

THE MANUAL SCAVENGING PROBLEM: A CASE FOR THE SUPREME COURT OF INDIA

*Samuel D. Permuti**

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I. INTRODUCTION

Every day, for a handful of rupees, more than one million Indian women and girls clean human excreta off the dry walls of waterless latrines,¹ in choked-up gutters, and down dark man-holes.² They do so with nothing more than a broom, or a small tin

* Senior Notes Editor, CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW. Candidate for Juris Doctor, Benjamin N. Cardozo School of Law, June 2012. Special thanks to Professors Vijay M. Padmanabhan and Sheri P. Rosenberg.

¹ A “dry latrine” refers to any non-water-based flush toilet; it might be anything from a bucket to an outhouse that requires manual cleaning. W. HODDING CARTER, FLUSHED: HOW THE PLUMBER SAVED CIVILIZATION 207 (2006). Many dry latrines have cement floors, from which the excreta must be scraped meticulously. David Griffiths, *A Crap Job*, NEW STATESMAN, May 28, 2008, available at <http://www.newstatesman.com/2008/05/india-caste-manual-dry-work>.

² The NGO Safai Karmachari Andolan estimates that, as of 2008, there are 1.3 million manual scavengers in India, 92 percent of whom are women and girls. Mari Marcel Thekaekara, *A Lifetime in Muck*, NEW INTERNATIONALIST, Aug. 2008, at 10.

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plate, or a basket carried on their heads.³ Often, they use their bare hands and feet.⁴ As a result, they are exposed to dangerous infections, including dysentery, malaria, typhoid and tuberculosis.⁵ And, if they refuse such work, they might fall victim to physical abuse and social alienation; by virtue of being born into the lowest stratum of the caste hierarchy, they are condemned to a life of what is euphemistically called “manual scavenging.”⁶

Over a century ago, Mohandas Ghandi publicly labeled manual scavenging “the shame of the nation.”⁷ Since then, India has officially declared manual scavenging unconstitutional and illegal. The Indian Constitution—which guarantees justice, liberty, equality, and fraternity for all its citizens⁸—contains a provision that (albeit indirectly) bans manual scavenging.⁹ On this basis, the Indian Parliament has passed four acts banning the practice,¹⁰ including The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act,¹¹ which specifically makes manual scavenging a crime subject to imprisonment and a fine.¹² Moreover, numerous groups have taken up the cause to end manual scavenging as a human rights issue.¹³ Major human rights organizations, such as Human Rights

³ Sachin Kumar Jain, *India: The Curse of Manual Scavenging*, WOMEN'S FEATURE SERVICE (Jan. 31, 2005), available at <http://archive.deccanherald.com/Deccanherald/feb112005/she4.asp>.

⁴ MASSACHUSETTS INSTITUTE OF TECHNOLOGY, FROM PROMISE TO PERFORMANCE: ECOLOGICAL SANITATION AS A STEP TOWARD THE ELIMINATION OF MANUAL SCAVENGING IN INDIA 6 (2006) [hereinafter FROM PROMISE TO PERFORMANCE].

⁵ Rhys Blakely, *India's Dirty Secret is Flushed Out at Last*, TIMES (U.K.), Jan. 20, 2010, http://www.timesonline.co.uk/tol/news/world/world_agenda/article6995142.ece.

⁶ *Id.*

⁷ ROSE GEORGE, THE BIG NECESSITY: THE UNMENTIONABLE WORLD OF HUMAN WASTE AND WHY IT MATTERS 97 (2008).

⁸ INDIA CONST. pmb1.

⁹ INDIA CONST. art. 17.

¹⁰ See The Untouchability (Offences) (Amendment) Act of 1955, No. 22 of 1955, INDIA CODE (1955); The Protection of Civil Rights Act amended and renamed the Untouchability (Offences) Act of 1955 by Act 106, Acts of Parliament, 1976 (India); The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, INDIA CODE (1989); The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, No. 46 of 1993, INDIA CODE (1993) [hereinafter Manual Scavengers Act].

¹¹ No. 46 of 1993, INDIA CODE (1993).

¹² Manual Scavengers Act § 3(a), (b).

¹³ See, e.g., Clifford Bob, “Dalit Rights Are Human Rights”: Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue, 29 HUM. RTS.

Watch and Amnesty International, have written extensively on the subject,¹⁴ universities have issued studies,¹⁵ and a transnational network of non-governmental organizations has clamored for an end to the practice.¹⁶ Even the United Nations has approved a resolution condemning caste-based discrimination.¹⁷

In the face of such pressure, and combined with national legislation, the conditions would seem ripe for an end to manual scavenging. Yet, what E.M. Forster once called “a hideous nightmare”¹⁸ continues with impunity throughout much of the country.¹⁹ Manual scavenging thrives for two primary reasons. The first is due to practical necessity. Since much of the country lacks adequate sewage lines and disposal systems, manual removal of human excreta is required.²⁰ Indeed, 600 million people (or 55% of the country’s population) do not have water-based flush toilets.²¹ Without toilets, or a proper sanitation infrastructure,

Q. 167 (2007).

¹⁴ See, e.g., HUMAN RIGHTS WATCH, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA’S UNTOUCHABLES* (1999); HUMAN RIGHTS WATCH, *HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA’S “UNTOUCHABLES”* (2007) [hereinafter HUMAN RIGHTS WATCH, *HIDDEN APARTHEID*]; Luke Harding, *Sex Hell of Dalit Women Exposed*, *GUARDIAN* (U.K.), May 9, 2001, <http://www.guardian.co.uk/world/2001/may/09/lukeharding> (describing a 2001 Amnesty International report on lower caste women in rural India in Uttar Pradesh and Rajasthan States).

¹⁵ See, e.g., ELLYN ARTIS ET AL., *ECONOMIC, SOCIAL AND CULTURAL RIGHTS FOR DALITS IN INDIA: CASE STUDY ON PRIMARY EDUCATION IN GUJARAT*, PRINCETON UNIVERSITY (2003) (Princeton University’s 2003 study on Dalits in Gujarat, which includes a description of problems facing manual scavenging); FROM PROMISE TO PERFORMANCE, *supra* note 4.

¹⁶ See, e.g., INTERNATIONAL DALIT SOLIDARITY NETWORK, <http://idsn.org/front-page> (last visited Feb. 28, 2011).

¹⁷ Hillary Mayell, *India’s “Untouchables” Face Violence, Discrimination*, NATIONAL GEOGRAPHIC NEWS, June 2, 2003, available at <http://news.nationalgeographic.com/news/pf/56390270.html> (discussing an August 2002 UN Committee for the Elimination of Racial Discrimination resolution condemning caste or descent-based discrimination).

¹⁸ E.M. FORSTER, *Preface* to MULK RAJ ANAND, *UNTOUCHABLE* vi (1935).

¹⁹ See Ajoy Ashirwad Mahaprashasta, *Struggle in Progress*, FRONTLINE, June 20–July 3, 2009, <http://hindu.com/fline/fl2613/stories/20090703261309200.htm>.

²⁰ *Highlighting the Plight of India’s Manual Scavengers*, CHRISTIAN AID (Nov. 2010), <http://www.christianaid.org.uk/whatwedo/partnerfocus/india-manual-scavenging.aspx>.

²¹ *The World’s Toilet Crisis*, CURRENT (June 10, 2010), http://current.com/shows/vanguard/92482205_the-worlds-toilet-crisis.htm. This problem is not confined to India. *Id.* Indeed, it is a global public health crisis. *Id.* 2.5 billion people (38% of the world’s population) still lack access to improved sanitation, including 1.2 billion who have no facilities at all. The progress is particularly poor in Sub-Saharan Africa and Southern Asia (including India). *Progress on Drinking Water and Sanitation: Special Focus on Sanitation*, INDIA SANITATION PORTAL (WORLD HEALTH ORGANIZATION), <http://www.india-sanitationportal.org/79> (last visited Feb. 24, 2011); see also GEORGE, *supra* note 7.

someone must, eventually, clean the excrement from wherever it has been deposited.

The need for removal is inextricably linked to the second reason for manual scavenging: a tradition of discrimination deeply rooted in India's caste system.²² The caste system—which divides people into a hierarchy of power, status, and identity in society²³—has left the task of cleaning human excreta to its lowest stratum.²⁴ In other words, those who occupy the lowest caste position are already so “polluted” that they are the only ones capable of doing such work.²⁵ As a result, the members of other castes simply avoid the excreta problem altogether,²⁶ and leave it to the manual scavengers. As Forster put it, the manual scavenger, who has inherited her work by birth,²⁷ “is bound for ever, born into a state from which he cannot escape and where he is excluded from social intercourse and the consolations of his religion.”²⁸

This Note seeks to answer a simple question: how can manual scavengers escape from what seems to be their only fate? Forster observed the “disquieting” and “disgusting” face of manual scavenging nearly a century ago, yet (and despite mounting opposition) the system has only become more pervasive.²⁹ Is there nothing to be done? Should more than one million people be relegated to cleaning human excreta, while India is currently

²² Vidya Subrahmaniam, *Throwing Off the Yoke of Manual Scavenging*, HINDU, Oct. 27, 2010, <http://www.thehindu.com/opinion/lead/article850934.ece>.

²³ MARTIN MACWAN, NATIONAL HUMAN RIGHTS COMMISSION (India), DALIT RIGHTS 7 (2006). The caste system is so complex that no satisfactory definition is possible, and there is no unanimity among scholars on the subject. One scholar, Emile Senart, has defined caste as:

[A] close corporation, exclusive and, in theory at any rate, rigorously hereditary . . . bound together by common occupation . . . ruling its members by the exercise of jurisdiction, the extent of which varies, but which succeeds by the sanction of certain penalties and, above all, by the power of final or revocable exclusion from the group in making the authority of the community effectively felt.

EKTA SINGH, CASTE SYSTEM IN INDIA: A HISTORICAL PERSPECTIVE 108 (2009).

²⁴ Annie Zaidi, *India's Shame*, FRONTLINE, Sept. 22, 2006, <http://www.hindu.com/fline/fl2318/stories/20060922005900400.htm> [hereinafter Zaidi, *India's Shame*].

²⁵ Annie Zaidi, *System Has Become More Pervasive*, FRONTLINE, Sept. 22, 2006, <http://www.hindu.com/fline/fl2318/stories/20060922005101600.htm> [hereinafter Zaidi, *System*].

