

SOCIO-LEGAL REVIEW

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SOCIO-LEGAL REVIEW

Vol. 16 (2)

2020

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EDITORIAL NOTE

Volume 16(1) of the *Socio-Legal Review* explored contemporary, pertinent, and oft-overlooked issues within the socio-legal discourse of South Asia. It touched upon topics ranging from the ‘Right to the City’ within an Indian context, equality of opportunity in Sri Lanka, the need for articulating the concept of ‘hate crime’ to address violence, to an interdisciplinary perspective on the ‘Essential Religious Practices’ doctrine, and procedural injustices pertaining to the NIA Act in the Bastar region. Volume 16(2) of the *Socio-Legal Review* carries forward this project, with a focus on critical issues which often go unnoticed and neglected.

In Volume 16(2), we cover four distinct issues, which may be national or regional in geographic scope, but nevertheless hold lessons for the entire country. These issues have had a real and severe impact on the lives of many and yet have not often received the kind of comprehensive analysis that they deserve. Volume 16(2) of the *Socio-Legal Review* attempts to remedy this deficiency to some extent. In this volume, our esteemed contributors have engaged in a thorough analysis of the topics at hand, often straying away from mainstream and uncomplicated narratives, to present varying insightful perspectives. We hope that this Volume helps us all recognise the various facets of the law- the distorted form that it may take in practice, the painful impact that it may have on the lives of millions, the complicated legacies that it may leave behind, or the limited transformative potential that the law may hold in certain instances.

Of the diverse themes of Volume 16(2), we commence with Saurabh Bhattacharjee’s critique of the Code on Wages, 2019. In the article titled ‘*Universalization of Minimum Wages as a Pipe Dream: Many Discontents of the Code on Wages, 2019*’, the author argues that the Code on Wages, 2019 fails to recognize an entitlement to minimum wages for every wage worker and does not address the systemic hurdles in the payment of minimum wages. He argues that these gaps undermine the goal of universalization of minimum wages and the constitutional mandate on the payment of minimum wages. Our second article of the issue is Padmini Baruah’s “‘*The Right to Have Rights*’: *Assam and the Legal Politics of Citizenship*”, where the author argues that the use of documentation has served specific political goals which work in tandem with existing vulnerabilities to disenfranchise those who are already marginalized. The author makes their argument in the context of a study of Assam’s citizenship tribunals and its arbitrary bureaucratic barriers, which are depriving people of their right to access the entitlements of citizenship. Tvisha Shroff’s

'The Demand-Side of the Rule of Law: India's Experience with Eminent Domain Law Reform' places the issue of land acquisition within a rule of law framework and analyses the national level reform of the Land Acquisition Act, 1894. Through a study of the factors surrounding and following the compulsory acquisition of agricultural land in Singur (West Bengal), the author reflects on the potential of legal empowerment and demand-side strategies to contribute to long-term and sustainable legal reform in pursuit of the 'rule of law' ideal. We conclude the issue with Neetika Vishwanath's *'Ethnographic Study of Rape Adjudication in Lucknow's Trial Court'*. This article forms a part of the *Notes from the Field* section and here, the author exposes the chasm between the formal written law and the operational law in Lucknow's Fast Track Court by means of an eight-week long ethnographic study on the rape trials conducted in this court. The author concludes that the transformative potential of criminal law for sexual violence is rather limited and that one may have to explore strategies outside of criminal law to combat sexual violence.

Putting together this issue would not have been possible without the help and support of many. We are extremely grateful to our peer reviewers for their invaluable comments and suggestions. We owe a tremendous debt of gratitude to the Editorial Board of 2019-20 whose dedication and efforts have been central to the successful publication of Volume 16 of the *Socio-Legal Review*. We are also thankful to our Faculty Advisor Professor Rashmi Venkatesan and our Vice Chancellor Professor (Dr.) Sudhir Krishnaswamy for their continued support and guidance.

We hope that our readers enjoy this issue. We would love to receive feedback and responses to the scholarship published. You may write to us at socio-legalreview.nls@gmail.com.

Shannon A. Khalkho and Sreedevi Nair,
Chief Editor and Deputy Chief Editor,
Socio-Legal Review,
Bangalore, 2020

UNIVERSALIZATION OF MINIMUM WAGES AS A PIPE DREAM: MANY DISCONTENTS OF THE CODE ON WAGES, 2019

—Saurabh Bhattacharjee*

The Code on Wages, 2019 ('Code') seeks to universalize the law on minimum wages in India by removing the distinction between scheduled and non-scheduled employment that has been central to the application of the Minimum Wages Act, 1948. The Union Ministry of Labour and Employment claims that the elimination of this dichotomy will extend the protection of minimum wages law to more than an estimated fifty crore workers. This paper posits that the goal of universalization of minimum wages may remain a pipe dream due to several explicit exclusions, definitional limitations, and ambiguities in the Code. As a result, not only would many wage workers still remain outside the ambit of minimum wages protection, the coverage of domestic workers, who were earlier covered under the Minimum Wages Act, 1948, may also be imperilled. Further, the exclusion of employment guarantee programmes from the ambit of the provisions on minimum wages also contravenes the constitutional prohibition against forced labour under Article 23. In addition, the Code also fails to address some of the critical structural barriers in the labour economy that have impeded the implementation of minimum wages law so far. This paper argues that the Code's failure to recognize an entitlement to minimum wages for every wage worker and address the systemic hurdles in the payment of minimum wages undermines the goal of universalization of minimum wages as well as the constitutional mandate on payment of minimum wages.

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I. INTRODUCTION

The Code on Wages, 2019 is the first legislation to have been enacted as a part of the National Democratic Alliance government’s agenda on labour reforms.¹ In an attempt to simplify and consolidate existing labour regulations, the Ministry of Labour and Employment has consolidated 38 central legislations into 4 Labour Codes.² The Code on Wages, 2019 (‘Code’) amalgamated 4 laws – the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976 – into a single statutory instrument and repealed the individual laws. The Statement of Objects and Reasons asserts that the merger of these 4 statutes into a single law “will facilitate the implementation and also remove the multiplicity of definitions and authorities without compromising on the basic concepts of welfare and benefits to worker”.³ It further declares that “[w]idening the scope of minimum wages to all workers would be a big step for equity”.⁴

Indeed, the Code has not only introduced a statutory national floor wage⁵ but has also taken a significant step towards making the right to minimum wages a truly universal entitlement. Until now, the Minimum Wages Act, 1948 applied only to those employments that were listed in the Schedule to the Act.⁶ Apart from a handful of states, there was no statutory obligation whatsoever in other states to pay minimum wages in those fields of employment that were not mentioned in the Schedule.⁷ As a result, estimates indicated that somewhere

¹ ‘India’s New Government to Push Labour Reforms’ (*Asia Times*, 28 May 2019) <<https://www.asiatimes.com/2019/05/article/indias-new-government-to-push-labor-reforms/>> accessed 23 June 2020; TK Rajalakshmi, ‘Amendments to Labour Laws Under the Modi Government: No Love for Labour’ (*Frontline*, 16 August 2019) <<https://frontline.thehindu.com/the-nation/article/28757774.ece>> accessed 23 June 2020.

² Code on Wages; Code on Industrial Relations; Code on Social Security; Code on Occupational Safety, Health and Working Conditions.

³ Code on Wages Bill 2019, Statement of Objects and Reasons.

⁴ *ibid.*

⁵ Code on Wages 2019, s 9.

⁶ Minimum Wages Act 1948, s 3(1).

⁷ Admittedly, several states like Maharashtra, Gujarat, Karnataka, and Tamil Nadu have widened the scope of ‘scheduled employments’ by adding a residuary clause. For example, the Maharashtra Government has added a residuary clause covering ‘[e]mployment in any shop or commercial establishment, other than that covered under any of the other entries in this schedule’. Similarly, Karnataka has notified minimum wages and has amended the schedule to extend minimum wages to ‘employment not covered in any of the scheduled employments to

between 35% and 40% of all wage workers in India fell outside the ambit of that law.⁸ The new Code dispenses with this distinction between scheduled and non-scheduled employment. The removal of this dichotomy is a groundbreaking step, and the government claims that it will extend the protection of minimum wages law to more than an estimated 50 crore workers.⁹ The Code also stipulates provisions on timely payment of wages and permissible deductions that are applicable to all establishments.¹⁰ Consequently, the Code promises to extend a statutory remedy for non-payment of wages to several new categories of employees who were hitherto solely reliant on the illusory and sclerotic protection of civil courts.

However, this paper posits that the Code suffers from several lacunae in that it may imperil the progressive goal of universalization of minimum wages. *First*, the Code fails to extend the right to receive minimum wages to all the wage workers. This failure stems from certain limitations and contradictions in the definition of ‘employee’ under the Code. Significantly, these lacunae may also undermine the scope of gender anti-discrimination provisions contained in the Code concerning equal remuneration. Additionally, these definitional ambiguities may also risk the coverage of domestic workers who were earlier covered under the Minimum Wages Act. *Second*, this paper draws attention to the explicit exclusion of employment guarantee programmes from the ambit of the provisions on minimum wages in the Code and argues that such exclusion not only impedes the goal of universalization of minimum wages but

the schedule to the Act’. Indeed, the Karnataka High Court has also observed that the notification has made minimum wages universal. See *Karnataka Small Scale Industries Association v Secretary* (2019) 2 LLJ 740: 2019 Indlaw Kar 8824 (High Court of Karnataka). However, even some of these residuary clauses are limited in their ambit. For example, the residuary clauses in Gujarat and Maharashtra extend the schedule to shops and commercial establishments covered by the Bombay Shops and Establishments Act 1948. As such, they fail to embrace all workplaces and employments. Secondly, the abovementioned states are exceptions, since most states, along with the Central Government, have continued to follow the rigid binary classification between scheduled and non-scheduled employment. See Ministry of Labour and Employment, ‘Report on the Working of the Minimum Wages Act for the Year 2014’ (Government of India 2016) <http://labourbureau.new.gov.in/UserContent/Report_MW_ACT_2014.pdf?pr_id=wEIJPpAkILE%3d> accessed 23 June 2020.

⁸ Patrick Belser and Uma Rani, ‘Extending the Coverage of Minimum Wages in India: Simulations from Household Data’ (2011) 46(22) *Economic & Political Weekly* 47; Anwarul Hoda and Durgesh K Rai, ‘Labour Regulations in India: Rationalising the Laws Governing Wages’ (2017) ICRIER Working Paper 346 <https://icrier.org/pdf/Working_Paper_346.pdf> accessed 23 June 2020; ‘India Wage Report: Wage Policies for Decent Work and Inclusive Growth’ (International Labour Organization 2018) <https://www.ilo.org/wcmsp5/groups/public/asia/robangkok/sronew_delhi/documents/publication/wcms_638305.pdf> accessed 23 June 2020.

⁹ Ministry of Labour and Employment, ‘Lok Sabha Passes the Code on Wages Bill, 2019’ (*Press Information Bureau*, 30 July 2019) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=192386>> accessed 23 June 2020.

¹⁰ In contrast, the Payment of Wages Act 1936 is applicable to a limited set of establishments specified in Section 1(4) of that Act or to establishments notified by the appropriate government. See *Payment of Wages Act 1936*, s 1.

also contravenes the constitutional prohibition against forced labour. *Third*, the paper alludes to the structural barriers in the realization of minimum wages in India and avers that universalization of minimum wages cannot be achieved in isolation from an appropriate response to such barriers.

II. UNDERMINING UNIVERSALITY BY A DEFINITIONAL QUAGMIRE

As mentioned earlier, the protections under the Minimum Wages Act, 1948 extended only to persons in scheduled employments.¹¹ The dichotomy between scheduled and non-scheduled employment had its genesis in the history of the minimum wages law in India. In 1931, the Royal Commission on Labour in India had suggested the introduction of statutory minimum wages only in a few “sweated industries”, where the wages were inadequate and collective bargaining was not possible.¹² This blueprint for extending minimum wages to only a few select occupations was adopted by the postcolonial state through the Industrial Policy Resolution, 1948, which called for the fixation of statutory minimum wages in “sweated industries” only.¹³ The newly enacted Minimum Wages Act, 1948 incorporated this policy and limited the applicability of the Act to only those employments listed in the Schedule.¹⁴ The list of categories of employments covered by the Schedule incrementally grew from 13 categories to 376.¹⁵ In fact, there existed more than 1,054 different minimum wage rates in the country.¹⁶ Yet, around one-third of the wage workers in the country were still not covered by the Minimum Wages Act, 1948.¹⁷ The dichotomy between scheduled and other employments significantly contributed to their exclusion from the Act’s protection.

The Code abolishes this erstwhile distinction between scheduled and non-scheduled employment. Section 5 of the Code makes an emphatic assertion that “no employer shall pay to any employee wages less than the minimum rate of wages notified by the appropriate Government”. Consequently, there is no scope for classification of employments into scheduled or non-scheduled categories. However, the apparent universality of the obligation to pay minimum

¹¹ Minimum Wages Act 1948, s 3.

¹² ‘Report of the Royal Commission on Labour in India’ (Royal Commission on Labour in India 1931) 211-214 <<https://archive.org/details/in.ernet.dli.2015.1111/page/n1/mode/2up>> accessed 23 June 2020.

¹³ Sahab Dayal, ‘The Development of Modern Wage Concepts and Labour Legislation in India—An Analysis’ (1978) 12(2) Indian Journal of Industrial Relations 147, 148.

¹⁴ The Statement of Objects and Reasons had indicated that the ‘items in the schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour’. See Minimum Wages Act 1948, Statement of Objects and Reasons.

¹⁵ International Labour Organization (n 8) 77.

¹⁶ Uma Rani and others, ‘Minimum Wage Coverage and Compliance in Developing Countries’ (2013) 152 (3-4) International Labour Review 381.

¹⁷ International Labour Organization (n 8) 75.

wages in this provision is only a chimera. This part of the paper will show that the definition of key terms like ‘employee’, ‘workers’, and ‘employer’ have indirectly resulted in qualifications on the applicability of minimum wage provisions under the Code, thereby excluding a considerable number of workers from the protection of the Code.

A. Definition of ‘Employee’ and Qualifications on Nature of Work

An ‘employee’ is granted the right to be paid minimum wages under Section 5 of the Code. Consequently, not every wage worker will be automatically entitled to minimum wages. In other words, Section 5 necessitates that a wage worker must fall within the definition of ‘employee’ before they can claim a right to minimum wages under the Code. This emphasis on the relationship of employment can act as a significant hurdle in the path of complete universalization of minimum wages, as several categories of wage workers can be excluded from the definition of ‘employee’.

Despite the centrality of the status of employment in labour and employment, there has been considerable divergence over the appropriate legal standards for defining it.¹⁸ Indeed, it is doubtful whether every worker would meet the technical-legal standards formulated through centuries of evolution in common law.¹⁹ Admittedly, the classical common law’s standard of control and supervision²⁰ has been overtaken by more holistic modern standards that allow for the balancing of several factors.²¹ Yet, supervision and control still remains a crucial factor in proving the existence of a relationship of employment. This is indicated in *Balwant Rai Saluja v Air India Ltd*,²² which spoke of effective and absolute control. Earlier, the Supreme Court had distinguished between primary and secondary control in *International Airport Authority of India v International Air Cargo Workers’ Union*,²³ and asserted that primary control is

¹⁸ Guy Davidov, ‘The Subjects of Labour Law: “Employee” and Other Workers’ in Mathew Finkin and Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015) 115; Richard R Carlson, ‘Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying’ (2001) 22(2) *Berkeley Journal of Employment and Labour Law* 295, 296–301.

¹⁹ Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52(4) *The University of Toronto Law Journal* 357.

