya judgment on the victim-survivor community—it restored their faith in justice and rule of law. It also gave a message that perpetrators who commit the heinous crimes associated with communal violence cannot escape with impunity forever.

77 The Naroda Patiya judgment was passed by Judge Jyotsna Yagnik on 29 August 2012. The special trial court convicted Maya Kodnani - a sitting member of Legislative Assembly belonging to the Bharatiya Janata Party and former Minister for Women and Child Development of Gujarat, and Bajrang Dal politician Babu Bajrangi for criminal conspiracy and murder. It also convicted 30 other people of murder, criminal conspiracy and other criminal charges. The judgment was significant as Kodnani was the first woman, MLA and minister to be convicted in the context of the Gujarat carnage.
Gulberg Society case

R.K. Shah was appointed as the Special Prosecutor and his colleague, Nayana Bhatt was appointed as the Assistant Public Prosecutor (PP) in the Gulberg Society case. Shah observed as follows:

There was no faithful recording of the evidence, and police officers did not cooperate with the prosecution. In this case, witnesses did not trust the police, and gave in written submissions before the police, for them to file an FIR / complaint based on that. The police did that, but subsequently the Special Investigation Team (SIT) recorded further statements, which were recorded in such a way as to nullify the earlier statement. In that situation, we had to guide the witnesses to deny having given any further statement… Also I had examined 300 witnesses by then and thought I will not be able to do justice to the victims, so I sent a letter with explanations and reasons, and I resigned.

Shah’s resignation indicates the gravity of the challenge that those advocating for justice for the victims of the pogrom of 2002 face. The state at every level tries to subvert the struggle for justice and in many cases succeeds.

Bilkis Bano case

Bilkis Bano’s case was the first judgment in which there was a conviction for gang rape in a context of communal violence, in post-independent India. In this case, the local police, before whom Bilkis lodged a complaint of gang rape and murder, said that no case was made out and closed it as a summary case. When civil society actors including human rights advocates took up the matter to the NHRC, the NHRC asked for an inquiry by the Central Bureau of Investigation (CBI). In the opinion of R.K.Shah, who was the Special Public Prosecutor appointed by the CBI in Bilkis Bano’s case, the CBI commenced investigation and recorded statements with a substantial amount of accuracy.

Shah, speaks of the challenges he faced in the case as well as the strategies that had to be formulated:

We had to depend upon the local administration (police) with some of the police themselves being accused. We also had to be careful in handling the Hindu witnesses of the locality as most of the witnesses were illiterate and were from rural areas, and

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78 For more details see ‘SC sets 3 month deadline for Gulberg Society case’, The Hindu, 14 November 2014.
80 Bilkis Yakub Rasool is a victim-survivor of gang rape committed in the context of the Gujarat carnage 2002. She was pregnant at the time of the brutal rape, and witnessed the brutal killing of 14 members of her family, including her 3 year old daughter. Besides Bilkis, a number of other female family members of hers were raped and killed in the same incident in Dahod district of Gujarat on 3 March 2002. She was the sole survivor of the massacre. Following a CBI inquiry, the rape trial was transferred from Gujarat to Mumbai. Mumbai Sessions Court convicted 13 out of 20 accused persons, in January 2008.
it was challenging to prevent them from succumbing to temptation of power and money pressure. Bilkis was very resolved, so that was our very big strength, but we had to orient her with the court room, judge, Public Prosecutor, the courtroom set up, and build her confidence and understanding of the legal system and how it works. We had to boost the confidence of underprivileged and illiterate witnesses from villages, who had themselves been adversely affected by the carnage. Very often they were afraid of the court room atmosphere. The strategy was to provide them with continuous support and guidance through NGOs and social workers, who kept a watch over the witnesses where they lived, to make sure that the accused and their supporters do not approach them and intimidate them or influence their decision to truthfully testify in court. Moral support was provided to the witnesses, and some key witnesses were also provided with police protection. As a result, only a few witnesses turned hostile – for instance, one medical expert who was to testify for the prosecution became a defence witness.

Shah explained the importance of briefing and training the witnesses, as if a witness resiles, in court, from his or her previous statement given to the police, the defence would take advantage of the discrepancy by pointing to contradictions and omissions, which reduces the witness’s credibility. In his opinion, briefing witnesses was important to ensure that their statement does not change and that if it did change, to understand the associated legal implications. He further reiterated that in rape cases, the victim was the only star witness and hence, she should be properly briefed so that there are no material contradictions in her testimony, and she is empowered to say the truth before the court.

On being questioned as to the strategy in preparing Bilkis for cross examination, Shah explained that the CBI had recorded four statements from her. Where there were some contradictions, she could explain that she was not in a proper frame of mind, or that she could not understand the language spoken by the police. Shah had to explain to Bilkis that the general purpose of the public prosecutor asking questions to her was to strengthen the prosecution’s, and to a certain extent, her case, and that the defence lawyer’s questions were intended at demolishing the case. Once she understood this basic concept, he was confident that she would be able to use her common sense and answer accordingly. Shah explained that this strategy he followed was less confusing for Bilkis. Moreover, it was less risky that the strategies suggested by some well-meaning lawyers, such as showing her gestures in court to indicate if she should answer in the affirmative or in the negative. If this had been done, a wrong gesture could have meant a wrong answer by Bilkis, which could have been fatal for the prosecution. According to Shah, his strategy worked as Bilkis was cross-examined by three defence lawyers for 20 days, and she was able to answer many questions which she had not been prepared for in advance.81

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81 The cross examination in Bilkis case was conducted by defence lawyers Advocates Harshad Ponda from Mumbai, Gopalsingh Solanki from Gujarat and S.K. Jain from Pune.
When asked about the essential factors in securing a conviction in such cases, Shah said that apart from briefing the witnesses, it is also important to gather corroborative evidence and circumstantial evidence; a competent Public Prosecutor, a good judge and a Public Prosecutor who shares a good rapport with the judge are important factors which were crucial in Bilkis’s case, he said.

Gagan Sethi described Shah’s strategy in Bilkis case in the following words:

R.K. Shah had this beautiful mantra for cross examination... In English it can be translated to mean, “I have no idea, I don’t know and I don’t remember”. If there is any difficult question, then use these replies judiciously. His strategy in cross examination was that he would not ask the most obvious questions which a prosecutor was supposed to ask. The defense would then think that there was something missing and ask those questions for which the witness was perfectly prepared to give an answer. This meant that the defense was asking questions which had answers in our favour. He called it the “fill in the blanks” theory.

**Strategizing on Victims’ Right to Appeal**

Mihir Desai explained the importance of strategizing on how to use the amended S. 372 CrPC, which was amended in 2008 to include victims’ right to appeal. Previously only the state had a right to appeal. He said that in criminal trials that resulted in acquittals, he and other human rights lawyers filed appeals on behalf of victims. However, the state government took a stand that if the state files an appeal, the victim cannot. Mihir Desai said that problems arise when the state files shoddy appeals, with a mala fide intention, which were sure to be dismissed. Mihir Desai approached the Gujarat High Court over this issue after the single judge decided in the state’s favour, he appealed, appeared and argued for four months before a Division Bench, which referred the issue to a larger Bench, which finally decided in favour of the victim-survivors. This was an important issue on which a positive order was obtained which would serve as a precedent across the country.

**Holding the State Accountable for Protecting Persons and Property during Communal Violence**

Geeta Ramaseshan spoke of the communal violence in Coimbatore, Tamil Nadu that took place subsequent to the assassination of the erstwhile Prime Minister Indira Gandhi in 1984. She said that though there were no deaths, there was a substantial destruction of property in Coimbatore and adjoining areas, belonging to Sikhs. Many business establishments, shops and properties of Sikhs living in Coimbatore including

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82 S. 372 of the Cr. PC reads as follows: 372. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. [Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court].

83 Bhikhabhai Motilal Chavada vs. State of Gujarat and Others 2010 Cr. LJ 3325
their Gurudwara, were completely destroyed. As a young lawyer with two years’ of law practice, she wanted to make legal interventions but was not sure how she could use law to address the injustice that had been caused. She went to Coimbatore, met the affected persons, saw the destruction and damage to property, understood their requirements and returned to Chennai and discussed with senior lawyers who were associated with legal aid. They decided that Geeta Ramseshan would write a report based on her visit to Coimbatore, and that they would use her report to file a public interest litigation (PIL) asking for compensation in the Madras High Court. Two senior lawyers and two law students jointly filed the PIL on the basis of Geeta Ramseshan’s report. N.T. Vanamamalai, a senior counsel, argued the case in the High Court, and Geeta Ramseshan assisted him on the matter. This PIL resulted in the landmark judgment of R Gandhi vs. Union of India, where the court held the state accountable for protecting the properties of its people, something which occurred for the very first time in the context of a communal violence. It made the state responsible for “culpable inaction” in failing to protect the people and their properties, and directed compensation to be paid to the victim-survivors. Geeta Ramseshan said that the landmark judgment was possible due to a host of reasons, including the encouragement and participation of senior lawyers, and a culture of encouraging young lawyers to address injustice through the law, which existed in the Madras High Court in the 1980s.

Questioning Majoritarianism through the Legal Process: Resisting Attacks on Churches in Karnataka

Since 2007, the Christian community in the district of Davangere in Central Karnataka has been targeted by right wing vigilante elements. Fundamentalists have attacked assemblies of Christians at prayer in the confines of their own churches. The violence reached its zenith in September 2008 when over 56 churches across the state were attacked in a seemingly co-ordinated manner. In documentation filed before the Justice Somasekhara Commission of Inquiry (set up to inquire into the causes and perpetrators of the attack), 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. The pastors complained about the government’s serious constitutional infringements to

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84 R Gandhi and Others v. Union of India AIR 1989 Mad 205
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—such as 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 religious structures. 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.

It was at this stage, when all other options had been tried and had failed, that the pastors sought to take the matter to the High Court of Karnataka through a PIL. A writ petition seeking to quash the notices issued by the police and the Davangere Municipal Corporation and 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. However the Justice Somasekhara Commission failed to deliver satisfactory results leaving, the writ 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, 2009.86

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 (police) report discloses that there is no forcible conversion whatsoever.”87 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.”88 After the High Court order, the state government 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 raised the larger question of how a democracy crippled by a majoritarian bias can end up betraying 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.

86 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.
88 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.
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 of their choice, 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 irrelevant questions on conversion, the supposed incitement to hatred in the Bible as well as irrelevant questions on the registration details of the various church groups. 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 state– 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. 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 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. 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 respect makes the project of sustaining Indian democracy significantly more difficult.

A2.3 Assisting the National Human Rights Commission (NHRC)

Nupur Sinha spoke of how Centre for Social Justice (CSJ) came to assist the NHRC in post-carnage work. She said that after the Gujarat earthquake, Gagan Sethi, Annie Prasad, a retired IAS officer, and Mr. Namboodari were part of a committee to monitor rehabilitation. This was how Mr. Namboodari came to know about the work of CSJ. Mr. Namboodri was the special rapporteur with the NHRC after the 2002 carnage. He wrote to the NHRC asking for expansion of the jurisdiction of the committee, and this is how Gagan Sethi and CSJ got involved. CSJ assisted the NHRC in conducting its inquiry, meeting the victim-survivors, gathering information and evidence, and providing continued monitoring of the situation. It is a well-known fact that CSJ did the work behind the scenes in facilitating the report of the NHRC, spear-headed by Justice J.S. Verma – the erstwhile chairperson of the NHRC, which was critical of the state government and sought periodic reports from the same in assisting victim-survivors with relief, rehabilitation, compensation and reparatory justice.  

CSJ provided secretarial assistance to the NHRC during the latter’s visit after the Gujarat carnage. Subsequently, the NHRC asked us to continue to monitor. This made me privy to information about so many complaints. The system must have heard about 200,000 complaints. When Justice Verma came, there were several petitions. The system had so much work to do. Justice Verma trusted us implicitly. Apart from the first report which was written by the NHRC, the subsequent reports received substantial inputs from us. We were privy to too much truth and we had to get it out, for it was eating us up. So we researched and co-authored the book ‘Lest We Forget’, which was appreciated by Justice Verma, who said that the book had a version which was closest to the truth of what happened during the Gujarat carnage.

A2.4 Engaging with Commissions of Inquiry

Justice Liberhan Commission on the Destruction of Babri Masjid

Yusuf Muchhala, spoke of his involvement with the Liberhan Commission, which was established after the destruction of Babri Masjid by Hindu right wing groups. He said

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that the terms of reference in the Liberhan commission had been drafted in an ambiguous manner, and included inquiries into the entire history of litigation on the land on and around which Babri Masjid had stood, the claim of Ram Janmabhoomi, the promises that went fulfilled and unfulfilled by persons in power, as well as the culpability of political leaders. Muchhala intervened in the proceedings of the Commission almost five years after it was established in 1993, on behalf of the All India Muslim Personal Law Board. He cross-examined both L.K. Advani, a senior leader of Bharatiya Janata Party, and P.V. Narasimha Rao, who was the Prime Minister of India at the relevant time, and said that the latter’s culpability was based on sheer passivity. He spoke of his work with the Commission in the following words:

My questions to Narasimha Rao were - did you verify on whose/ which organization’s behalf Mrs. Rajmata Scindia gave an undertaking that the Babri Masjid will not be destroyed? Was she authorized to give such an undertaking by any organization, and who would be responsible for a breach of the undertaking? I further queried - How can you, as the government, act on the basis of the undertaking of an individual that the structure will not be destroyed?… Narasimha Rao’s role was one of sheer passivity. He tried to run with the hares and hunt with the hounds. He kept giving promises to the Muslim delegation that he was secular and at the same time, he allowed the destruction to take place.

I had also relied on the book ‘Unfinished Innings’ written by Madhav Godbole in which he had put the entire record including the cabinet notes and secretary’s notes. It clearly indicated that the Central Government should have taken a more proactive role. Even after the destruction of the historic monument, though the central government imposed President’s Rule, it did not take possession of that area and allowed the kar sevaks to construct a makeshift temple. Narasimha Rao’s line of argument throughout the Commission’s proceedings was that he relied on the undertaking. Unfortunately the Liberhan Commission accepted such an explanation and exonerated him. Hence I was not satisfied with my engagement with the Liberhan Commission. It was appointed with a political motive, and did not do its job. Justice Liberhan also generously gave adjournments and there was an inordinate delay in giving his report, and with a passage of time, the Commission lost its importance.

Yusuf Muchhala also believed that it was a dereliction of duty on the part of the Supreme Court judge who heard the matter and accepted this undertaking, when there was an application pending in the Supreme Court to immediately appoint a receiver. He opined that the Supreme Court is also responsible for protecting the property by taking charge of it, and failed to look into who was giving the undertaking, on whose behalf, was Rajmata Scindia connected with the agitation for Ram Janmabhoomi and what was her control over the people agitating on the ground in Ayodhya.

Justice Nanavati Commission of Inquiry for the Gujarat pogrom

Mukul Sinha is best known for years of meticulous work in engaging with the Justice Nanavati Commission of Inquiry which inquired into Gujarat pogrom 2002. Mukul Sinha said that he engaged with the Justice Nanavati Commission of Inquiry, not only
from the point of view of establishing criminal liability, but to obtain evidence to fix constitutional liability. After the carnage took place, initially, there was no source of information anywhere indicating the culpability of the perpetrators. In his viewpoint, the state government appointed the Commission to provide itself a cover; hence it was important to enter it to foil that objective.

He wondered if the state government could be free of constitutional liability for its failure to protect a section of its people, even if it were to be assumed that the government did not have the intention to kill. Though all organizations boycotted the Commission, Mukul Sinha and his team decided to use the Commission to obtain important information, data and documents. He opined that today, all that we know about the Gujarat carnage from official documents has really emerged from those submitted by the government officials to the Commission. He explained that some of the information obtained through the Commission has been important for the convictions of perpetrators. For example Rahul Sharma’s compact disc (CD) of phone call records made in Ahmedabad on the crucial days of the carnage was produced before the Commission. (discussed in further detail below)

Mukul Sinha further opined that since everyone else boycotted the Commission (due to a lack of confidence in its objectivity), the Commission also realized that its work without opposition would be meaningless; hence he and his team of lawyers were given some leeway. In addition to the official documents and data submitted to the Commission, Mukul Sinha emphasized that since many government officials deposed before the Commission, their cross examination was yet another way of obtaining vital information and evidence.

To illustrate this point, he referred to the call records produced by Rahul Sharma - who was the Superintendent of Police of Bhavnagar district, and had been summoned by the Commission. Mukul Sinha said that he had started arresting BJP workers, and hence was transferred to Ahmedabad. In 2002, Rahul Sharma was asked to assist the investigation headed by Mr. Suroli, who was the then Inspector General of Police. In Mukul Sinha’s opinion, this was a fatal mistake as Rahul Sharma obtained the phone call records of every call made in Ahmedabad from 25 February to 4 March 2002. Before he could analyze the data, the state government understood what he was doing and he was transferred. He was called before the Commission of Inquiry and in the course of cross examination, he revealed the existence of the CD and I asked that it be produced. It was produced before Justice Nanavati (who headed the Commission), who took it on record and sealed it and did not open it or analyze it.

When the National Democratic Alliance (NDA) lost the Lok Sabha elections in 2004, and the United Progressive Alliance (UPA) government was sworn in, the new railway minister, Laloo Prasad Yadav, constituted a U.C. Banerjee Committee to examine the Godhra train fire incident. Mukul Sinha said that Rahul Sharma deposed before the Commission and again submitted the CD before the Commission. Mukul Sinha obtained a copy of the CD from this Commission and began to analyze the data.
Mukul Sinha explained that he and his team worked backwards from knowing the phone numbers of some of those that they knew were suspects, finding out the number of calls made and where the calls were made from. He said that the analysis of phone call records was undertaken by his wife, Nirjhari. Thereafter, they placed on record their analysis of the call records in an application before the court under S. 173(8) of the Code of Criminal Procedure.\textsuperscript{93} The application details the role of the police as well as the role of the political leaders, and was intended to pin responsibility on them for acts of omission and commission. It is also possible that the Section 173(8) report can be treated as an FIR on the basis of which investigation can be conducted and action taken, he opined.

Mukul Sinha mentioned that Narendra Modi, the erstwhile Chief Minister of Gujarat who was at the helm at the time of the pogrom, cleverly never used his own telephone but only the telephone of his Personal Assistant (P.A.). However there is an admission that Modi was using his P.A’s phone. Mukul Sinha opined that the three persons who were the master minds behind the carnage were Praveen Togadia and Jaideep Patel of the Vishwa Hindu Parishad (VHP), Govardhan Zadaphia who was the Home Minister and Modi who was in the know of it all. Mukul Sinha emphasized that Modi facilitated the entire attack on Muslims and that he was definitely constitutionally responsible even if not criminally responsible. In his viewpoint, Modi had instructed the officials not to interfere, preventing the police from protecting the targeted community when a violent mob of over 50000 persons attacked the same. This set in motion the deadly attacks following the Godhra train burning incident. Mukul Sinha referred to the Indian law which has no doctrine of vicarious criminal responsibility (command/superior responsibility) and hence it is difficult to pin criminal responsibility. Criminal conspiracy was also difficult to prove, he opined.

The Commission hearings became a source of information for the press. As observed by Mukul Sinha, Nanavati J ensured that the hearings itself were fairly democratic with open access to the press. Thirty to forty journalists became interested and regularly followed the proceedings and particularly the cross examination. Mukul Sinha also stressed the importance of engaging with media persons who were covering the Commission’s proceedings in order to alter their perception and the viewpoint with which they reported. Very often after the proceedings, he would go out and have tea with the media persons, and use the opportunity to brief them on the proceedings. He says that the VHP was very angry with him for doing so, as the younger journalists changed their perception and the coverage in the regional press became more balanced.

Yusuf Muchhala also engaged closely with the Nanavati Commission, but has a different approach from Mukul Sinha. He worked closely with and represented various

\textsuperscript{93} S. 173(8) Cr PC reads as follows: *(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).*
Breathing Life into the Constitution

Muslim organizations from Gujarat. He spoke of Justice Nanavati’s track record of having been appointed by the NDA government in a number of commissions after his retirement, and that almost all leading Muslim organizations refused to participate in the Commission’s proceedings due to a lack of faith in the judge. He opined that today, it is borne out that it is the Commission to cover up the wrong-doings of the state government rather than to expose the truth about the incident.

Yusuf Muchhala also spoke of his experience in representing Sanjiv Bhat before the Commission. He said as follows:

I had told Sanjiv to not expect the commission to do justice, and to only concentrate on one aspect: to expose the partisan attitude of the commission. We have partially succeeded so far. Sanjiv Bhat approached the commission and said that he wants to give evidence and that he was an intelligence officer at the time of the carnage. He said that there were so many intelligence reports that were given to the Chief Minister’s office and he makes a list of 47 documents and makes a request to the commission to ask for these documents and give him access to the same, so that he can tell the commission the truth of what happened. Sanjiv Bhat further requested the commission to issue summons to him, as he had given an oath of secrecy and due to this oath, he cannot divulge on his own unless he is compelled by the law. The Commission asks why it should summon him, and turns down his request for access to the intelligence reports. Will an independent commission act like this? These are very important document which the commission should have taken immediate possession of the moment it was constituted... For ten years they did nothing. Ultimately we approached the High Court asking for two reliefs – to direct the commission to summon Narendra Modi and to direct the commission to give us the inspection of these intelligence reports. The High Court did not agree with me and said that it will not interfere with the Commission’s work with respect to summoning Modi. However, when it conceded our right to inspection of documents, and directed the Commission accordingly. Immediately we make an application to the commission. When we made an application for inspection of the 47 documents, the state government replied that a number of those documents had already been destroyed. It is clear that the state government is trying to whitewash its culpability by appointing such commissions. This is why we must expose the commission. We are strategically playing double the game. When we go before the

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94 Sanjiv Bhat was the Chief Intelligence Officer at the time of the carnage. He was directly in touch with the erstwhile Chief Minister Narendra Modi on 27-28 February and 1 March 2002. Sanjiv Bhat says that he was present in the meeting in which after the burning of the bogie of the Sabarmati Express, and that he, along with the other officers had advised Mr. Modi not to bring the bodies of the karsevaks in a procession from Godhra to Ahmedabad. He informed Modi that they had intelligence input that there was a great deal of resentment and anger within the Hindu community and that regular mobilization of the people was going on by the VHP and Bajrang Dal, and hence it will be an uncontrollable situation. To this, Modi is said to have replied: “you the police officers are in the habit of balancing the interests of the Hindus and the Muslims. You have done it enough now. Let the Hindu anger be expressed on the streets.” Sanjiv Bhat has deposed before the Nanavati commission in an attempt to expose the culpability of the state government in general, and the erstwhile Chief Minister in particular, for the pogrom.
commission, we say “sir we have faith in you, please summon Narendra Modi!” and then we approach the High Court and highlight the lapses and partisan attitude of the commission.

**Justice Srikrishna Commission of Inquiry for Communal Violence in Mumbai**

Unlike the Nanavati Commission, the Justice Srikrishna Commission, established to inquire into the communal violence in Mumbai in 1992-93, inspired immense confidence in the victim-survivors of the violence as well as civil society actors who were advocating for justice and accountability. Yusuf Muchhala is well known for having worked meticulously with the commission for several years, representing the victim-survivors of the violence. When asked what the achievements of the commission were, he stated that there were many intangible benefits of the commission’s work, such as:

a) It corrects the record and states in the most unambiguous terms as to what happened during those days and as to who were responsible for it; It further indicted the police and the state machinery for not acting fairly and objectively. The commission’s report is now a part of government/public archives, which can be sourced by future historians of the city of Mumbai. Due to the work of the commission, the truth is now in the public domain in a documented form;

b) The commission had a good psychological effect on the community. The manner in which the entire inquiry process was carried on by Justice Srikrishna inspired tremendous confidence among the victims-survivors, assured them that the justice system was not hostile to them, thereby reducing the level of frustration and helplessness felt by them soon after the violence. It restored people’s faith in the rule of law. (He added that the faith people had reposed in the justice delivery system had to be followed up by actions for implementation of the report, which, unfortunately, has not happened.);

c) The commission received substantial support from the media; and

d) The secular groups in Mumbai stood up very firmly in support of the Commission. Though in the beginning the Muslim survivors felt isolated and experienced fear and anxiety in appearing before the Commission, the situation changed due to the support received.

According to Yusuf Muchhala, one striking feature that became visible through the commission’s proceedings was the collusion between the police and the Shiv Sena. Muchhala cross-examined several state witnesses to bring out this fact. He gave the example of a bakery that had been set on fire opposite Byculla railway station. Due to the fire, all the Muslim inhabitants of the building took to the streets. On the opposite side of the street were Muslims ready to help these inhabitants, as well as rioters who were attacking the Muslims. The police started firing at the inhabitants to prevent them from taking help from the Muslims across the street, as together, they would have been able to overpower the rioters from right wing Hindu groups. For this reason, police cordoned off the area, and fired at the inhabitants, in order to protect the rioters
who had set the bakery on fire. The affidavit of the police, however, showed Muslims to be the aggressors, thereby justifying the need for the police to fire. The real picture of the partisan role played by the police emerged only after several hours of cross-examination, he said.

Yusuf Muchhala outlined the strategy used by him for making interventions and engaging closely with the Commission. As a first stage, affidavits on behalf of victims and survivors had to be filed with the commission. Muslim lawyers from Legal Aid Society helped file at least 40 affidavits on behalf of survivors, from different parts of the city. The Bombay Bar Association and the Jamiat-e-Ulema-Hind also filed affidavits on behalf of victim-survivors. As a next stage, there had to be advocates on record and counsel to lead the examination in chief and the cross examination. Yusuf Muchhala said that by 1992, he had been designated as a senior counsel and hence could not file his vakalatnama. None of his juniors were willing to do so as the courtroom was intimidating, as it was filled with Shiv Sainiks. Finally one lawyer – a Mr. Sheikh from Thane – agreed to file his vakalatnama, and Yusuf Muchhala argued as a counsel on the strength of his vakalatnama.

The reason why Yusuf Muchhala engaged so closely with the commission, narrated in his own words were as follows:

You have to see the character of the commission. Justice Srikrishna was a sitting judge of the Bombay High Court and was appointed by the Chief Justice of the High Court. The erstwhile Chief Justice, Mr. M.B.Shah, did not allow political interference in choosing the judge to head the Commission of Inquiry. When the appointing authority asserts his/ her independence with regard to appointments, the commission truly becomes independent. Hence, engaging with this commission was of vital importance.

Shakil Ahmed – a Mumbai-based activist and lawyer - spoke of his engagement with the Justice Srikrishna Commission. While the Srikrishna Commission was proceeding with its inquiry, the state government ended its tenure abruptly in 1996-7. There were civil society demonstrations demanding that the commission be reinstated, and he took an active role in the same. He, along with others, initiated a massive signature campaign and a poster campaign asking for a reinstatement of the commission. Thereafter the commission was reinstated but the Shiv-Sena BJP government expanded the mandate to include the bomb blasts cases of 1993. Shakil Ahmed also worked for several years as a lawyer and an activist to implement the recommendations of Justice Srikrishna Commission. He said:

When the Srikrishna Commission report came out in 1997, we wanted the recommendations to be implemented. In the report there are specific references, for instance in the Hari Masjid case, of names where the police entered the mosque

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95 Vakalatnama is an Urdu term connoting a written legal document through which a person appoints an advocate and gives the advocate the authority to represent him / her in a court of law and argue on his / her behalf. Such a document is required to be filed in court before the advocate can appear before the court and argue in the case.
and killed 7 people or the Suleiman Usman Bakery where again they killed 6-7 people after entering the bakery. In these incidents the commission has indicted the police very clearly and has asked for the prosecution of 31 police personnel. The police had closed about 1600 cases, saying that there wasn’t enough evidence; the role of the judiciary was also suspect as the magistrates had routinely given permission for closing the cases. Srikrishna Commission asked for a reopening and re-investigation in those 1600 cases. It further ordered compensation to many victim-survivor families which had not been compensated for the harm caused to them through the violence... We highlighted the fact that many of the accused police officers were given promotions and increment in salary. One of them became the Police Commissioner of Bombay (Mr. Tyagi). He was the accused in the Suleiman Usman Bakery case. In posters, we put up the names of the 31 police officers indicted, their designation during the riots and their designation at the time we put up the posters. Even the Supreme Court began to question the government and in 2001, a special task force was formed who registered a few offences. We filed a case in the Supreme Court in 2001, specifically on the prosecution of the indicted police officers. It is still pending before the Supreme Court. The Supreme Court has now lost interest in the matter.

Shakil Ahmed also spoke of the strategies used for implementing the Commission’s recommendations. He said that he and other human rights lawyers and activists provided the media with information about the proceedings and related cases. They encouraged media persons to write about this issue and tried to keep the memory of the incident alive. The attempt was to disseminate the findings and recommendations to a larger audience. Shakil Ahmed was also involved in advocacy initiatives and dialogues with state government’s ministers, as well as the state commission for minorities. He narrated the need for a persistent dialogue with the state government, which was reluctant to provide compensation to the survivors whose family members were killed in the violence. He concluded that although the state government was persuaded to establish Fast Track courts some years ago for a speedy disposal of fabricated cases against Muslims they have not been very effective.

One of the cases related to the communal violence, that Shakil Ahmed pursued for years together, was the Hari Masjid case from Wadala. In this incident, the police entered the masjid on 10th January 1993 and fired indiscriminately, injuring 7 persons and killing 7 persons. They then charged the 50-60 persons present in the mosque with murder and attempt to murder. They claimed that the Muslims praying in the mosque were firing against the police and when they were pursued, they went to the neighboring basti and burnt a person alive. They arrested and prosecuted all the accused persons and there were no cases filed against the police. Shakil Ahmed was defending the accused Farooq Mhapker, who was injured in this firing, and had been falsely arrested and charged in this case. The Special Task Force (STF) had clearly deposed before the commission that the police were guilty in this incident. After some of the accused were acquitted in this case in 2006 (Farooq was not acquitted), Shakil Ahmed filed an F.I.R. against the police and approached for appropriate directions from the High Court when the police
refused to register it. The High Court ordered that the offences be registered. The other prayer sought from the High Court was for an investigation by the Central Bureau of Investigation (CBI). Shakil Ahmed said that though the F.I.R. had to be registered because of directions from the High Court, the CBI was reluctant to take up the case saying it was an old case. Thereafter the C.B.I was forced by the state government to take up the case but refused to investigate. Shakil Ahmed and other lawyers had to approach the Supreme Court, which instructed the C.B.I. to investigate. In its report, the CBI said that the evidence of the witnesses could not be relied upon, as they were charged in other cases by the police, and so they were “interested witnesses”. On this ground, the CBI filed a closure report before the magistrate. Shakil Ahmed challenged the closure report, and asked for forwarding the case to the sessions court. The trial continues to be pending for the last 21 years, he said.

**Other Commissions of Inquiry**

Human rights lawyers, who could not be interviewed for the present study, have actively participated in other Commissions of Inquiry too. They have testified in Commissions, filed affidavits on behalf of victims and survivors, examined and cross-examined witnesses, remained watchdogs for several years during the pendency of the proceedings, and written and spoken about the Commissions and their functioning, in order to generate public interest and visibility. For example, Vrinda Grover draws linkages between the quest for justice between the anti-Sikh violence in Delhi (1984) and the Gujarat carnage (2002), from her experience of engaging with the criminal justice system as well as the Justice Ranganath Mishra Commission and Justice Nanavati Commission of Inquiry established subsequent to the anti-Sikh violence.\(^{96}\) Karnataka High Court advocates Arvind Narrain and B.N.Jagadeesha, participated in the Justice Somasekhara Commission that inquired into the attacks on 15 churches in Karnataka in 2008.\(^{97}\) Advocates Dibyasingh Parichha and Bibhu Dutta Das have actively participated and monitored the proceedings of the Justice Panigrahi Commission of Inquiry and Justice Mohapatra/A.S. Naidu Commission of Inquiry which were established after the anti-Christian violence in Kandhamal (2007-8).

**A2.5 Public Hearings and Fact-Finding**

P.A. Sebastian of the CPDR preferred to initiate a civil society led process to inquire into what happened in Mumbai in 1992-93 by establishing the Indian People’s Human Rights Commission. The inquiry was conducted by Justice H. Suresh and Justice Daud – retired judges of the Bombay High Court. Sebastian said that Justice Srikrishna had issued a contempt notice to him and the two judges for lowering his prestige by carrying out a parallel enquiry. Sebastian challenged this in the Bombay High Court, which struck it down. Thereafter the Human Rights Commission continued its inquiry and published its report (titled ‘People’s Verdict’) with the permission of the High Court.\(^{98}\)

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B. EXTRA JUDICIAL KILLINGS / 'ENCOUNTER DEATHS'

Extra judicial killings, euphemistically referred to as ‘encounter deaths’ due to the frequency with which police and armed forces claim that persons were killed in ‘encounters’, are commonplace in India. In the words of the veteran human rights lawyer Kannabiran,

Criminal law has always been a political weapon in the hands of the state. Several members of our legislative bodies have criminal records both white collar crime and the bloody variety. Our law enforcers have for long been responsible for the deaths of suspects in their custody. These suspects very often come from economically and socially deprived strata. There has never been any accountability for these deaths. They also kill people in ‘encounters’, a euphemism for extra-judicial killings. Their disregard for the law results in a conflation of impunity with immunity.99

In 2013, Sub-Inspector Surjit Singh of Punjab police confessed to killing more than 80 people in fake encounters during the separatist movement in Punjab in the late 1980s.100 Daya Nayak, Pradeep Sharma and the late Vijay Salaskar are known as ‘encounter specialists’ in the Mumbai police, and have been hailed for ‘cleaning up’ the city of criminals, particularly gangsters from the underworld. Thagjam Manorama was sexually assaulted and killed by members of the Assam Rifles, who then took cover under the Armed Forces Special Powers Act to block an independent investigation and prosecution in the case.101

There are several such instances, leading one to be convinced that extra judicial killings are not mere aberrations or isolated instances, but a deliberate and conscious institutional practice of the state apparatus - the police, armed forces and paramilitary forces. Kannabiran refers to laws relating to ‘disturbed areas’, enacted in the 1960s in various states, and observes that disturbed areas were notified under these statutes and the government began faking ‘encounters’ in these areas.

Now, “this fig leaf is no longer necessary; extra-judicial killings take place right in the heart of cities and towns, with a whole population as silent witness. We now have a mockery of the rule of law and the constitutional value system.”102

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100 See ‘I Killed More than 80 People in Fake Encounters, Says a Repentant Punjab Cop’, The Hindu, 6 July 2013
101 On 10 July 2004, Thangjam Manorama, who the army suspected of being an activist of the banned Peoples Liberation Army, an underground outfit operating in the state of Manipur, was taken into custody for interrogation at midnight by a team from Assam Rifles, a paramilitary force. Her family members witnessed her being brutally assaulted in a corner of the house for almost half an hour after blindfolding and tying her hands and feet. The security personnel assured the family that Manorama would be handed over to the nearest police station the next morning. However, the next morning, before the family could approach the police, news came that Manorama’s body with multiple signs of torture and bullet marks was found lying at a village nearby on the roadside. Post-mortem revealed gunshot wounds in her genitals.
102 K.G.Kannabiran (2004), Wages of Impunity, New Delhi: Orient Longman Pvt Ltd, p. 115
The first extrajudicial killing, or “encounter”, in Andhra Pradesh took place as early as 1968. Since then, close to 4,000 people have been killed in alleged encounters. In December 2012, the National Human Rights Commission informed the Supreme Court that in the past five years, there had been 191 fake encounter killings in the country. Most perpetrators enjoy near-complete impunity and are rarely held accountable under law. Human Rights Watch raised a pertinent question through its report in 2013 – At which point can a potential threat be reason enough to compromise on the right to life? In 2013, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, expressed his continuing concern with extrajudicial killings after his mission to India. In January 2013, the Supreme Court established a three member independent commission headed by Justice Santosh Hegde (retd.), to inquire into six cases of extra judicial killings out of a list of 1528 persons killed unlawfully in the state of Manipur between 1979 and 2012.

Human rights lawyers and activists in India have engaged with the issue of extrajudicial killings for the past several decades, often at the expense of grave risk to their lives. In 1995, the Punjab police abducted, tortured and killed human rights defender Jaswant Singh Khalra for his work in uncovering thousands of disappearances, extrajudicial deaths, and secret cremations of Sikhs perpetrated by the Punjab police, and highlighting the same in the public domain. Jalil Andrabi – a human rights lawyer and activist from Kashmir – was killed in 1996, allegedly by the late Major Avtar Singh, who was never prosecuted for the offence.

Among the conversations held with human rights lawyers as part of the present study, experiences in engaging with the issue of extra judicial killings emerged from varied contexts – in Naxal-affected Andhra Pradesh with a strong presence of paramilitary forces, as a regular feature in the highly militarized Kashmir valley, in Gujarat where it was used as a tool to widen the communal divide, in Maharashtra where the ‘underworld’ was active in the 1980s and 1990s and in Tamil Nadu with its caste politics and heightened violence by the state. The common threads among these varied contexts are:

103 Bernard D’Mello (2009), ‘Encounters are Murders’, MRZine, 13 September
104 Dhananjay Mahapatra, ‘191 Fake Encounters in Last Five Years, NHRC Tells Supreme Court’, The Times of India, December 5, 2012.
106 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Mission to India, A/HRC/23/47/Add. 1
108 In 2005, six police officers were convicted for the murder. In 2007, the Punjab and Haryana High Court upheld the conviction for five of them, and enhanced all sentences to life imprisonment. In November 2011, the Supreme Court upheld the convictions and sentences.
the impunity with which the public officials act;
the manner in which the killed persons are labelled as “terrorists”, “gangsters” or “Naxals”, thereby legitimising the killings;
the absence of independent eye witnesses to corroborate / contradict the version of the public officials;
non-registration of FIRs (for murder) against the concerned public officials;
lack of an independent and impartial investigation by state agencies about the circumstances leading to and facts of the killing; and
the challenges faced in making the perpetrators accountable through a legal system whose stakeholders are complicit in the offence of extra judicial killings, either through acts of commission or omission.