²⁶ Zaidi, *India's Shame*, *supra* note 24.

²⁷ *Id.*

²⁸ FORSTER, *supra* note 18, at iv.

²⁹ Zaidi, *System*, *supra* note 25.

undergoing an “economic miracle”³⁰ and rising as a “world power”?³¹

This Note argues that the Supreme Court of India provides the answer through its power of Public Interest Litigation (PIL).³² Since the late 1970s, the Supreme Court has established itself as “the guardian of human rights,” “fearlessly activist,” and integral in ensuring social justice in India.³³ Through PIL, the Court has addressed numerous social issues, including those related to the environment,³⁴ bonded labor,³⁵ child labor,³⁶ the rights of detainees,³⁷ the right to food,³⁸ and the right to housing.³⁹

PIL emerged in the 1970s as the result of two main factors. The first was India’s Emergency Period,⁴⁰ which caused the Supreme Court to rethink its role in the enforcement of basic rights for Indians.⁴¹ The second was the increase in influence of Chief Justice P.N. Bhagwati, who sought to make the judicial system “more reformative and responsive to the needs of average man and to pave the way for social change.”⁴² In Bhagwati’s view, the various problems confronting India’s staggering number of

³⁰ *India’s Economy: India’s Surprising Economic Miracle*, ECONOMIST, Sept. 30, 2010, <http://www.economist.com/node/17147648>.

³¹ *Obama Backs India on Permanent UN Security Council Seat*, BBC NEWS (Nov. 8, 2010), <http://www.bbc.co.uk/news/world-south-asia-11711007>.

³² See generally ARUN RAY, PUBLIC INTEREST LITIGATION AND HUMAN RIGHTS IN INDIA (2003); VARUN GAURI, THE WORLD BANK POLICY RESEARCH WORKING PAPER, PUBLIC INTEREST LITIGATION IN INDIA: OVERREACHING OR UNDERACHIEVING? (2009).

³³ Jessie M. Hohmann, *Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing*, 13 YALE HUM. RTS. & DEV. L.J. 135, 146-47 (2010).

³⁴ *M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176 (India).

³⁵ *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (India).

³⁶ *Id.*

³⁷ *Sheela Barse v. Union of India*, (1983) 2 S.C.C. 96 (India).

³⁸ *People’s Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (interim orders).

³⁹ *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180 (India).

⁴⁰ Between June 1975 and March 1977, India operated under the Maintenance of Internal Security Act, which gave sweeping and arbitrary powers to the national government. Linda Charlton, *Obituary: Assassination in India: A Leader of Will and Force; Indira Gandhi, Born to Politics, Left Her Own Imprint on India*, N.Y. TIMES, Nov. 1, 1984, <http://www.nytimes.com/learning/general/onthisday/bday/1119.html>. See also INDIA: THE YEARS OF INDIRA GANDHI (Y.K. Malik & D.K. Vajpeyi eds., 1988).

⁴¹ ASHOK DESAI & S. MURALIDHAR, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE, PUBLIC INTEREST LITIGATION: POTENTIAL AND PROBLEMS 5 (2000), available at www.ielrc.org/content/a0003.pdf.

⁴² RAY, *supra* note 32, at 63.

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poor⁴³ and disadvantaged⁴⁴ required judicial intervention.⁴⁵ For too long, the masses of India had constituted the “low visibility area of humanity.”⁴⁶ They had been unable to “assert their [constitutional rights, . . .] enforce their social and economic entitlements and combat exploitation and injustice.”⁴⁷ In response, Chief Justice Bhagwati encouraged the Court to be more receptive to individual rights claims.

This Note argues that two legal developments that emerged during Bhagwati’s tenure can combine to eradicate manual scavenging. The first is a “markedly flexible interpretation of requirements relating to standing,” allowing virtually anyone motivated by a sense of public duty to bring a claim.⁴⁸ Indeed, the Court’s relaxation of the rules of standing has allowed a Hyderabad-based non-governmental organization (NGO), Safai Karmachari Andolan, to bring a claim against the national and State governments of India to force them to eradicate manual scavenging.⁴⁹ The second is the Court’s willingness to “embroil itself unabashedly in the most divisive social issues” confronting India.⁵⁰ Direct judicial involvement in social and State policy questions entails fact-finding, direction to the State governments, and even shaming those governments into action.⁵¹ Such

⁴³ In the years 1973-74, for example, 56.4 percent of India’s population lived below the poverty line. S. Kumar, *Poverty and Human Development in India: Getting Priorities Right*, UNDP (1996), available at http://hdr.undp.org/en/reports/global/hdr1996/papers/a_k_shiva_kumar.pdf (Occasional Paper 30, background paper for the global Human Development Report of 1996).

⁴⁴ See G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT’L & COMP. L. Q. 66, 66-67 (1991). See also Jayanth K. Krishnan, *The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India*, 25 HUM. RTS. Q. 791, 793, n.8 (2003) (“By ‘disadvantaged,’ scholars who study India typically refer to those groups that have historically suffered discrimination or who have had their rights severely curtailed. These would include: lower castes, the poor, religious minorities, women, migrant laborers, those with incurable diseases, and the like.”).

⁴⁵ RAY, *supra* note 32, at 63.

⁴⁶ *Id.*

⁴⁷ Bihar Legal Support Society v. Chief Justice of India, (1986) 4 S.C.C. 767, 768 (India).

⁴⁸ Peiris, *supra* note 44, at 70.

⁴⁹ Safai Karmachari Andolan v. Union of India, Writ Petition (Civil) No. 583 of 2003 (India) (interim orders), available at <http://www.ielrc.org/content/e0335.pdf>. As of October 7, 2011, this case is pending. See *Case Status*, SUPREME COURT OF INDIA, <http://courtnic.nic.in> (last visited Oct. 7, 2011).

⁵⁰ Peiris, *supra* note 44, at 72.

⁵¹ The Indian political structure possesses a hybrid system of governance, which may be described as parliamentary federalism. The Indian system draws upon the British

involvement by the Court, and its eschewing of traditional norms of judicial detachment and objectivity, has been called a “bold . . . response to the perceived implications of social inequality and economic deprivation.”⁵²

Through the relaxed barrier to standing and direct involvement in the problem, the Court is able to confront manual scavenging head-on and to resolve the problem in flexible and creative ways.⁵³ Indeed, in the ongoing case of *Safai Karmachari Andolan v. Union of India*,⁵⁴ the Court has begun this process by issuing orders that direct the national and State governments to determine where manual scavengers work and find other jobs for them.⁵⁵

However, the Court’s approach so far has done little to affect the kind of change necessary to eliminate manual scavenging. Since 2003, when the case first appeared before the bench, the Court has passively relied on the States to implement policies to eliminate manual scavenging, without any accompanying active enforcement action.⁵⁶ This approach bears too much resemblance to that taken by Parliament, which has passed anti-manual-scavenging legislation that leaves enforcement to the States, with which the majority of States have failed to comply.⁵⁷ The experience of Parliament demonstrates that if the States are left to deal with the problem themselves, it is likely that little change can be expected.

A new approach is required. This Note suggests that the Court, through the power of PIL, ought to craft a new, ambitious three-step approach to the problem of manual scavenging. First, the Court should force the States to destroy dry latrines and other

tradition of parliamentary sovereignty and the American federal legacy in which States have primacy. BIDYUT CHAKRABARTY, *INDIAN POLITICS AND SOCIETY SINCE INDEPENDENCE: EVENTS, PROCESSES AND IDEOLOGY* 109 (2008). While the Indian Parliament (the central law-making body) has passed laws with respect to manual scavenging, the States are responsible for enforcement of those laws. See FROM PROMISE TO PERFORMANCE, *supra* note 4, at 8.

⁵² FROM PROMISE TO PERFORMANCE, *supra* note 4, at 66.

⁵³ See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 505-07 (1989).

⁵⁴ Writ Petition (Civil) No. 583 of 2003.

⁵⁵ *Safai Karmachari Andolan*, Writ Petition (Civil) No. 583 of 2003 (India) (Nov. 14, 2005) (interim order).

⁵⁶ V. Venkatesan et al., *In Denial Mode*, FRONTLINE, Sept. 22, 2006, <http://www.frontlineonnet.com/fl1922/stories/20021108004803000.htm>.

⁵⁷ *Id.*

types of excreta dumping grounds that require manual cleaning. Second, the Court should implement a plan whereby the States are forced to construct, maintain, and operate both water-based flush toilets and alternative toilets, such as Ecosans.⁵⁸ Third, the Court should create an oversight mechanism to ensure that States are effectively, and persistently, carrying out the Court's plan. Through this three-step process, the Court can provide a practical answer to manual scavenging by striking at the heart of the problem: the need for manual cleaning and removal of human excreta. With toilets—whether water-based flush or alternative toilets—the need for manual scavengers virtually disappears.

Before reaching that conclusion, Part II of this Note will explore the problem of manual scavenging. Part III will then demonstrate how States have either denied the existence of manual scavengers within their jurisdiction or ignored existing laws that prohibit manual scavenging. Part IV will examine the rise of an activist Supreme Court and the development of PIL, and illustrate how PIL has allowed the Court to address social issues in India. Part IV also demonstrates how the Court has used PIL to address the problem of manual scavenging in *Safai Karmachari Andolan*. Finally, Part V argues that the Court should create a three-step process whereby the Court orders the States to eliminate the conditions that yielded the need for manual scavenging originally, and, instead, create something new.

II. THE PROBLEM OF MANUAL SCAVENGING

A. A Caste-Based Problem

In order to understand the manual scavengers' position in Indian society, it is important to, at least briefly, examine the caste system. Most of India's population lives under the caste system, which divides people into a hierarchy that governs the distribution of power, status, and identity in society.⁵⁹ The caste system, created over 3,000 years ago by Hindu priests, is divided into four distinct classes—comprised of (in descending order of “superiority”) priests, warriors, artisans, and peasants.⁶⁰ These

⁵⁸ See FROM PROMISE TO PERFORMANCE, *supra* note 4, at 28. See discussion of Ecosans *infra* Part V.

⁵⁹ MACWAN, *supra* note 23.