²⁰ *Dharangadhra Chemical Works Ltd v State of Saurashtra* AIR 1957 SC 264 (Supreme Court of India); *Shankar Balaji Waje v State of Maharashtra* 1962 Supp (1) SCR 249 (Supreme Court of India).

²¹ *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans* (1952) 1 TLR 101 (Court of Appeal); *Cassidy v Ministry of Health* (1951) 2 KB 343 : (1951) 1 TLR 539 (Court of Appeal); *Birdhichand Sharma v First Civil Judge* AIR 1961 SC 644 : (1961) 3 SCR 161 (Supreme Court of India); *DC Dewan Mohideen Sahib v United Beedi Workers’ Union* AIR 1966 SC 370 : (1964) 7 SCR 646 (Supreme Court of India); *Silver Jubilee Tailoring House v Chief Inspector of Shops and Establishments* (1974) 3 SCC 498 (Supreme Court of India); *Workmen of Nilgiri Cooperative Marketing Society Ltd v State of Tamil Nadu* (2004) 3 SCC 514 (Supreme Court of India).

²² (2014) 9 SCC 407 (Supreme Court of India).

²³ (2009) 13 SCC 374 (Supreme Court of India).

necessary for employment. Therefore, contract labourers were not considered as employees, due to absence of primary control.

The absence of direct control over work potentially excludes a large swath of contract labour, sub-contracted workers, home-based workers, dependent entrepreneurs, and gig workers from the ambit of employment. This is amply evident from the Supreme Court's decision in *Managing Director, Hassan Co-operative Milk Producer's Society Union Limited v Assistant Regional Director, Employees' State Insurance Corporation*, where drivers engaged by a milk cooperative through contractors were held outside the purview of 'employees' as defined by the Employees' State Insurance Act, 1948, on account of lack of supervisory control and "consistency of vigil".²⁴ Thus, the employment-centricity of the Code will act as an impediment to universal coverage of minimum wages law. Not only does this undermine the stated objective of the Code, but it also goes against the International Labour Organization's ('ILO') recommendations in Transition from the Informal to the Formal Economy Recommendation, 2015 (Recommendation No. 204), which call upon countries to progressively extend minimum wage protections to workers in the informal economy.²⁵ The inability to cater to such workers in precarious fields of employment would also render the Code marginal to the reality of the contemporary labour economy, which has seen a systematic increase in atypical work.²⁶

A perusal of the definition of 'employee' in Section 2(k) of the Code further shows that not every person in a relationship of employment is brought within its ambit. The operative part of the Section defines an employee as "any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward".²⁷ This means that a person must be employed to perform one of the types of work specified in the provision to be considered an employee. Consequently, many persons who remain in a relationship of employment may potentially be excluded from minimum wage protection. This is because, while the terms used to qualify the nature of work, like 'manual', 'unskilled', 'skilled', 'technical', 'operational', or 'clerical', may have broad meanings, they have been subjected to a comparatively narrow interpretation by the judiciary in recent cases under the Minimum Wages Act, 1948, the Industrial Wages Act, 1947, and the Payment of Gratuity Act, 1972 ('POGA').

²⁴ (2010) 11 SCC 537 (Supreme Court of India).

²⁵ 'R204 - Transition from the Informal to the Formal Economy Recommendation, 2015 (No 204)' (*International Labour Organization*, 12 June 2015), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R204> accessed 23 June 2020.

²⁶ Kim Van Eyck, 'Flexibilizing Employment: An Overview' (2003) International Labour Office SEED Working Paper No 41 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_117689.pdf> accessed 23 June 2020.

²⁷ Code on Wages 2019, s 2(k).

For example, in *Haryana Unrecognised Schools' Association v State of Haryana*,²⁸ the Supreme Court held that school teachers do not come within the fold of “skilled, semi-skilled or unskilled, manual, operational, technical or clerical work” under the Minimum Wages Act.²⁹ In the same vein, the Supreme Court in *Ahmedabad Pvt Primary Teachers' Association v Administrative Officer*,³⁰ held that teachers “are not skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical employees” under the POGA. The Court, in this case, specifically held that teachers do not conform to the description of being employees who are ‘skilled’, ‘semi-skilled’, or ‘unskilled’.³¹ While the POGA was amended in 2009 in response to this case,³² the reasoning of this case was not addressed by the amendment. Indeed, even after the amendment, the judiciary has continued to rely on this reasoning in the context of other statutes.³³ Similarly, the Supreme Court has also held in *Bharat Bhawan Trust v Bharat Bhawan Artists' Association*³⁴ that theatre artistes would not be covered within the meaning of ‘skilled work’ for the purpose of the Industrial Disputes Act, 1947. This case had, in turn, relied on a Constitution Bench decision in *HR Adyanthaya v Sandoz (India) Ltd*,³⁵ where it had been held that the term ‘skilled work’ in the definition of ‘workmen’ in Section 2(s) of the Industrial Disputes Act, 1947 must be construed by using the rule of *ejusdem generis*.³⁶ Thus construed, the Court ruled that medical representatives could not be considered as ‘skilled workers’ and, by extension, as ‘workmen’ under that Act.

These cases illustrate the limited manner in which the types of work listed in Section 2(k) of the Code have been interpreted by the judiciary in the context of other statutes. These interpretations exclude numerous types of workers from statutory protection. In view of the fact that courts have been inclined

²⁸ (1996) 4 SCC 225 (Supreme Court of India).

²⁹ The Court followed its earlier decision in *A Sundarambal v Government of Goa* (1988) 4 SCC 42 (Supreme Court of India), wherein it had been held that ‘the main function of teachers cannot be construed as skilled or unskilled manual work or clerical work’.

³⁰ (2004) 1 SCC 755 (Supreme Court of India).

³¹ *ibid* 764-765.

³² Payment of Gratuity (Amendment) Act 2009. The implications of the amendment on coverage of teachers under the POGA was acknowledged by the Supreme Court in *Birla Institute of Technology v State of Jharkhand* (2019) 15 SCC 587 (Supreme Court of India).

³³ For example, the Allahabad High Court in *Shrikrishna v Surendra Singh* 2014 SCC OnLine All 15225 : 2014 Indlaw All 1221 relied on the interpretation of the Supreme Court in *Ahmedabad (P) Primary Teachers' Association v Administrative Officer* (2004) 1 SCC 755 while adjudicating on the meaning of ‘unskilled’ labour under the Motor Vehicles Act 1988. See also *Sarajuddin v Jai Narain Vyas University, Jodhpur* 2013 SCC OnLine Raj 1808 : 2013 Indlaw Raj 2586 where the Rajasthan High Court invoked the case while adjudicating on the University Rules on gratuity. See also *Sanjay Memorial Institute of Technology v Appellate Authority* 2018 SCC OnLine Ori 441 : 2018 Indlaw Ori 535 (Orissa High Court) for continued reference to *Ahmedabad (P) Primary Teachers' Association v Administrative Officer* (2004) 1 SCC 755 (Supreme Court of India).

³⁴ (2001) 7 SCC 630 (Supreme Court of India).

³⁵ (1994) 5 SCC 737 (Supreme Court of India).

³⁶ *ibid* 755.

to follow judicial precedent from analogous labour statutes while interpreting these terms,³⁷ there is a distinct possibility that a similar meaning would also be accorded to terms like ‘manual’, ‘unskilled’, ‘skilled’, ‘technical’, ‘operational’, and ‘clerical’ in the definition of ‘employee’ in Section 2(k) of the Code. Consequently, many white-collared employees like teachers, theatre artistes, and medical professionals would fall outside the purview of the Code. Such an exclusion would thoroughly undermine the goal of universalization of minimum wages.

It is also submitted that such exclusion also runs afoul of the dicta of the Supreme Court, which views minimum wages as a constitutional entitlement for every worker. The Supreme Court had held in *Sanjit Roy v State of Rajasthan*³⁸ that every person who provides labour or service to another is entitled to the minimum wage and “if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23”.³⁹ Therefore, the imposition of qualifications in the definition of ‘employee’ is constitutionally suspect. If minimum wage is indeed a matter of constitutional right of every person who works for wages, then it should apply to every worker, regardless of the nature of their work. The qualifications contemplated in Section 2(k) of the Code undermine that constitutional guarantee.

B. ‘Worker’ and ‘Employee’ – A Lack of Definitional Consistency

The impact of the exclusion embedded in the definition of ‘employees’ in Section 2(k) of the Code is compounded by the ambiguity caused by the use of different statutory terms to refer to workers to whom the Code shall apply. It is noteworthy that some of the rights under the Code are available to ‘workers’ while many rights are available to ‘employees’. For example, Section 5, which prohibits an employer from paying less than the notified minimum rate of wages, uses the term ‘employee’. In contrast, Section 6(6) and Section 7(1) of the Code use the term ‘worker’ while providing for fixation of the minimum wage rate. Similarly, Section 9, which empowers the Central Government to fix the floor wage, uses the term ‘worker’.

The difference in usage of terms is reinforced by differences in the statutory definitions of these terms. Section 2(z) of the Code defines a ‘worker’ as any person “employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward” and includes working journalists and sales promotion employees.⁴⁰ By one count,

³⁷ *Sarva Shramik Sangh v Indian Smelting & Refining Co Ltd* (2003) 10 SCC 455 : AIR 2004 SC 269 (Supreme Court of India); *Ahmedabad (P) Primary Teachers’ Association v Administrative Officer* (2004) 1 SCC 755 (Supreme Court of India).

³⁸ (1983) 1 SCC 525 (Supreme Court of India).

³⁹ *ibid* 533.

⁴⁰ Code on Wages 2019, s 2(z).

this definition appears broader since it specifically includes working journalists and sales promotion employees. By another count, however, it is narrower as it does not include managerial and administrative workers. It is submitted that this lack of consistency in usage and definition is likely to cause considerable confusion with regard to the scope of persons covered by the provisions on minimum wages, particularly with respect to working journalists, sales promotion employees, managerial workers, and administrative workers, who evidently fall under only one of the two definitions.

The Ministry of Labour and Employment, in its submission to the Parliamentary Standing Committee, had stated that the drafters had used these two different terms for distinct scenarios. It claimed that “the word ‘employee’ has been used where the right for minimum wages, payment of wages and payment of bonus is concerned” and “the word ‘workers’ is used in the definition of industrial dispute”, implying that disputes “cannot be raised by persons in supervisory, managerial and administrative capacity”.⁴¹ However, this claim is belied by the fact that both these terms have been used in the very same chapter pertaining to minimum wages. The use of different terms, with separate statutory definitions, for the same chapter, is a recipe for confusion and will undermine the practical application of the Code. In fact, the Parliamentary Standing Committee had itself noted that “the Code lacks consistency in use of both terms” and “the confusion may lead to employers misinterpreting these terms and perhaps also discriminate between the workers and employees”.⁴² However, there has been no pursuant amendment to the Code and the confusion still persists. This lack of consistency, and the consequent confusion, may turn out to be an Achilles’ heel of this Code, especially with respect to payment of minimum wages to working journalists, sales employees, and managerial and administrative workers.

C. Defining ‘Employer’ and the Ambiguity Over Coverage of Domestic Work

The goal of universalization of minimum wages is also undermined by the uncertainty over the status of coverage of domestic workers by the Code. The erstwhile Minimum Wages Act, 1948 had been extended to domestic workers in more than half a dozen states through their inclusion in scheduled employment and a notification fixing minimum wage rates for such work.⁴³ While there were several challenges in the actual enforcement of the law, there was little doubt that state governments could notify minimum wage rates for

⁴¹ Standing Committee on Labour, ‘Report on the Code on Wages Bill 2017, Forty Third Report’ (Ministry of Labour and Employment 2018) 15 <http://164.100.47.193/Isscommittee/Labour/16_Labour_43.pdf> accessed 23 June 2020.

⁴² *ibid* 18.

⁴³ Neetha N, ‘Minimum Wages for Domestic Work: Mirroring Devalued Housework’ (2013) 48(43) *Economic & Political Weekly* 77.

domestic workers.⁴⁴ The provisions in the Code are, however, far more ambiguous. Section 5 of the Code states that “no employer shall pay to any employee wages less than the minimum rate of wages”. While this clause is very broad, the definition of ‘employer’ in Section 2(l), read with the definition of ‘establishment’ in Section 2(m), may result in the exclusion of domestic workers. A conjoint reading of these provisions suggests that a worker must be employed in an establishment before they can claim the right to minimum wages under the Code. The term ‘establishment’ has been defined under Section 2(m) as “any place where any industry, trade, business, manufacture or occupation is carried on”.⁴⁵

It is doubtful whether households and homes would fall within the scope of the terms listed in the definition of ‘establishment’. Terms like ‘trade’, ‘business’, ‘manufacture’, and ‘occupation’ have also been used in the definition of ‘industry’ in Section 2(j) of the Industrial Disputes Act, 1947. It is noteworthy that in the context of this Act, the Supreme Court has held that “services rendered by a domestic servant” would fall outside the definition of ‘industry’.⁴⁶ The inference that a household would not fall within the scope of the term ‘establishment’ is strengthened by the Supreme Court’s decision in *Bangalore Turf Club Limited v Regional Director, Employees State Insurance Corporation*,⁴⁷ in the context of the Employees’ State Insurance Act, 1948. In this case, the Supreme Court had held that an ‘establishment’ is a place “where an activity is systematically and habitually undertaken for production or distribution of goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking”.⁴⁸ This standard is similar to the principles outlined by a seven-judge bench of the Court in *Bangalore Water Supply and Sewerage Board v A Rajappa*⁴⁹ in the context of the definition of ‘industry’ in the Industrial Disputes Act. Given that the Supreme Court has held in later cases that domestic work does not meet this standard, it is unclear whether domestic work in a household would meet the onerous requirement in the definition of ‘establishment’. Therefore, the question of whether domestic workers would be covered by the provisions on minimum wages under the Code does not furnish an unequivocal answer. Indeed, the definition of ‘employer’, read with the definition of ‘establishment’, generates considerable confusion on this issue. The ambiguity over coverage of domestic workers would substantially impair the coverage of the Code. It also goes against the principles enshrined in the ILO Domestic Workers

⁴⁴ Nimushakavi Vasanthi, ‘Addressing Paid Domestic Work: A Public Policy Concern’ (2011) 46(43) Economic & Political Weekly 85.

⁴⁵ Code on Wages 2019, s 2(m).

⁴⁶ *Som Vihar Apartment Owners’ Housing Maintenance Ltd v Workmen* (2002) 9 SCC 652 (Supreme Court of India); *Manjur v Shyam Kunj Occupants’ Society* Civil Appeal No. 7502 of 2002, order dated 4-2-2004 (SC) (Supreme Court of India).

⁴⁷ (2014) 9 SCC 657 (Supreme Court of India).

⁴⁸ *ibid* 680.

⁴⁹ (1978) 2 SCC 213 (Supreme Court of India).

Convention, 2011, which calls upon states “to ensure that domestic workers enjoy minimum wage coverage”.⁵⁰

This part of the paper has highlighted the lacunae and the contradictions embedded in the definitions of key terms like ‘employees’ and ‘employers’ in the Code and their ramifications on the objective of extending the right to minimum wages to all wage-earners. In this context, it is suggested that the Code should instead use a definition of ‘employees’ akin to the amended definition of this term in the POGA. This definition extends to every person “who is employed for wages” in “any kind of work” that is connected “with the work of an establishment”.⁵¹ Indeed, this would have aligned the Code’s provisions with the recommendations of the Standing Committee, which had opined that “since minimum wage is a matter of right for every working person, a common and comprehensive definition” must be incorporated in the Code.⁵² Further, the confusion and uncertainty over the coverage of domestic workers could have been obviated with a clause similar to Section 2(g)(iv) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which stipulates that in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of a domestic worker shall be considered the employer.⁵³ This would have also ensured that there is no regression in the erstwhile protection of domestic workers under the Minimum Wages Act.