B1. Mumbai

In Mumbai – the practice of extra judicial killings probably began in the 1980s, when the underworld started exercising control and generating income through hafta (protection money), drug trafficking, commercial sex, trade in illegal weapons and extortions from builders, film producers and business persons. Gang rivalries were at their peak – between Dawood Ibrahim, Chhota Rajan, Ashvin Nike, Ravi Pujari, Arun Gawli gangs, and ‘encounters’ were seen as a way of eliminating key persons from each gang.

In the early 1990s, a special squad was created in the police, under orders from the Home Minister, to combat the underworld terror and finish off gangsters if necessary. The squad was trained in automatic weaponry and virtually given the licence to kill.\(^{109}\) This squad specialized in ‘encounters’. This is probably when the extra-judicial killings by the police became more planned and systematic, and were perpetrated with a near complete impunity due to the blessings of the higher-ups. A report by Human Rights Law Network states as follows:

During the 1980s and 1990s, the practice of encounter killings by the Mumbai police to eliminate gangsters initially received popular support. The citizens of Mumbai were generally supportive of the encounters which were heralded as a way of improving safety in the city. Several policemen have spoken openly to the press about how many gangsters they have eliminated.\(^{110}\)

**Writ Petition on Extra Judicial Killings**

P.A. Sebastian, spoke of extra judicial killings that CPDR had documented in the late 1980s and 1990s. He observed as follows:

\(^{109}\) See FN 105

Most of these encounter victims were, according to the police, picked up from the Fort area. Their account usually is that they see a car coming, they tell the car to stop, it doesn’t stop, it speeds up, and so they block the car. When the car was blocked, the criminals get down from the car and open fire first against the police, and in response the police open fire and the criminals dies on the spot. Then they are taken to St. George hospital. The Hospital declares them dead. FIRs were rarely registered against police officials who were involved in the killings, and they escaped with impunity. We (CPDR) documented 110-115 encounter deaths and found a distinct pattern. We filed a writ petition in the Bombay High Court, seeking an inquiry into the ‘encounter deaths’ by the police. In this case the persons who supported me were Advocates Monica Sakhrani and Mahrukh Adenwalla, who are members of the CPDR. The writ petition led to an inquiry and certain guidelines were issued by the court to the police; the writ petitions also highlighted aspects of extra judicial killings and the culpability of the police. This played a role in how the frequency of these ‘encounters’ reduced considerably in Mumbai.

Guidelines issued by the Bombay High Court included procedures to be followed upon receiving intelligence about activities pertaining to the commission of grave crimes, upon encounter resulting in deaths, registration of FIR, investigation, preparation of spot panchanama and recovery panchanama, guarding of scene of occurrence of the encounter till investigation, inquest, and medical aid to injured criminals. Not satisfied with the adequacy of the reliefs granted, three Special Leave Petitions were filed in the Supreme Court against the judgment and order dated 22-25 February 1999. After considering the NHRC guidelines and revised guidelines on the issue as well as suggestions from the petitioners, amicus curae and others, the Supreme Court issued elaborate guidelines on the issue in 2014.

Khwaja Yunus Case

Mihir Desai spoke of the Khwaja Yunus case in which he represented the victim’s mother. Khwaja Yunus, a 27 year old software engineer working from Mumbai in a Dubai-based company, was arrested by the police in connection with a bomb blast in a bus in Ghatkopar, Mumbai in December 2002. In January 2003, the police claimed that he escaped while being taken to Aurangabad when the police jeep met with an accident. The sessions court conducted an enquiry and concluded that the police version did not seem to be correct. However, the State or the police did not take any action. In 2003 itself a habeus corpus petition was filed by Mihir Desai in High Court. The State CID took over investigation, and concluded that he had died in custody due to police assault. It indicted 14 police officials, and arrested four of them including Assistant Police Inspector

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111 PUCL vs State of Maharashtra, judgment of the Bombay High Court dated 25 February 1999. A set of three writ petitions were clubbed together – WP No. 1146 of 1997, WP No. 1032 of 1997 and WP No. 1064 of 1997. The last of the three writ petitions was filed by CPDR.

112 Judgment and order of R.M.Lodha and Rohinton Fali Nariman, JJ. Of the Supreme Court, in PUCL and Another vs State of Maharashtra and Others, Criminal Appeal No. 1255 of 1999 on 23 September 2014
Sachin Vaze in April 2004, for alleged murder of Khwaja Yunus. The Court directed that a separate FIR be filed against the police officers for murder. This order was upheld by the Supreme Court. Accordingly at that stage, due to filing of a separate FIR, the Writ Petition in the High Court was disposed of.

In 2005, Mihir Desai filed a habeas corpus petition on behalf of the mother of Khwaja Yunus, Aasiya Begum, seeking adequate compensation from the state government and demanding prosecution of police officers who were allegedly responsible for her son’s death in custody. In a landmark judgment, the Bombay High Court awarded a compensation of Rs. 20 lakhs, for the first time, in a case of custodial killing. This is a precedent that would benefit future cases of a similar kind.

At the same time, Mihir Desai pointed out to the difficulties in prosecuting the police officials concerned. The state government denied sanction for prosecution of 10 police officials, and granted sanction to prosecute only four officials, against whom criminal proceedings are pending. He said that it was very difficult to get witnesses or collect evidence, and that it was for the court to determine the veracity of the statement of eye witness - Dr. Abdul Mateen. Dr Mateen had also been arrested and placed under police custody along with Yunus, and had testified that he witnessed Yunus being severely assaulted in police custody, and of the possibility of Yunus having succumbed to the injuries caused to him during custodial interrogation. Mihir Desai also pointed out that the concerned police officials had lied about being elsewhere when Yunus was allegedly beaten to death in custody, as shown through an analysis of their cell phone records. The High Court, while granting compensation refused to allow prosecution of 10 officers in respect of who sanction was not given. Mihir Desai opined:

In a sensitive case like this, which is against its own police officers, the state, if it genuinely wants neutrality, should have accepted the plea of the victim’s mother to have a public prosecutor of her choice. However the government decided not to appoint a Special Public Prosecutor, in order to shield its own officials who were involved in the case.

However, a Prosecutor of the choice of Asiya Begum has been appointed. In 2012, Mihir Desai filed a Special Leave Petition in the Supreme Court, challenging the order of the High Court that refused to prosecute the remaining police officials who had been indicted by the State CID. He argued that this was a case where sanction should have been granted, as there were eyewitnesses to the custodial torture and the CID report said the remaining policemen should be prosecuted. The Special Leave Petition has been admitted and has been kept by for final hearing.


114 Assistant Police Inspector Sachin Vaze and constables Rajendra Tiwari, Rajaram Nikam and Vasant Desai are facing trial on charges of the murder of Yunus and destruction of evidence.

Khan Abdul Wahab - a criminal lawyer practicing in the courts of Mumbai - pointed further to the difficulties in pursuing cases of extra-judicial killings in courts of law. In his words:

In cases of custodial violence, illegal detention and extra-judicial killing, difficulties arise as the family members are so frightened that they don’t dare to come forward to pursue justice. Family members often end up succumbing to the threats and pressure caused by the concerned officers dealing with these cases. They feel that they have already lost one man and they don’t want to lose other members of their family. So, if the litigants themselves are not ready then there is nothing much we can do as advocates.

Perhaps this is where human rights organizations play a significant role – in supporting families of the victims in their pursuit of justice through courts of law. Another strategy adopted by organizations such as the Human Rights Law Network has been to hold independent people’s tribunals and public hearings on torture, extra judicial killings, forced disappearances and other aspects of state terrorism. This was a platform that brought together victims from all parts of the country, to narrate the horrific brutalities they and their family members suffered, in an attempt to highlight the voices of the unheard.

B2. Gujarat

Mukul Sinha spoke of his work on the spate of extra-judicial killings in Gujarat after the carnage of 2002. This included the killing of Sadiq Jamal in 2003, Ishrat Jahan and three others in 2004, Sorabuddin and Kauserbi in 2005, and Tulsi Prajapati and four others in 2006. The pattern was the abduction of Muslim youths and then their cold blooded execution by members of the Gujarat Anti Terrorism Squad (ATS). The state government projected the incidents as the killing of ‘terrorists’ by the ‘brave’

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117 Sadiq Jamal was shot dead on November 13, 2003 near Galaxy Cinema in Naroda area in Ahmedabad by police officers on the ground that he was a Laskhar-e-Taiba operative, who was on a mission to kill the erstwhile Chief Minister Narendra Modi and VHP leader Pravin Togadia.

118 Ishrat Jahan, who hailed from Mumbra near Mumbai, Javed Shaikh alias Pranesh Pillai, Zeeshan Johar and Amjadiali Rana were killed by the Gujarat police in an ‘encounter’ on June 15, 2004 on the outskirts of Ahmedabad.

119 According to the CBI, Sohrabuddin Sheikh and his wife Kauser Bi were abducted by Gujarat’s Anti-Terrorism Squad when they were on way from Hyderabad to Sangli in Maharashtra and killed in an alleged fake encounter near Gandhinagar in November 2005. Prajapati, a key witness in the alleged fake encounter, was killed by police at Chapri village, Banaskantha district of Gujarat, in December 2006.

120 Tulsiram Prajapati was an eye witness to the abduction of Sohrabuddin and Kauserbi. He was killed while in police custody, in December 2006, a year after the killing of Sohrabuddin and Kauserbi. In Tulsi Prajapati’s case, the Supreme Court directed the CBI to take over the investigation. The erstwhile Home Minister Amit Shah is the main accused. See Narmada Bai vs State Of Gujarat & Ors., order dated 8 April, 2011.
Gujarat police, and claimed that these ‘terrorists’ had hatched a conspiracy to kill Narendra Modi and other key persons in Gujarat.

In Mukul Sinha’s words:

The idea behind the killings was to keep the anti-minority spirit alive. The methodology was to abduct Muslims from outside the state, bring them to Ahmedabad, profile them as terrorists and then kill them. Every six months, someone was being killed. The Muslims were terrified that one of them could be picked up and killed; the Hindu majority was also terrified as it was constantly reminded of a threat from the Muslim community. It was a fantastic game plan to increase the communal divide.

This highly successful plan first developed cracks when magistrate Tamang, after doing the inquest under S. 176 Cr PC in the killings of Ishrat Jahan and three others, concluded in his report, based on prima facie evidence, that the killings were a false (extra-judicial) encounter. In Mukul Sinha’s opinion, the state government, which had used the inquest as a delaying tactic to foil investigation, was shocked at the report and its indication of the complicity of public officials, and appealed against it and obtained a stay on the report.121 Mukul Sinha remained at the forefront of the effort to publicize the findings of the report and bring public attention to the fact that elements of the Gujarat state were functioning as an illegal killing machine.

The larger plan of state-sponsored extra-judicial killings of ‘terrorists’ also fell apart when one of the police officers, Rajnish Rai, who was entrusted with the responsibility of investigating the killings, revealed that the Gujarat Anti-Terror Squad (ATS) was at the core of the killings. His investigation included an analysis of cell phone records of the concerned police officials. This revelation led to the arrest of 30 top police officers from the Gujarat ATS, which, with the blessings of their superiors, was revealed to have abdicated its constitutional duty of protecting life and was instead taking life.

Mukul Sinha represented those killed through such fake encounters; additionally he assisted and represented those honest police and other officials who choose to expose the killings and the attempt to scuttle justice for the same. The efforts of Mukul Sinha and other human rights lawyers in Gujarat began to bear fruit with regard to extra judicial killings. In Sadiq Jamal’s killing, the Gujarat High Court had, in 2011, transferred the case to CBI following a petition by Shabbir Jamal, brother of the victim. The CBI accused eight Gujarat policemen, including two retired officers of criminal conspiracy and murder in the encounter case.122

In its first charge sheet, filed on December 22, 2013, the CBI said that the encounter was stage-managed and that Sadiq was illegally brought from Mumbai days before the killing and kept in the confinement of city crime branch. Subsequent to the


investigation, seven police officials were arrested. In Sohrabuddin’s case, the erstwhile Home Minister Amit Shah was arrested. In the Tulsi Prajapati case as well the charge sheet has been filed and the Home Minister is the main accused. The Sohrabuddin and Tulsi Prajapati cases were clubbed and transferred from an Ahmedabad court to a Mumbai court in 2012 following a Supreme Court order. In Ishrat Jahan’s case the CBI took over the investigation in December 2011, and subsequently arrested four police officials.

However there have been a spate of setbacks in recent times. In December 2014, a special CBI court in Mumbai discharged Amit Shah - the erstwhile home minister of Gujarat and President of Bharatiya Janata Party - as an accused in the Sohrabuddin fake encounter case. In February 2015, four days after a CBI court granted bail to IPS officer P. P. Pandey in Ishrat Jahan’s case, he was reinstated in service by the Gujarat government, given the post of Additional Director General of Police (Law and Order). Ironically P P Pandey has been put in charge of investigating officer Satish Verma, whose aggressive investigation of Ishrat Jahan’s case under the Gujarat High Court’s directions, led to the arrest of top police officials including P P Pandey. On 2 March 2015, Additional Director General of Police Geeta Johri, who had been booked by the CBI for delaying the investigations and destroying certain records in the Tulsi Prajapati case, was discharged as the mandatory government sanction for prosecution had not been obtained.

At the level of strategy, Mukul Sinha was one of those who favoured investigation by a ‘Special Investigation Team’ appointed by the court as opposed to the Central Bureau of Investigation (CBI), as he opined that in the former, those representing the victims had the opportunity to nominate an honest investigation officer, who could potentially turn the tide. On the other hand, he opined that the CBI was a ‘political tool.’ Time proved him right as it was the SIT which was responsible for the breakthrough which led to 30 police officers being arrested on the grounds of authorizing ‘murder’.

When questioned if his faith in the judicial system was shaken, he opined as follows:

   There is no point in abusing the courts; instead one should find a way to use it... However it is clear that the state can’t give you rights, it is only the courts which can. I may not have complete faith in the law or the courts but whatever relief is possible, one should aim at obtaining them through the courts. The results we have got in the fake encounter cases are an exemplar on what can be achieved through the courts.

123 Rubabbuddin Sheikh vs State Of Gujarat & Ors on 3 May, 2007
124 The arrested persons were IPS officer Girish Singhal, deputy superintendent of police Tarun Barot, inspector Bharat Patel and retired deputy superintendent of police J G Parmar.
125 For more details, see ‘Sohrabuddin Fake Encounter Case: Charges Against Amit Shah Dropped’, The Times of India, 30 December 2014
126 See ‘Tables Turn: Now Pandey to Probe his Investigator Satish Verma’, The Times of India, 10 February 2015; see also ‘Ishrat Jahan False Encounter: Top Cop P P Pandey Reinstated in Service’, The Times of India, 9 February 2015
The reason the courts are useful is because the Constitution of India does cast a duty on the judges to go by the Constitution. One has to know the limitations of the courts, and access what you can from the system.

B3. Andhra Pradesh

An overwhelming majority of these killings in Andhra Pradesh occurred in contexts of anti-Naxal operations by the Andhra Pradesh (AP) police. Justice V.M. Tarkunde, who headed an inquiry committee in 1977 to look into the ‘encounters’ between the AP police and the Naxalites, made alarming revelations about the state practice of planned extra-judicial killings, which were camouflaged as encounters. In his report titled ‘Encounters are Murders’, he recommended an independent commission of inquiry to verify facts of these incidents.\textsuperscript{128} Veteran human rights lawyer K.G. Kannabiran of the Andhra Pradesh Civil Liberties Committee (APCLC) and other human rights advocates actively participated in the proceedings of the Tarkunde committee. Human rights organizations such as the APCLC, PUCL and Human Rights Forum have meticulously documented many incidents of extra-judicial killings, and accused the state of providing the concerned police officials with complete impunity. Most encounters happen at isolated places, either early in the morning or late at night, in the absence of witnesses, and police officers rarely seem to get injured in them. All this is often cited as proof of foul play.\textsuperscript{129} The APCLC has recorded approximately 1800 cases of extra judicial killings in the state of Andhra Pradesh (AP) between the years 1997 and 2007.\textsuperscript{130}

Suresh Kumar – a lawyer practising in the AP High Court - spoke of a case he had handled of a rickshaw puller – a tribal from Mehboobnagar district of Andhra Pradesh, who was tortured in police custody and died as a result of the torture. This case came to be known as the ‘Motia’ case. The police version was that he sustained a snake bite while in police custody, and this caused his death. The AP High Court did not believe the police version and in 1996, it awarded compensation. Echoing the concerns raised by Mihir Desai (referred to above), Suresh Kumar spoke of the relative ease with which orders for compensation can be obtained from court, as compared to orders directing prosecution of the concerned police officials. He says:

\begin{quote}
Even in lock-up death cases we are able to get compensation but we are not able to prosecute the perpetrators. What we want is to prosecute the police. When the court has come to a conclusion that death is due to the police complicity or negligence or whatever, based on which compensation is awarded, then criminal proceedings need to be initiated against the concerned police officials. However the courts are reluctant to direct prosecution. . .
\end{quote}

\textsuperscript{128} India Republic Civil Rights Committee (1977), ‘Encounters’ are Murders: A Documentation of the ‘Naxalite’ policy of the Andhra Pradesh Government, Civil Rights (Tarkunde) Committee
\textsuperscript{129} Aparna Alluri (2009), ‘End to Impunity?’, Frontline, Vol. 26, Issue 20, Sep 26-Oct 9
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Suresh Kumar further opines that death in the police lock-up (due to custodial torture) and death by ‘exchange of fire’ are two sides of the same coin – both are extra-judicial killings that take place while the person is in the custody of the police. In order to demolish the argument of the police that an individual did not die in custody, but escaped from police custody and was killed in the process, Suresh Kumar has argued repeatedly in court that the concept of ‘custody’ does not apply only to the police lock-up; in every other place where the police is in control of the person arrested too, it is responsible for the life and well-being of the arrested person.

He further spoke of the practice, in Andhra Pradesh, of registering an FIR after the killing, not against the concerned police officials for murder (under S. 302 IPC), but against the so called ‘encountered’ person for attempt to murder (under S. 307 IPC). Typically, the complainant of the FIR would be a police official, and the informant would be a police official too; however the FIR would not reveal the names of police officials who were involved in the ‘encounter.’ It would merely say “When I went to nab the Naxalites along with my team…”Since the accused person has died, the case gets abated; since the FIR reveals no names of the concerned police officials, there is no judicial scrutiny of the acts of the concerned police officials involved in the killing. In this context, Suresh Kumar said that his organization has consistently insisted on a filing of FIR against both the concerned police persons as well as the killed person, as there are two parties to the incident, and that the names of concerned police officials should be revealed.

As in the case of CPDR in Mumbai (discussed above), the APCLC, in 1994, brought 565 cases of extra judicial killings to the notice of the NHRC, as stated by Suresh Kumar. This led to the well-known guidelines issued by the NHRC with regard to custodial deaths and encounter deaths. Speaking of the process, Suresh Kumar said:

In 1994 we brought 565 cases to the notice of the NHRC; we recorded all these cases with evidence and we submitted compilations of reports of encounter incidents. The NHRC said: “We cannot go through all these cases; we’ll take some representative cases only. You suggest some 5 cases so that we can inquire into the same. So in 1996 the erstwhile NHRC chairperson – Justice Ranganath Mishra – led the inquiry, which was conducted in Hyderabad for about 20 days. Based on the 5 cases studied, the NHRC passed guidelines in 1997 for the first time. However the NHRC guidelines are vague. They state that a case should be registered and investigation should be conducted by “an independent agency”. The guidelines stopped short of specifying the section of the IPC under which the FIR should be registered, and who will carry out the independent investigation. In 2001, the revised guidelines issued by the NHRC specified investigation by a sub-divisional police officer (SDPO) – an officer of the rank of Deputy Superintendent of Police (DSP) from another jurisdiction. This does not guarantee impartial or independent investigation. For this reason, we filed a writ petition in the AP High Court, seeking, inter alia, for directions related to accountability of concerned police officials involved in extra judicial killings.
The AP High Court pronounced a landmark judgment in 2009 through a five judge bench.\textsuperscript{131} It held that a combined reading of “relevant statutory provisions; the binding and persuasive precedents; the normative architecture of private defense justifications generally and in the context of the provisions of the IPC; and the constitutional values” left no doubt that FIRs must be registered against the police officers “notwithstanding a claim as to the death occurring while exercising the right of private defence”. It stated in clear terms that the police do not have a discretion not to register an FIR. The judgment also stated that once an FIR is registered, an investigation must be launched; however the judicial magistrate is not bound to agree with the report of the investigation if the report concludes that the concerned official killed while exercising the right of private defense under S. 100, IPC. In other words, the plea of self-defence must be reserved to be established only at the stage of trial. It stated that the judicial discretion must be exercised independently, and that the police had no authority to file closure reports without judicial scrutiny.\textsuperscript{132} The judgment spoke not only about ‘encounter’ killings but also about custodial killings. The Andhra Pradesh Police Association appealed against this judgment in the Supreme Court, which granted an ex parte stay on the judgment. The case is currently pending in the Supreme Court.

The extra-judicial killing of five undertrial prisoners in Nalgonda district of Telangana and 20 persons in Chittoor district of Andhra Pradesh in April 2015 are an indication of the continued blatant violation of the law by the police of Telangana and Andhra Pradesh.\textsuperscript{133} The killing of the five undertrial prisoners who were unarmed, in handcuffs and under heavy escort by the police while enroute Hyderabad for a court hearing, makes the police claim of self-defence dubious. Similarly it has been opined that the killings of 20 woodcutters, allegedly involved in smuggling of red sanders in Seshachalam forest, Chittoor district, was unwarranted as there was not sufficient threat to kill them instead of apprehending them. The two incidents reflect the continued excuse given by the police that they were under attack and fired in self-defence. The aftermath of the two horrific incidents underscores the reality that the legal requirement that FIR’s should be filed against against police officials who commit murders is still a matter of struggle.\textsuperscript{134}


\textsuperscript{133} See ‘Encounter Killings Evoke Old Fears’, The Free Press Journal, 10 April 2015

\textsuperscript{134} See ‘Human Rights Forum Condemns ‘Encounter’ Killings’, The Hindu, 8 April 2015
B4. Tamil Nadu

People’s Watch – a human rights organization based in Tamil Nadu consisting of human rights activists and advocates – speaks of the use of torture and extra judicial killings as state policy in Tamil Nadu:

It is unacceptable that encounter deaths are part of the law-enforcement culture in Tamil Nadu. There have been at least fifteen such deaths since 2006, of which four occurred in April 2008 alone... It is often claimed by the law-keepers and by a section of civil society that there is nothing wrong in encounter deaths because the persons who are “bumped off” are only hard-core criminals who do not deserve the benefit of constitutionally guaranteed judicial trials. Unfortunately, however, such proponents do not understand that condoning extrajudicial executions will only foster authoritarian tendencies that in turn will undermine the supremacy of the Constitution... The lack of accountability of superior officials, including District Collectors, Magistrates, and police officials, is particularly problematic when assessing the cases of torture. There are numerous instances where victims have approached superior officials and police officers. The response has varied from apathy and inaction on part of these officials, to actual connivance and cover-up of the actions of subordinates. The attitude and behaviour of the police, as reflected through victim testimonies, without any fear of even judicial orders and directions, and without any fear of consequences of acts of torture and extrajudicial killings (claimed to be “encounter deaths” by the police) is indicative of the failure of the legal system to make such perpetrators accountable. It is also indicative of the level of impunity that has been entrenched into the system. People’s Watch, for example, has documented the way a person named Manalmedu Sankar was killed extra judicially despite a Supreme Court direction to provide him security, and killed in exactly the manner as stated in the Supreme Court petition, speaks volumes about the lack of fear of consequences and the callous nature in which the police force commits such heinous crimes.135

People’s Watch documented at least 23 such instances between the years 2006 and 2010 in Tamil Nadu and in 2010, filed a public interest litigation seeking the appointment of a judicial commission headed by a retired High Court judge to investigate “encounter deaths” in Tamil Nadu and to register a FIR in every such case.136 The writ petition stated that these cases reflected a pattern of consistent, intentional and unchecked murder by police officers of Tamil Nadu and disregard of the State in enforcing the rule of law.137 The writ petition is still pending.

Geeta Ramaseshan – a practising human rights lawyer in Chennai High Court, has questioned the right of the police to claim ‘right of private defence’ in all cases of

135 People’s Tribunal on Torture (Tamil Nadu): Interim Observations of the Jury, 2 June 2008, in file with the authors, pp. 126-128
136 ‘Plea to Probe Encounter Deaths’, The Indian Express, 30 March 2010
137 Ibid
‘encounter’ killings, and has opined that while on one hand, a lay person faces a trial if claiming right to private defence if his or her acts, results in death, on the other hand, despite being trained in combat and armed with weapons, those who indulge in encounters do not even face an investigation.\textsuperscript{138} She has suggested that the test for “reasonable apprehension” of imminent danger (an important ingredient of claiming the right of private defence) cannot be the same for police officials and needs to be addressed with a categorical shift in burden of proof in cases of such custodial violence.\textsuperscript{139}

Saravana Vel speaks of the culture of celebrating encounter killings in the state, of sweets being exchanged and people praising encounter deaths in the visual and print media. He narrated an incident in Coimbatore in 2010, when a van driver and associate abducted and murdered a brother and sister. There was a huge hue and cry in Coimbatore. The van driver was ultimately shot dead by the police, when he was taken for remand extension. People reportedly celebrated and said that it will teach other criminals a lesson. Saravana Vel opines that extra judicial killing is legitimized by inordinate delays in the legal system, and the uncertainty of a conviction and stringent punishment being awarded to the accused persons.

R. Sankara Subbu – a practising lawyer at Chennai High Court – narrated various cases of extra judicial killings by the police, where he had represented the victim’s family. For example, he represented, in the High Court, the widow of the forest brigand Veerappan, who was killed along with three others by the police (Tamil Nadu Special Task Force) in an alleged extra judicial killing.\textsuperscript{140} Apart from approaching the High Court for compensation and prosecution of concerned officials, Sankara Subbu has also used the strategy of fact-finding to highlight the pattern and the scale of extra-judicial killings. He said:

Wherever there was an encounter, I would form a fact-finding team and we would go to the village and collect materials near the locality and then interview the people affected in the encounter. Many of the persons killed through such ‘encounters’ were from the most marginalized sections of society - Dalits and bonded labourers who were paid below minimum wages, working in quarry sites and in farms in sub-human conditions. If there was a movement against a dalit atrocity, the leader of the movement would be killed in an ‘encounter’. A man named Balan was a leader fighting for dalit rights. He was taken into police custody, tortured and killed. Similarly, Pachchakali was taken into custody, tortured and killed. So I moved the High Court, which conducted an enquiry. Ultimately court has come to the conclusion Pachchakalai was taken by the police, tortured and ultimately done to death. My fact-finding team collected materials / evidence of nearly 30 such false encounter killings. I handed the material over to Prof. Rajini Kothari who

\textsuperscript{138} Geeta Ramaseshan (2012), ‘When the Right to Private Defence in Wrong’, The Hindu, 29 February

\textsuperscript{139} Ibid

\textsuperscript{140} Muthulakshmi vs. State, judgment and order of V. Kanagaraj J of the Madras High Court on 18 January 2005, in Criminal Original Petition No. 35899 of 2004
filed a writ petition before the Supreme Court, asking for appropriate directions against the practice of encounter killings.\footnote{Chaitanya Kalbagh and Others vs. State of UP and Others AIR 1989 SC 1452: 1989 Cri LJ 1465 – three writ petitions were clubbed in the case, all related to ‘encounter’ killings from different states. Writ Petition No. 62 of 1982 was filed by Prof. Rajni Kothari on the basis of evidence gathered by Sankara Subbu with regard to 30 extra judicial killings from Tamil Nadu. The other two writ petitions were filed in the context of the practice in the states of Uttar Pradesh and Andhra Pradesh.}

In a shocking incident, Sankara Subbu’s son was tortured and killed in an extra-judicial killing, allegedly by the police, in order to intimidate him and other human rights lawyers into silence on the issue of pursuing justice and accountability for extra judicial killings committed by the police. This indicates that taking on the state when it comes to ensuring accountability for extra judicial killings, can be a dangerous affair. Those who challenge the state’s right to kill outside the law, challenge a core aspect of the shadowy state’s power to inflict unlimited violence, untrammeled by any legal consequences. When the state acts outside the framework of the rule of law, it exposes the fact that the state acts not in a constitutional manner but rather as a criminal. Those who expose the double nature of the state end up facing dire consequences as seen in the killing of Sankara Subbu’s son.

### B5. Kashmir

Extra-judicial killings, in the garb of ‘encounter deaths’, have been a common feature of the violent history of the state of Jammu and Kashmir in the past three decades. Human Rights Watch, in a 1993 report, spoke of assault, torture and summary executions of detainees in custody by the security forces, and stated that though militants too committed these offences, these were to a lesser extent than that by the security forces.\footnote{Human Rights Watch, ‘The Human Rights Crisis in Kashmir: A Pattern of Impunity’, Human Rights Watch and Physicians for Human Rights, London, 1993.} The security forces are shielded by the Armed Forces (Special Powers) Act (AFSPA) which prohibits prosecution of security forces without the prior sanction of the Central government – a sanction which is almost never given. Moreover the National Human Rights Commission has no power to directly inquire into violations by armed forces, including extra judicial killings; it can only seek a report from the central government, and make its recommendations to the government, which may or may not be accepted by the government.\footnote{S. 19 of the Protection of Human Rights Act 1993 provides this special procedure for inquiry with regard to armed forces.} These factors contribute to a culture of impunity that is entrenched and institutionalized, both in law and in fact.

Ashok Agrwaal, in his book ‘In Search of Vanished Blood’ has analyzed the use of the writ of habeas corpus in Jammu and Kashmir during the period 1990-2004, and observed that in Kashmir, the primary role of law seems to be the legitimizing of force.\footnote{Ashok Agrwaal, In Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004, South Asia Forum for Human Rights, Kathmandu, 2008. p. 4} He has highlighted and discussed various facets leading to the ‘impossibility of justice’. A 2012 report states that the institutional culture of moral, political and juridical impunity has
resulted in enforced and involuntary disappearance of an estimated 8000 persons (as on Nov 2012), besides more than 70,000 deaths, and disclosures of more than 6000 unknown, unmarked and mass graves. It further points to a deep institutional involvement of the Indian state in crimes of torture, rape, arbitrary and illegal detentions, enforced disappearances and extra-judicial killings.

It is in this difficult context that human rights lawyers in the state of Jammu and Kashmir work. Their conversations with the team involved in the study on human rights lawyering has revealed their spirited struggle for justice, and the strategies that they use against a state that is complicit in the violence through its acts of commission and omission, and where the state institutions including the judiciary, often stand compromised.

G. N. Shaheen spoke of his experience of handling habeas corpus petitions in the 1990s. He said:

It started with an illegal arrest; we would file Habeas Corpus petitions before the Jammu & Kashmir High Court, seeking directions for the state to disclose the whereabouts of the persons who were detained. In Kashmir, the Army was not one agency, but multiple agencies – army, Border Security Forces (BSF), Central Reserve Police Force (CRPF), Special Operation Group (SOG) etc. They were picking up boys from the roadsides, from homes, wherever they wished, so we were constrained first ask their whereabouts. This would take us 2-3 months. In some cases, we could trace the whereabouts, and in other cases, we could not. ..

In another incident, Zahid Farooq, an 11th class student, was shot dead at point blank range by members of the Border Security Forces near his residence at Nishat, on the outskirts of Srinagar, in February 2010. The case was taken up by the Bar Association; members of the Bar including Shaheen participated in the police investigation. After investigation, a Special Investigation Team (SIT) of the police filed a chargesheet in the case, accusing two personnel with murder - Commandant R K Birdi and his subordinate Lakhwinder Kumar. They were arrested and prosecution was commenced against them in the Court of Sessions, Srinagar. Shaheen argued successfully in court that the act was not in discharge of their official duties, and hence there was no requirement for prior sanction from the government for their prosecution. To support this argument, he pointed to the fact that the accused were posted at Tangmarg / Gulmarg area, while the killing took place at Nishat – an area that they merely passed by in a vehicle. He said that the BSF has challenged the order of the sessions court dispensing with sanction for prosecution, in the Supreme Court.

Subsequently, the Supreme Court gave the BSF the option of either prosecuting the personnel by itself in the General Security Forces Court, or through a civil trial. Thereafter the BSF filed an application before the Chief Judicial Magistrate seeking

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146 Ibid
permission to prosecute them in the General Security Forces Court. In September 2013, this application was allowed. The uncle of the slain teenager filed a revision petition before the Principal District and Sessions court, but in June 2014, the petition was dismissed. The case is therefore tried by court martial in which the accused were acquitted.  

The human rights lawyers from Kashmir referred to many instances, where they had filed habeas corpus petitions in the High Court, asked for compensation for the victim’s family and tried to make the perpetrators accountable for commission of extra judicial killing. They spoke of small successes and large roadblocks. For example, Mian Qayoom narrated his struggle for justice in the killing of Ghulam Mohammed by the armed forces – which it claimed was a Pakistani militant, though in actuality, he was a poor labourer. After seven years, Qayoom was successful in getting the case reopened and reinvestigated, but wonders who will arrest and prosecute the concerned three army officials, who have been identified.

Zaffer Qureshi referred to the extra judicial killing of another man – another poor labourer who was killed in Kupwara and branded as a foreign militant. When Qureshi filed a writ petition in the High Court on behalf of the man’s mother Zaithuni, asking for disclosure of the name and photograph of the person killed, and exhumation of the body for a DNA test, the state denied having taken a photograph or knowing where he was buried. This denial is intended at scuttling processes of justice. Since the killed person was shown as the accused, the criminal case was closed / abated.

G.N Sayeen also referred to the unprovoked killing of 13-14 year old Wamiq Farooq Wani – a boy who was hit on his head by a tear gas shell as he played cricket at a stadium in the old city. The concerned official was suspended and an inquiry ordered. A private complaint was filed, family members and other witnesses who saw the killing testified before the court, their statements were recorded, they were cross examined, the accused were identified and yet, no justice has been rendered as the accused have obtained a stay over the proceedings from the Supreme Court. In Shaheen’s words, “the Supreme Court issued the stay because it is, as Kashmiri lawyers observe, deaf, dumb and blind towards the Kashmiri situation.”

The lawyers also cited well-known cases as examples of the impunity that prevails despite an active civil society (including human rights lawyers and activists) that tirelessly pursues justice. These include a) the Shopian double rape and murder case – where two young women were abducted, raped and killed by security forces, and a cover-up by the CBI has ensured, among other things, that five lawyers and three doctors who told the truth and struggled for justice are now facing prosecution, and

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147 For more details see ‘Zahid Farooq Killing: Court Rejects Family Plea, Upholds Order for GSFC Trial of Accused BSF Men’, Kashmir Reader, 12 June 2014

b) the Pathribal case – where members of Rashtriya Rifles abducted and committed cold blooded murder of five innocent civilians in a fake “encounter” and named them as foreign militants. The army, in this case, gave itself a clean chit through a court martial proceeding.149

From the narratives of the human rights lawyers working in Kashmir, the legal strategies and challenges to justice in the Kashmir context stand distinctly apart from the other contexts discussed above. The AFSPA provides blanket immunity, and the army has an option to prosecute an accused official by court martial or a civilian trial; it chooses the former, which eventually ends up in an acquittal. The cases referred to highlight the fact that there is an overwhelming reluctance and resistance of the justice administration to impartially investigate and prosecute the armed forces for heinous human rights violations including extra judicial killings. While in other states, compensatory relief is given more generously to victims’ families, in Kashmir, this option too is restricted, as the killed person is often named as a militant / a wanted criminal. Prosecution of the concerned officials is an uphill and near-impossible task, though various legal and extra-legal strategies have been employed. These include institution of a private complaint, ensuring re-opening and re-investigation of cases where the police has filed a closure report, obtaining orders for exhumation of body of the killed person to ascertain his/her identity, filing writ petitions in the High Court and the Supreme Court, investigations by Special Investigation Team and the CBI, press conferences, advocacy campaigns, protests and demonstrations, as well as approaching international human rights bodies.

As stated in the report titled “Alleged Perpetrators’, the documents in possession of the State itself indict the armed forces and the police by providing reasonable, strong and convincing evidence on the role of the alleged perpetrators in specific crimes. Yet, the response of the Jammu and Kashmir Police, Government of Jammu and Kashmir and the Indian State has been woefully inadequate. From denial of sanction for prosecuting members of armed forces under the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 [AFSPA] to limited prosecutions of members of the Jammu and Kashmir Police and civilian associates of the armed forces, the Indian State and its functionaries appear to have played a direct role in the commission of crimes and subsequent cover ups.150 In the absence of any institutional or political will to establish the guilt of the perpetrator, the Indian state stands indicted.151

149 The army held that there was no prima facie evidence against the accused officers. For details see ‘Army Gives Itself Clean Chit in Pathribal Case’, The Hindu, 25 January 2014

150 Indian People’s Tribunal on Human Rights and Justice in Indian-Administered Kashmir (IPTK), Alleged Perpetrators – Stories of Impunity in Jammu & Kashmir, Srinagar: IPTK and Association of Parents of Disappeared Persons (APDP), 2012., p. 8

151 Ibid
C. ADDRESSING THE ARBITRARINESS INHERENT IN ANTI-TERROR LAWS

Since the 1980s, specific laws came to be enacted to address the issue of terrorism. These include the **Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA)**, **Prevention of Terrorism Act (POTA) 2002** and the amendments to **Unlawful Activities (Prevention) Act (UAPA)** in 2004 and 2008.