⁶⁰ Sessa Kethineni & Gail Diane Humiston, *Dalits, The “Oppressed People” of India: How are their Social, Economic, and Human Rights Addressed?*, 4 WAR CRIMES,

four classes are “vested with spiritual importance” because they all derive from different parts of the Hindu god, *Brahma*, the creator.⁶¹

Beneath the four castes are the “untouchables,”⁶² also known as Dalits,⁶³ or in Indian legal parlance: Scheduled Castes.⁶⁴ They are officially external to the caste scheme; i.e., they are considered to be outcasts and are seen as a lower grouping to be distinguished from one of the four Hindu classes.⁶⁵ According to India’s Ministry of Home Affairs, as of the 2001 census, there are over 166 million Dalits (comprising 16.2% of India’s population).⁶⁶

A complex web of religious, moral and cultural beliefs and attitudes has, over centuries, created the pervasive view that Dalits are “impure” or “polluted.”⁶⁷ They are considered so inferior to other castes, and so polluting, that they are deemed “untouchable.”⁶⁸ As a result, they are subject to various forms of oppression. For example, one custom prohibits Dalits from “walking public streets lest their ‘polluting’ shadow should fall on an ‘upper-caste’ Hindu.”⁶⁹ Another requires that Dalits “string a broom around their waists so as to sweep the ‘polluted’ dust they

GENOCIDE, & CRIMES AGAINST HUMAN. 99, 101 (2010).

⁶¹ *Id.*

⁶² Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 WIS. INT’L L.J. 255, 272 (2008).

⁶³ The word “Dalit” is a self-designated term, “fast supplanting the other generic names for persons descended from the old Untouchable castes.” The word “Dalit” comes from the Marathi language. In an 1831 dictionary, the word is defined as “ground” or “broken to pieces.” OLIVER MENDELSON & MARKIA VICZIANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY, AND THE STATE IN MODERN INDIA* 3-4 (1998). Since Dalit appears to be the preferred designation, Martin Macwan—who is founder of Navsarjan Trust, a leading NGO supporting Dalit rights in Gujarat State, identifies himself as a “Dalit”—and for the sake of consistency, this Note will use the term “Dalit.” See MACWAN, *supra* note 23.

⁶⁴ See, e.g., INDIA CONST. pt. XVI.

⁶⁵ MENDELSON & VICZIANY, *supra* note 63, at 6.

⁶⁶ According to 2001 census data compiled by the Office of the Registrar General & Census Commissioner, India, the official tally was 166,635,700. *Census of India – India at a Glance: Scheduled Castes & Scheduled Tribes Population*, GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, www.censusindia.gov.in/Census_Data_2001/India_at_Glance/scst.aspx (last visited Oct. 7, 2011).

⁶⁷ Yozo Yokota & Chin-Sung Chung, *Prevention of Discrimination*, U.N. Doc. A/HRC/11/CRP.3, at 8 (2009), available at http://www.idsn.org/fileadmin/user_folder/pdf/New_files/final_report_discrimination_on_work_and_decent.pdf.

⁶⁸ Narula, *supra* note 62, at 272.

⁶⁹ *Id.* at 273.

walked on.”⁷⁰

While those customs are not necessarily followed everywhere in India today, caste divisions, and their attendant forms of discrimination, continue to prevail. Divisions between Dalits and other castes “dominate in housing, marriage, employment, and general social interaction—divisions that are reinforced through the practice and threat of social ostracism, economic boycotts, and physical violence.”⁷¹ Dalits are typically relegated to the outskirts of towns, particularly in rural villages, where they occupy the village “ghetto.”⁷² They cannot enter certain temples,⁷³ often have trouble obtaining access to water,⁷⁴ subsist on menial wages,⁷⁵ and are routinely abused by police and higher castes that often enjoy the State’s protection.⁷⁶ Put simply, “Dalits face discrimination and violence in every aspect of their lives.”⁷⁷ They are deprived of basic necessities, and “suffer social exclusiveness and degradation for the sin of being born in a caste, rated the lowest caste by Hindu orthodoxy.”⁷⁸

Because of their so-called untouchability, most Dalits continue to involuntarily inherit jobs their caste has assigned to them—jobs that are too “filthy” for others to hold.⁷⁹ Moreover, even as outcasts, Dalits themselves are divided into sub-castes and practice untouchability against those below.⁸⁰ Accordingly, Dalits assign the filthiest work to the members of the lowest Dalit sub-caste: the manual scavengers. This system of “graded inequality” has forced the manual scavengers to exist at the bottom of the bottom of India’s social pyramid.⁸¹

⁷⁰ *Id.*

⁷¹ HUMAN RIGHTS WATCH, HIDDEN APARTHEID, *supra* note 14, at 2.

⁷² Narula, *supra* note 62, at 274.

⁷³ HUMAN RIGHTS WATCH, HIDDEN APARTHEID, *supra* note 14, at 105.

⁷⁴ *Id.* at 103.

⁷⁵ *Id.* at 90.

⁷⁶ Narula, *supra* note 62, at 273-74.

⁷⁷ *New India Study Finds Untouchability Pervasive Across Public and Private Life*, ROBERT F. KENNEDY CENTER FOR JUSTICE & HUMAN RIGHTS (Jan. 26, 2010), <http://www.rfkcenter.org/untouchability>.

⁷⁸ RATNA G. REVANKAR, *THE INDIAN CONSTITUTION: A CASE STUDY OF BACKWARD CLASSES* 113 (1971).

⁷⁹ Narula, *supra* note 62, at 272.

⁸⁰ *Id.*

⁸¹ *Id.*

B. The Reasons for Manual Scavenging

Manual scavengers exist throughout India,⁸² numbering (by the national government's own admission) at least 676,000.⁸³ Others estimate that the number may actually be closer to one million,⁸⁴ or even 1.3 million.⁸⁵ Among them, nearly all are women,⁸⁶ who do "the filthiest" aspects of cleaning human excreta, while their husbands and other men supervise.⁸⁷ In a 2010 study of manual scavenging in many areas of Gujarat State, female manual scavengers were found to be as young as thirteen and as old as seventy-five.⁸⁸ They are typically illiterate, work long hours, and live below the poverty line.⁸⁹

Moreover, most manual scavengers have little choice in what they do for a living. Like most Indians, manual scavengers live according to the rigid stratification of the caste system.⁹⁰ In other words, they dispose of human waste not because they want to, but because they are born into their particular caste.⁹¹ In a society where birth dictates one's job and livelihood, it is nearly impossible to find other opportunities; as a result, many are resigned to their fate: "You do what's assigned to you" is the usual refrain.⁹² One woman, interviewed for a documentary film on the subject, said, "we must keep cleaning [other people's] shit, and when we die, our kids must do it."⁹³ Martin Macwan, the founder of the Gujarat-based NGO Navsarjan Trust, has described the lives of manual scavengers this way: "Their isolation and exclusion is historical, bringing about an internalization of despair, hopelessness, and cynicism. This degradation of [their] humanity has confirmed the belief that they could be secure only with their

⁸² Zaidi, *India's Shame*, *supra* note 24.

⁸³ Thekaekara, *supra* note 2.

⁸⁴ Jain, *supra* note 3.

⁸⁵ Thekaekara, *supra* note 2.

⁸⁶ *Id.*

⁸⁷ Zaidi, *System*, *supra* note 25.

⁸⁸ NAVSARJAN TRUST, MANUAL SCAVENGING IN RURAL AHMEDABAD (July 2010) (on file with author).

⁸⁹ *Id.*

⁹⁰ Zaidi, *System*, *supra* note 25.

⁹¹ Interview with Shankarbhai Motibhai (June 2010) (a 45 year-old manual scavenger in Rethal Village, Gujarat, India). See also NAVSARJAN TRUST, *supra* note 88.

⁹² LESSER HUMANS (Drishti Media Collective 1998), available at <http://material.ahrchk.net/video/lesser-humans.html>.

⁹³ *Id.*

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present status.”⁹⁴ As one manual scavenger put it, “we soil ourselves, so that others can look clean.”⁹⁵

At the same time, manual scavenging exists for a more urgent, and practical, reason: the country’s toilet crisis. India’s rural areas, and even booming towns and cities, lack toilets and adequate sewage lines and disposal systems.⁹⁶ Indeed, few places possess the kind of technology that disposes of human waste without the need for manual cleaning.⁹⁷ Rather, people tend to defecate in dry latrines, which are prevalent across the country.⁹⁸ In addition, open defecation continues to occur throughout India. Since more than half of India’s 203 million households lack a toilet, people are forced to defecate outside in fields, pits, and in rivers.⁹⁹ A report by the World Health Organization and UNICEF found that about 665 million Indians practice open defecation.¹⁰⁰ The practice is so widespread that India’s Ministry of Urban Development reported that “everyone in Indian cities is at risk of consuming human feces, if they’re not already.”¹⁰¹ As a result, manual scavengers are needed to sweep up and carry away the piles of excreta that are left in the open.¹⁰²

Cleaning human excreta usually takes two forms. The first involves cleaning dry pit latrines of human waste.¹⁰³ Those who perform this task are forced to crawl into the latrines with nothing more than a broom and tin plate to clear it.¹⁰⁴ They collect the waste in a basket, carry the basket atop their heads, and bring it to

⁹⁴ Zaidi, *System*, *supra* note 25.

⁹⁵ BURDEN OF INHERITANCE, WATERAID intro. (2009), http://www.wateraid.org/documents/plugin_documents/burden_of_inheritance.pdf.

⁹⁶ WATERAID, *supra* note 95, at 3.

⁹⁷ *Id.*

⁹⁸ *Id.* “Dry latrines” have no facility for water—i.e., there is no flush system. *Id.* Therefore, someone must clear out the latrine by hand with a broom, tin plate, or bucket. *Id.* at 5.

⁹⁹ Jason Gale, *India Failing to Control Open Defecation Blunts Nation’s Growth*, BLOOMBERG (Mar. 3, 2009), http://www.bloomberg.com/apps/news?sid=aErNiP_V4RLc&pid=newsarchive.

¹⁰⁰ Teena Thacker, *India Has the Highest Rate of Open Defecation: WHO*, INDIAN EXPRESS, July 19, 2008, <http://www.indianexpress.com/news/india-has-the-highest-rate-of-open-defecatio/337666>.

¹⁰¹ Gale, *supra* note 99.

¹⁰² WATERAID, *supra* note 95.

¹⁰³ *Creating a Future for the ‘Untouchable’ Scavengers of India*, ACTIONAID, available at www.actionaid.org.uk/_content/documents/INDIA.pdf.