III. EXCLUSION OF NREGA FROM MINIMUM WAGES LAW

One of the most egregious aspects of this Code is the exclusion of the work under the National Rural Employment Guarantee Programme (‘NREGA’) from the ambit of minimum wages law. Section 66 of the Code states that nothing in the Code “shall be deemed to affect the provisions of the Mahatma Gandhi National Rural Employment Guarantee Act 2005”. This provision must be juxtaposed with Section 6 of the latter statute, which allows the Central Government to specify wage rates irrespective of the provisions of the Minimum Wages Act, 1948.⁵⁴ Section 66 of the Code also explicitly excludes NREGA from the ambit of minimum wages law.

⁵⁰ Convention Concerning Decent Work for Domestic Workers, art 11.

⁵¹ Payment of Gratuity Act 1972, s 2(e).

⁵² Standing Committee on Labour (n 41) 18.

⁵³ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(g):

(g) “employer” means [...] (iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.

⁵⁴ Mahatma Gandhi National Rural Employment Guarantee Act 2005, s 6.

The applicability of the Minimum Wages Act, 1948 to public works programmes, especially in the context of NREGA, has been a bone of contention for a long time. The Central Government has time and again sought to delink the wages under NREGA from minimum wages laws. Indeed, a recent study found that the wages paid under NREGA were less than the statutory minimum wages in all states and union territories but one.⁵⁵ This exemplifies the systematic neglect of the observations of the Supreme Court that non-payment of minimum wages amounts to forced labour.⁵⁶ The Court has also explicitly held that such obligation to pay minimum wages extends to public works programmes as well. In *Sanjit Roy v State of Rajasthan*,⁵⁷ the Supreme Court held that minimum wages have to be paid for a drought relief programme and observed:

Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him he can complain of violation of his fundamental right under Article 23. . . . The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The State cannot, under the guise of helping these affected persons, extract work of utility and value from them without paying them the minimum wage. Whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person on pain of violation of Article 23.⁵⁸

The applicability of minimum wages law to public works programmes as a tenet of Article 23 was also reiterated in the context of NREGA by the Karnataka High Court in *Karnataka Prantya Raita Sangha v Union of India*.⁵⁹

⁵⁵ 'MNREGA Wage Hike Less Than Minimum in 33 States' (*Down To Earth*, 3 April 2019) <<https://www.downtoearth.org.in/news/agriculture/mnrega-wage-hike-less-than-minimum-wage-in-33-states-63791>> accessed 23 June 2020.

⁵⁶ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235 (Supreme Court of India).

⁵⁷ *Sanjit Roy v State of Rajasthan* (1983) 1 SCC 525 (Supreme Court of India).

⁵⁸ *ibid* 534.

⁵⁹ 2011 SCC OnLine Kar 4509 (High Court of Karnataka). On appeal, the Supreme Court had noted that the Ministry of Rural Development had issued a notification that had increased the wages under NREGA. Therefore, the Supreme Court declined to decide the issues raised in the special petition. See *Union of India v Karnataka Prantya Raita Sangha* 2014 SCC OnLine SC 1793 (Supreme Court of India).

Admittedly, some doubts over the obligation to pay minimum wages under NREGA arise because of the observations of the Madras High Court in the recent case of *R Gandhi v Union of India*. The Madras High Court held that the nature of work intended to be assigned under NREGA “was separate to be [sic] and distinct from those listed under the Schedule to the Minimum Wages Act” and as a result, “any comparison between works assigned under the two legislations seems specious and legally untenable”.⁶⁰ It is submitted that the Madras High Court’s reliance on the distinction between scheduled employment under the Minimum Wages Act and work envisaged under NREGA may not be relevant for analysis under the present Code due to the elimination of the dichotomy between scheduled and non-scheduled employments under the Code. Further, the High Court also did not take into account the categorical assertion of the Supreme Court in *Sanjit Roy* that “every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him he can complain of violation of his fundamental right under Article 23”.⁶¹

In spite of the unequivocal assertion by the Supreme Court that “whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person on pain of violation of Article 23”, the Code has delinked the minimum wages law from NREGA. Such divorce of NREGA from the legal norms on minimum wages arguably violates the prohibition on forced labour as outlined in Article 23 and is consequently unconstitutional. Much like how the Supreme Court had declared the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 unconstitutional on account of violation of Article 23 and Article 14,⁶² there is a strong case to assail the constitutional validity of Section 66 of the Code.

IV. FAILURE TO ADDRESS STRUCTURAL BARRIERS

Apart from the definitional limitations, the goal of universalization of minimum wages is also likely to be impeded by the Code’s failure to address the structural barriers in the implementation of the minimum wages law. The High Power Expert Groups on Determining the Minimum Wages in India had noted that low wages and wide disparities in wages have continued to prevail across states even for various scheduled employments.⁶³ TS Papola and KP Kannan had found that “an overwhelming majority of casual workers” were not being

⁶⁰ *R Gandhi v Union of India* 2020 SCC OnLine Mad 618 (Madras High Court).

⁶¹ *Sanjit Roy v State of Rajasthan* (1983) 1 SCC 525, 536-538 (Supreme Court of India).

⁶² *ibid.*

⁶³ Ministry of Labour and Employment, ‘Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage’ (Government of India January 2019) <https://labour.gov.in/sites/default/files/Committee_on_Determination_of_Methodology.pdf> accessed 23 June 2020.

paid the recommended National Minimum Wage rate.⁶⁴ The systemic non-implementation of the minimum wages law has been as much a product of the structural features of the labour economy as it is of the limitations in statutory definitions.

Among such structural barriers is the lack of bargaining power of workmen to “refuse work when the wages offered are below the minimum wage”.⁶⁵ Endemic poverty aside, such lack of bargaining power is exacerbated by precarity of work and absence of effective organization among workers. Indeed, the ILO has noted that empowering workers through collective action and workers’ organization has enabled better implementation of minimum wage laws.⁶⁶ Pertinently, the Minimum Wage Fixing Convention, 1970 itself alludes to collective bargaining.⁶⁷ Consequently, universalization of minimum wages cannot be divorced from the question of more robust protection for the collective bargaining rights of trade unions. In view of this, the goal of universalization of minimum wages has to be juxtaposed against the systematic assault on the rights of trade unions in the aftermath of COVID-19⁶⁸ and the proposed dilution of the rights of trade unions in the Code on Industrial Relations Bill, 2019.⁶⁹ Beyond the lack of collective bargaining, the ILO has also acknowledged the role of precarious work as a key driver for the preponderance of low wages.⁷⁰ Thus, the legal guarantee of minimum wages cannot be translated into meaningful protection, without proactive steps against precarious work. Unfortunately, the direction of change in Indian labour relations is likely to enhance greater insecurity and precarity for workers due to the legalization of

⁶⁴ TS Papola and KP Kannan, ‘Towards an India Wage Report’ (International Labour Organization October 2017) 110 <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_597270.pdf> accessed 23 June 2020.

⁶⁵ *ibid* 120.

⁶⁶ ‘Minimum Wage Policy Guide: A Summary’ (International Labour Organization 2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_570376.pdf> accessed 23 June 2020.

⁶⁷ Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries, art 2(2).

⁶⁸ Pratap Bhanu Mehta, ‘Ordinances by States to Change Labour Laws are a Travesty’ *The Indian Express* (12 May 2020) <<https://indianexpress.com/article/opinion/columns/industrial-relations-code-india-labour-law-amendment-pratap-bhanu-mehta-6405265/>> accessed 23 June 2020; Payaswini Upadhyay, ‘The Unprecedented Changes to India’s Labour Laws = Social Chaos?’ (*Bloomberg Quint*, 12 May 2020) <<https://www.bloomberqqint.com/law-and-policy/the-unprecedented-changes-to-indias-labour-laws-social-chaos>> accessed 23 June 2020.

⁶⁹ Shreehari Paliath, ‘Why Trade Unions are Pushing Back Against India’s Proposed Industrial Relations Code’ (*Scroll.in*, 7 January 2020) <<https://scroll.in/article/949030/why-trade-unions-are-pushing-back-against-indias-proposed-industrial-relations-code>> accessed 23 June 2020; Akhil Kumar, ‘Trade Unions Protest Against Changes in Labour Laws, Allege Pro-Employer Bias’ (*The Wire*, 2 August 2019) <<https://thewire.in/labour/trade-union-protest-change-labour-laws>> accessed 23 June 2020.

⁷⁰ ‘From Precarious Work to Decent Work: Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment’ (International Labour Organization 2012) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_179787.pdf> accessed 23 June 2020.

fixed-term contracts in the Industrial Employment (Standing Order) Rules⁷¹ and the Industrial Relations Code Bill, 2019.⁷²

The question of income security and universalization of minimum wages is also inextricably linked with social security and protection for workers. Indeed, the recommendations of the National Commission for Enterprises in the Unorganised Sector highlighted the need for a National Minimum Wage as well as a National Minimum Social Security.⁷³ Therefore, any discussion on the possibility of universal coverage of minimum wages must also necessarily look at universal social security for all workers.

Other structural barriers that must be addressed in order to ensure universal income security include the limited institutional capacity of the state enforcement machinery. The labour inspection machinery in India is generally under-resourced and overburdened, with the task of monitoring the implementation of multiple legislations at the same time.⁷⁴ The scope for enforcement has been further weakened by the inspection system envisaged under the Code. Section 51(3) of the Code envisages randomized selection for inspection, which goes against the ILO's emphasis on the need for targeted inspection "based on an analysis of the levels and patterns of compliance from labour statistics".⁷⁵

Most significantly, as the India Wage Report, 2018 noted, "the potential for minimum wages to reach low-paid workers depends on the level at which the minimum wage is fixed".⁷⁶ Even though the Code has very commendably introduced a statutory national floor minimum wage, a suggestion first mooted by the National Commission on Rural Labour in 1991,⁷⁷ it does not lay down any definite norm or criteria for fixing the minimum wages. In this context, the Code's failure to incorporate the guiding principles adopted by the Indian Labour Conference in 1957, and endorsed and developed by the Supreme Court in *Standard Vacuum Refining Co of India v Workmen*⁷⁸ and *Workmen v Reptakos Brett & Co Ltd*,⁷⁹ is a glaring lacuna. This lacuna is also in contravention of General Comment No. 23 of the Committee on Economic, Social, and Cultural Rights, which recommends that the minimum wage should not

⁷¹ Ministry of Labour and Employment, 'Notification to Amend the Industrial Employment (Standing Orders) Central Rules, 1946' (The Gazette of India 2018) <<https://labour.gov.in/sites/default/files/FTE%20Final%20Notification.pdf>> accessed 23 June 2020.

⁷² The Industrial Relations Code Bill 2019.

⁷³ National Commission for Enterprises in the Unorganised Sector, 'Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector' (Government of India 2007) <https://msme.gov.in/sites/default/files/Condition_of_workers_sep_2007.pdf> accessed 23 June 2020.

⁷⁴ *ibid* 166-67.

⁷⁵ Code on Wages 2019, s 51.

⁷⁶ International Labour Organization (n 8) 86.

⁷⁷ Ministry of Labour and Employment (n 63).

⁷⁸ AIR 1961 SC 895 : (1961) 1 LLJ 227 (Supreme Court of India).

⁷⁹ (1992) 1 SCC 290 : AIR 1992 SC 504 (Supreme Court of India).

only be recognized in legislation, but also be “fixed with reference to the requirements of a decent living, and applied consistently”.⁸⁰

The failure to address these systemic impediments in the path of realization of minimum wages is bound to undermine the aim of universalization of minimum wages. It is submitted that the attempt to expand the coverage of minimum wage law is unlikely to succeed in isolation. Unless the Code is accompanied by an appropriate structural transformation that can remedy some of the structural barriers affecting the law’s implementation, its promise of universalization would be belied in the days to come.

V. CONCLUSION

This paper has tried to establish that despite its very laudable objective of universalizing minimum wages, the provisions dealing with minimum wages in the Code suffer from several infirmities that will ensure continued exclusion of large swaths of workers from the protection of minimum wage laws. While the Code undoubtedly takes a very substantive step forward by eliminating the dichotomy between scheduled employment and non-scheduled employment, it fails to extend the protection of minimum wage norms to all wage workers in India. The myriad lacunae in the Code, including the absence of a common definition of ‘worker’ and ‘employee’, qualitative restrictions on the types of work covered under these definitions, exclusion of NREGA, and ambiguity over the status of domestic workers, will ensure that universalization of minimum wages in its true sense will remain a pipedream. Additionally, the Code’s failure to confront the systemic impediments to the implementation of minimum wage law will act as a major hindrance in the path to universalization of minimum wages. Income security laws cannot operate in a vacuum, without adequate changes to wage policy, broader labour laws, and institutional framework that can promote decent work for all. In its failure to create an entitlement to minimum wages for every wage worker and surmount the structural hurdles in the payment of minimum wages, the Code not only belies its own promise of extending minimum wages to all workers, but also renders meaningless the constitutional mandate on payment of minimum wages under Article 23.

⁸⁰ Committee on Economic, Social and Cultural Rights, ‘General Comment No 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (United Nations Economic and Social Council 2016) <<https://www.refworld.org/docid/5550a0b14.html>> accessed 21 May 2020.

“THE RIGHT TO HAVE RIGHTS”: ASSAM AND THE LEGAL POLITICS OF CITIZENSHIP

—Padmini Baruah*

The historical contestations around documentary citizenship in Assam have led to a situation where people from ethno-religious minority groups find themselves at the fringes of citizenship. Through a closer look at case law being played out before Assam’s citizenship tribunals, this article seeks to explore the arbitrary bureaucratic barriers that are depriving people of their crucial right to access all other rights. This is framed in the context of the historical developments that have led to conflicts around identity in the region. Through my research, I argue that the use of documentation has served specific political goals which work in tandem with existing vulnerabilities to disenfranchise those who are already disadvantaged.

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I. INTRODUCTION

The exercise of citizenship is at its core a bureaucratic exercise, and like all bureaucratic practices, it mandates a paper trail. This paper trail is one that has to be in accordance with the rules and regulations that the state lays down, and if contested, it becomes a contest between the suspected person and the state that issues the selfsame documents. The verification of citizenship, in the words of Stevens, "...has no independent eyewitnesses, just state documents and their government curators".¹ If a citizenship document is to be considered a '*tool of the state*'² which imparts agency to the citizen, it is also to be perceived as an instrument of power exercised at the behest of the state. Documentation can and has been exercised as a tool to filter out those who are considered undesirable and unwanted by the state, with courtrooms acting as sites where contestation and negotiation around citizenship play out in different ways. Multiple cases reveal that courts have made evidentiary requirements around citizenship so stringent that respondents cannot meet them and become stateless,³ a situation where a person does not have the nationality of any one state.⁴ This effectively means that persons are denied the body of rights that come with the mantle of citizenship. This phenomenon has been playing out in the United Kingdom,⁵ Taiwan,⁶ and the United States,⁷ for instance, where documentation has become a significant challenge in terms of access to full citizenship.

A similar crisis has been unfolding in the state of Assam, positioned in India's northeast region. Historically, Assam has witnessed a decades-long movement against the presence of 'illegal' immigrants. Identifying and removing the body of the 'illegal' immigrant has dominated the political landscape of

¹ Jacqueline Stevens, 'Introduction' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 2.

² Kamal Sadiq, 'Limits of Legal Citizenship: Narratives from South and Southeast Asia' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 168.

³ Stevens (n 1).

⁴ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960), art 1.

⁵ Benjamin Lawrance, 'Statelessness-in-Question: Expert Testimony and the Evidentiary Burden of Statelessness' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 61. Immigration regulations have been found to place the burden of providing documents on individuals.