From 1984 onwards, approximately 75000 people were detained under TADA; of these, at least 73000 cases were subsequently withdrawn for lack of evidence. The conviction rate under TADA was less than one percent, indicating that more than 99% cases booked under the law were not backed by substantive evidence. It was permitted to lapse in May 1995 by the P.V. Narasimha Rao government, due to reports of widespread abuse. However cases initiated under it continued to have legal validity and remained pending in courts. POTA was then enacted by the National Democratic Alliance (NDA) government in 2002, against the backdrop of the attacks on the World Trade Centre in New York on 11 September 2001. POTA allowed for detention of a suspect up to 180 days without filing charges in court. It also allowed authorities to withhold identity of witnesses, treated confessions to police as admissions of guilt, and included provisions for banning organizations and for cracking down on funding for terrorism. It was also widely reported that in 2002-3, the law was misused to arrest and detain hundreds of Muslims in Gujarat for years without a trial.

Syed Abdul Rehman Geelani, described as a mastermind in the attack on the Indian Parliament in 2001, was given a death sentence by a POTA court but was subsequently acquitted by the High Court and the Supreme Court in 2005 because of lack of evidence. In 2004, a People’s Tribunal, held in Delhi, highlighted the fact that adivasis and dalits who were working for land reforms, those who were protests against bonded labour as well as poor farmers and even children were booked under this law.

The law was repealed in 2004. Thereafter, amendments were made to the UAPA in 2004, 2008 and 2012, to include excessively stringent, unjust and undemocratic provisions. These included increased punishment for committing acts of terrorism, enhanced police powers of seizure, communication intercepts made admissible as evidence and extended periods of detention without charges up to 90 days from the original 30 days, detention without bail for up to 180 days for Indians, indefinite detention without bail for foreigners and reversing the burden of proof in many instances. The 2012 amendments expanded the definition of ‘terrorist act’ to include

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153 Ibid
economic offences, acts involving detention, abduction, threats to kill or injure, or other actions so as to compel an international or inter-governmental organization to comply with some demand.¹⁵⁶

Ujjwal Kumar Singh opines that the changes in the criminal justice system indicate a pattern whereby the coercive aspects of the state are being progressively strengthened. The arming of the state …prepares the ground for authoritarianism.¹⁵⁷ He raises concern over the fact that extraordinary law becomes a model for remapping ordinary criminal jurisprudence.¹⁵⁸ Kannabiran observes that state violence under the cover of ‘law and order’, and ‘security of the state’ has been far more extensive in scale and destructiveness than private violence.¹⁵⁹ The body of extraordinary laws, including anti-terror laws, erroneously presumes that the interests of democracy can be encapsulated into those of state security. As cautioned by Asmita Basu, the formulation of security laws must be accompanied by a hyper-vigilance about human rights and the potential for their violation.¹⁶⁰ The trend of selective use of anti-terror laws against religious minorities in Gujarat in 2002 has continued thereafter; anti-terror laws have thus become instruments through which the Muslim community is rendered suspect at all times, and violence perpetrated on it legitimized through the complicity of the state, backed by the power of law.

Against this backdrop, the narratives of human rights lawyers who conversed with the team for the study on human rights lawyering have highlighted the atmosphere of fear and insecurity created by the anti-terror laws, making the state officials more powerful and less accountable. The cases handled by them illustrate how rule of law and fair trial procedures have been subverted in law and in practice, and avenues for recourse to justice minimized. Their narratives underline the need for renewed formulation of legal strategies to effectively address the injustice caused to persons falsely accused and incarcerated under such draconian laws.

C1. Presumption of Guilt

Khan Abdul Wahab who represents the accused in several terror-related cases – made a distinction between ‘ordinary’ and ‘extraordinary’ laws such as anti-terror laws in the following words:

Handling the anti-terror cases is a very difficult and challenging task. In these cases the practical aspect is altogether different from the theoretical aspect. Theoretically,

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¹⁵⁶ For a critique of the UAPA amendments, see Avani Chokshi, ‘Reading Between the Lines – A Critique of the UAPA’, 1 March 2015, available at http://kafila.org/2015/03/01/reading-between-the-lines-a-critique-of-the-uapa-avani-chokshi/, (accessed on 6 March 2015)


¹⁵⁸ Ibid

¹⁵⁹ K.G. Kannabiran, Wages of Impunity, Orient Longman Pvt Ltd, New Delhi, 2004. p. 87

according to criminal law there is a presumption of innocence that applies. The person is presumed innocent until proven guilty. His guilt has to be proved beyond reasonable doubt by the prosecution, and even if the accused creates a reasonable doubt with regard to his guilt / innocence, he can get an acquittal. What we have found in practice is that this principle is not applied in anti-terror cases. In anti-terror cases, the police and the courts commence with a presumption of guilt. In these cases, the prosecution is expected to prove the case on the basis of a preponderance of probabilities and the accused is expected to prove his innocence beyond reasonable doubt. This is because the interpretation of the charges is so strict and harsh, and the law is vaguely worded while being stringent and draconian at the same time.

Thus anti-terror laws challenge the very fundamentals of criminal law. The presumption of innocence is the philosophical heart of the criminal laws commitment to punishment based only upon culpability. Under anti-terror laws, the question of whether innocents suffer is of no consequence accounting for the arbitrariness inherent in these laws.

C2. Fabricated Charges against Innocent Civilians

Terror attacks put enormous pressure on the police to show that they have nabbed the perpetrators. One way of coping with this pressure is to randomly pick up innocents and foist cases upon them. This has been the experience of lawyers working with suspects in anti-terror cases.

R.K. Shah provided insights into the trial in Akshardham case, on which he worked as a defence lawyer. The official version was that one attacker was killed and two fled from the scene of the crime. However none of the accused as per the chargesheet were actual perpetrators of the terrorist attack; they were ordinary Muslims who had been falsely implicated in the case, and evidence manufactured and circumstantial evidence presented that they harboured the criminals, managed the funds for the attack and provided them arms and other assistance, he said.

A total of eight persons – all Muslims – were the accused in the case. The special POTA court convicted six of the accused. Three accused were sentenced to death but not executed, one was sentenced to life imprisonment and one was sentenced to seven years imprisonment – which he has completed. There were no acquittals. The High Court heard the appeal and for confirmation of death penalty, but reserved its judgment for 1 year, after which death penalty was confirmed. Shah emphasized that the accused were all innocent, and that confession before a police officer should not be made admissible even in anti-terror cases, as it allowed for manipulation of evidence.

161 This was an armed attack on the famous temple – Akshardham – in Gandhinagar, Gujarat on 24 September 2002. Over 30 persons – devotees and tourists - were killed, over 80 persons were injured, 1 attacker was killed and 2 attackers fled from the scene of the crime according to the police.

162 The accused persons were Adambhai Sulemanbhai Ajmeri and Abdul Kayum (who had been awarded death penalty by the sessions and High Court), Mohd Hanif Shaikh, Abdullamiya Yasinmiya Kadri amd two others who were sentenced to jail terms varying between 10 years to life imprisonment by the High Court. Majid Patel alias Umarji and Shaukatullah Ghori were also charged with conspiracy to commit the crime.
At the time of our conversation with R.K. Shah, the appeal was pending before the Supreme Court. Incidentally, in May 2014, the Supreme Court acquitted all the six persons who had appealed against the High Court judgment, including two who were on death row.\(^\text{163}\) Allowing their appeals against the conviction and sentencing, a bench comprising Justices A K Patnaik and V Gopala Gowda held that their confessional statements were invalid in law, and that the prosecution failed to establish that they participated in any conspiracy, beyond reasonable doubt. The fair trial guarantees had been violated as at least 14 witnesses had been examined by the POTA court leading to convictions, without their identity being disclosed to the accused\(^\text{164}\) – hence making it difficult for them to prepare an effective defence. Two weeks after the acquittal by the Supreme Court, the POTA court acquitted two others, whose trials were pending before it.\(^\text{165}\) The acquittals are an indication of the false allegations, the partial and biased investigations and the fabricated evidence of the Gujarat police that led to the incarceration of innocent persons in jail for several years under draconian laws.

Khan Abdul Wahab, with lawyerly precision, said that it was difficult to say if the police is filing fabricated and false charges in all the anti-terror cases, but in two cases that he handled, he could say so with confidence. In the Malegaon blast for example, he is convinced that an absolutely false case was filed against nine accused persons by the Maharashtra Anti-Terrorism Squad.\(^\text{166}\) The accused persons were shown as confessing to guilt. They must have been subjected to custodial torture for extracting the confessions, he observed. Wahab’s insistence of their innocence was vindicated when the National Investigation Agency filed a chargesheet in May 2013 against four other persons.\(^\text{167}\)

Yug Chaudhry speaks of how various stakeholders in the criminal justice system collude and contribute to fabrication of charges. He said:

I dealt with the case of Suryadevan Prabhakar - a 65-year old man who was accused of planting bombs in Mumbai, a completely bogus case. The prosecution case was that he was a high-powered terrorist and 3-4 policemen with lathis went to arrest him. I asked the police in cross-examination, “You have been trained in an anti-terror squad?”, he said, “Yes”, I said, “Do you know how to apprehend a terrorist?”, he said, “Yes”, I asked, “Did you wear any bullet-proof jackets?”, he said, “No”, so I asked, “Did you requisition any arms?”, “No”, so I asked, “What did you have with you?”, he said, “We had one service revolver and three lathis”, “When was the last time you fired your service revolver”, he said, “I can’t remember”.

\(^{163}\) ‘Supreme Court Acquits All Six Persons in 2002 Akshardham Temple Terror Attack Case’, The Indian Express, 16 May 2014

\(^{164}\) Ibid

\(^{165}\) ‘Akshardham Attack: POTA Court Acquits Remaining Two Accused’, The Indian Express, 7 June 2014

\(^{166}\) A series of bombings took place on 8 September 2006 in Malegaon - a town in Nashik district of Maharashtra. The explosions, which took place in a Muslim cemetery adjacent to a mosque, killed 37 people and injured at least 125 persons.

\(^{167}\) In May 2013, the National Investigation Agency (NIA) filed a chargesheet against four accused - Lokesh Sharma, Dhan Singh, Manohar Singh and Rajendra Chaudhry.
Can you believe this? The police claimed to have seized a lot of incriminating material from him which showed that he was member of an unlawful organization - People’s War Group. I asked the investigating officer to point to one piece of incriminating evidence that was seized after the arrest. He said, “I don’t remember”. I cross examined the officer who granted sanction for the prosecution. I asked him, “Is believing in Marxism an offence?” He refused to answer the question as he knows it is not an offence in law. I asked him to point to any evidence against the man that compelled him to give sanction for prosecution. He could not show any evidence. He’s being charged under the UAPA for conspiring to commit a terrorist offence and being a member of a banned organisation. He has got six or seven other cases slapped against him in different parts of the country. Some in Gujarat, some in other places of Maharashtra, so he will die in jail. The state is not concerned with convictions. The state is concerned with under-trial incarcerations.

Sharif Sheikh - concurs with Khan Abdul Wahab, and says that there is immense public pressure on the police to arrest the culprits and to show results, due to which innocent persons are arrested. Most persons arrested in terror-related cases are Muslims, he observed. He detailed the kind of inhuman treatment meted out to the accused after arrest under anti-terror laws. In one case, the mother and sister of the accused were brought to the police station, stripped naked before the accused as a pressure tactic for signing a confession. Many accused persons are threatened that their entire family will be arrested and kept in custody, as a way of coercing the accused to sign a confession. According to Sharif Sheikh, there are two ways in which the police incarcerate the innocent persons – “they take a forced confession or they plant materials which are then shown to be recovered from the accused.” He concludes that this is so because the investigation officers have excessive powers with no system of accountability.

Yug Chaudhry points out that part of the problem is with a lack of scrutiny and independent application of mind by the trial court. He points to the Rajiv Gandhi assassination case, where 26 persons were charged under TADA, all convicted by the TADA court, and on appeal to the Supreme Court, 19 out of 26 were acquitted. It is the similar case with the Parliament attack case and Indira Gandhi assassination cases. He wonders if this is not an indication that the trial court was rubberstamping everything that the prosecution said.

Apart from the obvious human rights violations which are committed when innocent people are scapegoated, this form of police action does not even play a role in preventing crime. As Khan Abdul Wahab observed, ‘if a theft is committed in a house, and there are more thefts after that, the police waits to nab the culprit and the moment the man is arrested the theft stops. However, why is this not happening with the terrorist related cases? If, in the Malegoan 2006 blasts, you had apprehended the real author then you would have avoided the 2008 blasts, Samjhauta Express blasts, Ajmer, Modasa and Mecca Masjid. Since the police indulge in this wrong practice of arresting innocent persons, the result is that those persons commit another blast. It is because they know that they are not going to be chased.’
C3. Violation of Fair Trial Guarantees

Khan Abdul Wahab narrated the manner in which fair trial guarantees that the accused is entitled to, are systematically and deliberately eroded through a malicious prosecution and an apathetic judge. He gives an example of the Mumbai train bombing case of 2006, where he was representing five of the accused persons. He said:

When the trial commenced under MCOCA, we were served a truncated chargesheet so that the identity of the prosecution witnesses was concealed. This included eye witnesses and panch witnesses. When the trial started, we gave an application in court for disclosure of the names of witnesses, relying upon a Supreme Court judgment - Kartar Singh vs. State of Punjab – which said that before trial, the identity of the witnesses should be disclosed to the accused. The trial court allowed the application. However, we had to make the same application 2-3 times as the prosecution failed to give the names of the witnesses to the defence. Despite a court order in our favour, the prosecution repeatedly postponed the issue, saying that the matter was under consideration. They would reveal the name of the witness to us a day in advance or on the day when the witness would depose in court. This caused great hardship in preparing the defence and for cross examination of the concerned witnesses. The moment the witnesses’ names were disclosed, the accused persons sent an RTI (Right to Information application) asking for the details of the witness to be furnished. They found that the witnesses named by the prosecution had a criminal record, and were habitual and regular panchas who were used by the same set of officers in other cases. Their affiliation with the investigating officers was clear. We inferred that this must be the reason that they suppressed the names of the witnesses. We supplied the RTI information to the court. They supplied us with a truncated copy of the charge sheet but in some places they could not conceal the entire name or the entire signature of the concerned witness. So wherever the name, signature or alphabets appeared, the accused persons microscopically compared the same with the other charge sheets where the names of these individuals were

168 On 11 July 2006, a series of seven bomb blasts took place within 11 minutes on suburban trains in Mumbai. The bombs were set off in pressure cookers and planted in trains. Atleast 209 people were killed and over 700 injured. The attack is popularly referred to as the “7/11” incident.

169 Maharashtra Control of Organised Crimes Act 1999

170 Section 19 is titled protection of witness and Section 19(c) of MCOCA allows for the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed.

171 Kartar Singh vs. State of Punjab 1994 SCC (3) 569. In paras 289-290, the Supreme Court stated as follows: “Whatever may be the reasons for non-disclosure of the witnesses, the fact remains that the accused persons to be put up for trial under this Act which provides severe punishments, will be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses. Therefore, in order to ensure the purpose and object of the cross-examination, we feel that as suggested by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur, the identity, names and addresses of the witnesses may be disclosed before the trial commences; but we would like to qualify it observing that it should be subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger.”
disclosed. Using this method they constructed some of the names, so when the RTI information came out it was clear that whatever the prosecution said about these witnesses was an absolute lie. These witnesses claimed that they were owners of a taxi but that taxi never belonged to them. They claimed that they worked at a company but that was never the case. However preparing their defence was an uphill task.

The violation of fair trial guarantees in the context of anti terror cases has a statutory component as well as a basis in the reality of court practice. The statutory framework under MCOCA allows for the prosecution to ‘secure’ the identity of witnesses. However, even if the statutory framework is interpreted in the light of Supreme Court decisions, protecting the right of the accused to cross examine those testifying against him, what court room based practice reveals is that exercising that right in reality is an uphill struggle.

C4. Poor Quality of Legal Aid

Even as human rights lawyers deal with what are at most a few cases in the huge stream of litigation, the bulk of cases concerning the marginalized are dealt with by the system. One of the innovations of the system has been the development of legal aid which is an institutionalized mechanism to ensure that no person because of financial reasons is deprived of legal assistance. However this system is in need of urgent repair and presents a real challenge to the goal of ensuring access to justice to all persons.

This becomes a particular crisis when it comes to the question of trials in anti-terror cases which are crimes in which the maximum punishment which can be awarded (and is often awarded) is the death penalty.

Sharief Sheikh outlines the context of anti-terror cases in which he says that invariably the accused very often comes from very poor families and is therefore unable to bear all the expenses. Added to this is the fact that the proceedings are stretched out as the trial goes on for 2-3 years on a daily basis. Khan Abdul Wahab also concurs in the viewpoint that many of the persons arrested and accused of anti-terror offences are poor and cannot afford a lawyer. If they ask for legal aid, the court looks at the legal aid panel and appoints a person; however lawyers in the legal aid panel are not competent advocates. They are irregular in court, not punctual and cannot represent their client effectively or present the defence in a proper manner, he opined.

Particularly in anti-terror cases, poor quality of legal representation can lead to convictions and the award of a sentence of death. As Yug Chaudhry observes:

“The quality of legal representation that is given in these serious cases is appalling. In a recent case of a Pakistani terrorist who was accused of planting bombs on buses etc., no legal aid was given at the Supreme Court. A young legal aid lawyer appeared but didn’t conduct cross examination of the witnesses as he was too overawed possibly.”

172 Sec 19(c) of MCOCA.

173 See for a detailed analysis of legal aid in India, Dr Muralidhar, Law, Poverty and Legal Aid, Lexis Nexis Butterworths, New Delhi, 2001.
The Supreme Court gave a split verdict. One judge said, “rights violated- acquit”, the other judge said, “rights violated- but the remedy should be a re-trial”. It will now go to a third judge. This is a death sentence case with no legal aid. So we need people to train these lawyers. We need a whole network of lawyers who are willing to take up these cases- lawyers who are competent, who have been trained and who will train others and who will be willing to take up these cases and make effective interventions at short notice. That is what will stop executions or will prevent such miscarriage of justice. Otherwise we will continue to have people sentenced to death on very flimsy evidence.

One structural reason why legal aid will continue to be of poor quality is because the state does not see it as a priority issue. As Sharief Sheikh observed,

Though there is a legal aid board, the advocates on that panel do not have the qualities that are required in such sensational matters in which the death sentence is a likely possibility. In all these matters, the governments are appointing Special Prosecutors and are paying them Rs. 10-15,000 per appearance. For the accused, a legal aid panel lawyer will get only Rs. 1500 for the entire trial. This is discrimination and there cannot be a fair trial. If you have been appointed by the legal aid panel and you attend trial for one or two years and get just Rs. 1500 for the entire trial, will such a person work hard at such a case? The same kind of fees should be given so that the defence is also able to avail of the services of a quality lawyer.

Yug Chaudhry expressed a similar opinion:

You have to try to improve the money given to legal aid lawyers. I have just completed a study on legal aid rates across the country. So far the best model in the country is Delhi which has revised its rates. Delhi now pays Rs. 12,000/- just for the trial. In addition you have money paid for clerkage and other expenses such as photocopying and typing which are all separate expenses. In Calcutta and a lot of other places, the legal fees are only Rs. 500/-. The system has to iron out these problems to attract better talent in legal aid.

This state indifference results in confirmation of the death penalty without the accused having the benefit of availing of all options under law to question his sentence. Chaudhry outlines this in the context of the execution of Ajmal Kasab, who was one of the perpetrators of the Mumbai terror attacks in 2008.

I wrote letters to the Government that Ajmal Kasab is entitled to know that he has the right to file a mercy petition and to be given legal aid for that mercy petition, and that in law, he is entitled to it. I sent him the law and everything. I wrote letters to the High Court Legal Services Authority, State Legal Services Authority, and the government but none of the institutions did anything.174

C5. Inordinate Delay Leading to a Shattering of the Lives of the Accused

Sharif Sheikh raised concern about inordinate delays in trial and pre-trial arrest and detention. He cited the example of the Aurangabad blast case, where the accused have been behind bars for 6-7 years, and the trial is yet to begin. One of the accused—Zaweerin—in the case is an engineer and has been accused of planting the bomb. For the past 10 years, he has been in custody and charges have not been framed yet, Sharif said. Even if charges were framed, it would take a minimum of 5 years for the trial to be completed. If he is finally acquitted, Sharif Sheikh, rhetorically asks, if the state will give back 15 years of the life of the accused. He emphasized the need for an expeditious trial, and said that unlike UK, where the chargesheet is filed within a few days of the commission of the offence, in India, 180 days is given for filing charge sheet, and despite this, there is an inordinate delay.

C6. Difficulties in Obtaining a Discharge / Acquittal

Khan Abdul Wahab also opines that the only hope of getting a discharge for the accused in terror cases, is if the police concede to insufficient evidence against the accused, under S. 169 Cr. PC.\(^{175}\) He further states that getting an acquittal is extremely difficult as most of the accused do not have the resources to appeal to the Supreme Court and follow up the case till its logical end at the apex court. Till now, it is only in the Ghatkopar blast case (in which Khwaja Yunus was killed in custody), that all the accused have been acquitted.\(^{176}\) Khan Abdul Wahab said that in the Zaveri Bazar case, even though the trial court had acquitted two persons - Hasan Batriol and Ismail Lathur, the High Court insisted that they must be convicted.

Sharief Sheikh narrated in detail a case to illustrate the difficulty in getting an acquittal. In the Gateway of India blast case, Sheikh represented two of the five accused – Mohammed Ansari alias Usman Ladoowala and Mohammed Ansar Sheikh alias Hassan Batterywala.\(^{177}\) He detailed the checkered history of the litigation:

The Prosecution’s case was that the other accused, along with these two accused, hatched a conspiracy in Dubai and were executing the conspiracy and prepared the bomb in the house of Hanif (another accused). Hassan assisted him in this process and after that they exploded it in the Gateway of India and Zaveri Bazaar.

\(^{175}\) S. 169 Cr PC states: If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused.

\(^{176}\) In June 2005, a special POTA court acquitted all the eight accused persons. Those acquitted were Dr Abdul Mateen, Sheikh Mohammad Nuzamil, Imran Rehman Khan, Mohammad Altaf, Tousiq Hamid, Aarif Hussain, Haroon Rashid and Rashid Ahmed. For more details, see ‘Shoddy Prosecution Led to Acquittal of Ghatkopar Bomb Blast Case Accused?’, The Hindu, 12 June 2005

\(^{177}\) On 25 August 2003, there were twin car bombings in Gateway of India and Zaveri Bazaar in Mumbai, killing atleast 54 persons and injuring more than 240 persons. Both the bombs were planted in parked taxis.
When the prosecution filed the chargesheet there were a number of lacunae in the chargesheet... 750 grams of RDX had been planted and then shown as recovered from the house of the accused. When in police custody a confession was shown to be recorded before the DCP (Deputy Commissioner of Police). Confession was recorded of both the accused before the DCP, in which they claimed responsibility for the blast. While TADA, POTA and MCOCA allow for confession before the police to be admissible (as an exception to the general rule of non-admissibility under S. 25 of the Indian Evidence Act), POTA enacted one safeguard – that the persons making the confession should be produced before an Additional Magistrate, who would verify if the confession was given voluntarily. If it wasn’t, it cannot be used against the confessor. Both my clients appeared before the magistrate and they disowned the confession, saying that it had been obtained by threat to their family members, and that they had been forced to sign blank papers in this regard. Despite this, chargesheet was filed against these two accused. I applied for a discharge on the grounds of planted recovery and forced confession but the application was rejected.

In 2004, the POTA Repeal Act was enacted, under which the Central government formed a five member POTA Review Committee (headed by Justice Usha Mehra) to review all the cases booked under POTA. I represented the accused before the Committee, which found that no prima facie case was made out against my clients. This was in 2005. The Special Court however, said that the order of the Review Committee was not binding on it. This order was confirmed by the High Court; the public prosecutor refused to withdraw prosecution under S. 321 Cr PC, so I appealed to the Supreme Court. My appeal was clubbed with 25-27 other Special Leave Petitions, which were on a range of issues related to POTA. The Division Bench which heard the matter referred it to the Constitutional Bench, which finally passed the judgment in 2009, stating that the Review Committee’s decision is binding on the courts. At the time when the order of the Review Committee was received one witness was being examined and the time when the judgment of the Supreme Court was given, the last witness i.e. witness no. 103 was being examined. By the time, I received the order from the Supreme Court the accused were acquitted. The story does not end here... The state government then filed an appeal challenging the order of the Review Committee before the High Court. The High Court set aside the order of the Review Committee stating that there was no application of mind. A direction was given to my clients to surrender before the Special Court. I again filed a Special Leave Petition before the Supreme Court and obtained a stay over the High Court order. This is the saga in just one case.

In this case, it appears that the prosecution and the courts were determined to convict the two accused, even if there was evidence of planting of recovery articles (RDX), a forced confession and no prima facie evidence against the two accused persons.

This case presents a microcosm of the way anti-terror laws work and raises the very difficult question of what is the strategy that human rights lawyers can adopt in these cases. Clearly conventional legal remedies such as bail and discharge are not options
for those accused under these laws. The only legal option is to go for a speedy trial, with quality legal representation which can ensure that the accused emerges innocent. However even this is not always a remedy as the police are quick to implicate the person in other terror related cases. The long term solution to the problematic of anti-terror laws is repeal of these laws. Hence while human rights lawyers have to defend their clients to the best of their ability in spite of the system being completely loaded against them, what is required is a systematic campaign which exposes the arbitrariness inherent in these laws and demands repeal of these arbitrary and unconstitutional laws.

D. COUNTERING DEATH PENALTY

As India continues to stand in favour of the death penalty, it is increasingly finding itself in the margins of world politics and international standards on this issue. Around 140 out of 193 member states of the UN have outlawed the death penalty in law or in practice. The Rome Statute establishing the International Criminal Court prescribes life imprisonment for some of the crimes considered most serious under international law - crimes against humanity, genocide and war crimes.

India’s retentionist position is based on many erroneous presumptions such as

- that death penalty would be a deterrent for serious offences;
- that the death penalty is awarded only in the “rarest of rare” cases; and
- the necessary procedural safeguards exist for a fair trial.

However in reality, all these three grounds stand hollow. The “rarest of rare” principle, formulated by a Constitutional Bench of the Supreme Court in 1980 in Bachan Singh’s case, has allowed for a great amount of subjectivity of the judges as well as social and political prejudices, leading to errors, inconsistencies, ambiguities, confusions and uncertainties – those very things that a law is not supposed to do. Despite the illustrative list of aggravating and mitigating circumstances given in Bachan Singh’s case, judgments are not centered on principles and are judge-centric. The Supreme Court articulated the legal uncertainty and the need for a fresh look in Sangeet’s case (2012). However, it stopped short of referring it to a larger Bench, even though it was competent to do so.

A study by the National Law University – Delhi highlights the fact that an overwhelming majority of the convicts on death row are from backward castes, dalits and minorities; most of them are actually first-time offenders and not habitual offenders as is widely believed; most of them were convicted on the basis of recoveries arising out of confessions in a police station (such confessions are inadmissible as evidence in a court of law); that over 80 per cent of them were tortured; and virtually all of them are poor.

178 ‘Rethink the Death Penalty’, The Hindu, 3 November 2014
180 Sangeet and Another vs. State of Haryana AIR 2013 SC 447: 2013 (2) SCC 452
182 ‘Most Death Row Convicts are Poor’, Uttam Sengupta’s interview of Anup Surendranath, Outlook, 15 December 2014
In arguing against death penalty, K. Balagopal states as follows:

For every crime that is committed, society carries some responsibility as well as the individual who has committed it. Society has created the conditions that impel or motivate the person to commit the crime. It is therefore partly responsible for it, along with the individual who has intentionally taken the decision to commit the offence. Punishment, therefore, should not hold the individual fully responsible for the crime. This is precisely what Death Penalty does.\(^{183}\)

The execution of Ajmal Kasab in a top secret operation and Afzal Guru in stealth, are acts whose legality were gravely questionable.\(^{184}\) On Afzal Guru’s death, Arundati Roy says “a man whose guilt was by no means established beyond reasonable doubt was hanged.”\(^{185}\) As observed by Usha Ramanathan, secret executions seem to have acquired the status of state practice.\(^{186}\) The questionable use of the death penalty was further buttressed by arbitrary execution of Yakub Memon on 30.07.15, who was convicted for having been involved in the 1993 bomb blasts in Mumbai.\(^{187}\)

The clamour for death penalty reached the highest pitch after the rape and murder of a young woman on a moving bus in Delhi in December 2012. The Criminal Law Amendment Act 2013 introduced death penalty for certain sexual offences. Arvind Narrain juxtaposes the judgment in 16 December rape case - where death penalty was awarded based upon the depravity of the offence and the “collective conscience of society”, with the Naroda Patia judgment. The judgment in the latter case – which involved mass rapes and murders of Muslims – categorically rejects the retributive logic and opted for a graded system of life imprisonment commensurate with the degree of culpability of various accused persons.\(^{188}\)

In short, there is, in the resurgence of the death penalty, a lack of respect for life, for the law and for procedure established by law.\(^{189}\) As a part of the study on human


\(^{184}\) Ajmal Kasab was the lone convict of the Mumbai terror attacks of 26 November 2008. The trial court convicted him and awarded him death penalty in May 2010, which was upheld by the Bombay High Court in February 2011 and the Supreme Court in August 2012. He was executed in a secret operation on 21 November 2012. Afzal Guru was convicted and awarded death penalty for his role in attack on the Indian Parliament in December 2001. On 3 February 2013, his clemency petition was rejected by President Pranab Mukherjee, following which he was secretly hanged on 9 February 2013.


\(^{186}\) Usha Ramanathan, ‘The Disturbing Truth About an Execution’, The Hindu, 13 March 2013

\(^{187}\) Supreme Court allots less than five minutes to Yakub Memon’s final appeal of his death sentence, http://scroll.in/article/742396/supreme-court-allots-less-than-five-minutes-to-yakub-memons-final-appeal-of-his-death-sentence (accessed on 25.08.15)


Breathing Life into the Constitution

rights lawyering, an extensive interview was undertaken with Yug Mohit Chaudhry – a criminal lawyer practicing in the Mumbai High Court, who has been passionately engaged with the issue of death penalty. Some of the key issues which arise when one is lawyering on behalf of those on death row are highlighted by Yug Chaudhry:

D1. **The Torture of Being on Death Row**

Yug Chaudhry articulates the agony of what it means to know that one is under a sentence of death:

After having lived for ten years under the shadow of a noose, not knowing which moment will be his last, when every man passing by the prison door may be the harbinger of bad news, not knowing when the letter for his date will come, and then suddenly to be told “in seven days, you are going to be executed!” How much cruelty will we inflict on our own people? This punishment is a punishment far worse than death. It’s a daily death. The Government of India files an affidavit in the Supreme Court saying “they should be grateful to us for keeping them alive for ten years. We have done them a favour, they shouldn’t complain”. The government doesn’t seem to have any sense of institutional morality. There is no one to hold the government accountable.

D2. **Miscarriage of Justice**

One of Yug Chaudhry’s strong arguments against the death penalty is not just that there is the possibility that justice may be denied, but rather that miscarriage of justice has happened with deathly consequences in the past:

There are many cases of grievous miscarriages of justice. There was one in which 14 prisoners were sentenced to death. In 2009, the Supreme Court admitted for the first time that those cases were wrongly decided. In 2010, a different bench of the Supreme Court reiterated it. In 2011 a third different bench of the Supreme Court reiterated that all those judgments were wrong. But these prisoners are still on death row! The cases are overruled on a point of law. Of the 14 prisoners, 2 are already executed. The admission of error has come too late for them. Out of the 14, around 11 were litigated by legal aid lawyers. It is not as though this issue has not come into the public domain. An entire issue of Frontline was devoted to this topic. 14 judges wrote to the President saying that these people should not be hanged. The letters were released to the press. It was given decent press coverage but these guys are still on death row. What does it say about us? If you see the kind of people who are being executed- people like Mahendranath Das (truck driver), Dhananjoy Chatterjee (watchman), Surja Ram, Rayji, Kasab – they have all been defended on legal aid, they are all Dalits, Muslims, from poor and underprivileged sections of society.

D3. **Double Standards and Disproportionate Award of Death Penalty**

The arbitrariness inherent in the death penalty is evidenced in how sentences with regard to death penalty are given out by courts across the country. As Yug Chaudhry succinctly put it:
There are two recent judgments on the death penalty - Naroda Patia and Kasab. What was the difference? Is there a qualitative or quantitative difference in the crimes committed in these two cases by Babu Bajrangi and Maya Kodnani, and Kasab? They have both killed a huge number of people; possibly Bajrangi and Kodnani killed in a far more brutal way, while Kasab just shot. Kodnani was a government representative and had the duty to protect the very people who were attacked. This made for far more aggravating circumstances than in Kasab’s case. Kasab was an enemy alien. If Bajrangi and Kodnani don’t deserve the death penalty, then why does Kasab?

D4. On the Linkage between Anti-Terror Cases and Death Penalty

Yug Chaudhry points to the link of anti terror cases to the death penalty:

In every anti-terror trial that takes place, we have the trial court acting like a rubber stamp for the prosecution. Due process is the biggest casualty. I am currently doing an appeal related to the 2006 Train Blasts. In this case, the police arrested 13 people saying that they were members of SIMI. The 13 persons were accused of conspiring together and planting the bombs. The police seized their phones and filed remand reports in the Court saying that the call detail records (CDRs) show that these people were in touch with the Lashkar-e-Toiba in Pakistan, that they conspired and prepared for the bomb blasts and that they were sending people to terrorist training camps in Pakistan. The prosecution kept repeating this in the remand reports till the last remand report. Six days after the last remand report, the charge-sheet is filed and the phone records were not in the charge-sheet. The accused filed an application asking for a copy of the call records. The prosecution refuses to provide the same, saying that they are not relying on it. The accused filed an application asking for the call records, stating that these records show that they were elsewhere at the time of the blasts and that we were innocent, and fear that the records would be tampered with. The Court rejected six such written applications. Finally, I filed an appeal in the High Court. For the first time in the High Court the prosecution filed an affidavit stating that they had destroyed the records. For six years during the trial, they didn’t say they destroyed them. I asked the judge, “Did they destroy them after I filed the appeal?” Is this a fair trial?

In the same case, in the neighbouring courtroom, where members of the Indian Mujahideen are being tried, for having committed various bomb blasts, the police has recorded their confessions of guilt and filed those confessions, and chargesheets based on the confessions in court. Those confessions state that they were involved in the same train blasts (for which SIMI activists are being prosecuted). In the SIMI case, the accused filed an application asking to lead evidence in the next courtroom. The

190 On 11 July 2006, a series of seven bomb blasts took place within 11 minutes on suburban trains in Mumbai. The bombs were set off in pressure cookers and planted in trains. Atleast 209 people were killed and over 700 injured. The attack is popularly referred to as the “7/11” incident.

191 SIMI is the Student Islamic Movement of India is a student organization, that was formed in 1977 and banned by the Indian government in 2001
Court rejected it saying that the accused cannot prove that somebody else did it; they can only prove that they are innocent. If these people are convicted, they will be sent to the gallows. They are clearly innocent.

So in death penalty cases, which usually deal with serious crimes, the Court is under immense pressure and usually rubber stamps the prosecution’s case and the State’s conduct is abominable. It is these cases where they end up in death penalty after such shoddy prosecution and trials. Look at the issue involved - it is not just death penalty; it is about civil liberties, fair trial and institutional integrity. Can the state be allowed to come up with two contradictory statements in two neighbouring court rooms? Can the state be allowed to destroy evidence? Even the phone companies do not keep records after 7 to 8 years, so how do I prove their innocence if they say they have destroyed their records? The media is also unsure about how much they can really report. The Inquilab and other Urdu newspapers report a lot more, but only a minority reads them.

As a strategy, if one works on terrorism issues, one will be working on death penalty because every anti-terror case one works on will end up in death penalty, so we can try and nip it in the bud.

D5. Juveniles on Death Row

One of the problems with respect to death penalty, is that even if the law prohibits a person from being put to death, yet the person is on death row. This paradox is highlighted by Yug Chaudhry in the context of juveniles and the death penalty. As Yug Chaudhry put it:

The Juvenile Justice (Care and Protection of Children) Act 2000 prohibits death penalty from being imposed on individuals who were juveniles at the time of the crime. However, there have been several cases of juveniles on death row. For example, Ankush Maruti Shinde was a juvenile who was convicted of rape and murder, and was on a death row. The Nasik Sessions Court declared him to be a juvenile after he had spent more than nine years in prison, six of which were spent in a solitary cell as a death-row inmate – in violation of the law. In this case of gross miscarriage of justice, the death penalty awarded to the juvenile was confirmed by the Supreme Court, and the clemency petition to the President rejected, without any of the institutions1/officials confirming the age of Ankush at the time of the offence. In the case of another juvenile, Ramdeo Chauhan who was convicted of murder and sentenced to death in 1998, the gross miscarriage of justice was set right by the Supreme Court after 12 years, in 2010.192 The Supreme Court upheld the grant of clemency by the Governor of State of Assam in accordance with a recommendation by the National Human Rights Commission, acknowledging NHRC’s wider role for promotion of human rights.193 These cases are discussed in further detail in H 1 below.