¹⁰⁴ *Id.*

a far away location where the waste is disposed of.¹⁰⁵ Occasionally, a manual scavenger has to wade into areas where people have openly defecated on a stone, plate, or bucket and remove the excreta.¹⁰⁶

The second form of manual scavenging involves working in manholes—a practice usually reserved for scavengers in urban areas.¹⁰⁷ A reporter, shocked at what he saw in one of New Delhi's manholes, wrote the following:

Rakesh sits in a low crouch at the bottom of a two-metre deep manhole, sloshing about in a swirl of human waste and sediment. Equipped with a hoe, a steel bar and wearing only a pair of loose purple underpants, he empties thick black sludge from a clogged sewer into a bucket that his crew members hoist up and dump in the middle of a narrow road. A small mountain of excrement accumulates between the manhole and a rickety wooden vegetable cart. Two co-workers reach down and yank him out by his sore, extended arms, his body splattered in putrid muck.¹⁰⁸

C. *The Dangers of Manual Scavenging*

While performing these tasks, manual scavengers are very rarely provided safety equipment. The Tata Institute of Social Sciences in Mumbai conducted a study of manual scavengers in Gujarat and discovered that “ninety percent of all manual scavengers have not been provided proper equipment to protect them from [feces]-borne illnesses.”¹⁰⁹ In other words, they did not wear gloves, masks, or boots while cleaning human excreta.¹¹⁰

Not surprisingly, manual scavengers often experience various health problems. Manhole workers, whose job is described above, may suffer from “skin rashes and eye soreness, respiratory and liver problems.”¹¹¹ Women face heavy menstruation, miscarriage,

¹⁰⁵ *Id.*

¹⁰⁶ PHOEBE SEBHATU, ONE WORLD FOUNDATION, MANUAL SCAVENGING CONTINUES 1 (2009).

¹⁰⁷ Daniel Pepper, *Life at the Bottom in a Caste-Ridden Country; Discrimination Keeps “Untouchables” Cleaning Sewers with No Access to Available Safety Gear*, THE GLOBE AND MAIL (CANADA), Jan. 29, 2008, at A3.

¹⁰⁸ *Id.*

¹⁰⁹ WATERAID, *supra* note 95, at 9.

¹¹⁰ *Id.*

¹¹¹ Pepper, *supra* note 107.

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severe anemia, and irregular heartbeats.¹¹² Indeed, a recent national study of manual scavengers determined that the majority of scavengers suffer from anemia, diarrhea, and vomiting.¹¹³ Additionally, diseases such as dysentery, malaria, typhoid and tuberculosis are common among manual scavengers.¹¹⁴ In addition, death caused by manual scavenging is not an uncommon occurrence.¹¹⁵ For example, one evening in May 2008, Nagin Ranchod Solanki and Harish Magan Solanki, two men employed by a municipal corporation in Gujarat, were summoned to address an emergency situation at a sewage pumping station.¹¹⁶ They were asked to block the main sewer pipe connected to a manhole, in order to help repair a valve, and were lifted into the manhole. Two hours later, they were both found dead, suffocated inside the manhole.¹¹⁷

In addition to the physical and psychological dangers associated with cleaning other people's feces, manual scavengers are poorly paid for their work. Private upper-caste families, municipalities, railways, and the army comprise the majority of employers.¹¹⁸ A manual scavenger's salary varies from place to place and depends on the employer,¹¹⁹ though, regardless of the particular employer (or their economic means), the pay is typically meager, and sometimes is appallingly small. In Gujarat, for example, a teenage boy was given as little as one rupee each month.¹²⁰ In parts of Rajasthan State, women are given stale bread or a few rupees.¹²¹ Some manual scavengers are paid not in rupees, but instead in kilos of grain¹²² or hand-me-down clothing.¹²³ Others wander around the upper-caste neighborhoods

¹¹² WATERAID, *supra* note 95, at 9.

¹¹³ Zaidi, *India's Shame*, *supra* note 24.

¹¹⁴ Blakely, *supra* note 5.

¹¹⁵ *India: Two Manual Scavengers Killed While Working Without Any Equipment in Gujarat*, ASIAN HUMAN RIGHTS COMMISSION (June 24, 2008), available at <http://www.ahrchk.net/ua/mainfile.php/2008/2910>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ SEBHATU, *supra* note 106, at cover page.

¹¹⁹ NAVSARJAN TRUST, *supra* note 88.

¹²⁰ LESSER HUMANS, *supra* note 92.

¹²¹ WATERAID, *supra* note 95, at 7.

¹²² *Id.* at 26.

¹²³ Interview with Manjula Pradeep, Executive Director, Navsarjan Trust (India) (June 2008) (on file with author).

at night, hoping to be handed scraps of leftover meals.¹²⁴

The problem of manual scavenging is prevalent, ingrained, and serious. The act of cleaning, loading, and carrying human excreta not only strips a person of his or her dignity, but also brings illness and even death in its wake. Manual scavengers are thus victims thrice over: they are shunned by society at large, cast aside among Dalits, and additionally made to suffer the severe emotional and physical consequences of their work.

III. THE FAILURE OF THE LAW

The preamble to the Constitution of India guarantees to “all” Indians “justice . . . liberty . . . equality . . . and fraternity.”¹²⁵ This guarantee, in and of itself, should have outlawed caste-based discrimination, for practices associated with a social hierarchy are inherently antithetical to the notion of justice, liberty, equality, and/or fraternity. Nonetheless, the Constitution’s drafters, including Dr. B.R. Ambedkar—a Dalit himself and the “principal architect of the Constitution”¹²⁶—sought to include a provision that confronted “untouchability” head-on.¹²⁷ The drafters were determined to “set the house in order, by redressing the wrongs done in the name of religion through [c]onstitutional means. Eradication of social disabilities [was] made the responsibility of the Government, by incorporating Art[icle] 17 in the Constitution[,]”¹²⁸ which stated: “Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘untouchability’ shall be an offense punishable in accordance with law.”¹²⁹ Thus, Article 17 made untouchability “not only antisocial, but a crime anathema to the concept of democracy[,]”¹³⁰ and to that end, vested the Indian Parliament with the power to legislate on the matter uniformly in all the States.¹³¹

The effort to “restore the dignity of the individual and to

¹²⁴ *Id.*

¹²⁵ INDIA CONST. pmbi.

¹²⁶ DR. AMBEDKHAR AND THE SIGNIFICANCE OF HIS MOVEMENT 49 (K.N. Kadam ed., 1991).

¹²⁷ REVANKAR, *supra* note 78, at 117.

¹²⁸ *Id.* at 117.

¹²⁹ INDIA CONST. art. 17.

¹³⁰ REVANKAR, *supra* note 78, at 117.

¹³¹ *Id.*

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establish fraternity”¹³² involved several acts passed by Parliament between 1955 and 1993. The first of these acts was the Untouchability (Offences) Act, passed in 1955,¹³³ which declared that:

Whoever on the ground of “untouchability” enforces against any person any disability with regard to . . . the practice of any profession or the carrying on of any occupation, trade or business . . . [will] be punish[ed] with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.¹³⁴

Problematically, the Act was full of loopholes and its penal provisions (“which *may* extend to six months”) were too lenient.¹³⁵ A 1969 government committee reported that the Act failed to make any impact on the eradication of untouchability, particularly because the penal provisions of the act were not strong enough.¹³⁶

In its second effort to combat caste-based discrimination, Parliament passed the Protection of Civil Rights Act in 1976.¹³⁷ This Act, unlike its 1955 predecessor, identified manual scavenging by name and made it a crime, declaring that:

Whoever compels any person, on the ground of “untouchability”, to do any scavenging or sweeping or to remove any carcass or to flay any animal or to remove the umbilical cord or to do any other job of a similar nature, shall be deemed to have enforced a disability arising out of “untouchability.”¹³⁸

Thus, if a person was caught “compelling” any person to manual scavenge, that person, under the Protection of Civil Rights Act, could be imprisoned for a term lasting between three and six months, and fined between one hundred and five hundred rupees.¹³⁹ But, like the Untouchability (Offences) Act, the Protection of Civil Rights Act’s penal provisions were too lenient, and it similarly failed to affect any change.¹⁴⁰

¹³² *Id.*

¹³³ The Untouchability (Offences) Act § 4, No. 22 of 1955, INDIA CODE (1955).

¹³⁴ *Id.*

¹³⁵ FROM PROMISE TO PERFORMANCE, *supra* note 4, at 8.

¹³⁶ DALITS AND THE STATE 130 (Ghanshayam Shah ed., 2002).

¹³⁷ *Id.* at 130-31.

¹³⁸ The Untouchability (Offences) Act § 7A(1).

¹³⁹ *Id.* § 7A(2).

¹⁴⁰ ENCYCLOPEDIA OF DALITS IN INDIA, HUMAN RIGHTS: ROLE OF POLICE AND JUDICIARY 211 (Sanjay Paswan & Paramanshi Jaideva eds., 2003).

In response to the failure of the Protection of Civil Rights Act, Parliament passed its third effort to combat caste-based discrimination, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act in 1989,¹⁴¹ which sought to prevent “the commission of crimes and serious offenses” against lower castes.¹⁴² It clarified specific crimes as “atrocities,” such as “dumping excreta, waste matter, carcasses or any other obnoxious substances in [Dalit] premises or neighborhood[s].”¹⁴³ Additionally, the Act created special courts to try cases considered atrocities,¹⁴⁴ and called on States to monitor and punish offenders.¹⁴⁵ Offenses under the Act were punishable by imprisonment for a term between six months and five years and a fine.¹⁴⁶ Unlike its predecessors, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act suffered from “a near-complete failure in implementation.”¹⁴⁷ The Indian government admitted this failure in its 2001-2002 Annual Report on the Prevention of Atrocities Act,¹⁴⁸ which stated that in 2002, only 2.31 percent of cases brought under the Act resulted in convictions.¹⁴⁹ The government’s report did not clearly explain why so few convictions occurred, but a 2007 joint report by the Center for Human Rights and Global Justice and Human Rights Watch posited that “the low rate of convictions, compared against the high number of atrocities reported against Dalits, speaks to the caste bias of [State] prosecutors, as well as other [State] organs of justice.”¹⁵⁰

In the wake of its prior failures, Parliament directly confronted the problem of manual scavenging in June 1993 by passing the Employment of Manual Scavengers and Construction

¹⁴¹ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, INDIA CODE (1989).

¹⁴² *Id.* pmbl.

¹⁴³ *Id.* § 3(1)(ii).

¹⁴⁴ *Id.* pmbl.