⁶ Sara L Friedman, 'Reproducing Uncertainty: Documenting Contested Sovereignty and Citizenship Across the Taiwan Strait' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 81. A scrutiny of travel papers between Taiwan and China reveals the anomalies in Taiwanese citizenship.

⁷ Beatrice McKenzie, 'To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 118. Documentary claims of citizenship have been found to depend heavily on ethnicity, race, gender, and other extraneous factors.

the state since the era of the Partition, and multiple efforts have been initiated in order to achieve this end. In this paper, I have explored in depth, the issue of how the state manufactures illegality through the legal process. I argue that a documentary regime has become the primary tool of exclusion, reinforcing existing societal notions around the idea of immigrants. I begin by providing a contextual background to citizenship in Assam. This is followed by a brief analysis of the politics of documentation. I have then taken a closer look at the Foreigners Tribunal ('FT'), the main legal player in the politics of citizenship in Assam. Through a study of 90 foreigners' cases in the relevant judicial bodies of the state, I have attempted to cull out the main challenges that present themselves in the process of proving one's citizenship. Finally, I try to examine the implications of the nexus between the National Register of Citizens ('NRC') and the Foreigners Tribunal, on people's lives.

I have confined my analysis to the state of Assam, and have limited the discussion to the question of the NRC and FTs alone. The scope of this paper excludes a closer look at the Citizenship Amendment Act; this is a subject that I hope to scrutinize in a later work.

II. CITIZENSHIP AND ITS PERILS

A. Citizenship and Documentation

Political citizenship, at the risk of oversimplification, amounts to the right to vote and the right to hold office.⁸ An identity document is a crucial mechanism through which the state identifies and categorizes its citizens and allows for a 'softer governmentality' in terms of enabling welfare policies.⁹ It amounts to 'state technologies of power'.¹⁰ Stevens has gone so far as to posit that identity documents effectively aim to achieve stability of borders.¹¹ They are crucial in conferring legal status, a bundle of rights, as well as a form of identity.¹² In postcolonial South Asia, however, the conferral of documentation does not always follow citizenship. According to Jayal, the inverse happens, whereby documents are presented as proof of citizenship, and often rejected.¹³ This effectively means that the existence of documents alone is often not enough

⁸ Eileen McDonagh, 'Political Citizenship and Democratization: The Gender Paradox' (2002) 96(3) *The American Political Science Review* 535.

⁹ Vasudha Chhotray and Fiona McConnell, 'Certifications of Citizenship: The History, Politics and Materiality of Identity Documents in South Asian States and Diasporas' (2018) 26(2) *Contemporary South Asia* 111.

¹⁰ Fiona McConnell, 'Citizens and Refugees: Constructing and Negotiating Tibetan Identities in Exile' (2013) 103(4) *Annals of the Association of American Geographers* 967, 969.

¹¹ Stevens (n 1) 3.

¹² Chhotray and McConnell (n 9) 113.

¹³ Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Harvard University Press 2013) 71.

to prove citizenship. There is no clarity on what amounts to legitimate identity documentation. In India, case law has reflected the courts' unwillingness to provide any such clarification. It has been held, for instance, that Indian passports could well be acquired by fraud,¹⁴ and the presence of one's name on a voter list does not amount to proof of citizenship.¹⁵ Thus, the validity of all forms of official documentation has been called into question. This effectively implies that once one's citizenship is under question, reversing the presumption is of utmost difficulty, even if one puts forward multiple identification documents. This is evident from the way in which the legal process of citizenship has evolved in India.

B. The Evolution of India's Citizenship Regime

The regulation of the presence of foreigners in India began in the colonial period. In the wake of the Second World War, the British government felt the need to regulate the entry and exit of people to and from the country as an attempt towards stronger border security. It is in this context that the Foreigners Act 1946 was enacted,¹⁶ which placed the burden of proof on the person accused of being a foreigner.¹⁷ Following the Independence of India in 1947, citizenship became the basis of manifesting a shared identity that had emerged after a transition from subjecthood.¹⁸ The Constitution of India, in Articles 5-11, laid down the basis for identifying Indian citizens, which was framed in the context of the Partition.¹⁹ Article 11 laid down the foundation for the creation of an overarching legislation governing citizenship, namely the Citizenship Act, 1955.²⁰ The provisions of this legislation guarantee citizenship by four distinct avenues – birth, descent, registration, and naturalization.²¹ A combination of *jus soli*, i.e. citizenship by birth, and *jus sanguinis*, i.e. citizenship by descent, can be found in these clauses. Citizenship by birth extends to everyone born in India after the Constitution was framed, but before the 1986 amendment to the Citizenship Act was enacted.²² This amendment provided that a person born in India after 1986 would be considered a citizen if either of the parents were Indian citizens.²³ Though a person may be born within the territory of India, they will not be considered a citizen if one of their parents is found to be an illegal migrant at the time of birth.²⁴ The Act defines an illegal

¹⁴ *Razia Begum v State* 2008 SCC OnLine Del 933 (Delhi High Court).

¹⁵ *Bhanwaroo Khan v Union of India* (2002) 4 SCC 346 (Supreme Court of India).

¹⁶ Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2(1) *The Statelessness & Citizenship Review* 112, 115.

¹⁷ *ibid.*

¹⁸ Anupama Roy, *Mapping Citizenship in India* (Oxford University Press 2010) 33.

¹⁹ Constitution of India 1950, arts 5-11.

²⁰ Roy (n 18) 34.

²¹ Citizenship Act 1955, s 3, 4, 5, and 6.

²² Citizenship Act 1955, s 3.

²³ Roy (n 18) 37.

²⁴ Citizenship Act 1955, s 3.

migrant as a foreigner who has entered India without valid travel documents, or has overstayed the validity of those documents.²⁵ Thus, the provisions of the Citizenship Act delineate the line between a citizen and the 'other'. They also take away rights of *jus soli* for persons who descend from the body of the migrant, even if they were born in the territory of India. As explored later in the paper, factors such as poverty, ethnic identity, and gender influence the construction of the 'citizen' and the 'outsider' dichotomy. This means that 'undesirable' persons, who are unable to procure documents, may find themselves outside the margins of legality. This question of identity and legality becomes crucial when we consider the history of Assam.

C. Contested Citizenship in Assam

Located in India's frontier northeastern region, the state of Assam has had a complex relationship with the question of immigration. Colonial expansion in the region led to an influx of Bengalis, both Hindu and Muslim. The former were brought in to play an administrative role, creating resentment among the indigenous Assamese population who felt excluded by the colonial policy.²⁶ The British government also encouraged migration by a significant population of East Bengali Muslims in order to clear and settle land in the Brahmaputra Valley.²⁷ This set the stage for anti-immigrant sentiments to arise through the perpetuation of the profile of the 'land-hungry immigrant'.²⁸ Partition also led to a surge in migration into Assam, and the post-Independence era saw attempts at trying to regulate this phenomenon.²⁹ The first National Register of Citizens ('NRC') was created in 1951 during the census enumeration, in the wake of the migration following the Partition.³⁰ The Central Government felt the need to identify and record the residents of the state given the flux of migrants at the time.³¹ This Register did not possess legal weight, and was considered to be fairly inconsequential in the larger scheme of things at the time.

Following the Bangladesh War in 1971, the displacement of people led to a significant migratory flow, especially towards the state of Assam. This led to a sweeping regional movement, the Assam Agitation, which demanded that foreigners be identified and expelled from the state.³² The Assam Agitation was sparked off by an electoral controversy. Mangaldoi, a constituency located at the centre of the state, was in the process of holding a parliamentary

²⁵ Citizenship Act 1955, s 2.

²⁶ Chandan Kumar Sharma, 'The Immigration Issue in Assam and Conflicts Around It' (2012) 13(3) *Asian Ethnicity* 287, 290.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Sangeeta Barooah Pisharoty, *Assam: The Accord, The Discord* (Penguin Random House India 2019).

³¹ *ibid.*

³² *ibid.*

by-election in 1979. An allegation was raised that the electoral rolls included the names of about 45,000 people who were not citizens of India.³³ The spectre of the illegal immigrant deceiving the democratic process in the country loomed large. The by-elections were cancelled. However, in 1980, a year when parliamentary elections were scheduled, the Chief Election Commissioner – whose office governs the electoral process in India – ordered state authorities to desist from deleting the ‘immigrant’ names, numbering 2 million state-wide,³⁴ from the rolls, stating that such a scrutiny could take place after the elections, so as to prevent delays.³⁵ The 1980 elections proceeded in the state, despite continued protests; however the protestors were able to boycott elections in 12 out of 14 districts.³⁶ The agitation therefore began in 1979 and gained momentum over the later years as a result of the All Assam Students’ Union’s (‘AASU’) demands that the electoral rolls be amended. Soon after, two organizations emerged to take the lead in organizing protests. The first was the AASU, which was the leading student organization at the time, and the second was the All Assam Gana Sangram Parishad, an umbrella organization created by the AASU during the movement.³⁷ These organizations wanted the following 1983 state elections to be completely boycotted until all grievances were resolved. This was in sharp contrast to the Bengali population, who supported these elections as a means of showing solidarity against the Agitation.³⁸ This Bengali-speaking population – particularly the body of Muslims – was marked as the ‘other’ during the six tumultuous years that characterized the Assam Agitation.³⁹ The aim was to articulate an *Axomiya* (indigenous to Assam) identity against the targeted entity represented by the body of the illegal immigrant.⁴⁰ This spoke to the power of Assamese subnationalism. The dominant narrative was built around the perceived threat to the very existence of Assamese autochthony.

There were several rounds of talks in the 1980s between the leaders of the movement and the then Prime Minister, Indira Gandhi, around the issue of deporting illegal immigrants.⁴¹ The leadership insisted on deporting all those who made their way into Assam after 1951, based on the NRC which had been prepared that year as a means of screening citizens. On the other hand, the

³³ Jaswant Singh, ‘Assam’s Crisis of Citizenship: An Examination of Political Errors’ (1984) 24(10) Asian Survey 1056, 1062.

³⁴ Navine Murshid, ‘Assam and the Foreigner Within: Illegal Bangladeshis or Bengali Muslims?’ (2016) 56(3) Asian Survey 581, 595.

³⁵ Singh (n 33) 1062.

³⁶ Jane S Wilson, ‘Turmoil in Assam’ (1992) 15(4) Studies in Conflict & Terrorism 251, 255.

³⁷ Murshid (n 34) 595.

³⁸ *ibid.*

³⁹ Apurba Baruah, ‘Chauvinism in Assamese Society and the Bengali Elite in Assam’ (Proceedings of the North East India History Association, IX Session, Guwahati, 1988) 427.

⁴⁰ Rafiul Ahmed, ‘Anxiety, Violence and the Postcolonial State: Understanding the “Anti-Bangladeshi” Rage in Assam, India’ (2014) 19(1) Perceptions: Journal of International Affairs 55, 56.

⁴¹ Makiko Kimura, *The Nellie Massacre of 1983: Agency of Rioters* (SAGE Publications 2013) 9.

Central Government bargained for this cutoff year to be fixed at 1971, the year that Bangladesh was formed. Between 1981-82, the force of the movement began to wane, but was reignited when the Central Government decided to hold elections in 1983 without revising the electoral rolls.⁴²

The emphasis on an ethnocentric identity took a decisive turn with the movement turning violent, infamously culminating in the 1983 massacre in the village of Nellie in Assam, at the hands of the Assamese and the Tiwa (an indigenous group from the area).⁴³ Over 2,000 Bengali Muslims were killed, and bridges, police stations, and government officers were attacked.⁴⁴ The state police failed to take action against the rioters, and allegedly assisted them by providing arms. The Central Government as well as the state government failed to conduct a full blown neutral investigation into the atrocities committed during the course of this incident, and the perpetrators were never brought to justice. The commission that was appointed was riddled with flaws, and was biased towards the perspectives of the student leaders at the helm of the agitation.⁴⁵ Apart from the Nellie Massacre, Kimura points towards evidence indicating multiple cases of assault, arson, murder, and explosions between 1979 and 1982.⁴⁶ Muslims faced the brunt of this violence.

In 1985, the Assam Accord was signed between the leadership of the movement and the Central Government. According to the terms of the Accord, 1966 was set as the base year for detecting and deleting foreigners.⁴⁷ Those who were found to have entered the state between 1966 and 1971 were to be deleted from the electoral rolls, and were required to register themselves before the Registration Officers of their respective districts. This category of people was to be reinstated on the rolls after ten years had passed. Foreigners who came to Assam after March 25, 1971 were to be detected and deported according to the provisions of the law.⁴⁸

One of the main prongs of the Assam Accord was the creation of a new National Register of Citizens ('NRC'). However, this did not materialize till 2009, when a body called the Assam Public Works filed a case calling for the deletion of names of illegal migrants from voter lists in Assam as well as an updation of the NRC.⁴⁹ The Supreme Court took up the mantle of ensuring

⁴² *ibid.*

⁴³ Kimura (n 41) 72.

⁴⁴ Myron Weiner, 'The Political Demography of Assam's Anti-Immigrant Movement' (1983) 9(2) *Population and Development Review* 279, 281.

⁴⁵ Ahmed (n 40) 62.

⁴⁶ Kimura (n 41) 69.

⁴⁷ Assam Accord 1985.

⁴⁸ Assam Accord 1985.

⁴⁹ *Assam Public Works v Union of India* (2018) 9 SCC 229 (Supreme Court of India).

that the NRC was updated with the latest numbers and bestowed itself with the authority to monitor the progress of state authorities under this exercise.⁵⁰

The legal home for the NRC rests within the 1986 Amendment to the Indian Citizenship Act, 1955. This Register solely includes the names of those who have been able to prove their Indian citizenship. The grounds for inclusion are based on the dates established in the Assam Accord. The names of those found in the 1951 Register and the electoral rolls prior to 1971 combine to create a database titled 'Legacy Data'. To prove citizenship, one has to establish a paper trail showing that their name finds a place in the Legacy Data, or prove a link by birth with such a person. An extensive list of documents ('List A') was provided, any one of which could be used as grounds for proving the former. Another set of documents was to be used to prove a relationship by birth with a citizen ('List B').⁵¹

LIST A	LIST B
1951 NRC	Birth Certificate
Electoral Rolls up to March 25, 1971	Land documents
Land and Tenancy Records	Board/University Certificate
Citizenship Certificate	Bank/LIC/Post Office Records
Permanent Residential Certificate	Circle Officer/GP Certificate
Passport	Electoral Roll
LIC	Ration Card
Government Issued License/Certificate	Other legally acceptable document
Refugee Registration Certificate	
Government Service or Employment Certificate	
Bank/Post Office accounts	
Birth Certificate	
Board/University Educational Certificate	
Court Records/Processes	

Anyone who was dissatisfied with the process could file claims and objections before the publication of the final list. These claims and objections could be made both by people whose names had not been included in the NRC as well as by those who objected to the inclusion of any name in the NRC.⁵²

⁵⁰ *Assam Sanmilita Mahasangha v Union of India* (2015) 3 SCC 1 (Supreme Court of India).

⁵¹ 'What Are the Admissible Documents?' (*Government of Assam*) <<http://www.nrcassam.nic.in/admin-documents.html>> accessed 30 May 2020.

⁵² 'Standard Operating Procedure (SOP)/Modalities for Disposal of Claims and Objections in the Updation of National Register of Citizens (NRC) 1951 in Assam' (*Government of Assam*) <<http://nrcassam.nic.in/pdf/SOP-claims-objections-final.pdf>> accessed 30 May 2020.