192 Ramdeo Chauhan @ Rajnath Chauhan vs Bani Kant Das & Ors, judgment of the Supreme Court on 19 November, 2010, decided by Justices Aftab Alam and A.K.Ganguly in Review Petition (C) No. 1378 of 2009 in Writ Petition (C) 457 of 2005
193 For further details, see http://www.hrln.org/hrln/child-rights/pils-a-cases/693-supreme-courtacts-to-prevent-travesty-of-justice.html#ixzz3XKuJMc7, (accessed on 15 April 2015)
D6. Strategies in working against the death penalty

While the case against the death penalty is clear, when it comes to strategies which can be employed? As Yug Chaudhry put it:

For Govindaswami’s case, PUCL in Tamil Nadu did a home study. The day before his execution, they went in procession to the President and got the execution stayed. It is heroic work! They lobbied and built up public support to finally get the death sentence commuted by the Government. It takes so much for one case that you can only adopt one case. I have no doubt that if other groups took up such cases, they would be equally successful. This is the kind of work that other groups should emulate...

I usually get information about death penalty cases at critical stages, not at the trial or High Court stage. Not even at the appeal stage in the Supreme Court. I usually get it when the Supreme Court has rejected the appeal. At that stage what is required is not so much of legal work. Most of the time it is letter campaigns, writing to Parliamentarians, to the Government - it is labour-intensive work.194 There is no way I can do this on my own. Everybody is sympathetic to the idea and will wave the flag of abolition but this issue is nobody’s child.

There are two aspects to work on death penalty. One aspect is that because it’s a matter involving law, there has to be massive litigation. For people on death row, one has to stop their executions and get their mercy petitions done properly. The other aspect is campaigning with people, with the government and with international bodies. Are we prepared to have executions resuming? Do we want to live in a state which is going to be executing people?

Let me give you an example of what stopping the execution means. I had just come back from a vacation, driving home from the airport. I received a call that the President had rejected the mercy petition of Mohendranath Das. I went straight to my office, drafted a writ petition, and contacted some lawyers in Assam, sent it there for filing. The execution date was set. The date of execution was the date that I would be reaching Assam for the hearing. My flight was slightly delayed and the hangman was on his way to Guwahati by train. I reached Guwahati before his train did. I rushed to the High Court and found that there was no Bench sitting that day. There were only single judges and this matter can be heard only before the Division Bench. So this matter can come up only the next day by which time the execution would have taken place.

The lawyers rushed into the chamber of the Chief Justice and asked him to constitute a Bench. A bench is constituted at 3pm and at 4pm a stay is granted. The train had not yet reached. This is how close it was. You can imagine the kind of stress involved in this work. It is a nightmarish situation! One wouldn’t want to ever take up such a case because if the person is hanged, how will one come to terms with it? In terms

194 See for example Yug Mohit Chaudhry, ‘Don’t Hang Him, Give Him a Chance to Atone Citizens’ (Letter written by Yug Chaudhry to the President to commute Kasab’s death sentence), The Indian Express, 22 November 2012 and Yug Mohit Chaudhry, Why Balwant Singh Rajaona shouldn’t be hanged, The Hindu, March 29, 2012
of priorities, in my mind, death penalty should be the top-most human rights issue. When you talk of violation of rights by the state, what greater violation can there be than to kill somebody?

D7. The Importance of Research on Death Penalty

What Yug Chaudhry demonstrated is that litigation with respect to the death penalty is unfortunately only reactive in nature. If one were to file a challenge to the constitutionality of the death penalty, one needs an adequate body of sociological and criminological data and research. As Yug Chaudhry put it:

Three consecutive challenges to death penalty in the Supreme Court were rejected because there is no empirical data or research corroborating the petitioner’s claims. Once Kasab is executed, the initial reluctance for executions will be gone. Already there were executions slotted for last year that we managed to stop- five or six of them. There were so many in the pipeline. We need more research; we need a lot more thinking and talking about this. We need more visibility… We are just not ready in terms of research and preparedness for such a challenge.

The last major challenge was Bachan Singh in the 80s and Shashi Nair in 1996. In terms of time being right, it is right. As 15 to 20 years is enough time to file another challenge. The last challenge to hanging as a mode of execution was in 1982. If you get hanging struck down, everybody sentenced to death gets a reprieve because the Government will have to change the punishment in law and that punishment cannot be applied retrospectively so you would get everybody off and you would start with a clean state. The last challenge was in the 80s, so 30 years have passed. A lot can be done but there is just no research. There is no data to support us.

D8. The importance of a network

Yug Chaudhry articulated the problems of working alone and hence the need for a wider network:

I just drop whatever I am doing and go. There are people now in different parts of India who will call me if there is a death sentence case. The local people help a lot with the legwork. But it differs from case to case. For example in the Rajiv Gandhi case, since it was a political and emotive issue, many lawyers from Tamil Nadu supported.195 But for Mahindranath Das’s case in Assam, PUDR helped – with an intervention in the Supreme Court when I needed a third party to make arguments that I could not myself make.196 However, in Assam, there was nobody to help me on the ground. It

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195 The erstwhile Prime Minister of India - Rajiv Gandhi – was assassinated through a suicide bombing at Sriperumbudur in Tamil Nadu in May 1991. 26 persons were accused in the case – all of them were convicted by the Trial court, but on appeal, 19 out of the 26 persons were acquitted, four accused sentenced to death - Nalini Sriharan, Santhan, Murugan and Perarivalan . Nalini was later given clemency.

196 Mahendra Nath Das was convicted of two murders under S. 302 of Indian Penal Code. He killed a man, Rajen Das, in Guwahati in 1990 and surrendered. On April 24, 1996, while he was on bail, he beheaded Harakanta Das in Guwahati and surrendered with the victim’s head. Das was sentenced to death in 1997. The penalty was confirmed by the Gauhati High Court in February 1998.
is difficult for local lawyers to stop what they are doing and suddenly take up these cases.

When I needed its help, PUCL helped me get the endorsements of more than 5-6 of the 14 judges who signed on the petition.\(^{197}\) I network with other lawyers working on death penalty. For example, Navkiran Singh in Chandigarh, Punjab; Ram Jethmalani at the Supreme Court level; Vrinda Grover and Rebecca John for trial court work in Delhi; Usha Ramanathan – a law researcher...

However death penalty is nobody’s child. Every organization has its own commitments and core interests. Death penalty doesn’t feature as one of them.

**Post script**

The concerted efforts of Yug Chaudhry and several other civil liberties and human rights advocates and activists across the country have resulted in some positive developments in 2013-14.

On 1 May 2013, the death sentence for Mahindra Nath Das was commuted to life imprisonment as his mercy petition had been rejected by the President after a 12 year delay (from 1999 to 2011), on the ground of inordinate delay and mental trauma caused due to the same.\(^{198}\) In January 2014, a three-judge bench of the Supreme Court commuted the death sentence of 15 death row convicts in *Shatrughan Chauhan vs. Union of India* case, to life imprisonment.\(^{199}\)

In February 2014, the Supreme Court commuted the death penalty to three accused persons – Santhan, Murugan and Perarivalan - in Rajiv Gandhi assassination case to life imprisonment, based on an 11 year delay in deciding their mercy petitions.\(^{200}\) In March 2014, the Supreme Court commuted the death penalty to Devinderpal Singh Bhullar to life imprisonment, in view of the inordinate delay of eight years in deciding the mercy petition as well as his mental illness.\(^{201}\)

In September 2014, a five judge bench of the Supreme Court, headed by Chief Justice R.M.Lodha, reworked the norms for death penalty cases, to ensure transparency, greater public participation and closer scrutiny. This includes the requirement of three judge

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197 For more details, see Manoj Mitta, ‘9 Death Penalties Wrongly Imposed: Ex-judges to President’, The Times of India, 19 August 2012

198 For more details see ’12 Year Delay Gives Life to Death Row Convict’, The Hindu, 1 May 2013; Mahindra Nath Das vs. Union of India and Others, judgment of G.S.Singhvi and S.J.Mukopadhyay of the Supreme Court dated 1 May 2013 in Criminal Appeal No. 677 of 2013, arising out of Special Leave Petition (Criminal) 1105 of 2012.

199 (2014) 3 SCC 1. Also see ‘Supreme Court’s Judgment on Death Penalty a Humane Approach’, Live Mint, 22 January 2014

200 V. Sriharan v. Union of India, http://indiankanoon.org/doc/103202517/ accessed on 15.05.15. Also see ’Supreme Court Commutes Death Penalty of Rajiv Gandhi Killers to Life Term’, The Times of India, 18 February 2014

201 Devender Pal Singh Bhullar v. State (NCT) of Delhi , (2013) 6 SCC 195 . Bhullar was convicted and awarded death penalty for triggering a bomb blast in New Delhi in September 1993, which killed nine persons and injured 25 others.
benches to decide all death penalty cases (as against a division bench prior to the judgment), hearings in an open court (as opposed to the judges’ chambers) and permission to media to cover the proceedings.\footnote{Mohd Arif and others v. Registrar, www.supremecourtofindia.nic.in/outtoday/WR7711.pdf (accessed on 15.5.15) Also see ‘Supreme Court Reworks Norms for Death Penalty Cases’, Live Mint, 3 September 2014}

In January 2015, the death penalty awarded to Surinder Koli, convicted in the Nithari killings of 2006, was commuted to life sentence, by the Allahabad High Court.\footnote{PUDR v. Union of India, http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do (accessed on 15.05.15) Also see ‘Surinder Koli’s Death Sentence Commuted to Life’, The Hindu, 28 January 2015.}

\section*{E. CONSOLIDATING WOMEN’S RIGHTS IN MATRIMONIAL LAW}

The binary concepts of public and private spheres opposing each other, both in law and in society, negatively impacts women’s enjoyment of human rights. This is particularly so in case of the harm done to women through domestic violence, as well as when women seek to assert their rights within the framework of matrimonial relations. The Convention on Elimination of all Forms of Discrimination Against Women makes a radical shift and brings nuances into the dichotomy, by making the state responsible for violence perpetrated, not only in the public sphere, but also in the private sphere, if it fails to prevent, investigate, prosecute, punish offenders and provide reparative justice for the victims / survivors. The CEDAW Committee, through General Recommendation 19, has emphasized state responsibility for violations by private actors in the following words:

States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.\footnote{http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (accessed on 15.09.15)}

The UN Special Rapporteur for Violence Against Women has emphasized the development of a comprehensive framework that would move beyond the public-private dichotomy, within which the crime of domestic violence is often caught. Her observations are as follows:

The rhetoric of public versus private and the consequent primacy afforded to the public realm has fundamentally affected perceptions of women’s rights. In distinguishing certain forms of violence as domestic violence, definitions have arisen out of the original conceptualization of such violence as private acts within the family. However, an inflexible definition of domestic violence, focusing solely on private actors, legitimizes the public/private dichotomy. This construction has continually been challenged and critiqued by women’s human rights activists, not least because it neglects a gender-specific dimension.\footnote{Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, U.N. Doc.E/CN.4/1996/53, 5 February 1996, para 26}
The gender relations within a family / matrimonial relationship are influenced by patriarchal values. Much of the absence of effective implementation of laws and lack of a positive response from the judiciary that is favourable to women, arise from a misplaced understanding that the private sphere of the home warrants no legal intervention. Hence, transcending the public-private dichotomy is a challenge that is particularly pertinent for human rights lawyers engaging with matrimonial law.

While the public private dichotomy is key to feminist lawyering, the Indian context has several other layers. Despite the constitutional guarantees of equality, the complex religion specific set of laws that are specifically applicable to each religious community in India with respect to rights within marriage, rights upon divorce and related issues (such as custody, guardianship, adoption, succession and inheritance) still have gender discriminatory provisions, despite many decades of efforts by the women’s movement and other concerned activists.206

While the laws applicable to Hindus have undergone amendments over the last six decades, gender-discriminatory provisions continue to exist, particularly on issues of guardianship and adoption. The Muslim community has a distinct set of issues as it is governed by a set of laws, a substantive portion of which remains uncodified. Although there are various landmark judgments of the higher judiciary that are beneficial to Muslim women’s matrimonial rights, gender-discriminatory practices continue to exist at the ground level.207 Matrimonial laws applicable to Christians underwent a set of reforms in 2001 - a culmination of decades of deliberations between women’s rights activists, the Christian leaders and the policy makers. The amendments incorporated current norms of gender equality into the archaic Indian Divorce Act which governs the Christian community in India.208 Inroads have been made through piecemeal legislations such as The Protection of Women from Domestic Violence Act 2005, which seek to protect women across all religious communities.209 Family courts were established through The Family Courts Act 1984, to promote speedy and amicable settlement of disputes related to marriage, divorce and related issues through non-adversarial processes. However, it has been pointed out that the functioning of Family Courts leaves much to be desired; the system lacks the trust of the majority of justice seeking population regarding its capability to provide a fair and just forum for handling family disputes.210

208 For more details see Flavia Agnes, ‘Political Reformulation of Christian Personal Law’ in Flavia Agnes Law and Gender Inequality, New Delhi: Oxford University Press, 2001. pp. 141-166
209 For more details of the campaign that led to the law, and what the law was intended to do, see Indira Jaising, ‘Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence’, Economic and Political Weekly, Vol. XLIV, No. 44, October 31,2009.
While women’s rights groups have advocated for pluralism and gender equality within all matrimonial laws, the Bharatiya Janata Party and Hindu right wing groups in India have advocated for a Uniform Civil Code on grounds of ‘national integration’ and conflated the same with women’s rights. Nivedita Menon highlights four features of the current debate on the UCC within the women’s movement:

a) The dropping of the term ‘uniform’ as a positive value from the debates within the movement;

b) A stronger interrogation of the assumed heteronormative family;

c) The need to reconceptualise all intimate relationships in contractual terms that protect all the women living in them; and

d) The question of women’s equal rights to property may need to be reformulated.

Another major challenge faced with regard to women’s rights is the propaganda around misuse of law and harassment of men by women. Increasingly, groups such as ‘Save the Family’ and other such groups, aggressively project men as the victims and women as the harassers, and are claiming increasing space in the political discourse to speak of men’s rights, men’s helplines and a demand for a men’s commission.

A practice of matrimonial law, from a women’s rights perspective, is grounded in this historic, legal and political context. As part of the study on human rights lawyering, lawyers practising matrimonial law and advancing the rights of women were interviewed. B.S.Ajitha provided insights into matrimonial law practice in Chennai, and the unequal power dynamics between men and women that often plays out in their relationship, in courts and elsewhere. Geeta Ramaseshan finds matrimonial law a very fascinating branch of law, as she is able to challenge the boundaries of the institution of marriage and all that it stands for, and to negotiate for women’s rights within the framework of law. Advocates Flavia Agnes and Veena Gowda shared their experiences of practicing matrimonial law in the courts of Mumbai, while Sophia Khan spoke of her work in empowering Muslim women in Gujarat. A summary of the problems faced and strategies used by them are presented below:

E 1. Judicial Stereotypes as a Barrier towards Gender Justice

From B.S. Ajitha’s experience with the Family Courts in Chennai, she speaks of the power dynamics between the man and the woman in a marital relationship, and the response of the courts to the same. She says:

Men have more strength and vigour to fight these cases, based upon their strength in society by way of their economic status, social status and their influence over other authorities. They want to fight the case tooth and nail... And the courts can


only conform to the law, so they do not see between the lines, they remain blind to the power dynamics and they become hyper-technical. Judges adopt hyper-technicality as a way of showing that they are unbiased – this way they can project themselves as protectors of women, which they are not actually. By being technical they empathize with men, as they feel that the women are well-placed and do not deserve legal interventions …the judges’ perspective is also to protect the family (this is a stated objective in the Family Courts Act). When a woman fights for a morsel of food or for an abysmal level of survival rights, the courts tend to pass favourable orders as benevolent and patronizing patriarchs, and project themselves as great protectors of women’s rights. However when a woman appears strong or educated, and asserts for equal status and dignity within marriage or upon divorce, the courts’ attitude turns against the women.

Veena Gowda echoes the same opinion, when she says:

When there is obvious violence, the case is easier as the system works for you. However, when middle class and upper middle class women assert their right to dignity and equality, they indirectly challenge certain patriarchal values and moral standards of the judge too. The do not fit into the framework of a perfect victim.

Thus it is easier to get a relief if the woman conforms to a patriarchal stereotype of being a dependent woman who can then be ‘protected’ by the judge. The challenge that feminist legal practice faces is on how does one challenges this judicial stereotype of an ideal woman while at the same time delivering relief to ones client?

E 2. Contending With the Public-Private Dichotomy

The key problem faced by feminist lawyers is to goad the system into taking the violence suffered in the domain of the private seriously.

B.S. Ajitha spoke of a woman client who has been undergoing blatant emotional and sexual abuse for the past 7-8 years. She is a graduate in engineering, an e-publisher, a forerunner in the e-publishing field and a thorough professional. She asked her husband, a computer engineer, to set up her business from home so that she could do the e-publishing work through her computer. After some days, she realized that he came to know her business partners and spoil her business with them, and he seemed to know, in detail, of all that she did at work. Subsequently she found out that the internal wiring of her computer was routed to the motherboard of her husband’s computer, so all her work and emails would be directed to his computer, and her computer system was being controlled by his. As his harassment continued within marriage, she was driven into depression, had suicidal tendencies and then consulted a feminist psychiatrist for counseling. After several sittings, and recovering somewhat, she wrote emails to the psychiatrist, stating that “I feel so happy when I talk to you, I feel like holding your hands for all that you have done for me”. Ignoring the fact that these words were an expression of friendship and gratitude, her husband accessed these emails and alleged that she was involved in a lesbian relationship with the psychiatrist. The woman has also been claiming the custody of the 13 year old daughter born in wedlock. In a
conversation that the woman had with her daughter, she told the daughter that her friends were holding a New Year party, and that all her women friends, including the psychiatrist, were going to participate in the same. She further told the daughter not to divulge this to the husband as he would get troubled about it. The woman stated that the husband has repeated to the Protection Officer, verbatim, what the woman spoke to the daughter in her bedroom, and projected it as the woman tutoring the daughter and compelling her to lie. She came to know that her husband has placed a hidden recorder in her room, and that her conversations are being recorded on CDs, and will most likely be presented to the judge to show her as a ‘bad mother’. The husband’s mother lives with them, and keeps provoking her, and when she gets provoked, that is recorded to show the woman’s personality in poor light.

In this case, B.S. Ajitha opines:

[W]e are not just fighting a legal battle; we are fighting against a system, we are fighting against prejudices against women... The woman has been taking anti-depressants for the past three years, and he has access to all the medical records and confidential communication between the doctor and her. When all of this is going to be shown to the magistrate, he is likely to dismiss her complaint of domestic violence. If her application for custody gets turned down in court due to her history of depression, it will only lead her to deeper depression and possibly even suicide.

Veena Gowda spoke of a woman who had filed for restitution of conjugal rights in the family court (for obtaining a direction from the court for her husband to return to the conjugal home). She was a very poor woman who could not afford to pay the professional fees of a lawyer. A lawyer agreed to represent her in the case, and said that in exchange, she could work with him. She agreed. During work, he forced himself on her sexually, and she became pregnant and had a child. Meanwhile, he settled her case, and obtained Rs. 40,000 from the husband as compensation, and started living with the woman. When the child was 4-5 years old, the lawyer had a sexual relationship with another junior and dispossessed Veena Gowda’s client. Veena Gowda asked for remedies under the Protection of Women from Domestic Violence Act (PWDVA) stating that the relationship was in the nature of marriage. She also filed a case of sexual harassment in the Bar Council, and a maintenance petition in the Family Court. The lawyer issued a cheque to the woman by way of settlement but the cheque bounced, so one more case was filed for cheque bouncing. The PWDVA case came up in the magistrate’s court in Kurla, where he practiced. But by this time, he had stopped paying any money and had stopped going to court. No positive orders have been possible despite the multiplicity of litigation, she said.

The challenge articulated by both B.S. Ajitha and Veena Gowda, is that the deep violation which is perpetrated in the domain of the private is not taken seriously by the system. The call is really for a rethinking of the public-private dichotomy such that the violence in the zone of the private (including abuse which takes emotional, physical and sexual forms) is taken as seriously as violence which is perpetrated in the public
E3. Dealing with Matrimonial Law Cases in the Pre-Family Court Era

The Family Courts Act was enacted in 1984 with a view to promote conciliation in, and secure speedy justice of, matrimonial disputes. Justice Hosbet Suresh – a retired judge of the Mumbai High Court - was a judge of the city civil court in Mumbai, in the early 1980s. He spoke about how he dealt with matrimonial matters as a city civil court judge:

When matrimonial matters came up before me, the City Civil Court had civil jurisdiction, criminal jurisdiction and matrimonial jurisdiction in those days. A judge who was good in law would always be given civil work since it was more complicated. A judge who would not be very good in law was given criminal work since it was easy [and based] on facts and a judge who would be absolutely neither here nor there would be given matrimonial work. There was a provision under matrimonial law that court should attempt to reconcile the parties. What we would normally do is call both the husband and wife, talk to them nicely, give them parental advice and tell them not to fight. If they do not agree then we would say reconciliation not possible, make a negative report and keep the matter aside for trial. We had one judge at that time who was a bachelor. When matrimonial matters came before him, he would direct the wife to go and stay with the husband for three months and come back and report to him. He had no idea what he was doing. It was around January 1980 to April 1980 when I dealt with these cases... I was the senior most judge at that time and I, myself, asked for matrimonial work. When such matters came before me, for the first time in the country I introduced marriage counseling. I contacted Tata Institute for Social Sciences and nine women’s organizations in the city. I referred parties to them. In a situation where the parties confessed to their mistakes before the counsellor and subsequently were unsuccessful in the amicable settlement of the matter, what was the evidentiary value of the confession. Could we admit it in court? I had to think of all these scenarios but it worked. Family courts were only introduced four years after this. In that period from January to April 1980 I settled around 80 matters through marriage counseling.

E4. Procedural Delays and Hardship Caused to Women

In B.S. Ajitha’s opinion, when the case remains pending in the Family Court for a prolonged period of time, women litigants suffer relatively more than the men due to their poor financial status, coupled with a lack of social and family support. Veena Gowda too opines that the Family Courts have become extremely procedural and technical, which they were not intended to become, when they were first established. However, she cautions that an emphasis on speedy trials, could also adversely affect the quality of the trial

E 5. The Problem of Implementation of Orders

Veena Gowda said that for poorer women, an issue that plagues them is the difficulty in implementation of the law and execution of favourable orders of the court. She spoke of her experience in Reshma’s case which she handled. Reshma had been so severely
assaulted by her husband that she sustained a fatal injury to her backbone, which has crippled her. Her husband earns well, so she asked the court for a maintenance amount of Rs. 15,000 a month. The court granted the entire amount, but the husband refused to pay. A further application was made in court, asking for arrears and for execution of the maintenance order. For defaulting payment, the normal practice is that judges award a one month imprisonment to the husband. In this case, ten months’ imprisonment was awarded. The husband wrote taunting letters to Reshma from the jail, but did not pay any maintenance. After he was released from jail, Reshma has not been able to trace him, and hence the positive maintenance order from the court has become infructuous in reality.

E6. Asserting Rights of Muslim Women

As noted above, Muslim women face the specific challenge of working with uncodified law. In such a context, as Veena Gowda observes, a lot of the legal work centers around using those legislations which apply to Muslim women as well. Sophia Khan notes that there are Supreme Court judgments which have enhanced the rights of Muslim women, unfortunately these judgments are not well known in the community. As such creating legal awareness is an important part of advocacy for Muslim women’s rights.

Veena Gowda opines that the Protection of Women From Domestic Violence Act (PWDVA) has been extremely useful in providing monetary reliefs to poor Muslim women. She said that the PWDVA allows all remedies (such as monetary benefit, residence, protection orders etc.) to be sought in a single petition in the magistrate’s court. She argues that there is a distinction between maintenance (which has to be paid within three months of iddat period as per the provisions of The Muslim Women (Protection of Rights On Divorce) Act 1986) and monetary relief. She opines that in the latter, the linkage is between domestic violence and monetary relief, which would then bypass the debate of iddat period, religious morality and the legal status of divorced Muslim women.

Sophia Khan reiterates the importance of creating an awareness of Muslim women’s rights. She said that her organization – SAFAR – has translated the Supreme Court judgment in Shamim Ara213 into Hindi so that more people can read it. This judgment outlaws oral triple talaq, and provides for conditions for the husband’s exercise of power to pronounce a divorce on his wife. The Supreme Court and the hadith have placed a condition precedent on giving talaq. This has empowered many Muslim women who now question their husbands’ talaq, she said.

Sophia Khan also opined that she did not ascribe to the concept of reform of Muslim law ‘from within the community’. She said:

We live in a secular, democratic country. We must remove inequalities through the constitutional framework. It is as if people do not want to address the problem and therefore abscond from the situation. It is unfair to expect the Muslims to come

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213 http://indiankanoon.org/doc/332673/(accessed on 24.7.15)
out and seek reforms. I believe there must be codification of Muslim law. When I originally pushed for UCC, I did not understand it. Later, when the BJP started pushing for it, it was a difficult position to reconcile with. Over time I realized that the debate for UCC has always been restricted to Muslim women, but what about Hindu women? Given that they benefit from the HUF under the Income Tax Act, they are unlikely to opt into the UCC... There are now strong voices and greater self-consciousness within the Muslim community. My concern is gender equality – whether this is through personal law reform or through codification. It is possible both from the framework of the Quran and the Constitution. The polarization is a result of the politics of majority and minority. In 1937 and 1939, the Muslim community was ready for reform. But post independence, the marginalization of the community has changed the trajectory of law reform.

Iddat, mehr, choice in marriage, ability of girls to work and study outside - these are all questions we need to work on. It is not easy to keep this work going on when the community is facing persecution from other communities, as it is in Gujarat, when issues of survival take a priority... Security though is coming at the cost of autonomy and this is a very heavy price to pay.

E7. Creatively Using the Existing Legal Framework

Flavia Agnes states that the Protection of Women from Domestic Violence Act (PWDVA) came into effect in 2005, and codified women’s right to residence in the matrimonial home. However even after the enactment, women are not aware of this right. She referred to the case of Afra Fernandes v. Anthony Fernandes, where she and her erstwhile associate, Saumya Uma, were able to argue successfully on behalf of the woman and her children’s right to residence even before the passage of the PWDVA.214 In this case, the husband was an alcoholic, drug addict and schizophrenic, who had inflicted extreme forms of domestic violence on his wife and children, and also molested his daughters. He had worked abroad for a few years, returned to India and bought a house in his own name. When he started abusing his wife and children, they approached the court and successfully obtained an injunction preventing him from entering the matrimonial home.

She explained that this case was an illustration of how the group of feminist lawyers at the organization she heads – Majlis – were able to use the concept of women’s right to residence in matrimonial home in favour of poor women, middle class and working women, by inserting a standard clause in the petition filed in the Family Court. Where a woman was dispossessed of her residence to the matrimonial home, with the help of Majlis, she has returned to the residence, followed by an order of injunction from the court, preventing the husband from dispossessing her. Flavia Agnes explained that Majlis was able to successfully use a clause in the Family Courts Act that allows remedies for “any rights arising out of a matrimonial relationship”. However, she

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214 Afra Fernandes vs. Anthony Fernandes, judgment delivered by Bombay High Court on 14 August 1998 in M.J. Suit No. 3624 of 1994
Breathing Life into the Constitution

says that most women, NGOs and lawyers do not know of this right. She explained the concept of women’s right to residence in the following words:

When women get married and leave their parental homes and go to their marital home, as per Hindu law, they cannot return to the parents’ home and claim their rights to the home unless deserted; this means that a presumption exists that the woman has a right to residence in her marital home. This right cannot be taken away just because the woman has not lived her entire life in that home. Even without the PWDVA, no husband has a right to inflict physical / mental / sexual / economic violence on his wife, though the husband, the wife, the society and the judge believed it was permissible, based on a patriarchal bias that operated. Similarly even without the PWDVA, no husband had the right to deprive the woman of her right to residence in the matrimonial home and force her into a state of destitution.

E8. Emphasizing Legal Awareness

One of the key challenges faced by feminist lawyers is a lack of knowledge of rights under the law among a large section of women. As such creating legal awareness among women of their rights is important work which feminist lawyers have to do.

Flavia Agnes said that in the 1990s, the legal and cultural wings of Majlis had collaborated and produced very short films (spots) titled ‘Kya Aapko Pata Hai?’ (Do you know?) to create awareness of women’s legal rights. These focused on issues such as women’s right to residence in the matrimonial home, Muslim women’s rights, Hindu daughters’ right to inheritance, the fact that women cannot be arrested after sunset and before sunrise etc. A story was knit around each of these rights, and presented in a glossy format in the form of advertisements. These films resulted from understandings that arose from feminist legal practice, and an effective application of the visual media. They were used successfully across diverse audience to create an awareness of women’s rights, she said.

E9. Building the Capacities of Women’s Rights Lawyers Working in District Courts

Flavia Agnes spoke at length about the district lawyers’ programme that her organization ran for five years. She said:

In 2003, we started the district lawyer programme, to train and network with women lawyers at the district level. The criteria were - you must be a woman, you must be litigating and you must be in a district court. For women lawyers practicing at the district level, continuing the legal practice involves a major struggle, as sometimes the parents or husband’s parents want them to discontinue the work. They did not have the confidence to start their own legal practice, and so, they would work as juniors under a senior lawyer.

Majlis provided them with a low stipend but it gave them a status. Majlis would also encourage them to write articles in newspapers concerning their learnings through litigation... Initially we received around 30 applications for this program and afterwards the number went up to 100. There was a high demand for this
programme in smaller towns. We prepared our resource material and the course would be conducted in Marathi...We were able to put our hearts and souls into it. So while we cannot continue this kind of model without funding, we can disseminate information and create models that other groups may replicate this effort to strengthen women’s rights lawyers.

Sophia Khan also emphasized the importance of capacity-building of lawyers to help women. Through her Ahmedabad-based organization – SAFAR – she works on ‘lawyers for justice, which involves sensitizing lawyers such that they take part in fact-finding missions, filing FIRs, etc. Monthly study circles have been initiated for lawyers in district courts to educate them about the law from a human rights perspective.

E10. Trope of Misuse of the Law

B.S. Ajitha opines that about 10% - 30% of her clients are men. When the Supreme Court passed a judgment ruling that the woman had caused cruelty to her husband by misusing the police and thugs, and getting him imprisoned for 21 days, many husbands flocked to her to enquire if this judgment could be used in their favour in court. Ajitha clearly distinguished the Supreme Court case, where the woman’s father was a Member of the Legislative Assembly (MLA) and used his clout to harass the husband, from her other cases.

She opines that while it is true that lucrative and influential parents with powerful contacts have, in exceptional cases, abused the law to harass their daughter’s husband or teach him a lesson, such exceptions do not make the rule; she says she handles many more cases of brutal forms of cruelty inflicted by the husband on the wife. Moreover, these are fights between the sons-in-law and parents-in-law. She also observes that they are “bad precedents that could potentially negate the rights of many other women.”

B.S. Ajitha spoke of another case she handled where the woman’s father – a police officer – had harassed his son-in-law. In this case, the woman cheated her husband, under the instigation of her father, and left for the U.K. The husband registered a complaint with the police saying that his wife is missing, while the woman has registered a complaint saying that he has taken away all her jewelry. Ajitha reiterated that a small percentage of women have the power and capability to abuse the law and harass their husbands; however this remains an exception to the rule of husbands’ infliction of varied and brutal forms of harassment and violence on their wives.

Geeta Ramaseshan agrees that there is a small percentage of women who misuse the law, and that she does not have a blinkered view on the same.

F. ISSUES, CHALLENGES AND STRATEGIES IN LABOUR LAW

In recent times, public discourse has focused on the prevalence of “restrictive labour laws” in India and their adverse impact on investment in the manufacturing and other sectors.215 The argument often made is that Indian labour laws have been “pro-worker”,

215 See for example ‘India’s Restrictive Labour Laws Challenge Investors’, Economy Watch, 12 November 2014; see also ‘India Has Too Many Labour Regulations: Rajan’, The Hindu, 15 March 2013
inflexible, business unfriendly, and have led to poor performance in the organized sector and inability to compete with international labour markets. For example, *The Industrial Disputes Act 1947* – the parent legislation on labour law in India – requires compulsory government approval for layoffs, retrenchment and closure of industrial establishments that employ more than 100 workers, making large-scale retrenchment of workers difficult.

The propaganda from the point of view of capital is that, “*India’s labour market is over regulated... One of the feature of Indian labour market is that it gets strongest protection under law,*” Dr. Raghuram Rajan – a former chief economist of International Monetary Fund (IMF) is reported to have said in 2013.\(^\text{216}\) For some years now, a concerted campaign was initiated to give the impression that the large number of central and state labour laws are redundant, cumbersome and cause obstacles to India’s economic development. The labour law reforms that were announced by Prime Minister Narendra Modi in October 2014, ostensibly aimed at supporting the ‘Make in India’ campaign and generating employment, were hailed by the industry lobby such as Confederation of Indian Industry (CII) and Federation of Indian Chambers of Commerce and Industry (FICCI).

Laws related to labour, broadly known as “industrial law”, have developed based on a respect for workers’ rights. A tripartite relationship between the employer, worker and the government exists, to monitor, primarily, terms of employment and conditions of work, and to prevent exploitation of labour by the employers. Principles of a welfare state and provisions of socio-economic justice for workers, enshrined in the Indian Constitution, form the basis for industrial law. The issues addressed by industrial law include the following:

- Provision for Collective bargaining by negotiations and mediation, failing which voluntary arbitration or compulsory adjudication by the concerned authorities; *(The Industrial Disputes Act 1947)*
- Regulation in engaging contractors and contract labour; *(The Contract Labour (Prohibition and Regulation) Act 1970)*
- Addressing Injury sustained during work, industrial safety and occupational health; *(The Employees Compensation Act 1923, The Employees State Insurance Act 1948)*
- Provision for Maternity benefits; *(Maternity Benefits Act 1961)*
- Payment of Retirement benefits and social security; *(The Payment of Gratuity Act 1972, Employees Provident Fund Act 1952, Unorganized Workers Social Security Act 2008)*
- Regulation of conditions of work in factories; *(The Factories Act 1948)*
- Regulation of conditions of work and functioning of shops and establishments; *(Shops and Commercial Establishments Acts – state legislations)*

\(^{216}\) Ibid

- Protection of rights of women workers; (The Equal Remuneration Act 1976, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013)

- Prohibition and regulation of child labour; (The Child Labour (Prohibition and Regulation) Act 1986)

- Abolition of bonded labour; (The Bonded Labour System (Abolition) Act 1976) and

- Protection of rights of migrant workers; (Interstate Migrant Workmen (Regulation of Employment and Conditions of Service Act 1979).

To advance an argument that these laws are redundant is to say either that a) the laws have achieved their stated objectives and the workers’ interests and welfare have been comprehensively addressed; or b) the workers’ rights provided for under these laws is less important than the capitalist need to make profits, and the state will have less to do with workers’ welfare. An analysis of recent labour law reforms concludes that these strengthen the hands of capital and “bring in a bogie of uncertainty and insecurity in the lives of millions of workers”, besides being gifts to the corporate sector rather than being based on sound economic logic.217 As pointed out by T.K. Rajalakshmi:

While the government is going full steam to simplify labour laws, there is no law as yet that provides for the mandatory recognition of trade unions. India is yet to ratify the International Labour Organisation (ILO) Conventions 87 and 98, which deal with the right to organisation and collective bargaining. The recent industrial conflicts in the National Capital Region, especially in Gurgaon (the city in Haryana whose growth has been compared to that of Singapore), were mainly over denying workers the right to form their own democratically functioning unions. About 147 workers of a leading automobile major, which recently unveiled its new product, have been languishing in jail since July 2012. In another part of the country, 13,000 contract workers of the Neyveli Lignite Corporation (NLC), a public sector Navaratna company, launched a protest demanding regularisation of jobs, among other things. The Prime Minister’s Office and the Union Labour Ministry seem oblivious to these facts.218

As part of the study on human rights lawyering, interviews were held with human rights lawyers whose primary focus area is labour and industrial law. Advocates NGR Prasad, Ramapriya Gopalakrishnan and R. Vaigai spoke from their experiences in practicing

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labour law in Chennai over the past few decades, while Advocates Jane Cox and Gayatri Singh shared experiences and insights into the labour issues they have contended with in Mumbai, in a context when the city has moved from being an industrial centre to a service and commercial centre. In complete contrast to the present discourse on labour and industrial law outlined above, their narratives tell a tale of the vulnerability of thousands of workers to exploitation and high handedness of the employers, and the lawyers’ heroic attempt to ensure implementation of labour laws, both in letter and in spirit.

F1. Right of a Representative Trade Union to be Recognized by the Employer

G. Ramapriya spoke of a landmark judgment on the issue of recognition of a representative trade union by the employer – *MRF United Workers’ Union case.* She was one of the two lawyers representing the trade union. The case is now pending before the Supreme Court. She said that the case involved questions of international law and how to read international law into domestic labour law issues, in a situation where there is a vacuum in the law in the state of Tamil Nadu. Some states in India have laws relating to recognition of a representative trade union, including Maharashtra, West Bengal and Andhra Pradesh. But in Tamil Nadu, there is no state law relating to recognition. There is no central law relating to recognition either; only a non-statutory code of discipline which covers the subject, but which just doesn’t suffice, she opined. In this case, G. Ramapriya had worked with the International Labour Organization (ILO), and she knew how the ILO supervisory machinery works. She had taken this case to the ILO Committee on Freedom of Association, and the committee gave certain conclusions and recommendations, approved by the governing body of the ILO. However, these are yet to be implemented by the government. Thereafter, a case was filed for the implementation of the recommendations, in which a Division Bench of the Madras High Court has passed a very significant order, she said. In her words:

The interpretation of the court that the right of workers to have a truly representative and independent collective bargaining agent flows from the provisions of the Industrial Disputes Act, 1947 relating to the prohibition of unfair labour practices and the fifth schedule to the Act and that it is the mandate of the Act that such an agent be recognized by the management appears to be a first of sorts. Such an interpretation of the Act assumes added significance in the light of the fact that there is a legislative vacuum in several states on the subject of recognition of trade unions.