¹⁴⁵ *Id.* § 9(1).

¹⁴⁶ *Id.* § 3(1)(xv).

¹⁴⁷ *Prevention of Atrocities Act: Unused Ammunition*, ASIA PACIFIC HUMAN RIGHTS NETWORK (Aug. 31, 2003), <http://www.hrdc.net/sahrdc/hrfeatures/HRF83.htm>.

¹⁴⁸ CENTRE FOR HUMAN RIGHTS AND GLOBAL JUSTICE & HUMAN RIGHTS WATCH, CASTE DISCRIMINATION AGAINST DALITS OR SO-CALLED UNTOUCHABLES IN INDIA 35 (2007) (discussing the 2002 report by the Government of India, Ministry of Social Justice and Empowerment).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

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of Dry Latrines (Prohibition) Act,¹⁵¹ which prohibited “engag[ing] in or employ[ing] for or permit[ing] to be engaged in or employed for any other person for manually carrying human excreta.”¹⁵² Additionally, the Act prohibited “construct[ion] or maintain[ance] [of] a dry latrine.”¹⁵³ Offenders could be subject to imprisonment for up to one year and/or a fine of 2,000 rupees.¹⁵⁴

Like its predecessors, however, the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act has done little to eradicate manual scavenging. There are three primary reasons for the Act’s inefficacy. In the first place, the Act did not address the more insidious forms of manual scavenging, such as cleaning open gutters, manholes and septic tanks.¹⁵⁵ Second, Parliament did not create an individual right to file a complaints under the Act,¹⁵⁶ rather, only specifically appointed authorities can file complaints, and only within a limited time frame.¹⁵⁷ As a result, by 2006, not one complaint had been filed under the Act.¹⁵⁸ Lastly, and perhaps more significantly, Parliament relied too heavily on the States to enforce the ban on manual scavenging. This reliance can be seen in the fact that the Act goes into effect only after a State government issues a notification fixing a date for enforcement.¹⁵⁹ This notification can only be issued after giving a notice of no less than ninety days,¹⁶⁰ and only “where adequate facilities for the use of water-seal latrines in that area exist.”¹⁶¹ But, as discussed above, “water-seal latrines”—i.e., toilets—are not prevalent in India.¹⁶² Critics have suggested that some States did not go about building toilets so as to ensure that manual scavenging would not be prohibited,¹⁶³ did not adopt the Act, or, if they did, failed to enforce its provisions.¹⁶⁴

¹⁵¹ No. 46 of 1993, INDIA CODE (1993).

¹⁵² *Id.* § 3(a).

¹⁵³ *Id.* § 3(b).

¹⁵⁴ *Id.* § 14.

¹⁵⁵ Vrinda Sharma, *An Endless Fight Against Manual Scavenging*, HINDU, May 23, 2010, <http://www.hindu.com/2010/05/23/stories/2010052355790900.htm>.

¹⁵⁶ Zaidi, *System*, *supra* note 25.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Manual Scavengers Act § 3(1).

¹⁶⁰ *Id.* § 3(2)(i).

¹⁶¹ *Id.* § 3(2)(ii).

¹⁶² *See supra* Part II.B (discussing India’s toilet crisis).

¹⁶³ Venkatesan et al., *supra* note 56.

¹⁶⁴ *Id.*

States' circumvention of the Act has prompted public comment, like that of one Indian newspaper, which wrote: "The law is more like a scheme; it has no teeth."¹⁶⁵

Many States have employed an additional tool to avoid the Act: denying the existence and practice of manual scavenging. In 2003, when Safai Karmachari Andolan filed its initial petition with the Supreme Court to eradicate manual scavenging, most States "hotly denied having scavengers and claimed that most had been rehabilitated in alternative professions."¹⁶⁶ Over the course of several years, State officials came forward with affidavits claiming that neither dry latrines nor manual scavengers existed in their States, despite overwhelming evidence to the contrary.¹⁶⁷ For example, in 2004, the State of Tamil Nadu asserted in its affidavit that manual scavenging had been completely eradicated there.¹⁶⁸ Yet, surveys conducted later that year revealed that the practice was rampant in Tamil Nadu.¹⁶⁹ Similarly, in 2005, while the Andhra Pradesh government denied the existence of dry latrines in its State, a dry latrine was being used in one of its district courthouses.¹⁷⁰ Likewise, Haryana claimed that its State was free of manual scavengers and dry latrines, while hundreds were seen working in the dry latrines of both the National Railways and the municipalities.¹⁷¹

Thus, despite the Constitution's ban on caste-based discrimination, and four acts of Parliament—including three that specifically targeted manual scavenging—the problem remains. Why any rule of law is ignored, or not always enforced, is outside the scope of this Note. The reasons for the disconnect between what is written in the law and the reality on the ground are numerous, complicated and nearly impossible to generalize. However, Indian scholar Smita Narula offered an eloquent summary when she wrote about violence directed at Dalits:

¹⁶⁵ Zaidi, *India's Shame*, *supra* note 24.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ S. Darairaj, *Out in the Open*, FRONTLINE, Sept. 22, 2006, <http://www.hindu.com/fline/fl2318/stories/20060922005601000.htm>.

¹⁷⁰ Bezwada Wilson, *Why is it so Difficult to Free India of Manual Scavenging?* KAFILA (Dec. 22, 2010), <http://kafila.org/2010/12/22/why-is-it-so-difficult-to-free-india-of-manual-scavenging>.

¹⁷¹ Vrinda Sharma, *An Endless Fight Against Manual Scavenging*, HINDU, May 23, 2010, <http://www.hindu.com/2010/05/23/stories/2010052355790900.htm>.

Some may posit that such cases [of injustice], by the sheer force of their volume turn outrage into apathy, compassion into fatigue, and normalize that which should be anything but. Others may live in willful blindness and fail to connect the dots between acts of violence to draw the clear line that such violence helps preserve: the line between the “pure” and the “polluted.” Some may offer counter-narratives that pigeonhole such incidents into rural pockets, blame them on a few bad apples, or worse, blame the victims for the violence they surely invited upon themselves.¹⁷²

Irrespective of the underlying reasons, the States have simply not acted to eliminate manual scavenging. Therefore, the conclusion necessarily follows that States must be pressured to act, and the Supreme Court of India should be the body to apply such pressure, because the Court has the willingness and ability to do so.

IV. A CASE FOR THE SUPREME COURT

A. *The Rise of an Activist Court*

Upon achieving statehood in 1947, the Indian judiciary adopted the English common law system.¹⁷³ In those early years of statehood, the Court looked to both the British and American judiciaries as models, and found a reluctance to intervene in affairs considered to be within the purview of other branches of government.¹⁷⁴ Accordingly, the Court believed that governance of social affairs was “best left to the discretion of policy makers, attorneys general, and other so-called guardians of the public interest.”¹⁷⁵

In the mid-1970s, however, the Court’s attitude began to change for two main reasons. The first was the experience of the Emergency Period, which some have called the “gravest constitutional crisis” in India’s post-colonial history.¹⁷⁶ It began, in

¹⁷² Narula, *supra* note 62, at 310.

¹⁷³ Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 134-35 (2011).

¹⁷⁴ A.K. Gopalan v. State of Madras, (1950) 1 S.C.R. 88.

¹⁷⁵ Cassels, *supra* note 53, at 498.

¹⁷⁶ See, e.g., Vijayashri Sripathi, *Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead*, 14 AM. U. INT’L L. REV. 413, 440 (1998).

large part, as the result of political opposition to Prime Minister Indira Ghandi,¹⁷⁷ and lasted for twenty-one months (June 1975-March 1977).¹⁷⁸ During those 21 months, India operated under the Maintenance of Internal Security Act (MISA), which gave sweeping and arbitrary powers to the national government.¹⁷⁹ The *New York Times* described some of what occurred during the Emergency Period:

India's equivalent of the bill of rights was suspended; the press was sharply censored; thousands were jailed incommunicado and without the right to know the charges against them; judicial review of Government acts was severely limited. Constitutional guarantees of civil rights were suspended, as was habeas corpus.¹⁸⁰

Meanwhile, the Supreme Court acted obediently. In a case that came before the Court at the height of the Emergency Period, *Additional Dist. Magistrate Jabalpur v. S.S. Shukla*,¹⁸¹ a four-member majority upheld MISA.¹⁸² By upholding the statute, the Court allowed the government to detain people under MISA, and prevented detainees from filing habeas petitions.¹⁸³ By virtue of that decision, the Court “acquiesc[ed] in the subversion of the Constitution and flagrant violations of civil liberties by the Executive.”¹⁸⁴ Indeed, the Supreme Court has admitted as much: in 2011, Justice Asok Kumar Ganguly said that the verdict in *Additional Dist. Magistrate Jabalpur* “violated fundamental rights of a large number of people in the country.”¹⁸⁵ After the Emergency Period ended, the Court determined that it would no longer defer to the other branches of government, whose “excesses” had trampled on citizens’ rights.¹⁸⁶ Rather, the Court would act to protect citizens’ rights.¹⁸⁷ As one scholar has

¹⁷⁷ See generally *INDIA: Symbol in Chains*, TIME, Oct. 18, 1976, <http://www.time.com/time/magazine/article/0,9171,946718,00.html>.

¹⁷⁸ Charlton, *supra* note 40.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Additional Dist. Magistrate v. S.S. Shukla*, A.I.R. 1976 S.C. 1207 (India).

¹⁸² *Id.*

¹⁸³ *Supreme Court Regrets Emergency-Era Verdict*, TIMES OF INDIA, Jan. 3, 2011, http://articles.timesofindia.indiatimes.com/2011-01-03/india/28354299_1_constitution-bench-habeas-corpus-writ.

¹⁸⁴ Sripathi, *supra* note 176, at 440.

¹⁸⁵ *Supreme Court Regrets*, *supra* note 188.

¹⁸⁶ *Id.* at 141.

¹⁸⁷ *M.C. Mehta v. Union of India* (1986) 1 S.C.R. 312 (India).