The outcome of the NRC process is well-documented.⁵³ 1.9 million people were left out of the final NRC list.⁵⁴ Multiple individuals claiming legacy from ancestors who migrated to Assam in the 1800s, as well as people whose ancestors' names were present in the 1951 NRC, all found themselves excluded from the NRC.⁵⁵ They are now suspended in limbo with their very nationality at risk. There has been little research done on the demography of those excluded from the list, but it would not be a stretch to conclude that a large majority of those excluded belonged the poorest and most vulnerable segments of society, a categorization that often finds overlap with Bengali Muslims in the state.⁵⁶ Women face the brunt of such exclusions, given that documentary evidence is hugely challenging to obtain in the face of patriarchal socio-legal norms. They are often unable to produce land entitlements or establish a legacy with their birth families, given that access to land ownership is minimal for women.⁵⁷ Birth certificates and school certificates are scarce in the socio-economic backgrounds they occupy; most are born at home, and often do not complete their formal education.⁵⁸

Following the release of the final list, the authority to take decisions regarding citizenship lies at the door of the Foreigners Tribunal.⁵⁹

III. LEGAL REGIMES, ILLEGAL BODIES

A key player in determining who amounts to an illegal immigrant is the Foreigners Tribunal ('FT'). These are quasi-judicial bodies created by an order in 1964 to carry out the task of enforcing the provisions of the Foreigners Act, 1946. Per this Act, the burden of proof for determining the status of an

⁵³ Suhasini Raj and Jeffrey Gettleman, 'A Mass Citizenship Check in India Leaves 2 Million People in Limbo' *The New York Times* (31 August 2019) <<https://www.nytimes.com/2019/08/31/world/asia/india-muslim-citizen-list.html>> accessed 30 May 2020.

⁵⁴ Joanna Slater and Niha Masih, 'In a Corner of India, 2 Million Risk Becoming Stateless After Release of Final Citizenship List' *The Washington Post* (31 August 2019) <https://www.washingtonpost.com/world/two-million-risk-becoming-stateless-after-indian-state-releases-final-list-of-citizens/2019/08/31/539d8d34-cb28-11e9-9615-8f1a32962e04_story.html> accessed 30 May 2020.

⁵⁵ Amit Ranjan, 'National Register of Citizen Update: History and Its Impact' [2019] *Asian Ethnicity* 1, 9.

⁵⁶ Jyotirmoy Talukdar, 'For Bengali Muslims Whose Names Are in the NRC, the Struggle Isn't Over Yet' (*The Wire*, 26 May 2019) <<https://thewire.in/rights/assam-nrc-bengal-muslims-objections>> accessed 5 August 2020.

⁵⁷ M Parwez, 'Marginalization of Women: Inheritance in Assam' in Prem Chowdhry (ed), *Gender Discrimination in Land Ownership: Land Reforms in India Volume 11* (SAGE Books 2009) 2.

⁵⁸ Nilanjana Bhowmick, 'India's New Laws Hurt Women Most of All' (*Foreign Policy*, 4 February 2020) <<https://foreignpolicy.com/2020/02/04/india-citizenship-law-women/>> accessed 30 May 2020.

⁵⁹ Prashant Bhushan, 'Conduct of Foreigners Tribunals in Assam is Questionable' *The Indian Express* (20 September 2019) <<https://indianexpress.com/article/opinion/columns/assam-nrc-final-list-foreigners-tribunals-6011356/>> accessed 30 May 2020.

individual as a foreigner vests upon the person suspected.⁶⁰ Thus, the FTs are the main authorities entrusted with the power to determine who is a foreigner. They are given the same power as that of a civil court, and the flexibility to define their own procedure. FTs usually rely on inquiry reports by police officers or the Election Commission of India, on the basis of which notices are issued to people who fall under suspicion.⁶¹

The inherent flaws in the Tribunal process mandate elaboration. First, in the absence of a legislative home, FTs were created by an executive order.⁶² Further, FT members are selected by the executive branch without limitations imposed by legislation. This has led to a situation where anyone connected to the judicial branch, be it lawyers, judges, or civil servants, can be appointed to the FTs, and are not provided training.⁶³ Research has revealed that the members of these FTs are incentivized on the basis of the number of foreigners they declare. An appraisal report issued by the state government evaluating the performance of the FT members showed that members who had declared a greater number of foreigners were likelier to have their contracts renewed.⁶⁴ Moreover, given that the membership of these bodies is drawn from the same community which has a long history of anti-‘immigrant’ sentiment, it is not surprising that they are inclined to adjudicate along those lines. The appointment of FT members as well as the renewal of their membership vests on the state government and the Central Government, implying executive influence.⁶⁵ There are no appeals in the legal structure underlying these Tribunals; challenges have to be made via writ petitions before the High Court, which themselves are often aligned with the Tribunals’ opinions.⁶⁶ Thus, it is evident that the history of resentment against ‘immigrants’ – which is a term now synonymous with a specific ethnic and religious minority – has been institutionalized in the FT process. Once a person is declared as a foreigner, they face the prospect of detention in anticipation of deportation, in one of the state’s six detention centers, living in deplorable conditions without the basic rights that prisoners are entitled to.⁶⁷ Thus, the stakes are extremely high in all FT cases, which is why it is imperative to scrutinize their functioning.

⁶⁰ Foreigners Act 1946, s 9.

⁶¹ Interview with Aman Wadud, Human Rights Lawyer at the Gauhati High Court (Telephonic Interview, 28 May 2020).

⁶² Rahman (n 16) 121.

⁶³ *ibid* 127.

⁶⁴ Sagar, ‘Case Closed’ (*The Caravan*, 6 November 2019) <<https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>> accessed 30 May 2020.

⁶⁵ *ibid*.

⁶⁶ *ibid*.

⁶⁷ DHNS, ‘Harsh Mander’s Full Report to NHRC’ *Deccan Herald* (30 June 2018) <<https://www.deccanherald.com/national/top-national-stories/harsh-manders-full-report-nhrc-678127.html>> accessed 30 May 2020.

Documentation, as discussed before, stands at the heart of proving citizenship, and is critical to the FT process. In the absence of transparency on what amounts to appropriate proof of identity, tribunals have exercised free discretionary reign over the evidentiary process.

In brief, the FT process begins at the reference stage. The Border Police or the Election Commission makes a reference pointing out their suspicion that one is an illegal immigrant. This is followed by an investigation conducted by the police, following which the report is forwarded to the FT.⁶⁸ If the FT determines that there is a case, it sends a notice to the suspected party, who then has to attend a series of hearings and present documentary and oral evidence to prove their case. The FT finally looks over the evidence and issues a ruling which either bestows or strips away citizenship.

A. What Really Happens at the FT: An Empirical Look

To arrive at a deeper understanding of the workings of the FT, I attempted to conduct a qualitative analysis of case law surrounding the FT process. To this effect, I read 90 judgments. 22 of these were orders passed by the Tribunals that I had been provided access to by a local lawyer working on citizenship matters. 68 were High Court judgments that I had selected at random from a publicly available legal database. I filtered out case law from one year – 2019⁶⁹ – pertaining to citizenship through specific keyword searches, and eliminated, after manual screening, cases that did not directly deal with FT judgments. At the end of this process, I was left with 88 judgments spanning from January 2019 to December 2019.

This combination of High Court judgments passed by the Gauhati High Court as well as orders issued by multiple FTs, brings to light multiple issues around documentation that plague the system. In this section, I have highlighted my findings.

1. *Flawed Reference Process*

FTs act on references made by the Border Police⁷⁰ or the Election Commission, which are often made on no clear basis and are wrought with anomalies. The police or the electoral officer is to conduct an inquiry into a person they suspected was a foreigner, and then forward that report to the FT. From my analysis of references, I found that that they lacked any mention of

⁶⁸ Interview with Wadud (n 61).

⁶⁹ This piece was conceptualized in early 2020, so I wanted to examine data from the previous year.

⁷⁰ ‘Branches of Assam Police: Functions’ (*Government of Assam*) <<https://police.assam.gov.in/portlet-sub-innerpage/functions>> accessed 20 July 2020.

the grounds for suspicion as specified in the reference. In all cases, the forms regarding verification by local authorities were unanimously blank, apart from the name and address of the defendant. This supports the conclusion that references are made without serious inquiries.⁷¹

2. *Jurisdiction Exceeded In Terms of Reference*

Cases are brought before the FTs only upon reference by the relevant authorities.⁷² Tribunals are confined to the jurisdiction of the reference and cannot go beyond it. These references specify whether the person is suspected of being a foreigner who entered Assam between January 1, 1966 and March 25, 1971, or subsequent to March 25, 1971. This is a crucial distinction, since the implications are vastly different for both these cases. In multiple cases, the reference is usually made by the Superintendent of Police (Border), to determine whether the proceedee is a foreigner who entered between 1966 and 1971. However, the FT glibly rules that they belong to the post 1971-stream. This is in clear violation of the FT's jurisdiction.

3. *Defective Notice Process*

The Foreigners (Tribunals) Order, 1964 provides for a clear procedure regarding the manner in which notice has to be served to the proceedee.⁷³ These rules provide that in the event that the person upon whom the notice has to be served changes their residence or place of work, a copy of the notice has to be fixed at their last known residence or place of work. In an overwhelming majority of the cases examined, it was found that there were procedural aberrations to this rule. The suspected persons were often not available at their given addresses, and the process server did not follow the rule prescribed. Thus, ex-parte orders were passed against the proceedee, without them even realizing that there was a citizenship case against them. In *Jahida Khatoon v Union of India*, for instance, “the petitioner could not be found at the given address for the purpose of service of notice and therefore, the notice was hung.”⁷⁴ Similarly, in *Dilowara Bibi v Union of India*, the petitioner “... was not found in her residence and therefore, the notice was hung at a conspicuous place of the village in presence of witnesses.”⁷⁵ Likewise, in *Rasul Begum v Union of India*, the High Court points out that, “...the report of the process

⁷¹ Rahman (n 16) 131.

⁷² Foreigners (Tribunal) Order 1964, rule 2(1A). The Central Government may by order, refer the question as to whether a person is not a foreigner within the meaning of the Foreigners Act 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.

⁷³ Foreigners (Tribunal) Order 1964, rule 3(5)(f).

⁷⁴ *Jahida Khatoon v Union of India* WP (C) No 8489 of 2018, decided on 4-1-2019 (Gauhati High Court).

⁷⁵ *Dilowara Bibi v Union of India* WP (C) No 744 of 2019, order dated 11-2-2019 (Gauhati High Court).

server indicates that the notice was put up in some place as the petitioner was not found.”⁷⁶ These procedural violations – which have not been scrutinized in detail by the High Courts - strike at the heart of equity, and are indicative of the fact that FTs treat cases upon which the entire body of rights rests, with careless flippancy.

4. *Rejection of Multiple Documents on Arbitrary Grounds*

FTs rely almost exclusively on documentary evidence, without any clarity on what constitutes acceptable documentation to confirm one’s citizenship status.⁷⁷ Public documents such as voter lists and land records have to be presented through certified copies. Moreover, private documents have to be proven through the presence of the issuing authority. These requirements present a monumental challenge for low wage workers and labourers, who are usually the social group that falls under scrutiny.⁷⁸ Even if a body of documents is presented, the trend is that they are mostly dismissed on the basis of a wide range of grounds. It is assumed that the party “...has taken the help of some false and manipulated documents...miserably failed to discharge her burden to prove that she is not a foreigner”.⁷⁹

An analysis of randomized FT orders showcases the following grounds that have been presented to dismiss documents produced. It is seen that FTs rule against persons on the basis of minor discrepancies in the documentations, such as spelling errors and contradictory dates, disregarding all other evidence. These grounds are entirely discretionary.

Type of document	Grounds for dismissal
Land Record	Damaged or illegible document; Unable to recollect details on examination; Linkage not established, so land record rendered invalid; Rewritten by cutting name; Photocopy cannot be appreciated as evidence
Marriage Certificate	Issuing authority not produced to testify; Different spelling (minor) in marriage certificate

⁷⁶ *Rasul Begum v Union of India* WP (C) 132 of 2019, order dated 25-1-2019 (Gauhati High Court).

⁷⁷ Manu Sebastian, ‘Which Documents Prove Indian Citizenship?’ (*Live Law*, 21 February 2020) <<https://www.livelaw.in/columns/which-documents-prove-indian-citizenship-153027>> accessed 30 May 2020.

⁷⁸ *ibid.*

⁷⁹ *State v Kad Bhanu* FT 5th 407/16 (Foreigners Tribunal 5th – Barpeta).

Type of document	Grounds for dismissal
Examination Admit Card	Father's name not mentioned
School Leaving Certificate	Issuing authority not produced to testify
Voter List	Inclusion of name not sufficient to prove citizenship; Proceedee failed to corroborate other names on the voter list; Genuineness not proven by comparing with primary evidence; Post-1971 documents do not prove citizenship; Reasons for address change in different years' voters lists not mentioned; Age discrepancies in different voters lists; Photocopy cannot be appreciated as evidence; Rejected without reason
Gaonburah Certificate	Issuing authority's evidence not convincing; State emblem embossed over the document in violation of the law; ⁸⁰ Issuing authority not produced before the court; Link certificate not proven to be based on any record; Authority who issued it did not personally know the party
Sale Deed	Not proved by evidence of the author; Linkage not established, so deed rendered invalid
1951 NRC	Photocopy presented only; Age of persons not mentioned
Ration Card	Issued after March 25, 1971, and has no value

5. *Strict Evidentiary Standard Which Cannot be Met, Even Upon Production of Documents*

FTs apply provisions of the Indian Evidence Act, 1872 in an extraordinarily stringent and selective manner, effectively using the same standard as that of a criminal trial. This is disproportionate, given that FT proceedings are civil in nature. In the case of marriage certificates or residence certificates, the content has to be proven in the FT by the authorities who issued it.⁸¹ The onus

⁸⁰ The State Emblem of India (Prohibition of Improper Use) Act 2005.

⁸¹ 'Designed to Exclude: How India's Courts Are Allowing Foreigners Tribunal to Render People Stateless in Assam' (Amnesty International 2019) <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>> accessed 30 May 2020.

is on the person proving their citizenship to make sure that these authorities are present before the FT. Deposition by family members (who are citizens) attesting to their relationship with the person accused is often disregarded, in clear contradiction to the principles of Section 50 of the Indian Evidence Act.⁸² Little reason was mentioned for the same in the orders, with most judges labeling the witnesses as 'unreliable'.

6. *Gender Specific Challenges*

Women face the brunt of these challenges disproportionately, as the system hinges on the notion of patrilineal descent. Despite there being proof of women's names appearing in voter lists, in the absence of proven linkage with the father's side of the family, they are declared as foreigners.⁸³ In numerous existing cases before the FTs, it is seen that women suffer and are declared as foreigners on account of having no linkage to their father as proven through a voter list; many attain adulthood only after marriage and therefore have their names registered with reference to their husband. This is not considered sufficient ground for citizenship. A *Panchayat* (an elected village council) Secretary's certificate verifying that the woman in question is the child of her father stands in lieu of a birth certificate; however, given that it is considered a private document under evidence law, it requires the issuing authority to testify before court.⁸⁴ In many instances, this is rendered impossible as the relevant authorities are reluctant to appear before a judicial body. Therefore, structural barriers render it difficult for women to meet the documentary requirements demanded by the legal system.

IV. CONCLUSION: DOCUMENTATION AND STATELESSNESS

Many have argued that the power of documentation is exercised by the state to magnify its reach in the lives of people and is the source of exclusion.⁸⁵ From my analysis, it can be seen that the power of exclusion has been exercised to a visible degree in the case of Assam. Through complicated

⁸² Indian Evidence Act 1872, s 50. Opinion on relationship, when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

⁸³ Utpal Parashar, 'As High Court Rejects Assam Woman's Plea, a Look at What Exactly is Needed to Prove Citizenship in the State' *Hindustan Times* (19 February 2020) <<https://www.hindustantimes.com/india-news/as-high-court-rejects-assam-woman-s-plea-a-look-at-what-exactly-is-needed-to-prove-citizenship-in-the-state/story-Cdb4VfL0MgcWGILUnluKXXK.html>> accessed 5 August 2020.