She also observed that the court further held that the stand of the management that it will decide as to who should be the representative of the workmen and that it will negotiate only with them is contrary to the letter and spirit of the Industrial Disputes Act, 1947. It observed that such a stand would also amount to interference with the right of the workers to organize themselves into a union for the purposes of collective bargaining.

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219 MRF United Workers Union represented by its General Secretary, Arakkonam vs. Government of Tamil Nadu, represented by its Secretary, Labour and Employment Department, 2010 ILR 165 (Mad HC)


221 Ibid
The judgment states that even in a state when there is no specific law in operation relating to the recognition of trade unions or no statutory requirement for the employer to recognize the union in the concerned establishment with the largest membership, the employer is duty-bound to accord recognition to the most representative union in the establishment for the purpose of collective bargaining.

In G. Ramapriya’s opinion, this judgment is all the more significant for the reason that the employer in question is one in the private sector. Considering that refusal by employers in the private sector to recognize and negotiate with representative unions is commonplace and also the fact that there is an increasing trend of employers arbitrarily by-passing representative unions and instead choosing to enter into so-called settlements with minority unions/management sponsored unions or committees whose members are hand-picked by the management, this ruling is of considerable significance for trade unions of workers in the private sector.222

F2. Disguised Employment and Contract Workers

Air India case

Jane Cox spoke about the issue of contract labour – a burning issue in labour law from the early 1990s. She spoke in detail about the struggle of sweepers, trolley workers, civil maintenance workers and others employed with Air India on a contract basis. Such workers were not eligible to the benefits that permanent workers had. In 1976, government issued a notification prohibiting engaging employees working in undertakings owned or controlled by the central government through a contract; they had to be engaged directly. As a consequence, thousands of workers filed an application asking for an implementation of the notification to their situation in Air India, and that they should be made permanent. Some categories of workers did not receive minimum wages. The situation of trolley workers was far worse, Jane Cox said. They did not get any wages though they were hired by Air India. They could only receive tips from the passengers, out of which they were made to give a percentage (‘hafta’) to the contractor every day. This amount was shared between airport officials and the contractor. The trolley workers and other contract workers were coerced into parting with an amount of their earnings. For instance, on the day of payment of wages, the permanent workers and the unionists would line up and form a corridor on either side, and so the contract workers who would get their pay packets from the contractor could not leave the premises without first giving a percentage of the wages to them. This was the first agitation of the newly formed Air India Employees Union.

The Bombay High Court passed an order protecting the rights of contract workers by prohibiting the termination of their services.223 The case went before a three judge Bench of the Supreme Court. S. 10 of the Contract Labour (Regulation and Abolition) Act 1970 states that...

222 Ibid
the contract can be abolished by the government if a) the work is perennial in nature; b) if it is incidental to the main work; c) if it can be ordinarily done by permanent workers; and d) it is enough to employ a substantial number of workers. Jane Cox pointed out that this section does not mention as to what would happen to the workers once the contract was abolished. She opined that there was perhaps not a need to mention it as it was obvious that if the contract labour system was abolished, the workers must be made permanent. However, in the Air India case, the management made an argument that since the provision is silent about the workers, they cannot be absorbed and their work made permanent thereafter. The Supreme Court gave a judgment that categorically said that it was implicit in the scheme of the Act that the workers would become permanent on abolition of the contract. The judgment had a strong legal logic- there is a tripartite relationship between the principal employer, contractor and worker. Once there is an abolition of the contract, the contractor goes out of the picture and it is a bipartite relationship. Deriving strength from Articles 14 and 21 of the Constitution (right to equality and right to life with dignity), the judgment held that the workers, on abolition of the contract, will automatically stand absorbed.

When this judgment was delivered in 1996, there was a huge lobbying by the Indian public sector employees and multinationals because thousands of workers across the country who were contract workers started becoming permanent. This judgment was a huge blow to the economic globalization/ liberalization project of 1992, which aimed at India offering a highly skilled, de-unionized workforce consisting of contract workers which could be easily exploited. Due to the lobbying of powerful business houses with vested interests, the matter was referred to a Constitutional Bench with five judges of the Supreme Court in 2001. The Bench held that there would be no automatic absorption; if they succeed in getting the contract abolished, they would need to return to the labour court or industrial court, and raise a demand through a permanent union, asking for their absorption. If there is no permanent union, the workers cannot raise such a demand. Jane Cox said that this judgment made the rights of workers in contract employment infructuous, due to the time delay involved in the first round of litigation to get the contract abolished (which would be around 15 years up to the Supreme Court) and thereafter a second round of litigation for their absorption (which would take another 10-12 years). As a result, no worker/trade union would want to subject themselves to such a lengthy process. This thereby indirectly deters workers from legally asserting and enforcing their rights, as the legal expenses would be colossal, she said. As a result of this judgment, all the workers stopped filing cases for absorption of contract labour. The only cases where they are able to litigate is where the permanent union is strong and prepared to stand with the contract workers. Only in such cases, can the union prevent the termination of the services of contract workers, she concluded.

224 Air India Statutory Corporation and Others vs. United Labour Union & Others, 1996 (9) SCALE 70
225 The Constitution Bench of the Supreme Court has reversed its earlier decision given in the case of Air India Statutory Corpn. vs. United Labour Union (1997) 9 SCC 377
MRL Case

The important issue of disguised employment came to be discussed in the context of the Madras Refineries Ltd (MRL) case. The MRL has now been renamed as Chennai Petroleum Corporation Limited. This case is pending in court. Ramapriya explained that disguised employment is when the workers are direct employees of a particular employer, but the employer wants to camouflage this fact, in order to evade application of various labour welfare legislations. Hence the workers are not shown as the workers of the employer, on paper. One method that employers use is by setting up labour co-operatives which they say are co-operatives set up by the workers themselves, and show the cooperative as the contractors of the company. The employers thereafter claim that the employees have a relationship with the contractor (cooperative) - as members of the cooperative - and not with the company itself, and that the company has no relationship with the workers but only with the contractor. This is exactly what the management did in the MRL case, although the workers had been working in the company since 1983.

These workers did not have regularization, permanency, and did not get the same wages as permanent workers - there was a huge wage difference. These workers were also not entitled to other benefits available to regular workers, such as transport and leave. For these reasons, an industrial dispute was raised in 1998. There was a round of reconciliation with the management, which failed; thereafter the government referred the issue to the Industrial Tribunal in 1999. The industrial tribunal finally passed an order in 2010.

G. Ramapriya said:

I and other lawyers who were working together on this case were partially responsible for the delay, because at one point in time there was a judge in central government industrial tribunal, who kept giving awards consistently in favour of the employers. So in 2001, we filed a writ petition before the court, saying that we have an apprehension of bias because the judge was then a presiding officer consistently giving orders only in favour of employers. So we said that he had a class bias towards employers and it is very unlikely that workers can get a fair hearing or a verdict in their favour. And we sought a stay of our own case. Usually it’s the management who may say that the proceeding should not go on, but here the Union itself did so on our advice. The court allowed the stay. We waited till the particular presiding officer retired and another judge came in his place, after which the proceedings were revived. We then received a very good award in favour of the workers in 2009 (from the Industrial Tribunal), against which the management went on appeal. The management succeeded in the appeal, so now it is the second round, pending before the Division Bench in 2012. From the point of view of contract workers and disguised employment, it’s a very significant case.

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Breathing Life into the Constitution

The case continues to be pending before the Division Bench as on 11 March 2015.

F3. Revision of Wages

G. Ramapriya also talked about another significant case that she had worked upon – the Bata case 227 where the issue was a failure of the management to revise the wages of its workers. She was one of the two lawyers who represented the union in court. The employees’ union raised a charter of demands in 2006 asking, inter alia, for increase in basic wage, increase in casual and sick leaves, and various allowances such as dearness allowance, house rent allowance, washing allowance, good will allowance, snacks allowance, skill allowance, conveyance allowance, shift allowance etc. Bilateral negotiations between the management and the union with regard to the charter of demands before the Labour Officer, Krishnagiri, were held but no settlement could be reached. The Conciliation Officer sent his failure report on 20.9.2006, pursuant to which the government issued a government order in November 2006, referring the case to the Industrial Tribunal for a decision. The management argued before the Tribunal that it did not have the financial capacity to pay increased wages to its workers. The Tribunal found on admitted facts that the salary paid to the persons working in showrooms as well as to the Directors of the management has been increased by about 50% to 100% every year and came to a conclusion that such increase is not possible unless the company earns enormous profits. Hence the Tribunal gave an award in favour of the workers, prescribing an increment in various components of the wage structure. This award was challenged in the High Court by the management by way of a writ petition. The High Court provided interim reliefs against the management. Finally, a single judge of the High Court, passed an order confirming the award of the Industrial Tribunal, after finding no perversity in the Tribunal’s award (order). The High Court further observed:

As repeatedly held by the Apex Court, there cannot be a hard line to be drawn or strict arithmetic formula to be followed in deciding the matters of wage fixation. In such matters, what has to be seen is the necessity for fixation of wages based on various conditions including living condition, capacity of the employer to make payment which depends upon not only marketing of products, but also the conduct of the employer in making payment to other members of the staff. It is also to be seen that at least the fair wages are paid for the workmen while comparing with other workers in the region, especially in the absence of any credible material placed on the side of the management to show that in similar industries in the region a lower wages are paid less. On the other hand, it is available on evidence that in respect of industrial workers in region wise, salary is paid more and therefore, the reasonable wages has been fixed by the Industrial Tribunal, though not based on correct and calculable precision.

The management has filed an appeal against the single judge’s order to a Division

227 The Management of Bata India Ltd. vs. The Presiding Officer – Industrial Tribunal, Tamil Nadu, judgment of P. Jyothimani J of Madras High Court on 23 November 2009 in Writ Petition Nos. 4938 and 5833 of 2009
Bench, which was pending at the time of the interview with G. Ramapriya in 2012. Thereafter, the matter has been settled out of court.

F4. Challenging Closures

Jane Cox spoke of the context in the late 1980s in Mumbai, when many companies were planning to close down their plants in Mumbai, and shift to states such as Gujarat, Goa, Karnataka and Madhya Pradesh. Sometimes these were connected to “development projects” such as real estate development – which involved closing down the plant and selling off the land. For example, in the Thane-Belapur belt, many companies have closed down since the 1980s till date, she said. Against this backdrop, a significant case in Mumbai was the Hindustan Lever Lockout case.

Hindustan Lever case

In the Hindustan Lever case, the workers challenged an ongoing lockout, which lasted for over 18 months. The management aimed at reducing the permanent workforce by sub-contracting labour and by replacing permanent workers with contract labour or temporary workers. It locked out the workers when it decided to shift out of Mumbai, as it wanted to break the union in Mumbai which was strong and independent.

In this case, the management set up a sham company called Bond Ltd which was shown to be its subsidiary, and was set up admittedly and exclusively only to transfer the entire undertaking with its employees out of Mumbai. This tactic was used by the Hindustan Lever to circumvent the procedural requirements for a closure – obtaining permission from the government after showing it the company’s balance sheet and its hold in the market (under S. 25-O of the Industrial Disputes Act). After three years, the subsidiary company said it did not have enough money to pay the workers. The workers had contended from the beginning that this was a sham company to circumvent procedures for closure. According to Jane Cox, the workers put up a strong battle and raised their demand. The case went up to the High Court, and was sent back to the adjudicators, saying that it was a sham closure.

Air India case

Jane Cox also discussed another similar case, in which Air India had created a wholly owned subsidiary called Air India Engineering Services Ltd. (AIESL), to which it planned to hive off / demerge the entire Engineering Department with its workers. This subsidiary was set up exclusively for this purpose, as in the Hindustan Lever case. After becoming aware about this development, the employees’ unions made representations to the Management to desist from proceeding with the said proposal of hiving-off/demerging the entire Engineering Department of Air India until a detailed feasibility study by an

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228 In an industrial undertaking with more than 100 or more workers, the employer has to obtain prior approval of the Government at least 90 days before the date of intended closure as stipulated under Section 25(O)(1) of the Industrial Disputes Act, 1947. A copy of the application shall also be served simultaneously on the representatives of the workers.

229 Hindustan Lever Ltd. vs. Hindustan Lever Employees Union and Another, judgment of R.M.Lodha and J.P. Devadhar of Bombay High Court, Appeal 1999 in Writ Petition No. 287 of 1995
independent concern was undertaken in that behalf. Jane Cox explained that at the moment, Air India was doing its own maintenance, but if this was outsourced, even to its subsidiary, it would incur about 43% taxes, which makes the subsidiary company financially unviable. On behalf of the union, Jane Cox argued that this subsidiary company is a sham, and that actually the management wishes to close down the plant and prune off/ sell off all assets. The apprehension of the employees of Air India employed in the said Department became stronger as their salaries were also not paid for the month of July, August, September, 2012 nor were the last six months PLI (Productivity Linked Incentive), amongst other allowances, and benefits offered to them. The unions moved the Regional Labour Commissioner (Central) to intervene in the industrial dispute, and conciliation proceedings were commenced. When Air India went ahead, unilaterally and without consultation with the unions, with the hiving off/demerger process, and the concerned employees received notices for their transfer to AIESL, the unions rushed to court for appropriate orders.

A Division Bench of the Bombay High Court delivered its judgment on 2 April 2013 (subsequent to our interview with Jane Cox). In court, Air India refuted the arguments of the unions, and said that the decision of hiving-off has not been taken casually but after due deliberations and consultations at different levels in the Government and also after considering the experts’ opinion, at the highest level by the Cabinet. It further asserted that it was a policy decision of the Government of India and not limited to some business or commercial decision taken by Air India on its own - a decision has been taken by the Government of India in the interests of the general public, of which judicial review is not permissible. Air India further argued that the employees could not challenge the policy decision of their employer so long as their service conditions remained unaffected.

The High Court, on perusal of the relevant records, found that the policy decision to hive off the Engineering Department had been taken after due deliberations, consultation and consideration of the entire materials including experts’ opinion, and that it was not open to the Court to undertake a judicial review of the policy decision (paras 34-35). The Court agreed with Air India that AIESL was likely to become a profit-making body in seven years, which belied the apprehension of the unions about loss of job or likelihood of retrenchment. (para 36) The court found the unions’ apprehension of closure or retrenchment to be unsubstantiated (para 37) but said that if retrenchment does happen, the unions could opt for a legal remedy at that time. Relying on the Balco case, the court said that “the courts cannot strike down a policy decision taken by the Government merely because it feels that another policy decision would have been fairer or wiser or more scientific and logical. Interference is possible only if the policy decision is patently arbitrary, discriminatory or malafide.” It rejected the argument that the proposed hiving off/ demerger was a sham, as it was convinced, based on documentary evidence, that it was a policy decision taken at the highest level by Government of India in public interest.

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230  Air India Aircraft Engineers Association vs. Air India Ltd. and Others, judgment of A.M.Khanwilkar and A.P.Bhangale JJ, on 2 April 2013 in Writ Petition Nos. 2457/12, 391/13, 2896/12 and 585/13

231  Balco Employees Union (Regd.) vs. Union of India & Others(2001) 8 SCALE 541
Jane Cox remarked that the conclusion to the Air India saga reinforces the point that the workers’ struggles in present times were of a defensive nature, as it was a question of holding onto one’s employment and protesting against the closure of the unit.

F5. Struggle Related to the Use of mill land

Gayatri Singh, a well known labour lawyer and trade union activist in Mumbai, spoke of the closure of textile mills in Mumbai in the early 1990s. In this context, the Girni Kamgar Sangharsh Samiti (GKSS) – a trade union – was established, which Gayatri Singh headed.\textsuperscript{232} There were outstanding wages to be paid to workers even six years after the closure of these mills, she said. GKSS started challenging illegal closures and worked towards ensuring that the workers received their dues. Rashtriya Mill Mazdoor Sangh (RMMS)\textsuperscript{233} – a recognized trade union affiliated to the Congress party – was signing agreements for closure, so Gayatri Singh and her colleagues had to work confronting the state, RMMS and the police.

Speaking of positive and negative outcomes in the struggle against illegal closure of mills, Gayatri Singh said:

The owner of Khatau Makanjee Spinning and Weaving Mill, Sunit Khatau, was killed due to rivalry and that was when we decided to organize the workers. We were attacked at the time. Our general secretary was attacked. In another mill, the Matula mill, which was controlled by the underworld, we organized the workers to prevent closure. When they were removing the machinery despite a court order restraining the same, I was called. I reached the mill without taking anyone else with me. And when I entered I realized that the management had come with many people, ready to face any opposition. I was there with a few of the workers. The management’s goons came to attack us; I was attacked on my head. But the workers came and protected me from the blow. We then got a police complaint registered and there was a cross-compliant from the management. The workers were too frightened to protest. We approached the High Court directly. Our position was that even if the BIFR finds that this was a sick company, the payment had to continue, so we challenged the illegal closure. We obtained a good judgment which had an effect on other mills. We also obtained a good order in the Khatau Mills case where the court ordered that the wages had to be paid.\textsuperscript{234} These were the positive outcomes.

However, she said that the negative outcome of the case was that the mill owners put up notices for voluntary retirement from service (VRS). For the mill workers, who generally have very little savings, this seemed like a good option. From the management’s point of view, the traditional route of retrenchment compensation and payment of gratuity could be circumvented. Gayatri said that she unsuccessfully tried...

\textsuperscript{232} Mill Workers Struggle Committee

\textsuperscript{233} National Mill Workers Association

\textsuperscript{234} Girni Kamgar Sangharsh Samiti vs. Khatau Mackanjji Spinning and Weaving Co. Ltd. 1998 (79) FLR 568: (1998) IILLJ 264 Bom
to convince the workers not to opt for VRS, suggesting instead that they were entitled to much more. However, given the prevailing financial condition, most workers opted for VRS which ensured a lump sum settlement of all dues. She said:

We obtained a favourable order from the court preventing sale of mill land, and directing a revival of the mills. We organized a hunger strike to support the order. The government tried to settle the matter, but was not accepted. The workers were amenable to closure and opting for a VRS as they were tired with the struggle. This was very demoralizing. I had to sign a no objection so that they could hire another lawyer who would withdraw the matter. In short, preventing closure of mills and VRS was one struggle, which did not succeed.

Gayatri Singh also spoke of the struggle related to mill land. Most mill owners did not own the land. The land was leased to them during the British rule in Mumbai. The original lease agreement was for as little as 1 rupee, Gayatri Singh said. Nobody was claiming that this land be given back to the city, as they did not own it. She explained that one constraint in selling land was that the mill owners had to conform to legal processes for closure and prove that they owned the land; the second option was to go to the BIFR and show only one small portion of the mill to be in use. Most of the mills adopted the second option, which resulted in de facto closure of the mill, while on paper the mill was running.

In 1991 the Development Control Regulation of Bombay which is part of the Town Planning Act had a provision which specifically stated that the mill lands would be divided into three parts, and would be shared between the Brihanmumbai Municipal Corporation (BMC), Maharashtra Housing and Development Agency (MHADA) and the ‘owner’. No other industry has this kind of a clause, Gayatri Singh opined. She and her colleagues challenged this because there is no ‘owner’ for such land and this led to some land being made available to workers in the form of housing land. There was a controversy about which portion of the land would be available to the workers, especially with respect to the ‘vacant land’. Many of the mills renovated the structure inside and sold it. The argument of the lawyers representing the mill workers was that if there is renovation, it amounts to demolition and that whatever is sold must be given in part to the workers. These structures are malls today – such as the Phoenix Mall. Vacant space is not shared and sometimes the lawyers intervene to ensure that it is. Vacant space is that which is left even after demolition as per the Bombay High Court. But the Supreme Court overturned this decision.235 As a result, there is less land available to the workers now, she concluded.

Meena Menon, Vice President of Girighar Kamgar Sangarsh Samthi (GKSS), writes of the small victory made in favour of the textile mill workers in June 2012:

On the 28th of June 2012, the Government of Maharashtra (GoM) will conduct the lottery for the distribution of 6948 tenements, the first phase of housing built for

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out-of-work textile mill workers...This is a culmination of a decade of struggle, just on the demand for housing. The main rationale of the demand for housing rights on cotton textile mill lands, has been that these lands were leased to mill-owners a century ago at rates as low as a rupee a metre, and if the land has now turned into prime real estate, and the industry shut down, there is no justification for the appropriation of the real estate value (now astronomical) by the mill-owners alone. The citizens of the city and the workers working in the mills should have a right too. That this is not a wild and unreasonable demand is validated by the fact that it was never permissible to sell mill lands. It was only in 1991 under pressure from the mill owners who claimed they needed to sell land in order to revive and modernize their sick mills, that the GoM obligingly allowed sale. Again, the closure of textile mills, and the redevelopment of the land does not affect just the workers and their families but the community living in what is called Girangao (Village of Mills), and the entire city. Today, the shabby vestiges of the old mill precinct: the chawls and derelict mill structures seem to cling hopelessly to life in the midst of the dazzling array of high rise shopping malls and luxury apartments. However mill workers have kept on fighting. Not as a trade union, any more, more as a social movement, organizing, not just as out-of-work workers, but also as residents, women, youth, tenants...If the lottery goes ahead as scheduled, every single worker-allottee is likely to accept the houses. They will see it as a victory, not defeat. The GKSS, Rashtriya Mill Mazdoor Sangh (RMMS) and others will be marching to the Mantralaya on the 20th of June, demanding that the process of finding land and homes for all the workers, be speeded up, and the lottery, already delayed for two years, be held as scheduled.236

F6. Challenging Illegal Termination

N.G.R. Prasad spoke of the Sundara Money case that he worked on, which became a landmark judgment in the field of industrial law. He spoke of the importance of regulating the power of the employer to hire and fire, and bear no liability for the adverse impact on the worker and his financial well-being. He said that in the Sundara Money case, the services of a temporary worker in the State Bank of India were terminated without giving him any notice or reason for termination. When Prasad took the case to the Madras High Court, he said that the High Court gave a positive judgment, stating that if a worker has completed 240 days of work, and has been retrenched, the company has to pay him retrenchment compensation under S. 25(F)(b) of the Industrial Disputes Act, and that upon non-payment of retrenchment compensation, the termination was illegal, and the worker had a right to be reinstated. The Supreme Court affirmed the High Court judgment, which, N.G.R. Prasad said, brought relief to thousands of workers who had been wrongfully terminated.237 Due to this landmark judgment, many workers were regularized in this process, he said.

F7.  The Struggle for Dearness Allowance

Jane Cox spoke about her struggle for Dearness Allowance (DA) for workers, as an ingredient of wage fixation. She said that the rationale of a DA was to safeguard against inflation. DA was also taken into account when gratuity was calculated. However there is no specific law on DA. However Industrial Tribunals have included this component in their awards, and the higher judiciary has affirmed the same through its judgments. She pointed out two challenges: a) In reality, in new areas where industries are established, such as in Silvassa, if there are no charter of demands by workers, there is no DA that is paid; wage is fixed for a period of 3-5 years, and there may be a moderate increase in wages, but due to inflation, the value of the wages received by workers reduces during this period) She explained that the wage is fixed based on the existing wage pattern and level in similar industries in the same region. Hence if one industry denies workers of DA, that can be used for other industries in the same region, or similar industries in other regions to deny their workers of DA too. Hence she said that this placed the workers of all industries in a precarious and vulnerable position.

F8.  Fighting for Rights of Unorganized Workers

Jane Cox said that working for unorganized workers was important and challenging. She said that a Bill was pending to protect the rights of a vulnerable section – domestic workers. The Unorganized Workers Social Security Act 2008 which had been passed had not yet been implemented, she said.

Jane Cox spoke about her work with one of the categories of unorganized workers, security guards. To ensure an end to the extreme exploitation of around 70,000 private security guards employed through agencies in Maharashtra, the state government set up a Security Guard Board under the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981. The Board is thus a statutory recruitment/allotment body invested with certain powers to oversee the master-servant relationship, which exists between the guards and registered employers to whom they are allotted.

In the opinion of Jane Cox, the Act says that employers can either employ guards directly or they can employ them through the board. There is a situation where multinational companies appoint security guards directly, and pay them over Rs. 20,000 a month, while those employed by the Board earn around Rs. 6000. Jane Cox and others challenged this in the Bombay High Court and thereafter the Supreme Court. Their argument was that given the rank exploitation of guards through agents, the 1981 Act was set up to basically be an agent for placement and to supervise and ensure that the security guards were not exploited. They must get at least the same wage as the other similarly graded workers in that company, wherever they’re sent. She said that both the High Court and the Supreme Court did not accept these arguments, and said that a) the security guards employed through the Board were not employees of the company which appointed them, and even if there are other guards who may be

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earning a much higher wage, the security guards going through the Board cannot claim a right to be paid the same amount of wages. Jane Cox said that though the Board was set up to protect the rights of unorganized workers – security guards in this instance – the interpretation by the courts has not served the purpose of protecting and furthering their rights.\(^{238}\)

**F9. Protecting Rights of Casual Workers in the Context of Economic Globalization**

Examining the trend of judgments from the 1970s till date, Jane Cox said that in recent times, on welfare matters such as ESI, the courts have tended to be more liberal, while on matters that hit the corporate sector hard – such as regularisation of contract workers, the courts have been more conservative.

She cited the example of *Umadevi’s case*, where a Constitutional Bench of the Supreme Court records that there were many who had been employed as casual workers and not been made permanent even after ten years of work, and that many of them were receiving less that minimum wages.\(^{239}\) Yet the court held that:

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\text{[M]erely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance...}
\]

While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm’s length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently.

According to Jane Cox, this judgment of the Supreme Court is a qualitative shift in recent times, away from the welfare, rights and social justice-oriented judgments of Justice Krishna Iyer and Justice Madan in the 1970s and 1980s. Despite acknowledging that the worker has less bargaining power vis-à-vis the employer, the court declined to intervene.

She said that although the Umadevi judgment is a precedent that High Courts and the Supreme Court are bound to follow, there has been an attempt made in a number of judgments to make inroads / dilute the impact of the Umadevi judgment, by drawing

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\(^{238}\) *Krantikari Suraksha Rakshak Sanghatana vs. Bharat Sanchar Nigam Ltd. & Others*, judgment of Arijit Pasayat, Lokeshwar Singh Panta, P. Sathasivam JJ of the Supreme Court, delivered on 25 August 2008 in Civil Appeal Nos. 4473-4474 of 2002

\(^{239}\) *Secretary, State of Karnataka and Others vs. Umadevi and Others* (2006) 4 SCC 1.
a distinction in facts of the case or remedies sought, and stating that the ruling in Umadevi’s case is not applicable. For example, in one case, the Supreme Court held that the Umadevi ruling was applicable to workers who went directly to the High Court under Article 226 of the Indian Constitution, but not for those who sought reliefs through the Industrial court, under Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (known as MRTU & PULP Act).

Jane Cox also referred to a 2010 judgment by a two-judge Bench of the Supreme Court, which made stringent observations against the court’s tendency in recent times to compromise the interests of workers in order to facilitate economic reforms and globalisation. Although the Bench comprising Justices G.S. Singhvi and Asok Kumar Ganguly couched its observations in general terms and not with regard to any specific judgment, it was obvious that they were expressing their extreme displeasure over the number of judgments rendered by the Supreme Court’s bigger Benches, including Constitution Benches comprising five judges, against the rights of workers.

As Justice Singhvi put it,

Of late there is a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalisation and liberalisation are fast becoming the raison d’etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling under the category of workmen, who are illegally retrenched from service by creating by-lanes and sidelanes in the jurisprudence developed by this Court in three decades.

Jane Cox sees such judgments, though few and far between, as giving a ray of hope to labour lawyers that all is not lost in terms of the struggle for workers’ rights in an era of economic globalization.

F10. Exploitation of Adolescent Girls and Young Women in the Textile Industry

Exploitation of adolescent girls has been taking place in the garment and textile industry of Tamil Nadu through a government-supported scheme known as the ‘Sumangali’ scheme. The young women were employed as apprentices in industrial enterprises, promised a lump sum amount of Rs. 30,000 – Rs. 50,000 at the end of the contract period (of 3 years), which would purportedly help them pay dowry and get married. The scheme was introduced by textile and garment manufacturers in Coimbatore and Thiruppur districts of Tamil Nadu in 2001, but subsequently spread to western and central Tamil Nadu. By 2011, it was estimated that about 1,20,000 adolescent girls and


young women were employed under the scheme, and nearly 60% of them were from Scheduled Caste families, where the parents were employed as agricultural labourers, construction workers, sweepers and cleaners.\textsuperscript{242}

A report titled \textit{Captured by Cotton: Exploited Dalit girls produce garments in India for European and US markets}, prepared in May 2011, captures the pathetic condition of Dalit girls and women, some even younger than 14 years, who are employed in the garment and textile industry of Tamil Nadu under the government-promoted Sumangali Scheme.\textsuperscript{243} The key findings of the report were:

- Girls and young women are forced to sign blank contracts once they enter the factory under the so called Sumangali Scheme. Workers do not receive their full daily wage as a part of it is deducted to save for the lump sum payment to which the workers have no access;

- Workers receive a daily wage, which generally starts at around Rs. 60 per day during the first six months, with a gradual increase of ten rupees every six months, up to a maximum of Rs. 110 on average. Costs for food and boarding, approximately 15 Rupees a day, are deducted from the daily wages. If the lump sum is paid out at the end of the period workers earn a total between Rs. 95,000 and Rs. 115,000 in three years. If the workers are paid the minimum wage however, they would earn Rs. 185,000 in the three year period of the contract;

- There are numerous cases where workers have not received the lump sum amount that was promised at the end of the period. Workers who decided to quit before the contract period ended, often did not receive the lump sum that they had saved so far. Many workers don’t complete the contract as they fall sick due to the unhealthy and unsafe working conditions, poor food and general lack of hygiene. Sometimes, workers are fired just before the end of the period, under the pretext of some feeble excuse;

- On a regular basis the women work 12 hours per day, to complete one and a half shifts. This means that they work 72 hours per week. During peak season they even have to work on Sundays. For overwork, workers are legally entitled to receive overtime payment, but more often than not workers do not receive any compensation. When a worker refuses to work more than one shift, she is often verbally abused by the supervisors and threats are made to withhold a month’s pay;


Girls under the age of 14 are recruited to work in the factories. An academic estimate says that 10 to 20% of Sumangali workers are child labourers, aged between 11 and 14;

Sumangali workers do not enjoy the legal benefits that other workers enjoy. Many clothing companies do not remit employers’ and employees’ contributions to the Employees’ State Insurance (ESI) Scheme and provident fund, and workers are denied the benefits of such social security legislations that are intended to protect their interests;

The Sumangali workers work and live without much freedom or privacy. Women workers either live in hostels on the factory compound, or with families or off-site hostels. The residential workers, who form the majority of the Sumangali workers, are not allowed to leave the factory freely and their stay in the hostels in the factory premises is mandatory. Instances are known where girls climbed over the high gate to escape from the harsh working conditions;

There are even reports of former Sumangali workers who had to pay a ‘penalty’ of Rs. 1,500 to 3,000 in order to be able to leave before the end of the period;

Due to the strains of excessive overwork, headaches, stomach aches, sleeplessness and tiredness are common among the girls. Accidents happen frequently. Workers lack training and instructions to properly work the machinery. The mills have bad ventilation systems, which causes the work space to be full of small particles of cotton dust. Heat and humidity add to a very uncomfortable working environment;

Many of the interviewed women noted that they lost a lot of weight. Irregular menstrual periods and heavy menstrual pains are also frequently mentioned. Cases of spontaneous abortions, infertility and premature menopause have also been reported by former Sumangali workers. Generally, there are no proper medical facilities available at these factories, at best a nurse who may offer basic medical care; and

Workers find their supervisors as abusive and there is no proper grievance redressal mechanism. Trade unions are not even allowed to enter the factories, and freedom of association and collective bargaining are non-existent.

R. Vaigai – a leading labour lawyer from Chennai – further spoke about the working and living conditions of the girls and young women as follows:

Touts are sent to rural villages, which are on a starvation diet. Pamphlets are circulated by these touts, which say that if you send your daughter to work in the mills for attractive wages of Rs. 40 per day, at the end of three years she will get Rs. 30,000-40,000 for her dowry. And she will become a Sumangali (a married woman with her husband alive); therefore it is called a Sumangali scheme. It is a highly exploitative scheme. Most workers are not paid anything; once they join
work, they are told that their Rs. 40 per day is spent towards their boarding and lodging. These girls are made to work 12-13 hours without any break or sleep. They are packed like sardines – twenty girls in a room measuring 10 feet x 10 feet. During an enquiry, the management admitted to the status of accommodation, and justified that due to working in shifts, at any point of time, there will be only two or three girls in the room. The matter came before the Madras High Court in a public interest litigation (PIL), and we were asked to be an amicus in that matter. That matter went on, and during the course of the enquiry, the court asked for reports from every district. The state legal aid board was also involved, and certain NGOs and women’s organizations in each district were asked to study the situation and file reports. The government pleader was unable to cull out the facts, as there were numerous reports. I think the reports would have occupied this entire room, our office. It was twenty one districts. Anna Matthew was the main person who went through and tabulated all the reports. So when we were presenting the facts compiled from the reports before the court, we decided to use the exact words used by the employers to these girls. The girls were allowed to visit the toilet for only one minute. The toilet was referred to as “kakkus” – nobody uses the expression any longer; it is a derogatory expression that is reserved only for Scheduled Castes (SC). Most of the girls belonged to poor SC families. That highlighted, to the court, the gravity of the situation and the extremely poor working conditions of these girls and young women.

She said that in this case, the court kept pressurizing the government as to what it was going to do about the scheme. The government responded by issuing a minimum wage notification; the managements went to the court, challenging the notification. The trade unions approached R. Vaigai and Anna Matthew to appear in the case, representing the trade unions. However, they were unable to do so as they were amicus in the PIL filed on the issue. Hence they referred the unions to another lawyer friend of theirs, and externally supported and guided the case unofficially. In the opinion of Vaigai, “You need to do all that if you are a cause lawyer; you can’t be tightly bound by all the technicalities and all, and ultimately the cause need to be served.”

The Tamil Nadu government issued a final notification, which was published in the government gazette. The notification included the following:

- The minimum rate of wages payable to the apprentices engaged in the Employment in Textile Mills, including Composite Mills, Spinning Mills, Weaving Mills, Open Ended Mills......in the State of Tamil Nadu, as Rs.110 per day;

- In addition to the minimum rate of wages fixed above, the apprentices shall be paid Dearness Allowance;

- Where the nature of work is the same, no distinction in the payment of wages shall be made as between men and women apprentices;

- To arrive at monthly wages, the daily wages shall be multiplied by 30;
Wherever the existing wages are higher than the minimum wages fixed herein, the same shall be continued to be paid; and

This notification shall come into force with effect on and from the date of publication in the Tamil Nadu Government Gazette Extraordinary, dated the 7th November 2008.\(^{244}\)

The writ petition was dismissed by a single judge of the Madras High Court.\(^{245}\) This judgment was upheld by a Division Bench of the Madras High Court on appeal.\(^{246}\)

In addition to approaching the courts for remedies, human rights lawyers and activists also simultaneously persuaded the Tamil Nadu State Commission for Women to address the issue. A public hearing was organized by the Commission, where several women who had been victimized due to the Sumangali scheme spoke about their experiences and grievances. In some specific instances, the Commission directed the mill owners to pay the amount due to the women workers as wages for the work done, as well as for compensation for accidents, injuries and deaths caused at the mills during the course of work.\(^{247}\)

Despite the public interest litigation (PIL) and the pressure exerted by the court on the government, highly exploitative schemes such as ‘Sumangali’ and ‘Marumagal’ continue to exist, with some modifications. In October 2014, there was a renewed call made to the state government to scrap such schemes, as many reports indicated that the girls were subjected to sexual harassment, physical torture, deprived of adequate nourishment, sleep and relaxation in the places where they worked, and once they returned from the mills after three years, they were broken and tortured.\(^{248}\)

G. LITIGATING THE RIGHTS OF LGBTI PERSONS

Much of the visibility for rights of lesbians, gays, bisexuals, transgender and intersex (LGBTI) persons in law comes from the campaign against S. 377 of the Indian Penal Code. S. 377 of the IPC, enacted in 1860 by the British colonialists, made it an offence for a person to have “carnal intercourse against the order of nature.”

In a historic victory, the Delhi High Court, in Naz Foundation vs. NCT of Delhi, opined that S. 377, in so far as it criminalizes consensual sexual acts of adults in private, was violative of fundamental rights guaranteed by the Indian Constitution.\(^{249}\) However this

\(^{244}\) Tamil Nadu Spinning Mill Association vs. The State of Tamil Nadu and Others, order of Justice V. Ramasubramanian of the Madras High Court dated 30 April 2009, in Writ Petition Nos 28741, 28749, 28782, 28783 and 28805 of 2008 at para 16.

\(^{245}\) Ibid.


\(^{247}\) For more details, see ‘Sumangali Scheme: Relief Ordered’, The Hindu, 7 October 2009

\(^{248}\) ‘Call to Scrap ‘Sumangali’ Scheme in Tamil Nadu’, The Times of India, 6 October 2014

\(^{249}\) Naz Foundation vs. Government of NCT of Delhi 160 Delhi Law Times 277
victory was not long lived as on appeal, the Supreme Court, in *Suresh Kumar Kaushal and another vs. Naz Foundation and others*, set aside the Delhi High Court judgment and said that S. 377 does not suffer from the vice of unconstitutionality.\(^\text{250}\)

It should also be noted that LGBTI rights is not confined to advocacy against Section 377. The struggle for recognition by the transgender community and the struggle of the lesbian community for the right to autonomous choice are important components of the LGBTI struggle as is the emerging struggle for recognition of the intersex community.