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observed, “[t]he catalytic influence of the Emergency Period seems to have contributed to the metamorphosis of the Supreme Court In its new role, the Court recognized the rights of the poor and downtrodden people of India and expanded its reach to cover their interests.”¹⁸⁸

The second reason for the Court’s attitude change was the increase in influence of Chief Justice Bhagwati. He was on the Supreme Court bench for thirteen years (1973-1986),¹⁸⁹ and has been described as “one of the most distinguished jurists of his time and a champion of the rights of workers, women, the poor, the underprivileged, and prisoners.”¹⁹⁰ Bhagwati viewed the Constitution as a tool of social revolution,¹⁹¹ emphasizing the role of Article 21 of the Constitution.¹⁹² He read that Article, which enshrines the right to life and personal liberty, expansively and believed Article 21 to mean that all Indians ought to live in dignity and free from exploitation.¹⁹³ And having given Article 21 an expansive reading, he imbued it with further force by linking it with Directive Principles of State Policy.¹⁹⁴ Those Directive Principles provide for certain social and economic rights, such as securing “the welfare of the people”¹⁹⁵ and promoting “educational and economic interests” of Scheduled Castes.¹⁹⁶ Bhagwati viewed Article 21 in conjunction with Directive Principles as a unity; in other words, the right to live with human dignity derived its “life breath” from the Directive Principles.¹⁹⁷ What this all meant was that the Supreme Court, acting under Bhagwati’s interpretation of the Constitution, could bring “justice

¹⁸⁸ Sripati, *supra* note 176, at 441.

¹⁸⁹ *P.N. Bhagwati*, SUPREME COURT OF INDIA, <http://supremecourtindia.nic.in/judges/bio/pnbhagwati.htm> (last visited Feb. 28, 2011).

¹⁹⁰ Paolo G. Carozza, “*My Friend is a Stranger*”: *The Death Penalty and the Global Ius Commune of Human Rights*, 81 *TEX. L. REV.* 1031, 1047 n.75 (2003).

¹⁹¹ RAY, *supra* note 32, at 67.

¹⁹² “No person shall be deprived of his life or personal liberty except according to procedure established by law.” INDIA CONST. art. 21.

¹⁹³ P.P. Craig & S.L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 *OXFORD J. LEGAL STUD.* 356, 362 (1989).

¹⁹⁴ The Indian Constitution contains specific fundamental rights, INDIA CONST. pt. III, and Directive Principles of State Policy, INDIA CONST. pt. IV, which obligates the State to provide certain social and economic rights to citizens. *See generally* Craig & Deshpande, *supra* note 193.

¹⁹⁵ INDIA CONST. art. 38.

¹⁹⁶ INDIA CONST. art. 46.

¹⁹⁷ Craig & Deshpande, *supra* note 193, at 362.

within the reach of the poor vulnerable masses and helpless victims of injustice.”¹⁹⁸

Thus, the combination of the trauma of the Emergency Period and Bhagwati’s emergence on the Supreme Court set the stage for a more active, human rights-oriented judiciary. This attitude was not pre-ordained; rather, it was a conscious outgrowth of a perceived need to protect the dignity, and combat exploitation, of the poor and disadvantaged. Given the Supreme Court’s attitude, one would be hard-pressed not to see the Court actively intervene to address and solve the problem of manual scavenging. Manual scavenging, after all, is an affront to human dignity and the very definition of exploitation. True, Chief Justice Bhagwati is no longer on the Supreme Court, and the Court has, in the past twenty years, begun to scale back some of its activism.¹⁹⁹ Nonetheless, the fact that the Court has been willing to grapple with the problem of manual scavenging in the first place²⁰⁰ shows that the Court has not receded back to its pre-Emergency Period form.

B. The Innovation of PIL

By the late 1970s the conditions had been set for what was to be called Public Interest Litigation (PIL). PIL emerged because of two legal developments. The first is a “comprehensive revision of the law of standing.”²⁰¹ This change grants manual scavengers access to the Supreme Court, which in turn gives the Court an ability to directly address the problem. The second is the Court’s willingness to force the States to comply with existing laws in creative and flexible ways.²⁰² Some of those ways include expansive fact-finding, instructions to the governments, and supervisory mechanisms to enforce compliance.

In its early years, the Court attached itself to the Anglo-American, private rights view of standing, which permits “only a person whose rights are directly affected to approach the

¹⁹⁸ RAY, *supra* note 32, at 71.

¹⁹⁹ See Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives under Liberalization*, 39 *ECON. & POL. WKLY.* 1770 (2004).

²⁰⁰ See *Safai Karmachari Andolan v. Union of India*, Writ Petition (Civil) No. 583 of 2003 (India) (interim orders).

²⁰¹ Craig & Deshpande, *supra* note 193, at 359.

²⁰² Peiris, *supra* note 44, at 72.

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Court.”²⁰³ Yet, the Court began to realize that such a traditional rule of standing was problematic. As a report by the International Environmental Law Centre, a NGO dedicated to sustainable conservation, has pointed out, “in a developing country, the legal process tends to intimidate the litigant, who feels alienated from the system. A poor person who enters the legal stream, whether as a claimant, a witness or a party, may well find the experience traumatic.”²⁰⁴ Moreover, as the ASEAN Law Association has explained, “the collective nature of the rights affected are less amenable to redress through an individualistic western model rights based approach which many Asian countries inherited from their colonial predecessors.”²⁰⁵ The Anglo-American system “eschewed group court litigation on behalf of others . . . [because] [t]he litigant had to show that he was peculiarly and especially affected by the damage, over and above the rest of the members of the public.”²⁰⁶

In response to what he believed to be a shortcoming of the Anglo-American system, Chief Justice Bhagwati revised the law of standing in *S.P. Gupta v. Union of India*.²⁰⁷ The traditional rule of standing, he wrote, came about at a time “when private law dominated the legal scene and public law had not yet been born.”²⁰⁸ But, individual rights are “practicably meaningless in today’s setting unless accompanied by the social rights necessary to make them effective and really accessible to all.”²⁰⁹ In an effort to provide access to the Court to “all,” Bhagwati broadened the rule of standing from traditional individualism to the more community-oriented public interest litigation. In his now famous opinion in *S.P. Gupta*, Bhagwati wrote:

²⁰³ Cassels, *supra* note 53, at 498. Under the common law system, “litigation requires that the participants have some real interest to promote in order that ‘truth’ will effectively be revealed through adversarial proceedings.” *Id.* Thus, in *Charanjit Lal v. Union of India*, a shareholder of a company was prevented from alleging a violation of his fundamental right to acquire, hold, and dispose of property (provided by Article 19(1)(f) of the Constitution in effect). *Charanjit Lal v. Union of India*, (1950) 1 S.C.R. 869 (India). The Court held that only the company itself could bring suit. *Id.*

²⁰⁴ DESAI & MURALIDHAR, *supra* note 41, at 3.

²⁰⁵ Gurdial Singh Nijar, *Public Interest Litigation: A Matter of Justice, An Asian Perspective*, ASEAN LAW ASSOCIATION, 4 (Oct. 8, 2006) available at www.aseanlawassociation.org/9GAdocs/Malaysia.pdf.

²⁰⁶ *Id.*

²⁰⁷ *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149 (India).

²⁰⁸ *S.P. Gupta*, A.I.R. 1982 S.C. 149 at 185.

²⁰⁹ *Id.*

[W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 [of the Constitution] and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 [of the Constitution] seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.”²¹⁰

Thus, under the PIL rule of standing, “any member of the public” can bring an action before the Supreme Court. This is a powerful tool for manual scavengers, because a relaxed rule of standing allows NGOs to appear before the Court as their representatives. Without PIL, it would be impossible for an uneducated, poor, low-caste individual to seek judicial redress. Indeed, before PIL came about, the Court was a “silent spectator” to “[t]he bottomless ocean of economic, social and political oppression and human indignities” in India.²¹¹ But now, any member of the public, acting in a bona fide manner, can approach the Court on behalf of a person or class of persons whose legal rights have been violated.²¹² The Court has even allowed lawyers,²¹³ medical practitioners,²¹⁴ and journalists²¹⁵ to bring actions under PIL.

Due to the relaxed standing rule of PIL, manual scavengers now possess the ability to be heard in the Supreme Court. In December 2003, the NGO Safai Karmachari Andolan initiated litigation in the Supreme Court in the form of a civil writ petition,

²¹⁰ *Id.* at 188.

²¹¹ RAY, *supra* note 32, at 64-65.

²¹² *See, e.g.*, *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (India), where the petitioner, an organization dedicated to the ending of bonded labor, was not barred under the traditional rules of standing.

²¹³ *R.K. Garg v. Union of India*, (1981) 4 S.C.C. 675 (India).

²¹⁴ *Dr. Shiva Rao Shantaram Ram Wagle v. Union of India*, (1988) 2 S.C.C. 115 (India).

²¹⁵ *Sheela Barse v. Union of India*, (1983) 2 S.C.C. 96 (India).

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requesting that the Court help to eradicate manual scavenging.²¹⁶ Specifically, they sought a declaration that manual scavenging and the operation of dry latrines violated the fundamental rights enshrined in Article 14 (equality before law), Article 17 (abolition of untouchability) and Article 23 (right against exploitation) of the Indian Constitution.²¹⁷ They also sought implementation and enforcement of the Employment of Manual Scavenging and Construction of Dry Latrines Prohibition Act.²¹⁸

Under PIL, the Court has developed ways to affect the kind of change Safai Karmachari sought in its petition. The Court has done so primarily by fact-finding and then directing the government to act according to the Court's observations and instructions.²¹⁹ Once the Court investigates the facts and circumstances of a particular case, it will coordinate with other branches of the government to either enforce existing laws or create policies that the Court believes will solve the issue at hand.²²⁰ Perhaps most dramatically, in *People's Union for Civil Liberties v. Union of India*,²²¹ the Court forced both the national and State governments to preserve and expand existing right-to-

²¹⁶ Safai Karmachari Andolan v. Union of India, Writ Petition (Civil) No. 583 of 2003 (India) (interim orders).

²¹⁷ *Supreme Court Issues Notices on Plea Against Manual Scavenging*, HINDU, Jan. 9, 2004, <http://www.hindu.com/2004/01/09/stories/2004010904781200.htm>.

²¹⁸ *Id.*

²¹⁹ For example, in *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, the plaintiffs alleged that pollution from limestone quarries and mining operations in the State of Uttar Pradesh posed serious negative effects on the local environment. *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1988 S.C. 2187 (India). The Court appointed a committee of experts to report on "the question of disturbance of ecology and pollution of air, water and environment." *Id.* In an effort to determine the best environmental policy for Uttar Pradesh, the Court directed a cadre of geologists, environmental scientists and town and country planners. As G.L. Peiris has noted, fact-finding as extensive and particularized as that demonstrated by the Court in *Rural Litigation* is not only highly unconventional, but also the Court's "most imaginative contribution to the strategy of social action litigation." Peiris, *supra* note 44 at 77.