⁸⁴ Interview with Aman Wadud, Human Rights Lawyer at the Gauhati High Court (Telephonic Interview, 28 May 2020).

⁸⁵ *ibid*.

bureaucratic processes, the state has completely undermined the social status of citizens belonging to minority communities in Assam. While FTs themselves do not follow any standardized procedure and exercise arbitrary discretion, people hauled up before the FTs are, conversely, expected to fulfil excessively stringent documentation requirements. Moreover, even when people provide different forms of documentation before the court, there is a legislative vacuum in terms of what constitutes valid documentation. Courts seem to have taken advantage of this gap to dismiss people's claims on arbitrary grounds. Further, failure of procedural due process has manifested as an insurmountable barrier, as litigants struggle with defective reference and notice processes, fatal jurisdiction errors, and unpredictable evidentiary norms.

To complicate matters, India is not a signatory to the two conventions tasked with mitigating statelessness and its impacts.⁸⁶ However, the body of international human rights treaties that India is party to – the UDHR,⁸⁷ CEDAW,⁸⁸ CRC⁸⁹ *inter alia* – enshrine the protection of the right to nationality. Thus, the actions of the FTs, which deprive people of their citizenship, are effectively leading up to a statelessness crisis in violation of international human rights law. 23,000 people have been declared as 'foreigners' over the last year alone, and very few of them have been deported to other countries – the all-India figure for 2019 was 1,351,⁹⁰ of which just 8 were from Assam.⁹¹ 802 declared 'foreigners' are perishing inside the state's detention centres.⁹² The rest remain suspended in limbo, with little certainty about their future. Being a part of a stateless population leads to the stripping away of entitlements to education, employment, healthcare, and legal due process;⁹³ as in the case of the Rohingya, it also leads to arbitrary detention that can go on for years.⁹⁴ Further, statelessness has been seen to disproportionately impact

⁸⁶ Vatsal Raj, 'Statelessness in India – Seeking Solutions in International Law' (*Cambridge International Law Journal*, 11 February 2020) <<http://cilj.co.uk/2020/02/11/statelessness-in-india-seeking-solutions-in-international-law/>> accessed 30 May 2020.

⁸⁷ Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 23 March 1976), art 15.

⁸⁸ The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), art 9.

⁸⁹ Convention on the Rights of the Child (Adopted 20 November 1989, entered into force 2 September 1990), art 7.

⁹⁰ Ministry of Home Affairs, 'Rajya Sabha Starred Question No 44 - Increase in Illegal Immigrants' (Government of India 5 February 2020) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/rs-05022020/44.pdf>> accessed 30 May 2020.

⁹¹ Padmini Baruah, 'The Blind Side: India's Tryst with Citizenship, Deprivation and Statelessness' (*The Fletcher Forum of World Affairs*, 12 May 2020) <<http://www.fletcherforum.org/the-rostrum/2020/5/11/the-blind-side-indias-tryst-with-citizenship-deprivation-and-statelessness?rq=padmini>> accessed 30 May 2020.

⁹² *ibid.*

⁹³ Lindsey N Kingston, 'Worthy of Rights' in Tendayi Bloom, Katherine Tonkiss, and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 19.

⁹⁴ Directorate-General for External Policies, 'Addressing the Human Rights Impact of Statelessness in the EU's External Action' (European Parliament 2014) <<https://www.europarl.europa.eu/media/default.do?mediaDataId=14612&mediaDataRef=14612>> accessed 30 May 2020.

minorities, a fact that plays out in Assam. A study conducted on cases decided by the FTs found that nine out of ten cases were against Muslims, and 90% of Muslims were declared illegal immigrants, as compared to 40% of the Hindus tried.⁹⁵ This is the prospect that awaits 1.9 million people, who are now poised to prove themselves before quasi-legal bodies riddled with unjust, inconsistent procedures.

Despite Assam's diverse ethnic composition, its colonial history has created deep-rooted divisions between the 'Assamese' representing an 'indigenous' body, and the 'Bengali', particularly the Bengali Muslim, who was posited as the 'infiltrator'. Throughout the history of the Assamese postcolonial state, identifying the outsider and stripping them of their citizenship status has been of utmost political priority. This forms the framework within which we must consider the NRC. It is incontrovertible that FTs are deeply flawed in their functioning and have, over the years, continued to strip people of their citizenship on flimsy grounds. In the words of Hannah Arendt, citizenship is the 'right to have rights'. Those excluded thus have their basic rights at stake, which are stripped with alacrity through flawed procedural mechanisms. This situation mandates a policy intervention at the earliest. The complex tangle of bureaucracy and judicial process must not disenfranchise citizens who already occupy a vulnerable position, lest the violent history of Assamese xenophobia repeat itself.

europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU%282014%29534983_EN.pdf> accessed 30 May 2020.

⁹⁵ Rohini Mohan, 'Worse Than a Death Sentence: Inside India's Sham Trials That Could Strip Millions of Citizenship' (*Vice News*, 29 July 2019) <https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship> accessed on 30 May 2020.

THE DEMAND-SIDE OF THE RULE OF LAW: INDIA'S EXPERIENCE WITH EMINENT DOMAIN LAW REFORM

—Tvisha Shroff*

This paper places the issue of land acquisition within a rule of law framework and analyses the national level reform of India's Land Acquisition Act, 1894. While orthodox approaches to legal reform have placed a strong emphasis on state-centric 'supply-side' factors, more recently it is the constituencies within society that call for and enforce limitations to the exercise of state power that have been highlighted in the context of rule of law reform strategies. The rule of law seeks to restrain government action through law. In the context of its relevance to economic development, it is seen as a protection of private property against arbitrary expropriation by the state. Eminent domain, on the other hand, is the state's legal power to take possession of an individual's property for the purposes of undertaking state-led development projects. Both of these legal precepts, the rule of law as well as eminent domain, are in their own right seen as enablers of a nation's economic development. However, in the context of the ongoing global land rush, it is argued that they can be at odds with one another. This paper illustrates how an attempt at eminent domain action came in conflict with rule of law principles in the specific case of the compulsory acquisition of agricultural land in rural West Bengal in India. A broad-based social movement against this land acquisition sparked the passage of a new land acquisition law in 2013. Specifically, it is argued that this legal reform resulted from a

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legal empowerment process involving both, rights-based legislation and the activism of non-state agents. Illustrating this case of demand for the new land acquisition law, its substantive provisions, and subsequent legal and political developments in relation to the 2013 Act, this paper concludes with critical reflections on the potential of legal empowerment and demand-side strategies to contribute to long-term and sustainable legal reform in pursuit of the 'rule of law' ideal.

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I. INTRODUCTION

A. The Rule of Law and Eminent Domain

The rule of law has been viewed as an essential underpinning of, as well as a means to, economic development. An ever-evolving concept that has been defined in various ways, both narrowly and broadly, it has wide-ranging implications for issues ranging from foreign investment and the ease of doing business, to security and public order.¹ At its core, the rule of law is the restraint on government action by law.² In the context of its role in promoting economic development, it has often been cast in terms of the protection of private property *against* arbitrary expropriation by the state. The concept of eminent domain on the other hand, provides an interesting juxtaposition— it is the power of the state to take an individual's private property as *recognized* by the law. Eminent domain is justified as a necessary evil, to facilitate the state

¹ James A Goldston, 'New Rules for the Rule of Law' in David Marshall (ed), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard University Press 2014) 1, 3-5.

² David Marshall, 'Introduction' in David Marshall (ed), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard University Press 2014) xiii, xxi; Brian Tamanaha, 'A Concise Guide to the Rule of Law' (2007) St John's Legal Studies Research Paper No 07-0082, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> accessed 10 December 2020.

undertaking activities for “the greater national good”.³ In principle, these large-scale land transactions are widely accepted as a means to stimulate economic growth and create jobs.⁴

Due to the very nature of eminent domain as state power with legal constraints, it is necessary to view it in the broader perspective of state commitment to the rule of law. Property rights and safeguards against the abuse of eminent domain powers are considered to be stronger in legal systems that emphasize civil rights. While the concept of ‘due process’ is often connected with issues of criminal justice, many countries invoke *procedural justice* in reference to eminent domain – most notably, the due process clause of the American Constitution that speaks of life, liberty, and property.⁵ The ongoing global rush for land and natural resources poses an important challenge to the international rule of law movement, wherein much foreign aid and technical assistance is being directed towards the strengthening of justice systems of developing nations.⁶ There is a great risk of injustice, given that three billion people across the world live without secure legal rights to their lands and pastures. Indeed, the most large-scale expropriation of land takes place in countries that provide the weakest protection to property rights. In such a situation, eminent domain and the rule of law – both, facets of the modern nation state that are seen as vital enablers of economic growth – can be in serious conflict with one another. This raises the difficult choice between the short-term gains of easily acquired land for developmental projects, and the long-term vision of maintaining public confidence in the state’s commitment to protecting private property and consequently, state commitment to the rule of law.⁷

In the case of eminent domain in India in particular, it has often been pointed out that the incessant manner in which land has been acquired in complete derogation of the right to property, has been increasingly counterproductive, rather than complementary, to economic growth and development.⁸ It has served state interests through the use of force, often resulting in

³ Jairam Ramesh and Muhammad Ali Khan, *Legislating for Justice: The Making of the 2013 Land Acquisition Law* (1st edn, OUP 2015) 1-4.

⁴ Vivek Maru, ‘Legal Empowerment and the Land Rush: Three Struggles’ in David Marshall (ed), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard University Press 2014) 193, 194.

⁵ Ramesh and Khan (n 3) 2.

⁶ See Marshall (n 2) xiii; Maru (n 4) 193.

⁷ Maru (n 4) 193-194. In the Indian context specifically, see Namita Wahi and others, ‘Land Acquisition in India: A Review of Supreme Court Cases From 1950 to 2016’ (Centre for Policy Research 2017) 9 <<https://www.cprindia.org/research/reports/land-acquisition-india-review-supreme-court-cases-1950-2016>> accessed 8 December 2020, for findings on power imbalances between the state and land losers in the land acquisition process, highlighting non-compliance with the rule of law under the the Land Acquisition Act, 1894 as a contributing factor to this issue.

⁸ Casey Downing, ‘Eminent Domain in 21st Century India: What New Delhi Can Learn from New London’ (2013) 46 NYUJ Intl L & Politics 207.

violence.⁹ Within the Indian Government, no less than the former Prime Minister Manmohan Singh has acknowledged that the injustice of the manner in which land has been taken from farmers since Independence has given rise to the Maoist-led guerrilla campaign against the state – a grave internal security concern.¹⁰ This law and order consequence of the capricious application of eminent domain law points to the necessity of viewing the issue of land acquisition as a rule of law concern.

B. Old and New Approaches: Legal Empowerment for the Rule of Law

At this stage, it is critical to clarify the specific definition of the ‘rule of law’ that is put forth in this paper. The rule of law has many competing descriptions invoking different, and often interrelated legal principles that are frequently confused with one another. Newer thinking in the field has emphasized the need to define the rule of law based on its *end goals*, such as a government bound by law, equality before the law, predictable justice, and respect for human rights. This is the perspective taken in this paper, as opposed to earlier views that highlighted the institutional characteristics of the law, such as well-written statutes, trained judges and personnel, and the provision of legal counsel, that are merely the *means* to achieve the end goals stated above. The ends-based framework for understanding rule of law reform that is taken up in this paper thus acknowledges that such goals are in fact *societal* goals, whereas the formalistic institutional (and rather apolitical) approach does not account for these socio-cultural aspects of the reform process.¹¹

Old technocratic approaches to the rule of law – ‘rule of law orthodoxy’, as it has come to be designated in recent literature – thus tended to ignore the power dynamics underlying legal reform processes.¹² However, the rule of law has increasingly been recognized as an expression of collective power within societies, becoming sensitive to the fact that problems ranging from judicial corruption to election fraud are ‘rooted in inequalities of power’.¹³ The recent changing positions of global organizations such as the United Nations and the World Bank towards legal reform indicate a shift from a “thin” conception

⁹ Ramesh and Khan (n 3) 128.

¹⁰ Sanjoy Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (1st edn, OUP 2013) xiii.

¹¹ Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law’ in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (1st edn, Carnegie Endowment for International Peace 2006) 31-74.

¹² *ibid* 36-52. See also Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (1st edn, Carnegie Endowment for International Peace 2006) 75.

¹³ Goldston (n 1) 11.

of the rule of law focused on institutional reform and capacity building, to a “thick” conception that is rooted in human rights.¹⁴

Amongst such “thick” conceptions of the rule of law, the *legal empowerment* approach in particular is being increasingly considered as an alternate strategy to traditional approaches by international aid agencies that had focused on efforts on the part of the state, i.e. ‘supply-side’ efforts for legal reform.¹⁵ Legal empowerment is understood as the use of law and legal services by ordinary citizens, particularly the poor and the marginalized, to enforce laws for their benefit, thus emphasizing the perspective taken in this paper, on the ‘demand-side’ of legal reform. It is rooted in the community, but encompasses a broader reach to influence laws and institutions on a national scale as well.¹⁶ By enabling citizens to understand and use the law in their interactions with administrative, legal, or judicial institutions, it goes to the root of power imbalances that make legal aid necessary to begin with.¹⁷ Indeed, recent empirical work studying the relationship between state institutions and economic development has suggested that it is not institutions that are the problem for development per se, but the “self-interested constituencies” underlying such institutions that prevent meaningful change and perpetuate underdevelopment. Essentially, “self-interested constituencies” or in simpler terms, interest groups, are successfully able to resist reforms that shift the initial conditions of endowments in society of both physical as well as human capital. It is proposed that “rather than focusing on the absence of institutions (for development), development policy should focus on the absence of the *constituencies that demand them*” (emphasis mine).¹⁸

Returning then to the case of India, the extensive use of eminent domain powers in the absence of procedural justice has, over time, weakened people’s faith in the rule of law and has led to widespread disaffection. This paper illustrates the case of the recent reform of the Indian Land Acquisition Act, 1894, to demonstrate the positive role that legal empowerment can play in the law reform process – specifically through its enabling role in the creation of *constituencies that demand* the reform of legal and political institutions.¹⁹ A broad-based social movement and associated community mobilization against

¹⁴ Maru (n 4) 206; Goldston (n 1) 8.

¹⁵ Dan Banik, ‘Rights, Legal Empowerment and Poverty: An Overview of the Issues’ in Dan Banik (ed), *Rights and Legal Empowerment in Eradicating Poverty* (Ashgate Publishing Limited 2008) 11, 13.

¹⁶ Stephen Golub, ‘The Legal Empowerment Alternative’ in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (1st edn, Carnegie Endowment for International Peace 2006) 161-163.

¹⁷ Maru (n 4) 203-204.

¹⁸ Raghuram G Rajan and Luigi Zingales, ‘The Persistence of Underdevelopment: Institutions, Human Capital or Constituencies’ (2006) CRSP Working Paper No 613, 41 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927949> accessed 8 December 2020.