Given the constraining framework of law that exists in India today, working on rights of LGBTI persons and negotiating their rights in courts of law and in allied domains is challenging. The human rights lawyers who have taken on this work include people like Senior Advocate Anand Grover and his team at Lawyers Collective, lawyers at ALF as well as Vijay Hiremath – a Mumbai-based lawyer. The work with respect to LGBTI rights can be classified as under:

**G.1 Work Leading up to Decriminalization of LGBTI Lives through the Naz Judgment**

This section will document how the work towards decriminalisation of homosexuality involves a multiplicity of strategies by a range of organisations.\(^\text{251}\) The uniqueness of the issue of LGBTI rights lies in the fact that progress on the legal issue of decriminalisation is closely tied into the issue of changing social and cultural attitudes to LGBTI people. As such lawyers working on this issue have to understand the multifaceted nature of the work to be done.

Since the issue of LGBTI rights was invisible in the Indian context, it was important to place the concerns of LGBTI people within a human rights framework. One way in which this was done was by a collaborative exercise of several organisations in Bangalore including the PUCL-K, People’s Democratic Forum, and Sangama which together produced a Report on Human Rights Violations Against Sexuality Minorities, which sought to place the discrimination suffered by sexuality minorities within a human rights framework.\(^\text{252}\) 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.\(^\text{253}\) Both these reports documented the horrific 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.

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\(^{250}\) *Suresh Kumar Kaushal and another vs. Naz Foundation andothers, A.I.R. 2014 S.C. 563*


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.

In the context of Bangalore these organisations also did consistent work at the ground level in redressing human rights violations. ALF lawyers along with PUCL-K and Sangama assisted numerous persons experiencing harassment or torture by the police due to their sexual orientation. Sangama also initiated numerous local level campaigns to ensure police accountability for acts of brutal torture and rape by the police of transgender persons.254

Apart from legal work, ALF also 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. ALF lawyers offered a series of courses at the National Law School, including an elective seminar course on the Illegal Citizen.255 The course included a module on sexual citizenship, with a focus on citizenship and its interface with markers such as sexual orientation. 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. The petition itself was filed by Lawyers Collective, led by Senior Advocate, Anand Grover. Again the thinking underlying the petition was that, in the days when there was no discussion of LGBTI rights in India, such a discussion could be kickstarted through a petition which initially emphasized the importance of decriminalization as a route towards containing the spread of HIV/AIDS. The Lawyers Collective itself saw its work as wider than a merely legal strategy and was closely associated with community event, pride marches, media advocacy as well as community education.


255 The course was based upon the work that ALF was doing, in terms of illegality and land, intellectual property and piracy, as well as litigation and support work with sex workers. Based on this work the course was conceptualized as having modules on slum citizenship, sexual citizenship, cinematic citizenship as well as religious, caste and refugee citizenship.
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 in support of the Naz Foundation. Voices Against 377 was represented by ALF. The intervention by Voices Against 377, sought to demonstrate the impact of Section 377 through affidavits based largely on the testimonies gathered in the PUCL Reports and other fact-finding reports.

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. This concern was sought to be addressed by reference to international jurisprudence. Case law in the United States recognized that privacy had zonal as well as a decisional component. Emerging jurisprudence in South Africa emphasized the links between privacy and dignity. Drawing from this the petition stressed the separation of the notion of zonal and decisional privacy and honed in 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, the petition 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.


258 See the concurring opinion of Sachs J. in National Coalition For Gay and Lesbian Equality v. Minister of Justice, [1998] [12] PCLR 1517, at ¶ 117. “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 recognising 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 should also be noted that Justice Sachs opinion was cited extensively in the decision by Justice Shah in Naz Foundation vs. NCR Delhi, 2010 Cr L. J. 94.
After an extensive hearing the judgment was delivered on July 2, 2009. The judgment itself 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.

The powerful language of the judgment provides an ethical and moral compass for the LGBT movement by literally inventing LGBT citizenship in India. 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. The Naz judgment 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 law sometimes can serve, as Justice Sachs put it, a “great teacher”, and help to establish “public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse.”

However within seven days of the judgment the first of over fifteen appeals against the judgment was filed in the Supreme Court. Within four years of the historic Naz judgment, the appeal was heard in the Supreme Court and the Supreme Court delivered a historic judgment on December 11, 2013, in the case of Suresh Kumar Kaushal v. Naz Foundation. The judgment of the Supreme Court overruled that of the High Court of Delhi in the Naz Foundation case, and held that Section 377 of the Indian Penal Code “does not suffer from any constitutional infirmity.”

G.2 Building documentation on rights violations post the Supreme Court judgment

Suresh Kumar Kaushal was criticized as forsaking empathy, compassion and showing a poor grasp of constitutional principles. The day of the decision, according to author Vikram Seth was ‘a bad day for law and love’. The decision was seen to go against the grain of international human rights law jurisprudence and scores of judicial decisions from other countries that have struck down anti-sodomy laws on grounds of violation


260 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, http://altlawforum.org/publications/the-right-that-dares-to-speak-its-name/(accessed on 15.4.15). This booklet was also translated by ALF into Kannada and later on by other groups into Tamil, Hindi and Bengali.

261 Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19. Para 138.


of privacy, dignity and autonomy of individuals.\footnote{265} Eight review petitions filed before the Supreme Court to provide an opportunity to the court to correct itself with respect to this judgment were summarily dismissed in January 2014.\footnote{266} There is a curative petition pending before the Supreme Court.

While the curative petition provides a small window of hope, in some ways activists have had to go back to square one. The essential point made by \textit{Koushal} which has to be redressed comprehensively is that:

While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.\footnote{267}

What becomes a vital challenge is to continue to build documentation on the harmful impacts of Section 377. Of relevance is a recent publication on the first anniversary of the Koushal judgment by the Coalition for Sexual Minorities and Sexworkers (CSMR) which asserts that, ‘anniversaries of great moments of injustice are occasions to pay homage to a struggle, to remember those who have sacrificed their lives and happiness to a cause and to remember ordinary people who have been victims of grave and continuing injustice.’\footnote{268}

The publication goes on to analytically document how Section 377 is used against the LGBTI community. The publication documents through case studies that since the judgment the following violations have taken place:

1) Arbitrary and false Cases have been filed against LGBTI persons under Section 377

2) Section 377 has been a legal cover for extortion, harassment and sexual abuse of LGBT persons

3) Civil society actors have unleashed acts of violence against LGBTI persons emboldened by Section 377

4) The law has had a negative impact on the self esteem of LGBTI persons.


\footnote{266} For more details, see Arvind Narrain ‘Section 377 and the Error of Judgment.’ Tehelka Magazine. Issue 7, Volume 11, February 15,2014


Members of CSMR hope that this kind of documentation will become useful in the next round of litigation. Added to this documentation work, lawyers at ALF along with other organisations have also begun the process of using the RTI mechanism to get information on FIRs filed under 377 from across the country.

Lawyers at ALF hope that building compelling case studies of the arbitrary use of the law as well as a record of the use of Section 377 around the country will ensure that in the next round of litigation the question of factual foundation of the case can be comprehensively answered.

G.3 Ensuring implementation of the judgment in National Legal Services Authority v. Union of India

The Supreme Court, barely four months after the judgment in Suresh Kumar Koushal came out with a historic judgment, which recognized transgender people as full citizens of India. It held that transgender people are entitled to full recognition in the gender of their choice and not doing so will violate the right to equality, dignity and expression. While the petition was filed by the National Legal Services Authority, in order to ensure that the voice of the community members was heard, Lawyers Collective on behalf of Laxminnarayan Tripathi filed an intervention in the petition. This ensured that some of the nuances of the issues affecting the transgender community were before the Supreme Court. The judgment itself declared that:

We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

As of now the struggle is for implementation of a wide ranging and progressive judgment. The most remarkable impact of the judgment was a bill on Transgender Rights which was passed by consensus in the Rajya Sabha with a number of MPs from across party lines, extending their support to the Bill, many of them citing the NALSA judgment with approval. While the progress of the Bill needs to be watched, the various state governments as of now have done little to implement the judgment. The decision laid out a set of recommendations, both broad and specific, that the government was mandated to comply with within a six month period. Only a limited of number of states made cognizable efforts to do so, Karnataka amongst them, by initiating the process of drafting policies for transgender individuals. Even in Karnataka however, where a final draft of the policy was accepted by the chief minister, no move has been made towards its actual adoption and implementation.

269 National Legal Services Authority v. Union of India, www.supremecourtofindia.nic.in/outtoday/wc40012.pdf (accessed on 15.4.15)
270 Ibid. at para 77.
G.4 Everyday litigation work with respect to LGBTI rights

Although Vijay Hiremath is primarily a criminal lawyer, he has been handling many cases of LGBTI persons because they approached him, either directly or through Hamsafar Trust based in Mumbai. He narrated to us some of the cases he has handled and the issues and challenges that emerged from the same.

He spoke of an instance when a man – Bindhan Barua – a 21 year old - wanted to have a sex change operation and marry a man working in the Indian Navy. Vijay Hiremath narrated the facts as follows:

Bindhan Barua (who named himself as Swati Barua) decided to do a sex change operation. So he came to Mumbai from Assam. The hospital he went to refused to do the sex change operation because the father called the hospital saying that he does not give permission. So Barua filed a writ petition in the Bombay High Court asking the court to order the hospital to carry out the operation. This became sensational news in the media. The judge asked the prosecutor, “is there any bar to do the operation?” The prosecutor didn’t say anything; he did not mention Section 326 or 320 of the IPC which deal with emasculation. He just said, “there is no bar”. The Judge said that the petitioner was 21 years old and knows what he is doing. He is an adult citizen and can go ahead with the operation if the medical procedure is clear. So he then approached the hospital which had to conduct a psychology test and so they said that they still need more time before he can undergo the operation. The petitioner got very angry and even his partner from the Navy said he does not want to marry him. Thereafter, the petitioner approached Humsafar Trust saying that he wants to file a case of cheating against his partner. So Humsafar called me and I refused to file such a case. We are always saying that we should not tie down anybody to a relationship and here there was clearly no case of cheating. The petitioner even wanted to file a case of rape. Technically he could have filed a 377 case, though this was a case of consensual sex. While leaving the courtroom, the Judge in this case, told the lawyer that for any rights, it is not the media that he should approach. He should approach the Court directly. This is because the lawyer who filed the writ petition on behalf of Barua had held a big press conference saying that the hospital was denying his client’s rights. Anand Grover was appointed as an amicus (friend of the court) in this matter. I assisted him. The petitioner has gone back to Assam without having the surgery done. I recently got a call from a lawyer in Kerala asking for help on a similar case in Kerala.272

Vijay Hiremath also referred to several instances of blackmail and revenge (by the aggrieved party) in gay relationships which were unsuccessful. In one instance, the ex-partner of a man sent an email to many family members and friends of the man, disclosing his sexual orientation. The man who was blackmailed approached Vijay Hiremath for legal intervention. He was confident of dealing with his family’s reaction,

once they got to know about his sexual orientation, but was deeply worried that he would lose his job. When his employer came to know, he was supportive and said there was no problem so long as his sexuality did not affect his work. Since the client had been in a relationship for two years with the blackmailer, Vijay Hiremath decided not to send a legal notice, as he may have had more material to blackmail with, which may adversely affect the interests of his client. Instead, he was able to settle the matter with a phone call, requesting the blackmailer to stop, and saying that he would take legal action in the alternative.

He spoke of an instance where a 40-45 year old married man from Delhi started dating a 21 year old man. The younger man looked younger than his age, and the age difference between the two was very visible. The younger man was from Pune, and a relative of his was a minister in the state government. Six months after they started dating, they decided to live together in Bombay. The younger man told no one in his family, and shifted to Mumbai and switched off his phone. “The couple approached me for help, saying that they were frightened that relatives would approach the police and trace them.”

Vijay Hiremath said he persuaded the younger man to first call up his mother and tell her that he was safe, and that he moved out of his home due to fights between his parents. The younger man secured himself a job at a call centre and did not require money from his parents. Vijay Hiremath prepared affidavits on behalf of both of them, stating that they both willingly left their houses. This was done to safeguard their interests and to pre-empt false allegation of kidnapping/abduction against the older man. The older man rented a flat in Andheri, Mumbai, and the younger man stayed there as a paying guest. Vijay Hiremath drew up an agreement between the two of them stating this. He says that when the agreement was taken to the notary, the notary started questioning the men, and was not willing to believe that the younger man was 21 years old – he disbelieved the birth certificate. So Vijay Hiremath had to approach the Registrar of the court, who was also reluctant to sign, and directed him to present the issue before the Chief Metropolitan Magistrate to obtain his signature. This would have meant an enquiry, so Vijay Hiremath returned to the notary, persuaded him and got the agreement registered. The family of the younger man did not come to Mumbai to search for him. Vijay Hiremath said that after this incident, he had prepared rent agreements of this nature for other couples too.

Vijay Hiremath also narrated the facts in a case of a run-away lesbian couple – Sia and Angel. Both were Muslim girls. Sia was ten years younger, from a wealthy family in Mumbai while Angel was her tutor, with no family in Mumbai. The two women fell in love and when Sia crossed 18 years of age, they decided to elope. They had been advised by a Mumbai-based lesbian support group – LABIA – against eloping. They contacted Vijay Hiremath the night before they eloped. Vijay Hiremath too advised them against eloping, and suggested they meet and discuss, but Sia insisted that she could stay no longer in her house as she felt suffocated by her family. The couple then called Vijay Hiremath in the middle of the night, informing him that they had rented a flat but Sia’s family found out the location due to the handset they were using. Vijay Hiremath
suggested that they go away from Mumbai for three days (as it was a long weekend) to a safe place, and return after three days, to sign the affidavit that they had left their homes of their own accord. The couple could not go to Mumbai airport to catch a flight as Sia’s family lived close by, so they took a taxi to Pune to catch a flight to Delhi from there. Sia’s father had anticipated this move and hence, relatives were waiting for her at the entrance of Pune airport. Sia saw this from a distance, turned their taxi around to a bus stand, took a bus to Belgaum. In Belgaum, they stayed in two or three different hotels, as they had to keep changing hotels to prevent being traced. Each time they left a place, the police would arrive at the place after a few hours along with Sia’s father as they were being tracked due to the handset they were using. From Belgaum, they returned to Mumbai, signed the affidavit and immediately left for Delhi by train. A group working to protect lesbian women’s rights – Sangini – provided the couple protection.

Meanwhile, Sia’s father lodged a complaint of theft against both the girls after a month, stating that they had run away with Rs. 8 lakh in cash and Rs. 4 lakh worth jewellery. He took the police to Sangini’s office to arrest them, but the workers at Sangini did not allow the police or the father to enter the office. Vijay Hiremath said that by coordinating with a lawyer based in Delhi, they were able to file an application for anticipatory bail in the Delhi Court. The Delhi High Court granted 15 days to the couple to appear before the Bombay Court. The couple decided that Angel would go to the UK as her only support was her brother, based in UK. Vijay had advised the couple against it, as it would be difficult for Angel to return to India, as she would be considered an absconder and arrested upon return. However, the couple decided to go ahead with their plan and Angel left for the UK. Vijay Hiremath decided to file an application for anticipatory bail on behalf of Sia. He decided not to produce the girl before the Sessions court, as her family members were present in court with at least 50 men, who looked threatening. On the first date, the judge agreed to grant Sia protection and wanted to speak to her. The case broke out in the media, and covered extensively by many newspapers. The next day, when Vijay Hiremath went to the court, the Sessions judge told him “I know who you’re representing. I checked about Sangini on the internet. It is funded by all the gays in the world. This is all illegal.” When Vijay referred to the Naz judgment, the judge reportedly asked in open court, “First tell me what exactly do your clients do with each other? That’s what I want to talk to her about. This is illegal. They should not be involved in this and you should not be defending them.” Vijay Hiremath suggested that that the judge put down these observations in writing, to which he became furious. He gave Vijay Hiremath two days to produce Sia before him. When Vijay Hiremath refused to produce her in court after two days, the judge rejected the application for anticipatory bail. He refrained from placing on record his personal opinion on the issue. Vijay Hiremath approached the High Court, where the judge asked in a matter-of-fact manner, if the girls were in a relationship. Anand Grover, who appeared on Sia’s behalf, said “yes, they are friends and they are in a relationship.” The judge doubted the veracity of Sia’s father’s complaint of theft, as it was made a month after the alleged incident. The High Court judge granted her bail. Vijay Hiremath and Anand Grover facilitated a meeting of Sia with her family members in a hotel room. Sia spoke confidentially and stated her demands – that she wanted to study, she will not stay with her family but her
family should continue to financially support her, that she wanted Angel to return to India, and that her family should not oppose the anticipatory bail. She also whispered in her father’s ears that she wanted to have a sex change operation which he should finance. Though Sia has returned to live with her family thereafter, Vijay Hiremath is apprehensive that she may be compelled into a marriage in the near future.

Sia’s family felt that Angel had betrayed their faith in her, and refused to allow Angel to return to India. Angel could not return to India, and has continued living in the UK, where she obtained asylum based on a fear of persecution due to her sexual orientation, if she returned to India. So the couple was ultimately separated, due to the immense pressure faced by them from Sia’s family.

Vijay Hiremath also spoke about handling cases of transgender persons and issues pertaining to their identity documents. He said:

I am presently handling a case of a female to male (FTM) undergoing a sex change operation. We work on changing the name and gender in the documents of the client but prospectively. Passports and PAN Cards are easy to change but there are now demands that mark sheets should also be changed because the mark sheet is in a different name with a different gender. This becomes a problem when the person applies for a job. I told my client that an application for a change of name and gender in the mark sheet might get rejected, in which case we should approach the court. In another case, a girl wanted to change her gender in the birth certificate also but I advised her that this would not be possible and getting the mark sheet changed would be good enough. A passport is the easiest to change and you can use the passport to get further documentation. One can get an affidavit for change in gender with medical certificates attached. For hijras who do not have medical certificates, this becomes a problem.

From Vijay Hiremath’s narrative, it is evident that drafting and registering agreements for paying guest, and affidavits declaring that the person has left the home out of his / her own accord are important strategies to pre-empt possible harassment of homosexual couples by their family members and others through a misuse of law.

### H. ADVANCING THE RIGHTS OF CHILDREN AND JUVENILES

Protection of child rights and rights of juveniles in India has received renewed attention in public discourse in recent times. A survey conducted by Ministry of Women and Child Development in association with the United Nations Children’s Fund (Unicef) and a few Indian NGOs working for child’s rights found that more than 53% of children in India are subjected to sexual abuse, but most don’t report it. The survey was conducted in 2007 and covered 13 states across the country with a sample size of 12,447.273

A 2013 Human Rights Watch report on the issue, titled Breaking the Silence - Child Sexual Abuse in India, presents a dismal picture of child protection in the country, and

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the existence of child sexual assault within homes, schools and institutions for care and protection.\textsuperscript{274} It has been reported that there is a 336\% increase in the reported number of child rapes from 2001 to 2011.\textsuperscript{275} The Protection of Children from Sexual Offences (POCSO) Act, which addresses the issue of sexual offences related to children—all persons under 18 years of age—was enacted in 2012.

Simultaneously, law has attempted to address the issue of children in conflict with the law, through the Juvenile Justice (Care and Protection of Children) Act 2000, (referred to as JJA hereinafter). The JJA provides for a special approach towards the prevention and treatment of children in conflict with the law, and for children in need of care and protection, and provides for protection and rehabilitation of children within the purview of the juvenile justice system. The JJA was amended in 2006 and 2011. In the context of the homicidal rape of a young woman on a moving bus in Delhi in December 2012, where a juvenile was involved in the horrific offence, media highlighted that the juvenile allegedly involved in the December 2012 incident was the “most brutal” of all accused persons. This was contrary to the reality. As per the provisions of the JJA, the minor was awarded a punishment of three years in a rehabilitation home. This led to several calls for a stringent punishment for juveniles between the age of 16 and 18, committing heinous crimes. Demands were made for reduction of age of children from 18 to 16 years, in order to prosecute the 16-18 year olds as adults in cases of heinous offences such as murder and rape. Eight writ petitions alleging the Act and its several provisions to be unconstitutional were heard by the Supreme Court of India in the second week of July 2013 and were dismissed, holding the Act to be constitutional. Demands for a reduction of the age of juveniles from 18 to 16 years were also turned down by the Supreme Court. In August 2014, the cabinet cleared amendments to JJA, paving the way for harsher punishment.\textsuperscript{276} On 25 February 2015, the Parliamentary Standing Committee on Human Resource Development rejected the government’s proposal to prosecute juveniles between the age of 16 and 18 as adults for the offence of rape, stating that such a differential treatment to 16-18 year olds was violative of international law and the purpose of the JJA.\textsuperscript{277} This issue however refuses to go away with the new administration introducing another bill which allows for children between the ages of 16 and 18 to be treated as adults provided they commit offences punishable with imprisonment of seven years or more.\textsuperscript{278}

\begin{itemize}
\item \textsuperscript{274} Available at http://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf, (accessed on 28 July 2013)
\item \textsuperscript{276} Cabinet clears amendments to Juvenile Justice Act paving way for harsher punishment, The Times of India, 6 August 2014
\item \textsuperscript{278} http://www.prsindia.org/billtrack/the-juvenile-justice-care-and-protection-of-children-bill-2014-3362/(accessed on 15.3 15)
\end{itemize}
Human rights lawyers working on issues of child rights and rights of juvenile contend with a) the rampant sexual abuse of children; and b) protecting and advancing the rights of juveniles in conflict with the law in a context that is increasingly hostile to the same. Advocates Maharukh Adenwalla and Vijay Hiremath spoke of the cases they handled, the strategies used, the good practices and the lessons learned.

**H1. Protecting the Rights of a Juvenile on a Death Row**

Ankush Maruti Shinde was a juvenile who was convicted of rape and murder, and was on death row. The Nasik Sessions Court declared him to be a juvenile after he had spent more than nine years in prison, six of which were spent in a solitary cell as a death-row inmate. The Governor had rejected his mercy petition, and the courts too had failed to investigate the matter. Although the Supreme Court has repeatedly directed trial courts to investigate the age of the accused as a preliminary issue, the lower courts (magistrate’s and sessions courts) have obviously failed to do so, as proved by Ankush’s case. He was 17 years 11 months 9 days old at the time of commission of the offence, as shown by his school leaving certificate. However he was able to produce it only after the mercy petition was rejected by the Governor. The process to prove his juvenility after the death sentence had been confirmed by the Supreme Court was protracted and tedious. Vijay Hiremath shared his experience of handling the case:

It is a struggle to do this matter. I used to go from Bombay to Nasik by train. The train used to reach by 10.30 and by 11 am I would be in court. But in Nasik the court started only around 12-12.30. The judge was completely disinterested in the matter. He said, “This is a matter where the Supreme Court has already decided.”[^279] He agreed to take the matter at the end of the board, which was at 6 p.m. So I missed my train back. This went on for four dates. Then I stopped doing reservations for my tickets. Usually, judges do not ask for certified copies of judgments or orders that are reported in law reports such as All India Reporter (AIR) and Supreme Court Cases (SCC). However in my case, he insisted on certified copies. When I asked him if he was applying this to rule to everyone, he said, “this is an important matter, that’s why. He is on death row. If you want me to release him, get me the certified copies.” We managed to get them thanks to Yug Chaudhry’s connections. Finally the judge passed a favourable order, ordering the release of Ankush, on the ground that he was a juvenile at the time of commission of the offence. He sent a copy of the same to the Supreme Court. Meanwhile the State filed an appeal against the session’s court order in the Bombay High Court. In the Supreme Court, when the matter was listed for the second time, Justice Ranjana Desai asked the State to confirm if there was anything pending in the lower courts and whether they were okay with this order. The Maharashtra government said that it had no objection to the sessions court order, although this appeal was pending before the Bombay High Court. This helped us and the Supreme Court endorsed the order in our case saying that the accused

[^279]: This was a case in which conviction and death penalty was confirmed by the Supreme Court in 2009. See Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667: (2009) 3 (Cri) 308
should be released immediately. We took this order to the Bombay High Court. The High Court judge became nervous, as the Public Prosecutor had not informed him that the matter was in the Supreme Court. He mentioned in his order that if there was any compensation to be given, it has to be given by the Maharashtra Government. Even after all this, there was a problem executing the order. You can’t tell the jailors on the phone, you have to go there and explain the orders. They insisted on an order stating that the lower court has vacated the stay. So the matter went again to the lower court, the court said send the matter to the Juvenile Justice Board because it was such a serious matter. The Juvenile Justice Board, last Friday, passed an order for his release. The jailor has also agreed to release him but said he was accused in another case. Finally I had to threaten the jailor, saying he was keeping the juvenile confined at his own risk and that we would file for compensation, so he finally agreed.

Vijay Hiremath explained that Ankush sent him the school leaving certificates only after the President rejected his mercy plea. This was not an obstacle as an amendment to the JJA states that the plea of juvenility can be raised at any time.

In another case, Ramdeo Chauhan, a juvenile was convicted of murder and sentenced to death in 1998. This was confirmed by the Supreme Court in 2001. Through a review petition, filed by lawyers from the Human Rights Law Network, the gross miscarriage of justice was set right by the Supreme Court after 12 years, in 2010. The Supreme Court upheld the grant of clemency by the Governor of State of Assam in accordance with a recommendation by the National Human Rights Commission, acknowledging NHRC’s wider role in the promotion of human rights. The moot question is – can death sentence be awarded to a person whose age is not positively established as above sixteen, on the date of the commission of the offence? The Supreme Court held as follows: “If a person is entitled to a benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights.”

There are many such juveniles on death row. Ankush’s and Ramdeo’s cases are only a representative sample. Such an imposition of death penalty constitutes a blatant violation of the provisions of Juvenile Justice Act and international human rights standards, including the UN Convention on the Rights of the Child. However, this practice continues, either on the ground that the age on the date of offence is not proven, or a failure of the judicial system to verify the age of the accused prior to sentencing.

H2. Ill-treatment and Abuse in Juvenile Homes

Maharukh Adenwalla, a Mumbai-based human rights advocate who specializes in advancing rights of children and juveniles, spoke of ill-treatment in Bhiwandi remand

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280 Ramdeo Chauhan @ Rajnath Chauhan vs Bani Kant Das & Ors, judgment of the Supreme Court on 19 November, 2010, decided by Justices Aftab Alam and A.K.Ganguly in Review Petition (C) No. 1378 of 2009 in Writ Petition (C) 457 of 2005

281 For further details, see http://www.hrln.org/hrln/child-rights/pils-a-cases/693-supreme-court-acts-to-prevent-travesty-of-justice.html#ixzz3XKujMfC7, (accessed on 15 April 2015)
home in Mumbai. A three year old boy had died at the Home because he was beaten. He was the youngest of four siblings – his two elder brothers, aged 5 and 9, and his sister also lived in the Home. A young social worker who used to go to the Home – Chris Perreira – came to know of the death of the boy from other inmates at the Home. He informed Maharukh Adenwalla, who filed a public interest litigation (PIL) in the Bombay High Court, asking for an inquiry to be conducted at the Home. Justice Ashok Agarwal immediately understood the seriousness of the issue, and granted permission to Maharukh Adenwalla and her team to go to the remand home and enquire into the matter. Maharukh Adenwalla, accompanied by another human rights lawyer – Monica Sakhrani – and Chris Perreira (carrying a big camera) went to the Home. However, they were denied entry by the Superintendent despite a court order. They then approached the police station of the area, and requested for cooperation from the Officer-in-charge. The subsequent day, they again went to the Home, and this time, the Superintendent was absent. In his absence, Maharukh Adenwalla and her team were able to convince the other workers into opening up their registers and documents for scrutiny, by showing them the High Court’s order. Reportedly, Chris took out his camera and photographed each page of the register. The team spoke to the two brothers of the deceased boy. The five year old said that “bhoot” (ghost) killed his brother. He then sat on a chair and acted out the beating.

When Maharukh Adenwalla returned to the court to report on the visit, the judge had changed. The new judge ordered a judicial inquiry into the issue. Maharukh Adenwalla opined that judges are far removed from reality, and hence the report of the judicial inquiry was not favourable. It made reference to un-related issues such as the presence of a television in the Home which kept the children connected with the outside world. The report did not find anything suspicious in the death of the boy or in the functioning of the remand home. Maharukh Adenwalla was called a liar in court. She and her team were individuals with no organizational backing. Thereafter, Justice A.P.Shah dealt with the case, and appointed a committee, consisting of Kalindi Mazumdar, Asha Bajpai and others, which would inquire into all government Homes for children in the city periodically.²⁸² Although the PIL filed by Maharukh Adenwalla resulted in the establishment of the committee which undertook the essential work of monitoring all the children’s homes, she said that the death of the boy at Bhiwandi remand home could not be further investigated due to the huge time lapse.

Subsequently the committee’s work was extended to monitor all government homes for children in the entire state of Maharashtra. The committee visited 25 institutions and prepared a report, which highlighted ill-treatment and mal-administration in some institutions. The report highlighted that one institution called Shraddanand Anathalaya in Nagpur, had an adoption racket. Maharukh Adenwalla explained that at Shraddanand too, a boy died under suspicious circumstances. No post mortem was done and he was quietly cremated. She said that although it is a practice among

Hindus to bury dead children, the Home was cremating them, and hence it was not possible to exhume the bodies to carry out investigation. Based on the report of the committee, the entire management of that institution was dismissed and a new set of officials were appointed.

Maharukh Adenwalla emphasized the importance of court-appointed committees such as these. She said:

> The positive development is that there is more transparency and there is space for outsiders, to monitor what is happening. Now an institution cannot feel that they can do whatever they want. The committee appointed by Justice A.P.Shah ultimately started getting phone calls from children in the institutions as to what was happening within, and asking the members to make a visit. That is how a committee ought to be – it ought to win the confidence and trust of the children. Ms. Kalindi Mazumdar of the committee was a 70 year old woman; she had been the vice Principal of the Nirmala Niketan College of Social Work and she was a motherly figure, so when she would walk into the institution, the children would throng around her. She would be the one who would be getting the phone calls.

**Anchorage Case**

Anchorage was a shelter home for street children, that was run privately in Colaba, Mumbai by Duncan Grant and Allan Waters, and managed by an Indian - William. The same committee mentioned above had visited the private children’s home, based on an order from the court. The boys at the home had spoken of beatings. Further the committee felt there was something suspicious but it had only one sentence referring to the same in its report. Maharukh Adenwalla said that this was not adequate to take any further action. However, the boys who were inmates of the home, started talking to strangers about the happenings in the home, in particular, the physical and sexual abuse of the children (boys). A journalist – Meher Pestonjee – decided to record the statements of the boys and showed the same to Maharukh Adenwalla. The children also contacted a dedicated helpline for children (1098) set up by Childline - a child rights organization. Maharukh Adenwalla worked closely with the court and the police, in piecing together the facts which revealed the scale of sexual abuse at the home. At that time, the passport of the boys were being made, and Maharukh Adenwalla and her colleagues were very apprehensive that the children would be taken out of India. She represented Childline in court, which sought investigation, arrest and prosecution of Duncan Grant and Allan Waters, as well as the manager, in addition to rehabilitation of the children.

When Maharukh Adenwalla was opposing the bail of Allan Waters, the defence lawyer reportedly said to her: “Oh! You are a Prosecution Witness and you are arguing the case, there is a conflict of interest.” That is when she realized, that she was working so closely with the police officials that they did not inform her that they were recording her statements and made her as prosecution witness, just to save their skin in case anything went wrong in the case. Since she had been named a prosecution witness, her hands were tied and she could not represent Childline in court. She strategized and
brought in her colleague, Yug Chowdhry, to appear in court on behalf of Childline. Maharukh Adenwalla asked for a Special Public Prosecutor (SPP) in the case, and obtained one. She said that even with an efficient and committed SPP, who was a very skillful trial court lawyer, the case was fought for ten long years up to the Supreme Court.

She said that it was difficult to make the judge view the case from the perspective of the street children. For example, she said that the street children would call themselves ‘guides’ and take foreigners to different places and claim it to be Taj Mahal. While activists working with street children knew that it was a common practice among such children to proclaim that they were guides when, in reality, they were not, the court was ignorant of this phenomenon. The highly experienced defence lawyer – Majeed Memon -reportedly tried to question the veracity of the children’s testimony about abuse in the shelter home, by asking questions to the children about the name of the street they lived on, and when they did not know the same, he questioned how they could be guides.

Many of the boys who came forward and spoke about the abuse were the ones who had fled from the institution. Maharukh Adenwalla recalled that the children were protected and kept in safe custody by two workers of Childline - Mamta and Meghna, as they were extremely frightened. The boys had earlier called up the workers and told them that they were being taken to the police station to withdraw their statements. Yug Chaudhry, Mamta, Meghna and Pratibha Menon from India Centre for Human Rights and Law rescued the boys from the police, and kept them in safe custody, she said. She emphasized that a successful case involved immense team work behind the scenes.

On speaking about how they obtained a favourable judgment from the Sessions court, Maharukh Adenwalla said:

The boys stood up and spoke. The boys gave evidence and they withstood cross-examination and the judge was able to weigh the cross-examination. The judge was able to recognize the vulnerability of the children. He was able to understand the dynamics and he was able to pass a very good judgment. The boys’ statements were taken in-camera. Majeed Memon, one of the finest criminal lawyers, did the cross-examination. I worked with the boys. These boys were 16-17 years of age when their evidence was being recorded in court. So I think they were old enough to know what they were saying. I felt that they should testify and face the cross-examination like anybody else, the accused should have all the right to test the evidence, but the evidence should be weighed properly by the judge concerned, recognizing that these boys were on the streets. It’s basically, little kids who you are worried about. In this case, the sessions judge was able to weigh the evidence in the correct perspective.

Maharukh Adenwalla also pointed out that part of the legal strategy that contributed to the success in the case, was that they were able to institute a transfer petition to transfer out a very visibly biased sessions court judge from the case, stating that the judge did
not follow the law and was prejudiced in favour of the accused. The judge who was substituted was able to weigh the evidence in a sensitive manner, she said. She explained that the argument in transfer petitions often hinged around the perceived (as opposed to real) bias of the judge based on consequences of his/ her action.

The Indian manager was arrested by the police a month or so after the registration of the FIR. In the opinion of Maharukh Adenwalla, this time lag provided adequate opportunity for the man to threaten the children and get them to withdraw their statements made to the police. Since Allan Waters and Duncan Grant fled from India, extradition proceedings had to be initiated to bring them back to India to face trial. Maharukh Adenwalla said that the extradition process was time-consuming and complex. The process began once the chargesheet was filed. Allen Waters had been arrested in the United States of America, but he challenged his arrest. Duncan Grant was able to move in and out of England despite a red corner notice (with the Interpol), due to the political clout he enjoyed, observed Maharukh Adenwalla. She drafted an affidavit as a prosecution witness, as to why it was important to have the two men back in India to face trial. All the affidavits of the boys, the legal provisions that applied to the case (particularly S. 377 of the Indian Penal Code), and other relevant documents had to be sent for the extradition to be successful. As a result, Allan Waters was extradited, while Duncan Grant returned to India on the basis of the legal advice given to him by the defence lawyer – Majeed Memon.

Apart from the extradition proceedings, Maharukh Adenwalla pointed out other challenges involved in the case. The manager – William – approached her and said he wanted to become an approver. She got another lawyer appointed for him, filed an approver application in court. The defence lawyer Majeed Memon influenced and convinced William overnight not to become an approver. Thereafter, William wrongly accused Maharukh Adenwalla, Yug Chaudhry and the public prosecutor Vijay Nahar, of offering him money to become an approver. He filed a complaint against them in the Bar Council of India, and since the chairperson was in Pune, the lawyers had to travel to Pune to defend themselves.

The sessions court convicted the accused but in the Bombay High Court, the accused were acquitted because the judge was unable to understand and connect with the lives led by street children. As soon as the Bombay High Court ordered the acquittal and release of the accused, Maharukh Adenwalla and Childline approached the Supreme Court, without any delay, as they were concerned that the accused would flee from the country, as had been done by a Swiss couple in another child sexual abuse case – the Marti case. The Supreme Court, however, concurred with the sessions court judgment and convicted the accused persons.

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H3.  Working with the Juvenile Justice Board

Maharukh Adenwalla felt it was important to work with the Juvenile Justice Board in order to get innovative reliefs which could make a difference in the lives of children in the here and now. She said:

I stopped doing all the cases I was handling and I went to the Juvenile Justice Board. I was providing legal aid to the boys for three years there to understand how the Act functions. There are lots of people working for children in need of care and protection, child rights, etc. But there were not many working with juveniles in conflict with law. And since I had contacts with those organizations, I started getting them to apply and get themselves declared as fit institutions, so that when the children got out on bail, they could go to those places. I have got such wonderful stories about the rehabilitation of those boys. Saathi\(^{285}\) is an organization working with children on the streets. They used to get themselves appointed as fit institutions. If the boys have pleaded guilty and have gone to them, the boys’ lives have changed. Because the wonderful thing about Saathi was, they would look at the skill and attitude of the boys. [Take the example of] this one boy from the Gharwal hills who had gotten into a fit of anger and he had killed his old lady employer with a frying pan. He is now making a career out of adventure campaigning. Mountains were his thing, he loved the mountains. Now he works with this camping organization. He takes these little camps into the mountains and he has done his advanced course and at the same time, he finished his graduation in computers. Where would he have had this option in his government-run special home?

We filed a public interest litigation asking for establishment of more number of juvenile boards for Mumbai. We also kept pushing the limits of law by opting for legal recourse when juveniles were detained in jail (which is against the law), and pressed for compensation from the state government for such wrongful detention / imprisonment.