²²⁰ In *M.C. Mehta v. Union of India*, for example, the Court directed the central government to develop a national policy for the location of chemical and other hazardous industries in areas where the local population was small. *M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176 (India). The Court also suggested that the government establish an Ecological Sciences Resources Group, so that the Court would be able to better obtain "competent technical information and advice." Cassels, *supra* note 54 at 506. And, in *Bandhua Mukti Morcha v. Union of India*, the Court directed the State of Uttar Pradesh to establish a policy for the rehabilitation of children working in the carpet manufacturing industry. *Bandhua*, A.I.R. 1984 S.C. 802.

²²¹ (1997) 1 S.C.C. 301 (India).

food programs and develop new programs to fight hunger.²²² The Court went so far as to force the national government to increase its budget and spend extra millions of dollars on various programs throughout the country.²²³ Thus, the Court demonstrated a remarkable willingness to intervene directly in the problem at hand.²²⁴ According to one of the principal lawyers in *People's Union for Civil Liberties*, “[n]o court in the world would force its government to increase its budget.”²²⁵

More often, the Court’s directions to the national and State governments have been “linked with the objective of invigorating the monitoring process and ensuring proper implementation of policy decisions and guidelines.”²²⁶ In *M.C. Mehta*, the Court set up an independent committee to visit a chemical plant every two weeks, and also ordered a government inspector to make surprise visits there once a week.²²⁷ In *Bandhua*, the Court “directed the authorities to accept the assistance of social action groups, to carry out surprise checks on local quarries, to set up labour camps to educate workers about their legal rights, and to ensure a pollution-free environment with adequate sanitary, medical and legal facilities.”²²⁸ Additionally, in *People's Union for Civil Liberties*, the Court established a commission for the purpose of collecting, collating, and analyzing national and State data regarding the implementation of food schemes.²²⁹

So far, in the ongoing *Safai Karmachari Andolan* case, the Court has instructed the States to reveal the truth about the existence of manual scavenging in their respective jurisdictions.²³⁰

²²² *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India) (interim orders).

²²³ For example, in November 2001, the Court issued an order that commanded the States to provide every child, in every government and government-assisted primary school, with a “prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days” and mandated that “[t]hose governments providing dry rations instead of cooked meals must within three months start providing cooked meals.” *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001) (interim order), available at <http://www.righttofoodindia.org/orders/nov28.html>.

²²⁴ Lauren Birchfield & Jessica Corsi, *The Right to Life is the Right to Food: People's Union for Civil Liberties v. Union of India & Others*, 17 HUM. RTS. BRIEF 15, 16 (2010).

²²⁵ *Id.*

²²⁶ Peiris, *supra* note 44, at 83.

²²⁷ *M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176 (India).

²²⁸ Cassels, *supra* note 53, at 506.

²²⁹ Birchfield & Corsi, *supra* note 225.

²³⁰ Dhananjay Mahapatra, *A Capital Shame: SC Gets Details of Manual Scavenging in*

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For example, in May 2009, the Court received a survey from Safai Karmachari Andolan detailing individual manual scavengers and the location of houses where they cleaned dry latrines in northeast Delhi.²³¹ Several years earlier, the Delhi government had issued an affidavit not only denying the existence of manual scavengers, but also accusing Safai Karmachari Andolan of “bad allegations against answering respondent without verifying facts.”²³² Yet, in court, pictures of five manual scavengers working in fifteen dry latrines were distributed to the justices.²³³ A survey was also handed over, which identified 1,085 scavengers working in Delhi.²³⁴ In the face of such irrefutable evidence, the Delhi government could no longer deny the truth about manual scavenging.

In addition to revealing the continued existence of manual scavenging, the Court has also instructed public officials to act. In April 2005, the Court issued an interim order directing that the national government and each of the State governments should, within six months, file an affidavit regarding the existence of manual scavenging within their respective jurisdictions.²³⁵ The Court ordered that if the affidavit admits the existence of manual scavenging, then the government “should indicate a time-bound program within which the rehabilitation of manual scavengers and the ultimate eradication of the practice is proposed to be achieved.”²³⁶ Then, in April 2009, the Court received a report detailing the locations of dry latrines in the States of Rajasthan, Haryana and Punjab.²³⁷ Responding to the prevalence of manual scavenging in certain districts of those States, the Court sent a copy of those details to local officials, requiring them to explain why steps were not taken to eliminate manual scavenging.²³⁸

However, despite the benefits of PIL, *Safai Karmachari Andolan* has been pending since 2003. True, such an entrenched

Delhi, TIMES OF INDIA, May 10, 2009, http://articles.timesofindia.indiatimes.com/2009-05-10/delhi/28195579_1_manual-scavengers-dry-latrines-safai-karmachari-andolan.

²³¹ *Id.*

²³² Zaidi, *India's Shame*, *supra* note 24.

²³³ Mahapatra, *supra* note 230.

²³⁴ *Id.*

²³⁵ Venkatesan et al., *supra* note 56.

²³⁶ *Safai Karmachari Andolan v. Union of India*, Writ Petition (Civil) No. 583 of 2003 (India) (Nov. 14, 2005) (interim order). *See also* Venkatesan et al., *supra* note 56.

²³⁷ Mahapatra, *supra* note 230.

²³⁸ *Id.*

practice as manual scavenging cannot be solved easily, and one should not expect the Court to eliminate manual scavenging in one fell swoop. Nevertheless, the Court cannot simply rely on the States to act to eradicate manual scavenging; it is unlikely that revealing the existence of manual scavenging and issuing directives to public officials will prove to be effective. Since the early days of independent India, the States have failed and/or refused to act. Thus, the Court must do more. That *Safai Karmachari Andolan* appeared at all before the Court at all was a critical first step. Now that the case is pending, the Court should take advantage of its ability under PIL to develop a creative and flexible approach to the problem. This Note suggests one such approach in Part V.

V. A THREE-STEP SOLUTION

While the Court can conduct fact-finding and issue instructions to the States to comply with the law, the Court has to take at least one extra step: to press States to build toilets. Specifically, the Court needs to create and oversee a three-step plan whereby the States finally end the conditions that have led to the need for manual scavenging, and build and maintain an alternative sanitation system. In the first step of the plan, the Court should force the States to destroy dry latrines and other types of excreta dumping grounds that require manual cleaning. Then, the Court should implement a scheme whereby the States are forced to construct, maintain, and operate toilets. Finally, the Court should create an oversight mechanism to ensure that States are effectively, and persistently, carrying out the Court's plan. Through that three-step process, the goal of ending manual scavenging may one day be realized.

The first step, destroying the dry latrines, is the easiest aspect of the three-step process. In response to Court orders issued during the course of *Safai Karmachari Andolan*, some States have already demolished dry latrines.²³⁹ The problem is that they have only demolished particular dry latrines—the ones referenced in their affidavits to the Court—leaving others to continue operating.²⁴⁰ Thus, the Court needs to ensure that the States demolish *all* dry latrines, in addition to manholes and other dumping sites where manual cleaning is required.

²³⁹ Venkatesan et al., *supra* note 56.

²⁴⁰ *Id.*

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The second step, directing the States to build toilets, is concededly much more difficult and complicated. In certain areas of Gujarat, for example, only 600 to 800 millimeters of rain falls a year, the bulk of which falls within three months of the monsoon season.²⁴¹ Any requirement to build a water-based flush toilet would tax that region's limited water resources and potentially increase the need for manual scavenging, because "[s]ewerage systems which pipe wastewater to centralized treatment facilities are often cleaned and serviced by manual scavengers"²⁴² Thus, the Court cannot simply tell the States to "build toilets"; a more nuanced, multifaceted approach would have to be taken. In regions that lack sufficient water resources, States should be directed to explore alternative types of toilets. One such toilet is the Ecological Sanitation toilet, or Ecosan.²⁴³ In 2006, the Massachusetts Institute of Technology (MIT) and the NGO Navsjaran Trust collaborated on the design of the Ecosan, a small non-water-based toilet that collects excrement and processes it so that it is safe for human handling. The Ecosan has three components:

- 1) urine separation, where feces and urine are collected separately and the feces is processed through dehydration; 2) composting, where excrement is made safe through mimicking soil conditions in a collection chamber over many years, and 3) biogas production, where excrement is digested in a chamber that harvests methane and produces an agriculturally valuable sludge byproduct.²⁴⁴

MIT recommends the Ecosan for arid and economically depressed areas, because it does not require water or expensive piping for sewers.²⁴⁵ It is thus economically sustainable, relatively inexpensive, and, most importantly, removes the need for manual scavenging.²⁴⁶ Using an Ecosan would avoid the need to defecate in a dry latrine or out in the open—the Ecosan is built in either a communal space or in a private home, and requires no manual cleaning.²⁴⁷

²⁴¹ FROM PROMISE TO PERFORMANCE, *supra* note 4, at 14.

²⁴² *Id.* at 29.

²⁴³ *Id.* at 6.

²⁴⁴ *Id.* at 28.

²⁴⁵ *Id.* at 6.

²⁴⁶ *Id.*

²⁴⁷ FROM PROMISE TO PERFORMANCE, *supra* note 4, at 6. To work effectively, however:

Yet, alternative types of toilets like the Ecosan are not necessary everywhere.²⁴⁸ Certainly, in parts of India that have more readily available water resources, water-flush toilets are appropriate (and also have the capacity to remove the need for manual scavenging).²⁴⁹ But, a piped system, if it becomes clogged or blocked, might result in an increased need for manual scavengers to physically go into a sewer and clean it out. Therefore, a conventional sewer grid system also requires a mechanical pump and careful maintenance.²⁵⁰ Critics might argue that building toilets—and a sophisticated sewer system, no less—is too expensive. A 2010 U.N. report has estimated that building one water-based flush toilet (including labor) costs \$300.²⁵¹ An Ecosan, by contrast, costs between \$60-120 (depending on its design).²⁵² At any of those figures, building toilets for more than half of India is undoubtedly an expensive undertaking. However, as the World Bank's Water and Sanitation Program has pointed out, the lack of toilets costs India more than \$50 billion per year, mostly through premature deaths and hygiene-related diseases.²⁵³ By building toilets, the United Nations has estimated that the country could expect a return of between three and thirty-four

[T]he user cannot simply 'flush and forget.' Urine, if not drained off must be collected regularly in buckets, while the feces and compost must be raked and removed, generally on a bi-annual basis. Furthermore, the system must be used properly, or the outposts may be contaminated. Proper use of [the Ecosan's] three-hole system (for urine, feces, and wash-water) is vital and requires user education and training, particularly in communal arrangements.