¹⁹ *ibid*.

the compulsory acquisition of agricultural land in Singur, a town in rural West Bengal, culminated in the passage of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the Land Acquisition Act, 2013' or '2013 Act'). This paper analyses this legal reform process, highlighting the significance of the legal empowerment of rural landholders in challenging archaic land acquisition procedures that have long been taken for granted in India. Two factors in particular, the better information of prices in the agricultural land market, and an increased awareness of legal rights facilitated by the involvement of civil society and other non-state actors, contributed to the rising 'demand' for reform.²⁰ The overall approach taken in this paper is based on the notion that legal reform is fundamentally a *political* process, intrinsically linked to a country's social and cultural attitudes.²¹

Section II describes the movement for reform of the archaic Land Acquisition Act, 1894 and the eventual enactment of the 2013 Act. Section III then provides a political economy analysis of the increasing demand for a new eminent domain law, demonstrating how better knowledge of legal rights and higher awareness of the price of agricultural land triggered the movement for change, culminating in the passage of the new law. Section IV considers the contribution of the *legal empowerment* of landholders in overcoming the power asymmetries that lay at the root of the turbulence in Singur, and eventually enabled meaningful and inclusive reform of the Land Acquisition Act, 1894. It also analyses the events subsequent to the passing of the 2013 Act to illustrate the limits of legal empowerment and demand-side strategies for governance. Section V concludes with a critical reflection on the potential of legal empowerment and demand-side strategies to contribute to long-term and sustainable legal reform in pursuit of the 'rule of law' ideal.

II. THE EVENTS IN SINGUR AND THE MAKING OF A NEW LAW

A. The Movement for Change

The acquisition of agricultural land has long been a contentious issue, sparking significant people's movements across the country. The press and public discourse have consistently referred to the issue as the 'biggest problem' in India's development path. The first major movement that captured public attention was that of the Narmada Valley Dam Project in Maharashtra, in the 1990s. Whereas, more recent movements include those in Nandigram and Singur in West Bengal, the Yamuna Expressway in Uttar Pradesh, and the Maha-Mumbai

²⁰ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10).

²¹ Marshall (n 2) viii.

Special Economic Zone in Maharashtra, these conflicts represent just a small fraction of the many injustices committed under the Land Acquisition Act, 1894.²² The fact remains that agitation against the postcolonial developmental state, as well as its associated infrastructure projects that have dispossessed various groups of their land – *Adivasis* (a collective term used for the many indigenous people of India), *Dalits* (members of the lowest social group in the Hindu caste system), peasants, fishers, forest-dwellers, and others within the unorganized sector – has had a long history in India.²³ These social movements, specifically *subaltern* social movements, have brought to the fore the experiences of marginalized groups within the increasingly neoliberal Indian economy, and have framed the broader social and political discourse on the *dislocation* of such groups in the course of what is widely accepted to be a ‘modernization’ process.²⁴

Coming to the case at hand, Singur is an agricultural region in the Hooghly district of West Bengal. After initial success in the state, particularly with regard to reforms geared towards rural populations, agricultural stagnation in West Bengal prompted the ruling Communist Party of India (Marxist) (‘CPI(M)’) to look towards re-igniting the industrial sector.²⁵ In May 2006, the West Bengal state government, led by the Left Front coalition, announced that Tata Motors would build a factory for the Nano, its new low-cost car model, in Singur.²⁶ Significantly, the Left Front government had campaigned on a promise of increasing industrialization, and the Tata Nano project with the promise of creating 10,000 jobs and attracting investments of ten billion rupees was symbolic of the new industrial ventures that the state was set to promote.²⁷ However, the acquisition of 997.11 acres of land by the state government in 2006 for lease to the company was not well-received and estimates of those affected by the acquisition, both in terms of loss of land and livelihood, ranged from 2,000 to 15,000 individuals. Additionally, the entire area to be acquired was farmland, two-thirds of which was high yield multi-crop soil.²⁸

²² Ramesh and Khan (n 3) 7-8; Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) xiii-5.

²³ Kenneth Bo Nielsen and Alf Gunvald Nilsen, ‘Law Struggles and Hegemonic Processes in Neoliberal India: Gramscian Reflections on Land Acquisition Legislation’ (2015) 12(2) *Globalizations* 203, 204.

²⁴ Dip Kapoor, ‘Subaltern Social Movement (SSM) Post-Mortems of Development in India: Locating Trans-Local Activism and Radicalism’ (2011) *Journal of Asian and African Studies* 1.

²⁵ Suchismita Das, ‘Pragmatic Negotiations and the Farmers of Singur’ (2017) 4(5) *South Asian Journal of Multidisciplinary Studies* 302.

²⁶ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 50.

²⁷ Kenneth Bo Nielsen, ‘Contesting India’s Development? Industrialisation, Land Acquisition and Protest in West Bengal’ (2010) 37 *Forum for Development Studies* 145, 154.

²⁸ Kenneth Bo Nielsen, ‘Not on Our Land! Peasants Against Forced Land Acquisition in India’s West Bengal’ in Dan Banik (ed), *Rights and Legal Empowerment in Eradicating Poverty* (Ashgate Publishing Limited 2008) 229.

In accordance with the Land Acquisition Act, 1894, farmers were offered financial compensation, reportedly Rs. 8,40,000 per acre for mono-crop land and Rs. 12,00,000 per acre for multi-crop land. While some landowners accepted the compensation amount, a significant number of them did not.²⁹ Resistance built up amongst the unwilling sellers and the *Singur Krishi Jomi Raksha Committee* ('SKJRC – Committee to Save the Farmland of Singur') was formed in late 2006.³⁰ Their methods of protest ranged from petitions, protest letters, and memoranda to the district administration, to fasts, highway blockages, and the use of violence. Various actors played a part in the build-up of this movement, notably the opposition party in the state, as well as civil society organizations with varying orientations, at the local, regional, national, and international levels, that were able to bring significant media attention to this issue.³¹ Specifically, under the leadership of Mamata Banerjee of the Trinamool Congress ('TMC') – the opposition party of the state at the time – the specific demand of returning 400 acres of land that belonged to those who were unwilling to sell, took hold.³²

Petitions challenging the land acquisition were filed before the Calcutta High Court on the ground that acquisition on behalf of a private company did not fulfil the 'public purpose'³³ element of the exercise of eminent domain powers, under the existing land acquisition law. However, the nature of the Act of 1894 was such that there were no grounds on which farmers could challenge the taking of their land *per se*, but could only fight for enhanced compensation, and the Court ruled against them. This was followed by an appeal to the Supreme Court of India and the election of the TMC, which took up office in 2011, promising to return the acquired land to the unwilling farmers in Singur.³⁴ In this vein, the first Act passed by the state legislature under the TMC government was the Singur Land Rehabilitation and Development Act, 2011 to fulfil this election promise.³⁵ The Act was subsequently challenged in the Calcutta High Court, and it was held to be unconstitutional. This was later

²⁹ Kenneth Bo Nielsen, 'Farmers' Use of the Courts in an Anti-Land Acquisition Movement in India's West Bengal' (2009) 41 *The Journal of Legal Pluralism and Unofficial Law* 121, 122.

³⁰ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 51.

³¹ Nielsen, 'Not on Our Land! Peasants Against Forced Land Acquisition in India's West Bengal' (n 28) 130; Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 36-51.

³² Ritanjan Das, 'The Politics of Land, Consent, and Negotiation: Revisiting the Development-Displacement Narratives From Singur in West Bengal' (2016) 13 *South Asia Multidisciplinary Academic Journal* 1, 5.

³³ Section 3 of the Land Acquisition Act, 1894 defined 'public purpose' as including (amongst others) provision or planned development of village sites; provision of land for town or rural planning; the provision of land for planned development of land from public funds in pursuance of a scheme or policy of the Government; and the provision of land for a corporation owned or controlled by the State.

³⁴ Nielsen, 'Not on Our Land! Peasants Against Forced Land Acquisition in India's West Bengal' (n 28) 135-140.

³⁵ Buddhadeb Ghosh, 'What Made the "Unwilling Farmers" Unwilling? A Note on Singur' (2012) 47(32) *Economic and Political Weekly* 13, 14.

reserved by a judgment of the Supreme Court of India, setting aside the entire Singur land acquisition on the basis that the acquisition was not indeed carried out for a 'public purpose'.³⁶ Simultaneously, the issue of eminent domain law reform gained momentum at the national level with the introduction of the Land Acquisition, Rehabilitation and Resettlement Bill in the Parliament in 2011. The passage of this Bill culminated in the replacement of the old Act of 1894 with the Land Acquisition Act, 2013.³⁷

The events in Singur and Nandigram are already being judged as crucial junctures, not just in the history of West Bengal, but also in the history of modern India.³⁸ Whereas this particular instance of land acquisition has indeed been greatly influenced by earlier peasant and *Adivasi* agitations, its significance is striking. The fact that these events unfolded in West Bengal, where the CPI(M) had led a coalition for seven consecutive terms from 1977, only to be unseated in 2011, following the protests in Singur, highlights its tremendous political significance. Having enjoyed great popularity for its pro-poor policies, the CPI(M)'s abrupt ousting directly in relation to its actions in Singur, raises certain critical issues – particularly in so far as resistance to land acquisition has traditionally been framed in terms of the 'proletariat' as against 'industry'.³⁹

In fact, Indian scholarship on land conflict is increasingly recognizing that there are two distinct narratives in relation to land and its ownership – one that is shaped broadly by the community struggle of marginalized groups and their *resistance* to land acquisition, and another that is shaped by the view of land as a commodity.⁴⁰ The controversy in Singur was a significant event in that it was a popular movement towards using democratic and participatory approaches in the larger developmental process of the country.⁴¹ It stands out against the protests and agitation on land acquisition issues that preceded it, in that the farmers in Singur expressed a desire to embrace free market principles in

³⁶ *Kedar Nath Yadav v State of West Bengal* (2017) 11 SCC 601 (Supreme Court of India). For a discussion of this judgment on the issue of public purpose specifically, see V Krishna Ananth, 'Singur Case and the Idea of Justice' (2016) 51(38) Economic and Political Weekly 14.

³⁷ Ramesh and Khan (n 3) 11.

³⁸ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 6.

³⁹ Das, 'The Politics of Land, Consent, and Negotiation: Revisiting the Development-Displacement Narratives From Singur in West Bengal' (n 32) 2. See also Das, 'Pragmatic Negotiations and the Farmers of Singur' (n 25) 310.

⁴⁰ Namita Wahi, 'Understanding Land Conflict in India and Suggestions for Reform' (Centre for Policy Research 2019) 140 – 141 <https://www.cprindia.org/sites/default/files/Regulation%20and%20Resorces_all%20pages.pdf> accessed 12 December 2020. See also Manjusha Nair, 'Land as a Transactional Asset: Moral Economy and Market Logic in Contested Land Acquisition in India' (2019) 51(6) Development and Change 1511, on the aspect of the dominant framing of such protests being in relation to peasant or farmer resistance to land acquisition.

⁴¹ Nielsen, 'Contesting India's Development? Industrialisation, Land Acquisition and Protest in West Bengal' (n 27) 166.

negotiating the price of their land, rather than have it set by the government.⁴² In this sense, the events in Singur mark a turning point in the debate on land acquisition, not only bringing into focus the issue of *consent* for acquisition of land, but also broadening it to issues such as the fairness of the price offered.⁴³ Both sides of the debate that has ensued about the Singur land acquisition case – amongst those in industry, as well as those concerned with farmers' rights – have argued in the name of development and justice, giving widely different meanings to each of these terms.⁴⁴ This signals not just the complexity of the eminent domain and rule of law issue, but also more broadly illustrates the complexity of the movement towards a healthier conception of the rule of law that is representative of a *shared* conception of both, development *and* justice.

B. The Land Acquisition Act, 2013

The Land Acquisition Act, 2013 reflects *five* legal concepts or ideas that can be traced to the demands that surfaced in the preceding era of protests – fairer compensation, consensual acquisition, rehabilitation and resettlement facilities for the displaced, curtailment of discretionary powers of administrative officials, and an appellate mechanism dedicated solely to addressing land acquisition related complaints. In essence, the new legislation marks a shift away from the policy of tolerating displacement and destitution as a necessary short-term consequence of land acquisition undertaken for the sake of economic development in the long-term. The 2013 Act may fairly be termed as taking a largely centrist position on the political spectrum, criticized by social activists for not going far enough, and by industry for making land acquisition too difficult. Nonetheless, it has widely been acknowledged as a tremendous step forward from the Act of 1894 in ensuring fairness in the land acquisition process.⁴⁵

Significantly, by mandating the conduct of social impact assessments *before* any acquisition, the Act shifts the onus on the state to justify the social cost of displacement that will be caused in each case of land acquisition. By providing for two public hearings where objections may be raised and for consultations with village councils, particularly in tribal areas, there is an attempt to mitigate the sense of marginalization that has traditionally marred state interaction

⁴² Kenneth Bo Nielsen, 'Four Narratives of a Social Movement in West Bengal' (2009) 32 South Asia: Journal of South Asian Studies 448, 458.

⁴³ In this regard, see Nair (n 40). Based on field research in two villages in Western Uttar Pradesh, Nair argues that 'rather than reclaiming land from commodification, the farmers were using the land as a market instrument, a transactional asset, in negotiating for a better deal within a dominant market-driven template'.

⁴⁴ Nielsen, 'Not on Our Land! Peasants Against Forced Land Acquisition in India's West Bengal' (n 28) 217.

⁴⁵ Ramesh and Khan (n 3) viii-14; Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 174.

with these groups.⁴⁶ Unfair compensation, in particular, lies at the heart of the land acquisition process. The Act notes that official records of ‘market value’ (a mandate of each state government rather than the Central Government) are grossly under quoted and provides for compensation to be paid at four times the recorded rate in rural areas. This quick fix approach has largely been criticized as both, unfair and populist. At the same time, to address the forcible nature of land takings, the new Act requires the consent of 70% of the families affected by the process when land is taken for public-private partnership projects, and 80% in the case of solely private initiatives. Here too, the Act has been criticized for not imposing any conditions of consent in the instance of state-owned projects.⁴⁷

Despite these criticisms, on the whole, the Act has been hailed as largely successful in ensuring the right to rehabilitation and resettlement of those displaced. In addition to providing for the right to rehabilitation in cases of state exercise of eminent domain powers, the Act, recognizing the unequal bargaining power between small farmers and private industry, has extended benefits of rehabilitation and resettlement facilities to instances of private land purchase. It also mandates that the state may only take possession of land *after* providing for compensation and resettlement, further safeguarding landowners against arbitrary state power.⁴⁸ It is in this manner that the 2013 Act, despite its flaws, has addressed many of the grievances that had come to light in the preceding period of protests and social movements.⁴⁹

III. THE BUILD-UP OF ‘DEMAND’ FOR REFORM

A. Rights-Based Legislation: Towards Legal Empowerment

India’s long-standing democratic institutions, while admirable and relatively robust for a developing nation, make for a *formal* but not an *effective* democracy in a number of ways.⁵⁰ The Central Government however, from 2004 to 2014, adopted a clear agenda of enacting rights-based legislation, specifically meant to empower historically marginalized communities. These range from legislation ensuring the right to forest produce and natural resources aimed specifically at tribal communities, to more broad-based legislation for the right to information, right to education, and national rural employment guarantees.⁵¹

⁴⁶ Ramesh and Khan (n 3) 17-39.

⁴⁷ Ramesh and Khan (n 3) 28-48; Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 184-189.

⁴⁸ Ramesh and Khan (n 3) 43-111.

⁴⁹ A Presidential Ordinance passed later in December 2014 significantly diluted the provisions of the Land Acquisition Act, 2013. This development is discussed in section IV below.

⁵⁰ Patrick Heller, ‘Degrees of Democracy: Some Comparative Lessons from India’ (2000) 52 *World Politics* 484.

⁵¹ Ramesh and Khan (n 3) 91.