H4.  Public Interest Litigations as a Legal Strategy

When we queried Maharukh Adenwalla if it was a sound legal strategy for child rights organizations to intervene in litigation related to child rights, through public interest litigation, she opined:

I don’t like PILs. I like to take an individual issue, from which different issues arise. I just feel that is much better. But I do think that the organization should be recognized enough for the court to call them amicus (as a friend of the court, to assist in the proceedings)…Geeta Ramaseshan (in Chennai) and Prof. Ved Kumari (in Delhi) have made very meaningful interventions as individuals. At the same time, ‘Haq for Child Rights’ in Delhi, Saathi and Childline in Mumbai have also

\(^{285}\) For more details about the organization, see http://www.sathiindia.org/child%20issue.html, (accessed on 14 April 2015)
supported the children, the lawyers and the litigation where it involved crucial issues related to child rights and the law. It is often the individuals who make an organization, and individuals’ commitment to the cause that translates into organizational intervention. These legal interventions helped lay the foundation for amendments that were brought about in the Juvenile Justice Act.

M.A. Shakeel, a human rights lawyer from Hyderabad, opined that PILs were “double edged swords.” He highlighted a case in which one of his clients filed a PIL on the issue of begging by children. In that case, the court went overboard and passed an order saying there can be no children begging at traffic signals. The collector of Hyderabad directed his staff to take away child beggars from the city, using the court order as a pretext for government officials’ highhandedness, rather than protecting and rehabilitating the children.

I. PROTECTING & PROMOTING THE RIGHTS OF PERSONS WITH DISABILITIES

While estimates vary, there is growing evidence that people with disabilities comprise between 4 and 8 percent of the Indian population (around 40-90 million individuals). Persons with disabilities are viewed stereotypically and face segregation, discrimination and many barriers to experiencing full citizenship. Apart from institutional and policy level responses, a legislation to promote the rights of persons with disabilities to full participation in the Indian society – The Persons with Disabilities Act - was enacted in 1995. India ratified the UN Convention on Rights of Persons with Disabilities, in 2007. Yet, their socio-economic empowerment and integration into the mainstream society remains a distant dream. A 2007 report prepared by the Human Development Unit of the World Bank, at the request of the Government of India, aptly sums up the situation faced by persons with disabilities as follows:

[T]he policy commitments of governments in a number of areas remain in large part unfulfilled. To some extent this was inevitable, given the ambition of commitments made, existing institutional capacity, and entrenched societal attitudes to disabled people in India. However, it also reflects a relative neglect of people with disabilities through weak institutions and poor accountability mechanisms, lack of awareness among providers, communities and PWD of their rights, and failure to involve the non-governmental sector more intensively. Most importantly, PWD themselves remain largely outside the policy and implementation framework, at best clients rather than active participants in development. There is also evidence in key areas like employment that disabled people are falling further behind the rest of the population, risking deepening their already significant poverty and social marginalization. The slow progress in expanding opportunities for disabled people in India results in substantial losses to people with disabilities themselves, and to society and the economy at large in terms of under-developed human capital.

loss of output from productive disabled people, and impacts on households and communities.\textsuperscript{287}

Unfortunately the core of disability law in India is only about the reservation of posts for the disabled in public employment. Disability law in the words of lawyer and writer, Jayna Kothari has to move from being based on the medical model to the social model.

The social model, in contrast to the medical model, shifts the focus from impairment on to ‘disability’ using this term to refer to disabling social, environmental, and attitudinal barriers rather than lack of ability. The notion of discrimination is key in this model, which holds the premise that disabled people do not face disadvantage because of their impairment but experience discrimination in the way society is organized. This includes failing to make education, work, leisure and public service accessible, remove barriers of stereotypes and prejudice, and failing to outlaw unfair treatment in daily lives.\textsuperscript{288}

Further in a context where the state employment is shrinking, the inordinate focus of the Persons with Disability Act on reservation in state employment is of limited value. However even with its serious limitations, advocates and activists have sought to take forward the key provisions in the legislation which are to do with reservation of vacancies for disabled persons in government establishments. To access this right, as per Jayna Kothari one has to show that:

1) The person can prove that he or she is disabled i.e. Comes within the narrow definition of disability in the Persons with Disabilities Act.

2) Reservation is contingent on identification of jobs by the appropriate government. There is persistent efforts by disabled people to access this benefit but thwarted by governments which have said that yes we have to reserve 3% but that is contingent on us identifying posts and we have not yet identified the posts.\textsuperscript{289}

Hyderabad-based lawyer M.A.Shakeel and Mumbai-based lawyer Mihir Desai conversed with us on strategies used by them in furthering the rights of persons with disabilities.

### I 1. Rights of Persons Affected by Leprosy

The National Leprosy Eradication Programme aims at eradicating the incidence of leprosy through prevention and cure. While an effective implementation of the Programme is key to furthering the human rights of affected people, there exist various laws and legal provisions that discriminate against leprosy patients. Lepra India – a non-governmental organization – has listed 15 central and state legislations

\textsuperscript{287} Ibid


\textsuperscript{289} Ibid.
that openly discriminate against leprosy patients. Some such discriminatory aspects allowed by law include:

a) Divorce can be granted to the other spouse under various laws on the ground of leprosy;

b) Services of employees affected by leprosy can be terminated on grounds of continued ill-health;

c) Life Insurance Corporation of India (LIC) charges very high premium from those affected by leprosy;

d) Railway authorities can refuse to carry leprosy patients on the ground that they have an “infectious and contagious disease”; and

e) State legislations relating to panchayati raj disqualify leprosy patients from becoming members of the panchayat (these laws exist in the states of Andhra Pradesh, Rajasthan, Chhattisgarh, Orissa and Madhya Pradesh).

M.A. Shakeel, a Hyderabad-based human rights lawyer, shared his experiences of working on the issue. He said that the Hyderabad municipality, in one instance, attempted to “clean up” the city by forcibly removing beggars affected by leprosy from the streets. One of them approached Shakeel and requested him to go to their colony to speak to them. When he went and conversed with the affected people, they told him about the entitlements that they have not been receiving – medicine, food and shelter. Shakeel took some of them to the office and they started working on a PIL. The PIL which they filed resulted in positive orders from the court, which has inspired the affected persons to feel empowered enough to approach the court and government departments themselves and ask for their entitlements.

When asked what factors contributed to the positive order, Shakeel said:

There are at least 20,000 people in the colonies. When I filed the petition, their wounds were oozing. We did a fact finding, took photographs and recorded their testimonies, due to their willingness to do so. This had a positive impact on the judges. Often, the positive orders in a case depend on the sensitivity and perspective of the judge hearing the case. Justice Singhvi had a rights based perspective and he gave orders, which kept the State under control, but no path-breaking orders were given. Then Justice Bilal Nazki came in. He furthered some orders. When Justice Anil Kumar Dave was here (in AP High Court), he was of the opinion that there must be a building for those affected by leprosy, with all facilities available to them. He then wanted a high level committee team to work on the idea. I requested the court to include the names of petitioners too in this committee because they are the ones most affected by the issues, and are direct stakeholders. The petition is still in court.

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290 For more details, see ‘Legal Discrimination Against Leprosy Patients Decried’, The Hindu, 27 September 2011

291 Ibid
Now they advocate for themselves. They go to the collectorate and the health department, advocating and asserting their rights. They are discriminated, stigmatized and don’t have ration cards and citizenship rights, but they have fought back. They are covered under the Persons With Disabilities Act. There was a recommendation in the Rajya Sabha that leprosy be removed as a ground for divorce. There are other legislations where, for instance, persons affected by leprosy are not permitted to board the train; such kind of exclusionary and discriminatory provisions have been challenged in courts of law.

Other strategies have also been effective. After the petition was filed, about 500 of them gathered at the dharna chowk here in solidarity. The media was totally taken aback by the sheer numbers. The gathering brought about visibility to the issue in the print and electronic media.

Some of the positive orders issued by the Andhra Pradesh High Court in a writ petition that has been kept pending, include providing continuous electricity, cleaning their colonies, issuing them anthyodhaya cards and bus passes. In the words of Shakeel, “their cases are continuing. I think it is better to have continuing orders that give specific directions with positive impact on the leprosy patients’ right to life with dignity, as opposed to a final order that may not result in anything substantial.”

The concerted work of human rights advocates such as M.A. Shakeel, along with NGOs and individual activists, has resulted in increased visibility to and public discourse on the stigma and discrimination against leprosy patients, and consequently the violation of their right to life with dignity. As a result, the Law Commission of India submitted a report on the elimination of discrimination against leprosy patients. It has recommended a 10 point plan to end discrimination against them, and has drafted a model legislation titled “Eliminating Discrimination Against Persons Affected by Leprosy (EDPAL) Bill, 2015”. The key aspects of the draft law include:

- Repeal and amendment of certain discriminatory laws, and inclusion of rights of persons affected by leprosy such as under Legal Services Act 1987;
- Measures against discrimination and guarantee of the right to access healthcare, adequate housing, education, employment and other such basic amenities;
- Legalising ownership of land in leprosy colonies, so that the affected persons are not under a constant fear of eviction;
- Prohibition of termination of employment on grounds of leprosy;
- Promotion of educational and training opportunities for persons affected by leprosy and their family members;
- Appropriate use of Language, and elimination of derogatory words and terms such as ‘lepers’;

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292 Summarized from ‘Law Commission’s 10 point Plan to End Discrimination of Leprosy Victims’, Deccan Chronicle, 7 April 2015
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- Assertion of right to freedom of movement in public transport, and the right to obtain a driving license;
- Concessions and monetary benefits to persons affected by leprosy during treatment;
- Emphasizing the need to create social awareness about the disease, treatment and curability, through public campaigns in government and private institutions; and
- Implementation of certain welfare measures as the responsibility of establishments, central and state commissions.

I2. Advancing the Rights of Dwarfs

Another group that was waging a protracted battle for human rights in the state of Andhra Pradesh are dwarfs. The issue for consideration was whether or not dwarfs were covered by the category of ‘orthopedically handicapped’, thereby entitling them to claim benefits under The Disability Act. Strategies included years of drafting letters, memorandums and campaigns leading up to a PIL filed by Twin Cities Dwarfs Association in the AP High Court. At the instance of the court, the Superintendent of Osmania General Hospital certified that:

a dwarf person can be included as handicapped or disabled because of loss of physical, intellectual and moral power as a result of short structure and abnormal (stunted) bone and joint growth. As a result…the ability of dwarfs to engage in gainful activity is considerably reduced. Hence dwarfs are eligible to be included in the category of orthopedically handicapped.293

By being included within the Disability Act, dwarfs also become entitled for reservations in government jobs, free passes for buses and trains and other such benefits. Shakeel also said that he and his team had filed the PIL to advance the rights of dwarfs. The positive order in the High Court was followed by a government order. M.A. Shakeel said that the judgment was a “landmark victory” as the judgment gave the community visibility. In his opinion, the petitioner became so empowered, that this petitioner stood for elections in Anantapura, against two big collectors.

I3. Employment Rights of the Visually Impaired

Persons with disability face challenges in finding suitable employment opportunities, although they wish to be productive members of society. Employers are often reluctant to employ or retain them, as they consider them to be a liability. The employers often find ways and means for non-compliance with the mandatory requirements of reservation/identification of jobs for persons with disabilities, as prescribed by the provisions of the Persons with Disabilities Act 1995. Disability discrimination is at work in most aspects of employment, including appointment, dismissal, salary, work

293 Disability News and Information Service, ‘Order issued by Andhra Government to Include Person with Dwarfism as Orthopaedic Disability’, Vol. 3, Issue 15, 1 Aug 2005
profile/assignments, promotions, training, service benefits, and terms and conditions of employment.\textsuperscript{294}

Mihir Desai referred to cases filed in the Bombay High Court to assert the employment rights of the physically challenged. He said the litigation served several purposes:

a) favourable orders and directions from the court led to implementation of provisions of The Persons with Disabilities Act by the government and semi-government agencies;

b) it arrested discrimination by employers and catalysed a change in mind set in the manner in which physically challenged persons are viewed by employers; and

c) the cases provided an avenue for international human rights standards on disability to be read into the national legislation, thereby raising the bar in terms of protecting and promoting the employment rights of the physically challenged.

Some of the writ petitions filed in this regard in the Bombay High Court, with positive judgments, are as follows:

In \textit{Ashok M. Shrimali & Ors. v. State Bank of India & Ors.},\textsuperscript{295} the petitioner, who was visually impaired, sought to be accommodated as a bank officer in a suitable position. However the bank stated that posts beyond level II were not suitable for persons with visual impairment. The Bombay High Court granted the petitioner liberty to move the court after the process of identification and reservations of posts is completed by the central government. In the interim, the respondents were directed to appoint the petitioner to a post consistent with his qualifications and results in appropriate examinations.

The Bombay High Court in its hearing in the case of \textit{National Federation for the Blind vs. State of Maharashtra}\textsuperscript{296} directed constitution of a committee for the purposes of identification of posts in various government and semi-government organizations for the disabled. It further directed that the committee shall not restrict the identification of the post only to the lower categories but also to prepare reservation at every stage where there is recruitment to be effected.

In \textit{Kritika Purohit and Anr. vs. State of Maharashtra and Ors.},\textsuperscript{297} the petitioner was a visually impaired student who sought admission to the course in Bachelor of Physiotherapy but was not permitted to apply for the same. The Bombay High Court, through an interim order dated 2 August 2010, directed the Commissioner of Disabilities to make available suitable instructions and arrangements for admission of visually impaired students. It further directed that the petitioner be provisionally admitted to the course.


\textsuperscript{295} 2001 (Supp) Bom C.R. 132

\textsuperscript{296} 2005 (1) Bom CR 740

\textsuperscript{297} Ms. Kritika Purohit & Anr vs The State of Maharashtra, through the Secretary, Department of Medical Education & Drug Control & Anr, Writ Petition No. 979 of 2010, filed in the Bombay High Court.
and be provided with reading materials in Braille. Subsequently the court stayed the decision of the state government, which accepted the guidelines of the Maharashtra State Council for Occupational Therapy and Physiotherapy that visually impaired candidates are not fit for the physiotherapy course. It directed the respondents to consider candidates with visual disability for admission to the course in physiotherapy.

J. CHALLENGING EVICTIONS AND DEMOLITIONS

P.A. Sebastian of Committee for Protection of Democratic Rights (CPDR), Mumbai, spoke of slum evictions and demolitions in the post-Emergency period. He gave a backdrop to the famous Olga Tellis case, where the Supreme Court read the right to livelihood into the fundamental right to life, guaranteed by Article 21 of the Indian Constitution. He said:

In the 1980s, the Chief Minister of Maharashtra - Antulay - wanted to beautify a stretch of Bombay from the airport to the Taj hotel, which was the only five star hotel in the city then. He wanted to present the city as a beautiful place to all the foreigners. He hadn’t publicly disclosed this plan publicly but it was under discussion. It was for this reason that demolition of slums took place…The demolitions began at midnight. No one except two journalists - Praful Bidwai and Ivan - knew about it. Within some hours, the municipality demolished the slum comprised of thousands of homes and the residents were deported to places like Kerala, Karnataka and Andhra Pradesh. Demolitions were stopped at around 2:45-3:00 p.m. after we filed a petition at noon, and received urgent orders from Justice Lentin of the Bombay High Court to stay the whole operation. It was the first time in history in a matter of this sort that people were called trespassers. I was the lawyer who signed the papers for this case but there were 37 lawyers who supported us. Subsequently a well-known journalist, Olga Tellis, wrote a letter to the Chief Justice of the Supreme Court regarding the slum demolition, which the court converted into a PIL. Since the Supreme Court was seized of the case, the Bombay High Court petition was transferred to the Supreme Court and heard along with the same. The slum demolition had an impact on at least five million poor people who lived in Mumbai in slums, leading a precarious life.

Mihir Desai distinguished between PUCL’s writ petition in the Bombay High Court, which primarily focussed on postponing the demolition of the homes of pavement dwellers till after the monsoons in Mumbai were over, and the writ petition in the Supreme Court which hinged on fundamental right to life, and reading the right to livelihood and housing within the same. On work behind the Olga Tellis case, Mihir Desai said that there were two levels of work involved – a) organizing the pavement dwellers; and b) litigation in the Supreme Court based on fundamental rights. Mihir Desai, who was a law student then, became involved at both levels of work. Indira Jaising, who is a human rights advocate and former Additional Solicitor General, was the lawyer who argued on behalf of Olga Tellis.

Since 1997, there were several waves of demolition, and more than 50,000 families were forcibly evicted from the Sanjay Gandhi National Park, without being given any alternative accommodation. This was one of the largest ever demolitions that was implemented in urban India in the post-Emergency era. The police, the municipality and demolition squads behaved in a brutal manner, destroying people’s homes and property, and leading to a loss of lives too. The high-handed behaviour of the state machinery was being justified in the name of saving the environment and in ‘public interest’. The writ petition was filed by Bombay Environmental Action Group (BEAG) – an NGO with a focus on environment – against the Municipal Corporation, forest officials and relevant ministries of the state government. The petition (No. 305 of 1995) sought a direction from the court to remove the ‘encroachers’ from the forest, relocate them in non-forest areas, and to demolish all unauthorised structures within the Park within a period of six months. The petition also sought directions from the court to prohibit the state government from regularizing the ‘encroachments’, and from providing amenities to the families living in the Park. In 1997, the High Court directed the government authorities to conduct a survey of the inhabitants of the Park, and to prosecute any person refusing to vacate the forest land under the Forest Conservation Act 1980, Indian Forest Act 1977 and Wildlife (Protection) Act 1972. The High Court also ordered those persons whose names were not found in the electoral rolls prior to or on 1st January 1995 to be removed from the Park and structures inhabited by them to be demolished. Those whose names were found in the electoral rolls had to be relocated by the state government in non-forest land within eighteen months.

Maharukh Adenwalla also spoke about slum evictions related to the Sanjay Gandhi National Park in Mumbai, that she was involved in. She worked closely with and represented Nivara Hakk Suraksha Samiti and Committee for Protection of Democratic Rights – non-profit organizations, both of which advocated for protecting the rights of slum dwellers residing in the Park. She said:

There used to be evictions, so to try and stop them, I used to rush to court and obtain orders. I tried to use the International instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) - Article 11, which speaks of right to housing. I would keep highlighting to the court that India

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300 Ibid, p. 2


302 Article 11 of the ICESCR provides that:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate
has signed and ratified the Covenant. The court would tell me not to speak of international covenants! The court decides which issues to use international standards in and which issues not to. The courts are very open, for example, in using provisions of the Convention on the Rights of the Child, but not the use of ICESCR in the context of eviction of slum dwellers and demolition of their homes. Ultimately it was so frustrating. I would be sobbing outside court, because I would feel so overwhelmed, with the number of people affected, and the callous attitude of the court towards them. The court actually started monitoring the demolition, by hearing the matter every fifteen days to ensure that the slum dwellers had been evicted and had not returned. In a way, the fight was between two organizations, with two totally opposite ideologies, BEAG (Bombay Environment Action Group) and Nivara Hakk Suraksha Samiti.

Justice Hosbet Suresh (retired) – a renowned human rights advocate and then a judge of the Bombay High Court – also spoke of large scale demolitions of poor people’s homes that he dealt with as a judge of the City Civil Court of Mumbai. He said:

At that time the concept of human rights was not known but the poor man came to the court. For example, we used to have large-scale demolitions of poor people’s homes at that time in Bombay. There is one provision in the Bombay Municipal Act (S.353/354) which would be used in the litigation. The complainant would say that construction was illegal because it was constructed without a plan, then they would go to the municipal corporation. The corporation would inspect the structure to see whether it was regular or irregular. They would show-cause as to why the structure should not be pulled down. The corporation would say that there is no plant so let’s demolish. At that time, nobody thought of a remedy of going to the High Court. So they would come to the City Civil Court to restrict the corporation from demolishing. I would always, invariably, grant them injunction. I would always ask “why have you chosen this particular structure when there are so many other illegal structures?” I would always say that this is poor man’s home and he has no other home. If you pulled it down, what should he do? At that time the corporation could also regularize the structure. So I would very often start with saying this is not a matter for litigation. This is a matter for regularization. I would begin my order like that. The municipal corporation would avoid my court thereafter.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.
Breathing Life into the Constitution

The cumulative narratives of Advocates P.A. Sebastian, Maharukh Adenwalla and Justice Suresh indicate the importance yet (almost) impossibility of having a sensitive judiciary in issues of eviction of slum dwellers and the demolition of slums. The narratives indicate that courts might at points in time also become a vehicle to authorize demolitions.

As Mayur Suresh and Siddharth Narrain note:

The Supreme Court has stated that allowing people who build their homes over generations on public lands-encroachers- to remain on land is akin to giving money to a pickpocket, the right to shelter notwithstanding. The violent reordering of cities in India driven by the judiciary to remove slums is a practice that not only violates legal protection to slum dwellers but also denies the legal obligation of the state to provide resettlement alternatives to the evicted families. As Baxi notes, demolitions, which were once seen as excesses perpetrated during the Emergency, now comes to be seen as the badges of good governance.

K. ENSURING JUDICIAL ACCOUNTABILITY

Working in courts of law entails an implicit faith in the integrity of the judiciary and its ability to deliver justice. However, like all other democratic institutions and associations, the judiciary is not without imperfections. Issues of accountability, transparency, democratic functioning, impropriety, abuse of power, corruption, individual and institutional bias and highhandedness are issues raised by human rights lawyers, not only vis-à-vis the executive but also with reference to the judiciary.

We conversed with two human rights lawyers from Chennai – R. Vaigai and Anna Matthew. They are founder members of the Chennai-based ‘Forum for Judicial Accountability’. Vaigai is the convenor and Anna Matthew is the secretary of the Forum. They spoke of a number of cases in which they sought to ensure accountability of judges.

One of the cases they worked on was that of a former chief justice of the Madras High Court and Karnataka High Court, who was to be elevated to the Supreme Court, as recommended by the collegium of the Supreme Court in 2009.

However, serious charges of land grabbing, corruption, accumulating disproportionate assets, abuse of office and lack of judicial propriety and probity surfaced against the concerned judge. The Forum processed the information and complaints in this regard, compiled and verified documentary evidence, and made a presentation of the same in the form of a letter before the erstwhile Chief Justice of India, Justice K.G.Balakrishnan.

The advocates recalled the strategies involved in this collective effort at ensuring judicial accountability, in the following words:

We, as a group, have been successful in addressing the issue of judicial accountability with regard to three judges. There is a lot of strategy and tact to be exercised in this regard. We are a well-knit and networked group in which there is division of

303 Siddharth Narrain and Mayur Suresh Eds., The Shifting Scales of Justice, Orient Blackswan, New Delhi, 2014
labour and collaboration. When there is a crisis, when there is a problem, we call each other, we say let’s meet, we have to discuss this... everybody comes together. Somebody drafts, somebody files, somebody represents in court.... When we have dealt with such instances in the past, we have given away most of our [regular] litigation work as we had no time. The volume of work was so high. We had two cupboards full of documents to read, understand, compile and safeguard. Once we start the first representation, the amount of information that pours in from people - litigants and lawyers - is overwhelming. In order to lodge a complaint against a judge, one had to scan and verify everything. It was a painstaking effort. Lots of homework is required to be done. When a judge amasses so much wealth, we have had to verify every survey number, tally everything - the pattas and the chittas. We are not regular property lawyers who were familiar with revenue records. But we had civil lawyers coming and helping us. At that time, when we had a whole gamut of lawyers coming to our office to help us, including regular practicing lawyers that we would not normally associate with for our work. However, when we called them and asked them for help, they immediately obliged as they identified with the cause.

In another case, a former sitting Chief Justice of Madras High Court was accused of corruption and misuse of powers. He allegedly had a tie up with a judge of the Andhra Pradesh High Court. Both the judges’ sons and nephews were practicing lawyers in each other’s courts, with a quid pro quo arrangement. Thus in the Madras Chief Justice’s Madras court, at some points in time, reportedly more than 50% of the vakalatnamas (application by a lawyer to represent the client in the case) in the cases would be filed by the relatives of the judge of the AP High Court. The issue of judicial accountability with regard to the Chief Justice arose at a time when the Madras Bar Association went on a strike for six weeks, protesting the move to establish a new High Court at Madurai. The notice to establish the High Court was upheld by the concerned Chief Justice in a public interest litigation. It was at this time when tempers were running high that the Forum for Judicial Accountability decided to initiate a campaign against the corruption and misuse of powers by the Chief Justice. Speaking of the work involved, both at the level of gathering information and harnessing broad-based support for the initiative, R.Vaigai says:

Every day we used to put up a shamiyana (temporary tent like structure) and sit outside the court...lecturing and speaking. We utilised the opportunity that the lawyers’ boycott gave us, drafted a representation, put together at least about ten cases of gross violations of judicial propriety by the concerned Chief Justice in matters involving enforcement directorate, customs and tax. We elaborately stated and compiled the facts. Simultaneously we invited further complaints and information in this regard. For this purpose, we placed four or five big ballot boxes in different parts of the High Court. We circulated pamphlets inviting complaints about the change of vakalats in favour of the AP High Court judge’s relatives and other related issues related to the functioning of the Chief Justice. The complainants could withhold their names but the information they give should be authentic, we said. Every lawyer who lost his / her case due to the influence wielded by those
relatives was disgruntled, as it involved a substantial financial loss too. Hence we received many complaints. Then we procured the cause list of the Chief Justice for the past six months, and started analyzing the number of cases handled by the relatives of the AP High Court judge on each day. We tabulated the same.

Anna Matthew spoke of how they converted the issue into a signature campaign:

After collecting and compiling the particulars, the next step was to garner a broad-based support for the issue. At the same time, two judges of the Madras High Court wrote two separate letters to the Chief Justice, protesting against the interference of the Chief Justice with the selection of the subordinate judicial officers. They alleged that he had asked them to change the marks so that a failed candidate would be selected. So we utilized those letters also, and compiled them in the form of a representation, and collected about two thousand signatures. The lawyers were ready to sign the representation and queued up for the signature! We readied the representation to deliver it personally to the Supreme Court.

R.Vaigai took the documents to Delhi. She was accompanied by other lawyers from Chennai, and legal luminaries from Delhi such as Senior Advocate Shanti Bhushan and Senior Advocate Indira Jaising when she met with the Chief Justice of India (CJI), and gave him the representation. According to Vaigai, the CJI was shocked, particularly as two of the brother judges from Madras High Court had also highlighted judicial impropriety of the Chief Justice of Madras High Court in their letters.

While the boycott continued in Madras High Court, Vaigai and others also tried to get an impeachment motion introduced in the Parliament. She stayed in Delhi for nearly three to four weeks, and along with other lawyers from Chennai and Delhi, she met all major political leader in Delhi - from CPI, CPM, RJD, RJP and so on. They met various persons everyday in order to garner political support for the impeachment. When she returned to Chennai, the news of a representation against him had reached the concerned Chief Justice. She says:

When I returned, a minor miscellaneous petition was posted before the concerned Chief Justice in a Division Bench – it was for condonation of delay or an exemption. As soon as the matter was called, he was very friendly to me. I requested him to post the matter before some other bench. He asked why, as the Bench was going to allow your petition. I said, “that is precisely the reason why I am saying, because I am a signatory to a representation given against the Chief Justice, and therefore I wouldn’t want anybody to say to me later that I got favourable orders because of that. Therefore kindly post my matter before somebody else.” This was the best opportunity for me to make public the representation made against the Chief Justice. The judicial system is particular that a complaint against a judge is not discussed by anyone, that it remains a well-kept secret, an internal matter behind closed doors. But who can prevent me from representing in the courts? So I used the opportunity to represent, and bring it out in public, to the press and everybody, that this is representation made against a Chief Justice. He just rose for the day, and never came back.
The Chief Justice was reportedly transferred to Kerala High Court and thereafter became the chairperson of the Andhra Pradesh Human Rights Commission.

This work was not without danger. Supporters of the concerned judges had tried to threaten and attack R. Vaigai and Anna Matthew at the car park of the High Court on a late evening. Police had been called upon to prevent R. Vaigai from travelling to Delhi with the concerned representation and supporting documents to place before the Chief Justice of India.

The advocates also spoke about the work of the Forum in relation to Justice N. Kannadasan – an additional judge of the Madras High Court, who was appointed in November 2003 for a period of two years. While he was a practicing lawyer, it was alleged that he did not conform to professional ethics and propriety, and that he and his family members/juniors would represent two warring parties to the dispute, or he would represent one party to the dispute and after some months, he would represent the other party to the dispute. The Forum filed a writ petition challenging his appointment as an additional judge, on this basis, which was dismissed on the ground that he had already been appointed. After he became a judge, he was reportedly assigned cases under the *Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985*, which had stringent provisions rejecting bail for persons caught with even small quantities of drugs in their possession. While other judges of the High Court would reject bail, Justice Kannadasan reportedly granted bail generously to persons accused under the law, in contravention of S. 37 of the NDPS Act.

The accused persons, who were involved with international crime syndicates on drug trafficking, and were wanted criminals by the Interpol, would escape from the country upon being granted bail, and it would be difficult to prosecute them afterwards. R. Vaigai said that the Enforcement Directorate was extremely unhappy with this turn of events. With the assistance of personnel of the Enforcement Directorate, the Forum was able to document the number of NDPS cases where such bail had been given, the offence involved and the quantity of drugs in possession of the accused in each case. This information was compiled and given as a representation to Justice Katju, who was the Chief Justice of Madras High Court at that time. The representation was also sent to the collegium of Supreme Court judges, which was considering the possibility of confirming the judgeship of Justice Kannadasan. Based on the representation, it refused to confirm the appointment of Justice Kannadasan as a High Court judge.

Thereafter, Justice Kannadasan was made the President of the Tamil Nadu State Consumer Dispute Redressal Commission. This appointment was challenged through a writ petition in the Madras High Court. R. Vaigai appeared as the lawyer for the petitioner – Anna Matthew. The criteria for appointment as President of the Commission was that the person is, or has been a judge. Justice Kannadasan said that he had served as a judge and hence he was eligible. The petitioner’s argument was that he was not eligible to be a judge in the first place, which is why the collegium did not confirm his judgeship. Hence the spirit of the law, and not the letter of the law should be implemented. The High Court agreed with the petition, and quashed
his appointment.\textsuperscript{304} Subsequently the Supreme Court issued a stay against the High Court’s order.\textsuperscript{305}

The work of R. Vaigai and Anna Matthew illustrate the enormity and daunting nature of an initiative to ensure judicial accountability, the need for collective work and strategy sharing, and the combined use of advocacy and litigation in this regard. Their work, and the work of the Forum is of immense importance in the present context, where Supreme Court judges and High Court judges (such as that of the Madhya Pradesh High Court) have allegedly indulged in sexual harassment of women subordinates, and processes are under way to make them accountable for their actions.\textsuperscript{306}

The need to ensure judicial accountability has now gained a wider public momentum with the introduction and passing of the \textit{National Judicial Commission Act, 2014}.\textsuperscript{307} The debate has now shifted from ensuring that corrupt judges are not elevated and appointed to ensuring that there is a systematic institutional apparatus through which judicial accountability can be ensured while safeguarding judicial independence.

\textbf{L. CONCLUDING COMMENTS: LEGAL STRATEGY AS LEADING TO A WIDER SOCIO - POLITICAL TRANSFORMATION}

This section has sought to pull together strategies adopted by human rights lawyers in a range of issues. One running thread through all the sections is the complex and mutually reinforcing relationship that exists between human rights lawyering and social movements. The labour lawyers interviewed in this study spoke about the importance of working with the trade union movements. In fact, lawyers such as Gayatri Singh, Jane Cox, N.G.R.Prasad, Mukul Sinha and Mihir Desai initially worked with trade unions and participated in the trade union movement before they took on labour law practice. Similarly lawyers working on dalit rights, such as Martin Macwan, Manjula Pradeep and Govind Parmar were and continue to be active participants in the dalit human rights movement, while Sudha Ramalingam, V Suresh, Nagasaila and Suresh Kumar are active in the civil liberties movement. Sometimes, activists who were active in social movements became inspired to study and practice law subsequently due to the legal issues arising from such movements, as in the case of Flavia Agnes – a leading figure in the women’s movements in India. Some other advocates, such as Mukul Sinha and P.A.Sebastian established non-funded, activist, pressure groups to complement their human rights work in courts of law. Other lawyers such as Sudha Bharadwaj, Maharukh Adenwalla and Geeta Ramaseshan, work closely with social movements while maintaining their primary identity as human rights lawyers.

\textsuperscript{304} \textit{Anna Matthew and Others vs. N. Kannadasan}, order dated 12 December 2008, by Justice P.K.Misra and Justice A Kulasekaran of the Madras High Court, in Writ Petition No. 18731 of 2008

\textsuperscript{305} ‘High Court Order Quashing Kannadasan’s Appointment Stayed’, The Hindu, 20 December 2008

\textsuperscript{306} For more details, see ‘CJI Sets up 3-judge panel to Probe Sexual Harassment Charge Against MP HC Judge’, The Times of India, 2 March 2015

\textsuperscript{307} The constitutionality of the Act has been challenged in the Supreme Court, final arguments have been heard and as this book goes to the press the judgement stands reserved. See http://lawandotherthings.blogspot.ch/ (accessed on 28.9.15) for a transcript of the oral arguments in the Supreme Court.
In fact, it is precisely this life experience of human rights lawyers which leads to a keen awareness of the way legal strategy should lead to a wider social transformation. Mihir Desai illustrates this when he says that litigation in the context of disability apart from arresting discrimination by employers also catalysed a change in mind set in the manner in which physically challenged persons are viewed by employers. Similarly as ALF argues, the most important contribution of the Naz case was that 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 sexuality was otherwise confined.

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 use of law as a strategy to the wider world of activism.
3. Challenges faced by Human Rights Lawyers

The challenges faced by human rights lawyers are akin to the challenges faced by the proverbial David facing the Goliath of entrenched prejudice. The challenges that this David has to face range from negotiating a deeply entrenched system of power and privilege to sustaining the fight against seemingly insurmountable odds. Human rights lawyers have to deal with a state apparatus, which is unremittently hostile to human rights concerns in a socio-political context where there is little support for their work of espousing ‘unpopular causes’.

Absence of rule of law

The legal system comprised of a pyramid of courts, tribunals and other authorities comprise a complex network of forums, which present many challenges to human rights lawyers. This complex system as such is not geared to address the need of the marginalized but prioritizes the conflicts among the wealthy in its civil docket. The criminal justice system with its network of police stations, jails and magistrates unfairly penalizes those from lower socio-economic strata.308

An understanding of the way the docket of the Supreme Court is structured will also help to illustrate this point. In spite of the fact that much has been made of the phenomenon of public interest litigation, the Supreme Court as any quantitative analysis would reveal remains an ‘arena of legal quibbling for men with long purses.’309 Perhaps illustrative of this is an analysis of the number of public interest petitions which are filed in the Supreme Court. In the time period from 1980-1990 it amounts to less than 10% of the docket.310 The fact that in civil cases court fees have to be paid and lawyers fees have to be paid in all cases means that the poor have very little chance of eking out justice within the system. All the statistics indicate that the system is weighed against those with very little resources.

These challenges of navigating the system on behalf of the marginalized are portrayed in these two narratives of a typical day in court.

B.S. Ajita observes:

308 The Prison Statistics India, 2013, http://ncrb.gov.in/PSI-2013/PrisonStat2013.htm( accessed on 10.7.15) bears out this statement. As per the Report, Out of 1,29,608 convicted inmates, majority of inmates are either illiterate (36,507) or educated upto class X (55,746). Out of 2,78,503 undertrial inmates, 80,393 were illiterates, 1,17,373 were educated upto Class X,56,806 having education of above Class X & below graduation, 16,233 were graduates and 5,056 were post graduates.


You have to go to the Magistrate’s Court, where law has to be taught to them and they don’t listen to us. The lawyers there are very bad. Corruption is high and when we go prepared to the court, the case papers will not be there because in the morning the opposite lawyer would have come and given 100 rupees to the bench clerk and the bundle would have been kept in some other place. At 5 o’clock they would say that the bundle has been found, that it had been misplaced and the date would be given at 5 o’clock. We would be made to sit there only because we are fighting cases for the marginalized.

Corruption is a big challenge; in fact it is the biggest challenge. For example in this case which we should have won because of the facts and the law we lose after an effort of 2-3 years because the judge takes around 2 lakhs and makes an order against our client. This lady has to again toil and go to the High Court and again we conduct the case free of cost. In the end we will only have our professional success, but the suffering that she had had to undergo means that she is really defeated. Some people would say that I should have accepted the offer given by the other side (which is a paltry sum) and then my client would not have undergone this stress and strain of coming and going to the courts etc. So now I say to my clients that you must be willing to undergo all these challenges then I am willing to support you legally, otherwise it is very difficult.

Sudha Ramalingam says:

The victims don’t even know that they have a right to protest, that they have a right to ask for the remedies which they are entitled to under law. We feel so impotent even today when we see that quite a number of accused are being handcuffed in court. I’ve actually taken up this issue with several magistrates and I will ensure that none of my clients are handcuffed. But, I am unable to do that for everybody. Go to any magistrate’s court, sessions court, anywhere, the handcuffs are removed just before they are brought inside the court, or, it’s done very openly.

This snapshot of some of the everyday problems in negotiating the system may seem Kafkaesque and point to the impossibility of negotiating the system. However incredibly many human rights lawyers engage persistently with this system in order to eke out a measure of justice for their clients.