Id. at 31.

²⁴⁸ This Note does not advocate for the Court to direct the States to use the Ecosan *per se*; it is merely an example of a creative, and sustainable, way of alleviating the manual scavenging problem.

²⁴⁹ In Bihar State, for example, the national Ministry of Rural Development, UNICEF, and the NGO Action for Community Empowerment, coordinated to build water-based flush toilets for 9,015 households over the course of seven months in 2006. Manisha Prakash, *India: Flush with Pride*, WOMEN'S FEATURE SERVICE, (May 14, 2007), available at ProQuest, Doc. ID 1470878581. As a result, the areas where those toilets were built bear "no resemblance to [their] past The roads are no longer filthy with human excreta." *Id.*

²⁵⁰ FROM PROMISE TO PERFORMANCE, *supra* note 4, at 14.

²⁵¹ David Knowles, *Report: India Has More Cell Phones Than Toilets*, AOL NEWS (April 19, 2010), <http://www.aolnews.com/2010/04/19/report-india-has-more-cell-phones-than-toilets>.

²⁵² FROM PROMISE TO PERFORMANCE, *supra* note 4, at 31.

²⁵³ Jason Gale, *India's Toilet Shortage Costs More than \$50 Billion*, *World Bank Study Says*, BLOOMBERG (Dec. 21, 2010), <http://www.bloomberg.com/news/2010-12-21/india-s-toilet-shortage-costs-more-than-50-billion-world-bank-study-says.html>.

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dollars for every dollar spent on sanitation.²⁵⁴ A simple cost-benefit analysis, then, indicates that it is well worth the initial cost for India to pursue building toilets.

Critics might complain that it is beyond the Court's capacity, or expertise, to oversee such a vast, and complicated, undertaking. Yet, as described in Part IV *supra*, the Court has previously set up similar monitoring bodies.²⁵⁵ Among those monitoring bodies, arguably the most ambitious one was created in *People's Union for Civil Liberties*, where the Court appointed a commission that would address all "grievances regarding food entitlement schemes." The commission was to coordinate with "reliable persons and organizations to facilitate monitoring, reporting, and working towards effective implementation[.]"²⁵⁶ and also to appoint advisers for each State, who would in turn act as liaisons between the Court, the States, and civil society.²⁵⁷ Each State adviser would then report back to the commission in an effort to work "towards more effective implementation of schemes and rectification of grievances."²⁵⁸

As the Court has already created an oversight commission in *People's Union for Civil Liberties*, there is little reason it should not be able to use that commission as a model for a future Eradication of Manual Scavenging Commission. The Court should appoint two Commissioners, who would in turn create a body of overseers (made up of experts in sanitation systems). These experts would then appoint State Advisors, who would coordinate with workers in the field, and report back to the Commission. These workers could easily be provided by organizations such as Safai Karmachari Andolan and Navsarjan Trust.²⁵⁹

Moreover, the Court can seek assistance from the various governmental bodies that have already been tasked with solving the problem of manual scavenging,²⁶⁰ including five national ministries, such as the Ministry of Social Justice and

²⁵⁴ Knowles, *supra* note 251.

²⁵⁵ See *supra* Part IV.B (discussing the various checks on national and State government action in *Bandhua, M.C. Mehta* and *People's Union for Civil Liberties*).

²⁵⁶ Birchfield & Corsi, *supra* note 225, at 727.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See SAFAI KARMACHARI ANDOLAN, <http://safaikarmachariandolan.org> (last visited Oct. 6, 2011); NAVSARJAN TRUST, <http://navsarjan.org> (last visited Oct. 6, 2011).

²⁶⁰ NHRC *Terms Manual Scavenging as One of the Worst Violations of Human Rights*, HINDUSTAN TIMES, Aug. 29, 2008, available at 2008 WLNR 16369562.

Empowerment and the Ministry of Urban Development and Poverty Alleviation.²⁶¹ Additionally, India's National Human Rights Commission—which has called manual scavenging “one of the worst violations of human rights”—has already directed independent agencies to survey the existence of manual scavengers and create new jobs for them.²⁶² The Court would thus have powerful national government bodies and other sectors of society helping in the effort, all acting under the auspices of the Eradication of Manual Scavenging Commission.

It is possible that such a Commission, under the auspices of the Court, could lead to a confrontation between the judiciary on the one hand, and the executive and legislature on the other. But, the guarantees enshrined in the Indian Constitution impose a duty on all three branches of government to act.²⁶³ Where one branch fails to carry out its responsibilities effectively, it becomes the duty of another branch to fulfill “the Constitutional mandate.”²⁶⁴ Otherwise, the Constitution is meaningless. As one scholar has noted, under PIL, the “judiciary acts anywhere the administration ha[s] failed to discharge its assigned function.”²⁶⁵ Indeed, in *Bandhua*, Justice Bhagwati observed that:

When the [C]ourt entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic programmes for the poor have-nots.²⁶⁶

Moreover, this Note's suggestion is in no way foreign to India. As recently as December 2010, India's National Advisory Council (a policy wing of the Prime Minister's Office),²⁶⁷ urged the national government to coordinate with all State and local governments to eliminate manual scavenging through destruction of dry latrines, and recommended that the “highest levels” of the national and State governments monitor compliance with the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act.²⁶⁸ This Note simply recommends that

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ RAY, *supra* note 32, at 75.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See NATIONAL ADVISORY COUNCIL, <http://nac.nic.in> (last visited Oct. 9, 2011).

²⁶⁸ Siddarth Varadarajan, *NAC to Monitor Abolition of Manual Scavenging*, HINDU,

the Court take the lead in that effort. Its activist spirit and power under PIL make the Court the last, and best, hope for solving the problem of manual scavenging.

VI. CONCLUSION

India prides itself on having a constitution that guarantees a free and dignified existence to all its citizens.²⁶⁹ The country also possesses one of the fastest growing economies in the world.²⁷⁰ Its rise in power and prestige has lifted many out of poverty, especially individuals from the urban slums.²⁷¹ Yet, the vibrant face of modern India has a persistent and ugly stain—the problem of manual scavenging. As one journalist has stated, “even after six decades of independence, India continues to dehumanize, degrade, and shame the most vulnerable amongst us.”²⁷²

Manual scavengers confront historical, and deeply rooted, caste-based discrimination—so much so that they seemingly have no choice but to spend their lives cleaning the human excreta deposited in dry latrines, streets, and sewers.²⁷³ Their so-called pollution, both as Dalits and as manual scavengers, has spurred on a cycle of oppression: they are marked, at birth, to do something only assigned to them.²⁷⁴ Breaking free from that cycle is nearly impossible, particularly when laws banning the practice are flagrantly ignored.²⁷⁵

To solve the seemingly intractable problem of manual scavenging, Safai Karamchari Andolan brought a claim to the Supreme Court of India.²⁷⁶ By virtue of Public Interest Litigation, the NGO managed to alert the Court to the widespread practice,

Oct. 25, 2010, <http://www.thehindu.com/news/national/article848906.ece>.

²⁶⁹ *Worst Job in the World?*, WATERAID (Jan. 19, 2010), http://www.wateraid.org/international/about_us/newsroom/8114.asp.

²⁷⁰ Harsh V. Pant, *Indian Economy Grows, Politics Stagnates*, INTERNATIONAL RELATIONS AND SECURITY NETWORK (ISN) (Feb. 21, 2011), <http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&id=126974&contextid734=126974&contextid735=126972&tabid=126972>.

²⁷¹ Taylor Barnes, *India, China Lead in Lifting People out of Urban Slums, UN Says*, CHRISTIAN SCIENCE MONITOR GLOBAL NEWS BLOG (Mar. 18, 2010), <http://www.csmonitor.com/World/Global-News/2010/0318/India-China-lead-in-lifting-people-out-of-urban-slums-UN-says>.

²⁷² Zaidi, *India's Shame*, *supra* note 24.

²⁷³ Zaidi, *System*, *supra* note 25.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *See supra* Part IV.B (discussing the ongoing case).

despite the clamor among public officials that manual scavenging did not exist in their respective States.²⁷⁷ The Court, seemingly sympathetic to the scavengers' cause, has issued orders to the States, directing them to demolish dry latrines and "rehabilitate" the manual scavengers.²⁷⁸

However, as this Note argued, the Court must go beyond simply relying on States to act. The States have not acted, even in the face of legislation by the national government. Therefore, the Court must use its power of PIL to go further, and to create a system whereby society is mobilized to attack manual scavenging at its foundation. Of course, the Court cannot eliminate caste-based discrimination, or erase the pervasive attitude that all Dalits are "polluted" and inferior²⁷⁹ (irrespective of whether they are manual scavengers). The Court can, however, eliminate the practical need for manual scavengers. After all, the need exists because India suffers from a toilet crisis—indeed, more Indians own cell-phones than toilets.²⁸⁰ If Indians were to stop defecating in dry latrines, or out in the open, there would be a substantially lesser need for manual scavenging. Thus, if States were forced to construct, maintain, and operate toilets (either water-based flush toilets with effective plumbing systems, or alternatives types), under the scrutiny of the Court and an independent oversight commission, manual scavenging could be eradicated altogether.

Of course, any attempt to eradicate manual scavenging requires will, imagination, and flexibility. Yet, over the past decades, the Court has displayed those qualities. Since Justice Bhagwati arrived on the bench several decades ago, the Court has brought poor and disadvantaged groups into the system of justice and under the protections of the rule of law.²⁸¹ The Court, through PIL, has acted as a catalyst in the process of social transformation in India,²⁸² and it should not fail to do so now.

²⁷⁷ Venkatesan et al., *supra* note 56.

²⁷⁸ *Id.*

²⁷⁹ *See supra* Part II.A (discussing the "pollution" of Dalits).

²⁸⁰ Gale, *supra* note 253.

²⁸¹ *See supra* Part III.A (discussing the Court's emergence as champion of social rights for the poor and disadvantaged after the Emergency Period).

²⁸² SANGEETA AHUJA, 1 PEOPLE, LAW AND JUSTICE: A CASEBOOK OF PUBLIC-INTEREST LITIGATION xlv (2000).

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