Patriarchal nature of the legal system

Apart from the class bias of the Indian legal system it’s also important to emphasize the gender blindness of the system. It is a significant challenge for women to become lawyers and to be taken seriously by the legal profession. This gendered nature of the legal system is exemplified by the number of women at the very top. I.e. the Supreme Court in which there is only one woman judge out of twenty eight judges.  This bias is manifest not just at the apex but permeates the entire system, putting women at the receiving end of prejudice.

311 http://supremecourtofindia.nic.in/judges/judges.htm( accessed on 14.10.14)
B.S Ajita is scathing about how patriarchy permeates the justice delivery system:

When it comes to the family, the judge’s perspective is to protect the family in one way or the other. [The judges] sympathize with the men because in the opinion of the judges, the men are well placed to protect the family. So what judges think that women should fight for is to move from an abysmal level of rights to a survival level of rights. So this is a judges perspective and an institutional perspective which is still feudal, patriarchal and male centric.

Jane Cox is a labour lawyer based in Bombay. She feels that the question of male bias is something which has to be faced. In Jane Cox’s opinion, there is an intersection of class and gender which often manifests itself.

[When I am] dealing with workers directly, there is no issue as what predominates is class. Workers always think someone from a higher class is speaking.... terrible thing but I suppose that kicks in. But trade unionists, I feel respond differently to me. Sometimes I think its sub conscious but the way they will speak to you is very different from the way they’ll speak to a male lawyer. It is difficult sometimes and one has to bite your tongue. It is very easy to become a hysterical woman because it is so frustrating. But in the long run, you have to establish yourself and build up that rapport with workers, trade unions, judges. But the woman issue is always there.

**Lack of research**

Another issues which presents a deep challenge to human rights practitioners is the lack of availability of research on cutting edge human rights issues. There is a dearth of literature which explores the social, political, cultural as well as the empirical context of human rights violation. This lack of literature hampers litigation in the High Courts and Supreme Courts on issues as diverse as pollution, environment, and health impacts of polluting industries, discriminatory rates of incarceration of people based on caste and class as well as the unequal impact of death penalty on those who are on the fringes of the nation.

To give an example, it is often said that death penalty affects those at the bottom of the socio-economic system more adversely. However there is no empirical data which can substantiate this widespread belief. As Yug Chaudhry observes,

We have no data to support us. If you see the kind of work that happened in America, when Furman\(^{312}\) took place, when the Supreme Court struck down the death sentence, the kind of preparation they did (before Furman), the data they had accumulated to support their claims was incredible. We had these examples before us. Why is it that in India [we don’t have the same kind of research?]

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\(^{312}\) Furman v. Georgia, 408 U.S.238 (1972) was a United States Supreme Court decision that ruled on the requirement for a degree of consistency in the application of the death penalty. The case led to a de facto moratorium on capital punishment throughout the United States, which came to an end when Gregg v. Georgia was decided in 1976.
The absence of empirical data can equally hamper public interest litigation. In fact arguably the weakest link of public interest litigation is the absence of credible socio-economic data which can support the claims of the petitioner. One of the eminent practitioners of public interest litigation in Gujarat, Girish Patel, articulates this lack.

Similarly, in environmental problems, there were limitations because we were not only fighting the government but also big corporations. To fight against the big corporations is very difficult unless you are fully equipped and you have all the data. We required some organisations to compile such data, but there was no such organisation. Most NGOs were either funded or were not interested in fighting against the establishment. So they would be interested only in limited issues like health or education, and would not want to come into conflict with the government.

Research can sometimes take the form of fact-finding reports which are often authored by members of civil society. As Maharukh Adenwalla notes:

People’s Verdict and reports of the People’s Tribunal on Environmental and Human Rights - these fact finding reports are very important in placing the facts before the public and creating public opinion. It is an important tool for documentation. Such documentation it is very important for lawyers to strengthen their cases in courts of law.

**Lack of networks**

One of the huge lacks felt by human rights lawyers is the lack of a network of human rights lawyers. This lack of a network is especially hampering when human rights work has a national dimension. This lack is spoken to by Yug Chaudhry who highlights how a lack of a committed pool of people to fight against the imposition of the death penalty is a serious hindrance to working on the issue. As Yug Chaudhry notes:

Of course! (We need a network) We are all isolated otherwise. I need help in death penalty matters where there is nobody working on the issue. There is a lot of labour involved in this process. You have people in Tamil Nadu being threatened with executions and they are flying down people from Bombay. Why is this happening? I am going to Guwahati to stop an execution. Why do I have people writing to me from Vellore Jail, Belgaum Jail and other jails from across India? If I get those cases, who can I give them to? There is nobody working in this field, so work piles up. (Points to a mercy petition where the papers are written in Kannada), I need a network of lawyers to work on this issue. To take up these issues at the drop of a hat. If somebody is charged with a serious offence, I need someone to represent him, somebody to file his appeal and draft his mercy petition.

The importance of a network is not merely in terms of having a group of people with professional skills whose services can be called upon but also about building a sense of community, lessening pressure and making the work that one does less lonely and more fulfilling. These dimensions are articulated by Maharukh Adenwalla:
See, for me, the most interesting thing about this work are the people I met. I believe you cannot be in this field and work alone. Even for lawyering you cannot be alone. You have to be part of a group working with petitioners and clients. To me it is always more satisfying when you are working with a group, because there is an application of mind when all of us are sitting together. For a lawyer, it’s important because you know all your reliefs are not going to come from the court. I think you should be a part of some community-based organization, whether it’s an NGO or a movement etc.

The lawyers in Kashmir also testified to the importance of a network. In the context of Kashmir, the lack of a network had an overtly political dimension. In the understanding of Kashmiri activists, the lack of empathy in Indian civil society for the question of Kashmiri self-determination is the reason why there are no networks of lawyers as far as the Kashmir cause is concerned. The concrete manifestation of this is in terms of the lack of legal support for Kashmiri youth imprisoned in jails across the country.

**Financial challenges**

One of the key challenges faced by human rights lawyers is with respect to how to ensure financial sustainability. The work that human rights lawyers do is not remunerative and hence it’s very difficult to sustain the work year after year. Mihir Desai and B.S. Ajitha speaks to how in the current era of globalization the ‘gap’ between human rights lawyers and commercial lawyers has really opened out. The income differences are so vast that sustaining a human rights practice is even more difficult in the current scenario.

As Mihir Desai puts it:

> The socio-economic and political changes have been massive since the (nineteen) eighties. So what would have worked at that time need not necessarily work now. To work and survive as independent legal professionals and stick to the kind of principles we have has became very difficult. We were lucky enough to be [in practise] in a time when we could stick to those principles and still survive but possibly today you don’t have that kind of situation. At that time the trade union movement was still thriving. Today if you want to practice as a labour lawyer, the only thing you are handling is some retrenched workers termination cases. You won’t be able to survive on those. This also leads to a lot of disenchantment. If you are doing a strike matter or a lock out matter you are looking at a collective. If you are looking at individual termination, it’s very different. It drains you emotionally. Beyond a point people get exasperated and a lot of young lawyers just give up practice. For a number of them it was just difficult to survive. I remember when I started staying separately from my parents in the Railway colony, I was paying 400 rupees rent. Today, if you want a one-bedroom house in Bombay, you would at least have to pay 25-30000 per month, which is the minimum you have to earn. When I started working as a lawyer, the difference of salary between a Solicitor’s firm and what I would get in Indira Jaising’s office was zero. Both paid you miserably but there was no difference. Now the difference between what the big firms and
companies pay and what human rights lawyers pay is so great that there is no comparison.

B. S. Ajitha, who is a practicing lawyer from Chennai, says:

Our own classmates and batch-mates will have a good car, they would have purchased a house and will say that you are not a person who is successful...Since both of us (Ajitha and her husband) are there and we have lots of cases we can manage. We don’t have a partying kind of culture and we don’t spend extra money for anything else, so that’s good. But I am constantly reminded by these people that when my father passed away, he had 50000 in his account and that was after forty plus years of practice. He had no fixed deposits, no insurance and no car. This house in which I am staying was purchased by my mother with her ancestral income. We had some money and he ensured that all three of his daughters were educated, but that was not expensive those days. For one year, for my law exam, I paid only 800-1,000 in government Law College, so it was fine. Nowadays it is very difficult, as I will have to pay around 35,000 to 40,000 just on school fees in one year.

Sometimes extraordinary sacrifices are called for in order to do human rights work. An exemplar is the senior activist and lawyer P.A. Sebastian who has been practising in Bombay on human rights issues since the Emergency. The sacrifices he has had to make to sustain his passionate engagement with human rights issues is obvious as at an age and seniority when most lawyers have resources of their own, P.A Sebastian still lives in a hostel in Bombay. We reproduce below the interview we conducted with P.A. Sebastian

Q: The sense that we have got is that for a lot of people after a certain age because of family commitments etc. fatigues hit and work gets diluted but you have managed to stay clear of this.

A: But I have paid for this. I am still staying in this place. (YMCA).

Q: This is the level of commitment that very few people have. The only person that we can think of like this is Mr. Balagopal who also lived by his ideals to the very end.

A: Whatever one can do, whatever is possible for someone to do they must do. Beyond that I won’t say anything...

The question of financial difficulties one faces is also articulated by Nagasaila:

On the litigation front there is a big difficulty, because first, we are unable to pay our juniors as we would like to. We all live on a hand-to-mouth on a shoestring budget. Of course I can’t say that we are not making enough to live on, eat, and feed and educate our children, but none of us have savings to fall back upon. So we don’t have a pie, and Suresh and I haven’t been able to buy a piece of property anywhere (laughs). So those are things one does. We are quite okay with it, but the question is for how long we can afford to do it.
Even while noting that the choice of being a human rights lawyer may demand sacrifices or may result in financial difficulties, one should not view this choice from only this prism. As noted human rights activist and lawyer K. Balagopal observed:

You can say commitment [as the reason for taking up human rights work], but it is never so. Responses are linked to your personality. You could say that I could give up this work and be an ordinary lawyer, but I can’t. Because if I don’t have this, I don’t live in this world, I lose all sense of reality. That is my personal explanation. I can rationalize and say that I have a deep sense of commitment. I don’t think that anybody does anything because he or she has an abstract commitment. I am not saying there is no commitment, commitment is there, but there are also factors linked to the personality rather than intellectual convictions [which are responsible for continuing in difficult circumstances]. These qualities include pride and other dimensions of the human personality which taken separately may not be complementary to the human personality. To take an example a quality like stubbornness… The more you are pushed to the wall, you do not want to give up as giving up would be like losing your very identity. These are not great values when taken separately but when taken with certain human values they help a person to continue in the movement.313

Keeping in mind the challenges, sacrifices as well as motivations which makes a person to choose to continue to be human rights lawyers, what are the institutional and personal forms through which financial sustainability can be ensured?

For some people to sustain a human rights practise, they rely on family as well as personal resources.

Maharukh Adenwalla said:

If I do a matter, the organizations I do it for pay me and my clients pay me. But it is not a lot. So if my family did not support me, I would have to do ten times the amount of matters I do today, to be able to survive in a place like Bombay. I have never been interested in other sort of law hence I have never felt that I should do other sort of matters to fund this.

Yug Chaudhry said:

Suppose I had a full-time commercial practice, either commercial criminal law or commercial civil law, I would not be able to do the kind of work I am doing. Then they (my clients in prison) won’t write to me and they won’t approach me because they’ll be scared that I’d charge them a fee. Maybe I’ll be able to take up one case for free but they won’t know that. How will they then write to me and have the courage to approach me? So it’s not something that you can just do part-time. If you’re going to do it full-time, then how do you survive? The state pays you Rs.900/- for a murder trial as legal aid, Rs.1000/- for a murder appeal as legal aid. How will you live in Bombay doing this kind of work? I have my own private resources on which I live. I am fortunate.

313 https://www.youtube.com/watch?v=MHMfRxBtHf0(accessed on 15.05.15)
As G. Ramapriya put it:

There are months when as a labour lawyer you may not see anything. So for a long time, I was dependent on my parents, I was like this fledgling who refused to move out of the nest. I couldn’t have managed without the support of my parents. Sometimes money comes in from consultancies. Even today I can live comfortably because I have a husband who is also earning. It is unfortunate but it is the truth.

However this is not an option available to all persons who want to work as human rights lawyers as they may not have the same level of family support. Keeping in mind the fact that it’s never financially remunerative to do human rights work, one way in which this work is sustained is by simultaneously engaging in paying litigation.

As P.A Sebastian put it,

My bread and butter is service and education matters. It’s mainly for teachers and other employees. It comprises fifty percent of my non-human rights matters i.e. commercial matters. There are a whole series of matters right from termination to non-payment of wages. Promotions, moral turpitude, sexual harassment. They get Sixth pay commission pay scales so even individuals can pay. I do even mainstream commercial matters like property. Around 60% of my work is human rights matters.

Mukul Sinha said:

[My organization] the Jan Sangarsh Manch does not support any one financially. Each of us has to support themselves and also contribute to the funds of the JSM. I manage financially because I take up other cases and particularly in service law in which I specialise.

This route of sustaining a human rights practise through taking up matters of clients who pay is a very important method of sustaining a human rights practise. However if the proportion of paying clients is less, the sustenance will be at a lower level. The advantage of this model of sustaining a human rights practise is that agendas can’t be determined by any external agency and one is relatively immune to forms of state pressure. However, the human rights work will only be a proportion of the work that one does and will have to be balanced with the work one will have to do to sustain oneself. In some cases there can also be a conflict of interest between human rights work and the challenges of earning a living.

This point is articulated by Girish Patel in the following words:

I go to speak to lot of students but I really don’t know what to say. I can’t say to them to become a sanyasi or a fakir. I only say that take up at least five cases for poor people. [However] if you want to fight for poor people you must be prepared for the possibility that you will lose your other clients. For example I fought cases for workers everywhere but I would not get other cases from the management side. Though many of my students are law officials in big corporations, these corporations will not give me their cases because I am fighting for the workers. I use to go to IIM to teach there based on my experiences with workers thinking that
it is good to exchange ideas. I went for three years but then I took up a case for the labour against the IIM management and after that they stopped inviting me.

One way out of resolving the problem of potential conflict of interest as well as a way of doing the work that one is passionate about full time is through ensuring that the work is financially supported by charitable or philanthropic bodies. This in particular is a model pioneered by Colin Gonsalves who has set up funded offices of the Human Rights Law Network in twenty states around the country. The impact of this effort can be seen in the fact that a large number of human rights lawyers around the country have been influenced either directly by Colin Gonsalves or indirectly by going through the doors of Human Rights Law Network (HRLN). The HRLN’s success has really been the fact that it is really the only human rights organisation with a countrywide presence which has had a sustained involvement with a range of human rights issues. HRLN can also be credited with having succeeded in inspiring at least two generations of human rights lawyers across the country.

However this is a solution which excites many strong opinions.

As Nagasaila put it:

We not very happy about receiving institutional funding, because NGO funding is not without strings attached, and in my experience, it in some way hampers your freedom of choice and your decision making in terms of what you want to take. And once you are part of these NGO networks, there is this compulsion to file X number of cases to justify the funds that is being received by you.

The problems with funding is also articulated by Yug Chaudhry

One solution to this [lack of resources] is funding but I have an antipathy towards funding. I have seen at close quarters for the one year that I worked at an NGO what funding does. It’s the nature of the beast, it is impossible to not be corrupted by it. It may not induce dishonesty but it induces ethical compromises at intolerable levels- either compromises entailed by the funder or compromises entailed by the Government because of that bloody license. (FCRA) If you do the kind of work that I do you are up against the Government everyday in terrorist trials, prosecuting police officers. Don’t you think they’re going to hit back? Of course they will. It is your Achilles Heel (the FCRA number). It’s only when they hit back that you know you’ve touched a raw spot and that you’re doing effective work. If you’re getting funding you won’t be able to do this work. It’s very important that independent people take this up but the question is how will they do it full-time?

Financial security is clearly one of the key challenges facing human rights advocates. The models which have been experimented with include full time human rights work which is funded, full time human rights work which is self supported and part time human rights work which is cross subsidized by paying clients. There are pluses and minuses of all models and perhaps the only lesson can be that the model one chooses should be based upon the combination of one’s political beliefs, personal inclinations and needs as well as an analysis of the current economic and social situation.
Dealing with frustration and demoralization

Closely linked with the question of the lack of a network and lack of adequate financial rewards is the question of results and impact of the work that one does. Very often human rights lawyers may not achieve dramatic results in terms of stopping environmentally harmful projects or ensuring accountability for mass crimes or stopping slum demolitions. This can result in a feeling of deep frustration that there has been no progress at all in obtaining justice for your client.

Jane Cox articulates how the frustration of experiencing loss after loss is mixed with the optimism that things will be better.

You feel very frustrated and demoralized but things go in swings. Even if things are down, there will be a fight back and a shift in the nature of defeats and losses. For a number of years, trade unions were just smashed. Being in the courts was very difficult because you always feel that you are just arguing without hope of success. However as a lawyer, it makes you sharper because things which you would have got easily a number of years ago, today you have to fight for by making well researched arguments. However in spite of all this, it is really demoralizing and I have seen so many people getting totally demoralized. It is difficult to face that onslaught all the time.

However hard as is the struggle, one has to find a personal meaning in spite of the fact that the larger scenario might be one of unremitting losses. Jane Cox articulates this in terms of finding meaning in honing one’s legal skills, finding meaning in representing a militant collective or meaning in small victories in individual cases.

However if you are associated with cases where there are struggles then there is something positive. For example, when workers are upbeat and ready to fight. ....Sometimes you hang in there because [you hope] the tide will change if there are enough people fighting for it. Sometimes, your vision becomes smaller, you take up one matter and push it through. That gives you some gusto.

Human rights lawyering is focused on the here and now and the attempt is to redress human suffering even as it is occurring. However in many cases, due to institutionalized forms of impunity, that becomes impossible. The structure of state impunity seems almost impossible to crack and human rights lawyers face defeat after defeat. The only way human rights lawyers can make sense of loss after loss is to place their work in the context of the long duree.

Exemplary in this context is the work of someone like Yusuf Muchhala, who represented the Muslim victims of the pogrom of 1992-9 before the Sri Krishna Commission. Commissions of Inquiry recommendations are not mandatory for the state to implement, the recommendations themselves are weak in nature and participation in the Commission often renders no immediate tangible benefits. However, if one views things from the perspective that it’s important from the point of view of future generations to establish the truth of what happened, then commission reports can serve an important purpose.
As Yusuf Muchhala states:

First intangible benefit is that it corrects the record and states in the most unambiguous terms as to what happened during those days. Who was responsible for it [the deaths and destruction of property during the pogrom] and further whether the police and the state machinery had acted fairly and objectively in the matter or not. That maintains the purity of the government archives or the public archives. Otherwise the future historians of the city of Mumbai would not have had clear information or correct information of the incidents that occurred in 1992 and ‘93. So it clears the record and that is the first intangible benefit, you know the truth.

**SLAPPS (Strategic Litigation Against Public Participation and Action)**

The state tries many repressive measures to counter determined human rights activism. One of the strategies used both by states and by corporate interests is SLAPPS (Strategic Litigation Against Public Participation and Action). For example a form of SLAPPS would be the slew of cases filed against Teesta Setalvad for consistently fighting for the victims of the pogrom in Gujarat 2002 and ensuring that there were over 100 convictions for mass crimes perpetrated with the connivance of the state. The only way one can understand the cases against her is one vindictive persecution by the state, only with a view to silencing voices of dissent. As the PUCL puts it:

> Allegations of financial impropriety are easy to make; but the damage such allegations cause to individual reputation and self-respect is irreparable. Very often though nothing much comes out of such allegations finally, the allegations would well have achieved their purpose of putting the individuals and organisations concerned on the defensive and force them to necessarily participate in an endless spiral of litigation trying to prove their innocence. Apart from diverting defenders from the main task of protecting, promoting and preserving human rights work, immense amounts of time, physical and emotional energy, and finances are lost in fighting malicious prosecutions and litigations.\(^\text{314}\)

The case of Teesta Setalvad, in many ways exemplifies the nature of challenges Indian activists are likely to face in the time going forward. Clearly the method of tying up activists in legal knots is one way in which uncomfortable voices can be stifled.

**Threats to life**

Human right defenders and advocates challenge powerful vested interests and consequently face threats to life. There have been a number of human rights lawyers who have been assassinated for daring to challenge powerful interests. Jalil Andrabi was killed by Major Avtar Singh for his seminal role in exposing state lawlessness in Kashmir.\(^\text{315}\) Jaswant Singh Kalra was singlehandedly responsible for exposing the mass disappearances, murders and illegal cremations by the state in Punjab during

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Breathing Life into the Constitution

the 1980’s for which he was disappeared.\textsuperscript{316} The ranks of the Andhra Pradesh Civil Liberties Committee (APCLC) were attenuated through periodic killings of its top functionaries including of Japa Lakshma Reddy, Narra Prabhakar Reddy and Dr. Ramanathan. What is common to all the killings is that there is no accountability for the murders and testifies to the impunity with which even lawyers have been killed.

Advocate R. Sankara Subbu – a practising lawyer at Chennai High Court has represented the families of numerous persons who have been targeted victims of extra-judicial killing by the police. For example, he represented, in the High Court, the widow of the forest brigand Veerappan, who was killed along with three others by the police (Tamil Nadu Special Task Force) in an alleged extra-judicial killing.\textsuperscript{317} The threats that Sankara Subbu’s faced for his work took a horrific turn when his son was tortured and killed in an extra-judicial killing, allegedly by the police. This was done in order to intimidate him and other human rights lawyers into silence on the issue of pursuing justice and accountability for extra judicial killings committed by the police.

In recent times, the one who comes to mind is well known criminal lawyer, Shahid Azmi who was assassinated by unknown persons for consistently challenged the state in its arbitrary war against terror. The killing of a human rights lawyer actually moves beyond the death of one person and has a ripple effect. As Khan Abdul Wahab observed:

\begin{quote}
Externally it does not affect me (Shahid’s killing) because if it does, then I would have to quit the profession but yes, internally it does affect me. It hurts and I felt upset and insecure about myself for a long period of time. Even today that feeling persists. But at the same time we have to be in the profession, we have to be in the world, we have to work. The risk factor is there in any work one does. The risk is there, the apprehension is there and the feeling of insecurity is there. There was a self-created perception of threat because if it could happen to Shahid it could happen to anybody.
\end{quote}

However sometimes the death of one person can instead of intimidating a movement and creating a culture of silence around rights violation, can result in an intensification of the struggle for justice. Sometimes the love of justice cannot be assassinated.

The time following Shahid Azmi’s assassination was a time of fear, with many advocates unwilling to take on Shahid Azmi’s cases. However Khalid Azmi ensured that there was a continuity in his brother’s work by first appointing counsel after much difficulty, and thereafter arguing the cases himself. He simultaneously built a team of young and committed lawyers to carry forward the sensitive and life-threatening work. Khalid Azmi himself is barely thirty years of age and seems too young to discharge such an enormous responsibility. When asked whether he was


\textsuperscript{317} Muthulakshmi vs. State, judgment and order of V. Kanagaraj J of the Madras High Court on 18 January 2005, in Criminal Original Petition No. 35899 of 2004
ever afraid that he too could be killed, Khalid Azmi responded: ‘I have never felt a fear because I have nothing to lose. I have lost my brother – that means that I have lost everything.’

Shahid Azmi’s story also spoke directly to film director, Hansal Mehta and producer Anurag Kashyap, who recently completed a film on Shahid’s life, titled ‘Shahid’. A Shahid Azmi memorial lecture has also been commenced in February 2012. These will, perhaps, inspire many others to take forward the legacy of Shahid Azmi. The assassination of Shahid Azmi, instead of killing the work that he had undertaken, has only succeeded in multiplying the quest for justice in innumerable hearts and minds.318

Challenges of practising in a conflict region

A conflict region presents unique challenges because the ordinary framework of rule of law is suspended. The situation is akin to a permanent emergency when the most basic right, the right to life is in jeopardy. If the rule of law stands suspended all the rights which are available under the legal system in ordinary times become casualties. The situation in Kashmir illustrates such a situation with the everyday emergency affecting not only ordinary citizens but practicing lawyers as well. Lawyers have faced threats to their life, have been subjected to violence and beating, have been imprisoned and have found it extraordinarily challenging to take forward their legal practice.

The context which lawyers face in Kashmir has global resonances with the work of lawyers in places which were under brutal military dictatorships like Brazil, Argentina, Uruguay in the 1980’s as well as apartheid South Africa and other authoritarian regimes around the world.319 All these regimes have sought to silence lawyers as lawyers in particular have the capacity to take the grievances of the people to a wider forum. This accounts for the particular ruthlessness through which authoritarian states seek to stamp out the threat posed by those in the legal fraternity who take on the onerous task of representing the concerns of the people living under authoritarian regimes.

Though India is a democracy, the democratic facade is at its thinnest in areas of continuous insurgency such as Kashmir and bears close resemblance to most authoritarian regimes. Some of the threats to legal activism include:

Threat to life

In a highly militarized zone such as Kashmir, lawyers as defenders of rights face the most grievous threats including the threat to life not only from the army but also from militants. In the past fifteen years, the state has eliminated many human rights activists. H.N Wanchoo who was the senior partner of well-known Kashmiri human rights lawyer, Parvez Imroz was assassinated in the 1980’s. In 1996 Jalil Andrabi who was

318 Saumya Uma and Arvind Narrain, Can the love of justice be assassinated?, http://nasheman.in/remembering-shahid-azmi-can-the-love-of-justice-be-assassinated/ (accessed on 12.5.15)
319 For a recent example of an authoritarian state cracking down on lawyers one has to note the crackdown in China on lawyers. China crack down on lawyer and activists, http://www.aljazeera.com/news/2015/07/china-crackdown-lawyers-activists-150719112829794.html (accessed on 2.09.15)
a lawyer and human rights activist was abducted from his car and two weeks later his body was recovered from the river Jhelum.320 In 2004, a gunman came to the home of senior lawyer Peer Husssam-ud-Din Banday to discuss a case, and killed him.321 These killings are part of the government’s attempt to suppress information regarding enforced disappearances from reaching the international community.322 Two who have survived these repeated attempts at killing include well known lawyers Mian Qayoom and Parvez Imroz.

Mian Abdul Qayoom, who was president of the Kashmiri Bar Association on numerous occasions, speaks to this pervasive sense of threat which resulted in two attacks on his life.

*Attempt on life in 1995*

There was an attack on my life in 1995. I was shot at by people who wanted to come to my office for some help in a case. I told them to come in, they came in and when I was about to sit on my chair, one of them fired at me. I was in hospital for six-seven months. I was operated on and my kidney was removed. I have a spine injury. I was out of a job for about one year and doctors in Delhi told me that it was impossible for me to attend to my professional engagements, to drive a vehicle etc. But I started [working] again in 1996.

*On the attempt at his life in 2006*

A grenade was thrown at me from a bund close to my office. There were two people waiting for me and when I was just driving my vehicle in their direction, they threw a grenade which struck the window of my vehicle. I would have died in 2006, because of that grenade attack, but I survived.

Pervez Imroz who is the founder of the JKCSS (Jammu Kashmir Coalition for Civil Society) is a leading human rights activist in Kashmir. Again his story parallels Mian Qayoom in terms of facing assassination attempts.

I was driving my car and it was dark. I always have this thing in my mind that they will be after me. I heard someone asking me to stop. I didn’t stop. I thought he was going to kill me. I instantly pressed the clutch. I heard a shot from behind. I was taken to a hospital, the bullet had stuck my left lung. Then he came and he apologized and said, ‘Bhai I told you to stop, but you didn’t...’ I said, ‘it’s ok, you had no bad intention.’ [In fact] two of the militants had taken me to the hospital. When one of them, came to my house later, when I returned from hospital, he said “I am stunned, how are you alive”. The bullet had struck the steel portion behind a fiat car so its force had reduced. Otherwise it would have ruptured my lungs.

Arbitrary arrest and detention

Arbitrary arrest and detention is again a common experience among human rights lawyers in Kashmir. Not even those who have reached the pinnacle of the legal profession in Kashmir have been spared. As Mian Qayoom the former president of the Kashmir Bar Association notes:

Preventive Detention 1990 to 92

I was in jail from 1990 to 92. I was first detained on 13th May, 1990 in Hiranagar Jail, Jammu near Kuthua. My detention was challenged, but before that order could be passed by the High Court, I was shifted to another jail, i.e. District Jail Udhampur. I was in district jail Udhampur, when the High Court quashed my detention order, but instead of releasing me, I was again shifted to District Police Lines, Udhampur. I was there for 5-6 days and then I was shifted to Joint Interrogation Center (JIC), Jammu where I was detained for one month. At this point another false case was registered against me. I challenged the registration of the case and also applied for bail to the designated court at Jammu. I got bail, but I was again detained under Public Safety Act and sent to Kuthua. I remained there for one year. This detention order was also challenged in the High Court, it was not quashed within that one year. After the lapse of that one year though the period of detention expired and I should have been released instead I was again shifted to JIC Jammu where I was detained for about five-eight days. Thereafter I was granted bail in the case which was registered in JIC Jammu, prior to my shifting from Kuthua to JIC Jammu. Anyway the matter was finally taken to the Supreme Court. The Supreme Court upheld that order of my release on bail and pursuant to that I was finally released in 1992.

Preventive Detention in 2010

I have again been detained in 2010, because of the turmoil and taken to Hiranagar Jail. From Hiranagar I was shifted to Kot Bhalwal Jail. I was detained under Public Safety Act and then I challenged the public safety order in the High Court. The High Court was about to pass a quashing order in my favour but before that could happen they withdrew that order. They booked me in another false case, which was registered against me in Hiranagar. I applied for bail to the High Court and for quashing of that FIR, but during that time they passed another order of detention and kept me in Kot Bhalwal Jail, Jammu. I challenged that order also and when the High Court quashed that order they again took me to Hiranagar in that criminal case. I again applied for bail. Bail was granted to me on 31st of January 2010. I was not released. I was again booked in 2 cases, registered against me in Jammu. Again I applied for bail. In one case I got bail, but before I could get bail in another case, I was again detained under the Public Safety Act. That was the third detention. I challenged that order of detention in the High Court and when that order was about to be quashed, they again withdrew that order, and foisted another criminal case. I was in Police Station Jainipur, for about 5-6 days. In the

323 The turmoil referred to is the uprising in Kashmir in 2010 led by students which was brutally cracked down by the Indian armed forces.
meanwhile I again applied for bail. I was granted bail by the court at Jammu. Ten months after my original detention I was released.

G.N Shaheen was the General Secretary of the Jammu and Kashmir Bar Association when Mian Qayoom was the president of the Kashmir Bar Association. He too was subjected to preventive detention in connection with the 2010 uprising.

Wani Fraooq was a sixth class student who was killed by the army in 2010, I filed a motion before the Chief Judicial Magistrate to direct a court inquiry into the killing. That was one of the reasons for my arrest. The state wanted to deprive the litigants from availing of legal advice so they attack the Bar Association itself. The President (Mian Qayoom) was arrested and detained under the Public Safety Act. I was the General Secretary of the Association and I was also picked up and detained under the Public Safety Act. We were there for nine months together in jail.

I was not directly released. When my first detention order was passed, the district jail authorities handed me over to CIK Jammu. Then I was straightway rushed to Joint Interrogation Centre, Jammu where I was detained for fourteen days. After fourteen days they received one more detention order from Srinagar. I was shifted to Kotbhalwal. Then that detention order was quashed by the High Court and I was directed to be released. Just as I was near the gates of the Central Jail, Kotbhalwal, Jammu, a vehicle with counter intelligence officers from Jammu pushed me into their vehicle and I was taken to another place in Jammu for fourteen days. From there I was rushed to Srinagar, CIK where I was detained for three days. From there I was taken to Marisimha police station, Kotibal where I was detained for fifteen days. Then police authorities came with another detention order and again I was removed to Central Jail, Jammu, Kotbhalwal Jammu. Again that order was quashed in court and I was again rushed to JIC, Jammu. From JIC, Jammu I was taken to CIK, Srinagar. Then CIK, Srinagar to police station Marisimha, after which I was released on 15th April.

What the narratives of both G.N Shaheen and Mian Qayoom illustrate in painful and excruciating detail is the blatant abuse of rule of law in Kashmir. As such the attack on them by security forces implies nothing less than an attack on the entire lawyering fraternity in Kashmir. The fact that they were arrested itself indicates a malafide intent on part of the state. The way the farcical detention was extended from month to month by producing new detention orders produces a crisis for the rule of law. If a court can strike down a detention order, only for the state authorities to produce yet another detention order and extend detention, it renders illusory the judicial commitment to ensure that right to life includes freedom from arbitrary detention.

Mian Qayoom and G.N Shaheen who were the President and General Secretary of the Kashmir Bar Association are representatives of the bar in Kashmir. They are dealt with as ordinary prisoners and not given the status of political prisoners, seeking to camouflage the reasons for their detention as being a mere criminal offence without acknowledging the political nature of the arrests. As G.N. Shaheen notes,
We (Mian Qayoom and I) were lodged with criminals. I was not given a separate accommodation. A General Secretary of the Bar and President of the Bar are political prisoners. When I was rushed to district jail, Rajori I was put in that part where undertrials and convicts were lodged for two months. Then after the detention order was quashed, I was lodged in Kotbhalwal Jail, Jammu. There we were with those convicted under 376 and 302.

Other challenges faced by lawyers in Kashmir in their efforts to fulfill their duty to their client and represent their client to the best of their ability are captured succinctly by G.N Shaheen:

*On Lawyers accessing clients/detenues*

It is very difficult to get access to the detenue. The parents of the detenu have to move from pillar to post to even get detention orders from the court clerks so they can meet the detenues in jails. Sometimes we undertake this exercise as Bar Associations, so that we can visit the jails and then we file petitions.

*On personal restrictions on freedom of speech and expression*

In 2010 after the teenage killings began because of the fresh genocide policy adopted by the Government of India in Jammu & Kashmir, I wrote an article, which was published in Pioneer called, ‘Fresh genocide policy in Jammu & Kashmir’ in which I had exposed what is likely to happen in Kashmir, because the security agencies have made a policy to kill teenagers as a matter of a policy of genocide. After the article was published, Chandan Mitra the editor of the Pioneer was asked to apologize. Chandan Mitra turned out a public apology to the defence ministry for my article in his paper.\(^{324}\)

*On exercising the freedom of association*

We are not allowed and in fact we are branded, if we hold a seminar or if we go for a campaign. Intelligence agencies follow you and harass you claiming that the seminar is a motivated exercise. NGOs are targeted, media is gagged saying that their activities are motivated because the security agencies are totally suspicious of the people of Kashmir.

*On right to bodily integrity being compromised*

I have been attacked three times in Jammu. In Kathua I was attacked by lawyers! In Jammu I was attacked by some goondas. This was when I was President of the Bar Association. In 2011, when I was taken to the court in Jammu, I was pounced upon by some people. The Bar members in Jammu were just watching this....

*On not being able to, and the danger of, meeting clients in prison*

Three cases have been booked against me for going to meet my clients in prison. They make out a case that I was part of a conspiracy, and that I wanted to disturb

\(^{324}\) https://wearethebest.wordpress.com/tag/chandan-mitra/page/2/(accessed on 10.11.14)
law and order and that I sent messages thorough my mobile phone for my clients. If I go to meet Masrat Alam Bhat, they register a case.

*On body search and frisking in prisons*

[Even as a lawyer if you go to jail to meet your clients], they will search you ten times before they allow you to enter. They will make you take off your clothes, they search your shoes, they search your socks, and they search every part of the body, just to find out whether you have hidden something anywhere or not.
4. Conclusion

This book has sought to contextualize the practice of human rights lawyering within a wider imagination of democracy. Democracy can never be reduced to its impoverished parliamentary form alone, but should really be about a way of collective living in which difference is respected. It is the central thesis of this book that such a richer and deeper imagination of democracy is nourished by grassroots activism. Among the forms of grassroots activism, one important form is that of human rights lawyers who seek to take forward an imagination of a utopian society through concrete interventions using the law.

The specificity of the work of human rights lawyers is that their work is animated by the larger framework set by the Constitution. The Indian Constitution being a product of a national struggle does embody a normative vision, against which everyday state practice can be tested. In this process of constantly striving for the normative vision embodied in the Constitution, human rights lawyers breathe life into the Constitution. They by their creative work seek to make the Constitution a live reality for those at the margins of the Indian nation.

This book has shown that this small grouping referred to as human rights lawyers have an influence out of all proportion to their actual numbers. This is because they activate the framework of law, which can potentially affect millions and play a critical role in setting the terms of debate at a national level. If the potential influence that human rights lawyers can exercise is clear, then the key questions relate to the three important thematics discussed in this book i.e. the motivations of human rights lawyering, the strategies adopted by human rights lawyers as well as the continuing challenges faced by human rights lawyers.

This is really an effort to pull together narratives of human rights lawyers and try and tell the story of Indian democracy from a different lens. In a sense the passion and commitment of the human rights lawyers speaks to a different order of values, in which dissent in cherished and difference is valued. One hopes that this book is of interest and inspiration to both aspiring human rights lawyers as well as all those who are interested in the question how democracy is sustained in India.

It should also be noted strongly that this is an initial effort and one hopes that this will nourish more such works to document the histories of those who contribute immeasurably to the project of sustaining democracy in India.
5. Selected Bibliography

BOOKS


ARTICLES


REPORTS


## Annexure: List of Lawyers Interviewed

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Human rights lawyering is about giving content to democracy and about shifting the understanding of democracy from majoritarian to constitutional. Democracy in a diverse and plural country like India cannot merely mean that the party with a majority governs, it has to also be about hearing the voices which do not have a space in a majoritarian set up. The concern running through this book is about making a place for dissenting voices in Indian society, small voices that might not be heard in the din of a majoritarian democracy.

Human rights lawyering amplifies the voices of minorities of many stripes and hues, from disabled people to religious minorities and Dalits to LGBT persons.

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