Taken together, this era of rights-based legislation enabled the gradual process of *legal empowerment* of traditionally marginalized communities in India in the years since 2004. In 2013, when the new Land Acquisition Act was finally passed, there was widespread acknowledgement that the use of the colonial-era eminent domain law had come at a high social cost. The Standing Committee of Parliament in its examination of the proposition for a new law observed that “the opening of floodgates to acquisition of land by the state for companies.... had unleashed rural and tribal backlash...which has caused the current decision of the Government to replace the 1894 Act with an altogether new Act.”⁵²

The era of conflicts and protests had been a result of both, the nature and manner of application of the old Land Acquisition Act, and it was widely agreed that the passing of the new Act would help address the issues raised by the many protests preceding the reform. The various land acquisition protests not only served as catalysts for the new law, but also brought about a great deal of recognition of past injustices perpetuated by the state’s exercise of its eminent domain powers. The new law has thus proceeded on an acknowledgment of the disparity of power between the acquirer and small landowners, and has aimed at empowering those affected to negotiate their rights against the state. It specifically recognized Scheduled Castes and Tribes as having suffered due to their lack of political influence.⁵³ Thus, the position of the state in creating an overall favourable political environment for the passage of the Act was an important factor. Despite this however, the new law has been criticized by many as paternalistic in some respects and as ‘a political solution to a problem of political economy’.⁵⁴

B. Tipping the Balance: Legal Awareness and Market Prices

The concerns of the landowners affected by the acquisition in Singur have centred around two primary issues – *first*, the lack of democratic process including that of a participatory approach to development,⁵⁵ and *second*, the sense of financial insecurity brought about by the acquisition, coupled with a strong perception of unfairness that the compensation offered to them was inadequate.⁵⁶ It must be noted here that the resistance on the part of farmers has not primarily been to the capitalist model of development, as it has often

⁵² *ibid* 7.

⁵³ *ibid*.

⁵⁴ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 174.

⁵⁵ Nielsen, ‘Contesting India’s Development? Industrialisation, Land Acquisition and Protest in West Bengal’ (n 27) 166.

⁵⁶ Maitreesh Ghatak and others, ‘Land Acquisition and Compensation in Singur: What Really Happened?’ (2013) Competitive Advantage in the Global Economy (CAGE) Online Working Paper Series, 41, 42 <<https://ideas.repec.org/p/cge/wacage/121.html>> accessed 8 December 2020.

been made out to be.⁵⁷ Indeed, several ethnographic accounts of the agriculturists of Singur who were at the forefront of the protests have highlighted this fact. Rather than viewing those involved in the protests as a uniform group of 'farmers' resisting 'industry', nuanced accounts of the perspectives of the landholders of Singur show that many of them were in fact in favour of industrialization, readily parting with their mono-crop land, but for practical reasons refusing to give up their more fertile multi-crop land. Some were sceptical of industrial employment and transitioning to new forms of work and life. Yet others who readily gave up the land took a view of their land as a commodity from which they might make a profit, rather than as a form of livelihood, but took issue with the price offered to them for the land.⁵⁸

The fundamental reason however for the turn of events exemplified by Singur, in contrast to the days when the state could take land with impunity, was the fact that the potential losers of land were better *informed*, and thus better prepared to stand up to the state. A sweeping change in the Indian information system enabled by technology, had revolutionized mass media and subsequently supported the growth of the internet and social media.⁵⁹ In this sense then, it was the erstwhile information asymmetries that had allowed an unjust colonial-era land acquisition regime to persist, and it is this factor that sets the protests in Singur apart from those that preceded it.⁶⁰ The landowners of Singur had more information about *both*, the price of their land as well as their right to refuse to sell it.⁶¹ Indeed, the evolving land market in post-liberalization India is increasingly signified by the shift in rhetoric among farmer's movements from 'land to the tiller' to a focus on 'remunerative prices'.⁶²

Until recently, asymmetries of power and information in the agricultural land market in India had reinforced one another and played an important role in maintaining the status quo. The determination of price by the state and want of information among the land losers had been 'normalized' over the years. However, the pressing demand for land, a commodity in extremely short supply in India, has led to 'information agents' in the form of both, civil society and political parties, playing an active and important role in building awareness among the rural population about the worth of their property and their legal rights.⁶³ Together with technology-based informational media, it was these actors from both civil society and politics that acted as conduits of critical

⁵⁷ Nielsen, 'Contesting India's Development? Industrialisation, Land Acquisition and Protest in West Bengal' (n 27) 166.

⁵⁸ Das, 'Pragmatic Negotiations and the Farmers of Singur' (n 25) 310.

⁵⁹ Sanjoy Chakravorty, 'Land Acquisition in India: The Political Economy of Changing the Law' in Sanjoy Chakravorty and Amitendu Palit (eds), *Seeking Middle Ground: Land, Markets and Public Policy* (OUP 2019) 15.

⁶⁰ *ibid.*

⁶¹ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) xvii.

⁶² Nielsen, 'Four Narratives of a Social Movement in West Bengal' (n 42) 448, 452.

⁶³ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) xx-xxv.

information – amongst the affected community members, between the affected community and the general citizenry more broadly, and ultimately to the state institutions.⁶⁴

These information flows are not however restricted merely to land prices. Empirical studies have shown that amongst those unwilling to have their land acquired, only a minority of them had substantial landholdings and their livelihoods tied to it, suggesting that there was something *beyond* the land pricing that was behind the resistance to the acquisition process.⁶⁵ It is here that legal empowerment becomes a part of the narrative. The information flows went beyond the issue of prices; improving information exchange was also what ultimately facilitated the landowners' assertion of their collective legal right to refuse acquisition and negotiate better prices.⁶⁶ Development economists, who have lauded the government's industrialization agenda, have also emphasized concerns regarding the transparency of land acquisition processes and information about the ultimate costs and benefits of the acquisition to land losers overall.⁶⁷ Indeed, ultimately, these changes in the agricultural land market in rural India – a greater transparency of price information as well as an increased emphasis on property rights – are extremely positive developments ultimately signifying "a better functioning market and democracy."⁶⁸

C. Agents of Change: Civil Society, Political Players, and the Media

The resistance to land acquisition by farmers built up through the coming together of better information on prices and a greater awareness of rights, creating its own 'feedback loop' and levelling the field between the acquirer and seller. This was facilitated by a host of non-state actors that played an active role in the movement at Singur – primarily civil society actors and a variety of political parties, catalysed by the media.

The primary role of civil society organizations has been the dissemination and exchange of information and building bridges between farmers, state institutions, and public opinion.⁶⁹ At the national level, their key contribution was undoubtedly in placing the issue of Singur within the wider debate on democracy, notions of citizenship, and rights.⁷⁰ At the community level, civil

⁶⁴ Chakravorty, 'Land Acquisition in India: The Political Economy of Changing the Law' (n 59) 15.

⁶⁵ Ghosh (n 35) 16.

⁶⁶ Chakravorty, 'Land Acquisition in India: The Political Economy of Changing the Law' (n 59) 15.

⁶⁷ Nielsen, 'Contesting India's Development? Industrialisation, Land Acquisition and Protest in West Bengal' (n 27) 156.

⁶⁸ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) xxix.

⁶⁹ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 9- 41.

⁷⁰ Nielsen, 'Not on Our Land! Peasants Against Forced Land Acquisition in India's West Bengal' (n 28) 233.

society organizations enabled the organization of farmers and their collective assertion of rights, a phenomenon that caught the attention of the mass media.⁷¹ Organizations involved in the process highlighted many facets of the problem, using a civil rights perspective to make the case against the use of force on protestors, looking at the issue of the acquisition of agricultural land through the lens of the right to food, as well as critiquing the consequences of development-induced displacement. This is not to say that the involvement of civil society has always been that of a completely *impartial* facilitator of information flows. Singur was also seen as an opportunity by groups intrinsically opposed to private capital and the larger development agenda that they claim it represents, to build support for their point of view.⁷²

The involvement of political parties has been inconsistent and opportunistic, but nevertheless crucial to the process.⁷³ Mamata Banerjee, leader of the Trinamool Congress Party which was in opposition in the state at the time, was a key actor in supporting the SKJRC.⁷⁴ The TMC provided organizational strength at a scale that would not have been possible for civil society alone, and attracted media attention to the case of Singur that reinforced public opinion and awareness.⁷⁵ While the farmers also approached the courts with their matter, it remained only one of the means to take forward their demands within the larger strategy of political mobilization. Their legal challenge to the land acquisition was bolstered by the election of the TMC and the discussion for reform of the legislation in the Parliament. However, the appeal pending before the Supreme Court of India lost its significance in light of these events, particularly the introduction of the Land Acquisition, Rehabilitation and Resettlement Bill in the Parliament in 2011.⁷⁶ Thus, in this case, it was primarily the civil society, political opposition, and the media that played a role in the legal empowerment process, using a variety of approaches to help farmers better understand both, the law and the market, and ultimately enabling them to 'demand' reform of the old land acquisition law.

IV. LEGAL EMPOWERMENT AND DEMAND-SIDE STRATEGIES: TOOLS FOR LAW REFORM

As can be seen in Section III above, a variety of political, economic, and social factors were key to the reform of India's eminent domain law, introduced

⁷¹ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 41.

⁷² Nielsen, 'Contesting India's Development? Industrialisation, Land Acquisition and Protest in West Bengal' (n 27) 160-161.

⁷³ Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (n 10) 37.

⁷⁴ Das, 'Pragmatic Negotiations and the Farmers of Singur' (n 25) 308.

⁷⁵ Nielsen, 'Not on Our Land! Peasants Against Forced Land Acquisition in India's West Bengal' (n 28) 232.

⁷⁶ *ibid.*

to meet a specific *demand* for a land acquisition mechanism that satisfied the requirements of both, *procedural* and *substantive* justice. Among these were: a legal and institutional environment of rights-based legislations that facilitated the *legal empowerment* of affected communities, a heightened legal and economic awareness amongst those who stood to lose their property by way of land acquisition, as well as the effective involvement of non-state actors acting as agents of information within the community and influencers of opinion at the national level. The view put forward in this section of the paper is that there is a significant synergy between legal empowerment and its role in rule of law reform on the one hand, and demand-side strategies for governance that are rooted in strengthening the voice and capabilities of people, especially the poor and marginalized, to 'demand' accountability from the state, on the other hand.⁷⁷

The 'demand for good governance' refers to the 'ability of citizens, communities and civil society organizations to demand greater accountability and responsiveness from public officials and service providers'.⁷⁸ In this sense, legal empowerment strategies are seen as *complementary* to social accountability interventions that stress the use of information channels and participatory mechanisms to call for improved public service.⁷⁹ In particular, the legal empowerment approach to the rule of law emphasizes legal education – both as regards the scope and content of rights, as well as the skills to access and leverage the law – thus providing precisely the tools required to generate a *demand* for improved governance mechanisms.⁸⁰ It is argued here that the transformation of the land acquisition law in India provides a persuasive case for how legal empowerment strategies can serve legal reform in moving towards a "thick" conception of the rule of law, engendering substantive justice.

In this case of reform of an important legal institution – India's land acquisition law – the generation of such a demand has resulted from information flows about *legal* rights, coupled with an economic awareness among farmers about the price of their land, in equal measure. It is through the mechanism of these information flows specifically – the disclosure of information on government rules and decisions, the interpretation of legal rules to foster a better understanding of the law amongst the general population, and the widespread

⁷⁷ Ana Palacio, 'Legal Empowerment of the Poor: An Action Agenda for the World Bank' (World Bank 2006) 9 <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalEmpowermentofthePoor.pdf>> accessed 8 December 2020.

⁷⁸ Sanjay Agarwal and Warren A Van Wicklin III, 'How, When, and Why to Use Demand-Side Governance Approaches in Projects' (World Bank 2011) 1 <<http://documents.worldbank.org/curated/en/823571468331836996/How-when-and-why-to-use-demand-side-governance-approaches-in-projects>> accessed 8 December 2020.

⁷⁹ Vivek Maru, 'Allies Unknown: Social Accountability and Legal Empowerment' (2010) 12(1) Health and Human Rights in Practice 83.

⁸⁰ Golub (n 16) 165.

diffusion of such rights and law related information⁸¹ – that the reform process was set in motion. The educative role played by information agents such as civil society actors, political parties, and the media, in this process of legal empowerment of the farmers in Singur, was notable. And true to the methods of legal empowerment, this reform process was rooted in the community but scaled up nationally, striking at the heart of the very inequality of power, both in terms of *legal and economic* awareness, that had thus far allowed an unjust model of land acquisition to be perpetuated.

Overall, the working of legal empowerment in this manner at the grassroots level is illustrated in its role in the creation of a *well-informed constituency* in Singur, that was both, aware of its legal rights *and* had the potential to resist what was viewed as an unjust snatching away of their land by the state, escalating their demand for reform to the national level. The legal empowerment of Singur's farmers, in fostering their resistance of the acquisition of their farmland, fundamentally altered the power dynamics underlying the reform process. The new Land Acquisition Act of 2013, on account of the emergence of this constituency of farmers demanding justice in eminent domain law reform, thus countered other pressures, balancing the demands of the farmers with the traditional interests of capital. However, it was almost equally important that these events took place against the backdrop of the Central Government's rights-based approach to law-making and a political environment *conducive* to this reform. In this sense, it must be recognized that there do remain other political, legal, and institutional hurdles that can limit the potential of demand-driven reforms in fulfilling their purpose. In this section, the events subsequent to the passing of the Land Acquisition Act, 2013 are analysed, illustrating some of the challenges faced in the realization of its purpose. These in turn, are broadly indicative of the potential shortcomings of the employment of legal empowerment as a *singular* reform strategy.

A. Balancing Supply and Demand: Politics Matters

While the demand side of governance stresses the role of non-state actors, most often civil society, in ensuring accountability and transparency, the supply side primarily concerns itself with improved state capacity for good governance. However, it cannot be emphasized enough that efforts to strengthen the demand for reform must be accompanied by commensurate efforts on the supply side, taking a 'balanced approach'. Two major factors influence the supply side – institutional capacity to uphold the rule of law and the political will to see this through.⁸² While the institutional capacity of the state has been the major focus of reform efforts until now, international agencies and grassroots

⁸¹ *ibid* 1-2.

⁸² Jennifer M Coston, 'Administrative Avenues to Democratic Governance: The Balance of Supply and Demand' (1998) 18 *Public Administration and Development* 479, 480.

organizations alike have identified the absence of political will as a recurrent obstacle to reform projects.⁸³

In the events subsequent to the passing of the 2013 Act, it is this very challenge of political will that is seen to underlie an unravelling of key aspects of the land acquisition law reform process. Soon after coming to power in the general election of 2014, the newly elected National Democratic Alliance-led government passed an executive Ordinance in December 2014 significantly diluting the provisions of the newly reformed law. It exempted five broad categories of projects from key requirements of the 2013 Act, such as obtaining the consent of affected families and the conduct of social impact assessments.⁸⁴ Following two further instances of re-promulgation of the Ordinance and failed attempts to write the Ordinance into law by way of the passing of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 ('the LARR Amendment Bill of 2015')⁸⁵ that remains pending before a Joint Parliamentary Committee, individual state governments have been encouraged to move forward with amendments to the 2013 Act to undermine its public purpose.⁸⁶ To date, the states of Tamil Nadu, Gujarat, Maharashtra, Rajasthan, Telangana, and Jharkhand have all introduced various amendments giving effect to the 2014 Ordinance and side-stepping many of the protections provided to landowners under the 2013 Act.⁸⁷

While this is indeed a disappointing development, given the long struggle for justice in the land acquisition process led by the farmers in Singur, it is important to recognise that such developments have not transpired in *all* states, nor has the LARR Amendment Bill of 2015 moved forward in Parliament. This remains a testament to both, the complex, politically charged nature of eminent domain law reform, as well as the power struggle imminent in the continued demand-and-supply battle for what different parties involved in the land acquisition process might perceive to be 'good governance'.

⁸³ See generally Fran Quigley, 'Growing Political Will From the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions' (2009) 41(1) Columbia Human Rights Law Review 13.

⁸⁴ Ramesh and Khan (n 3) 126. See KB Saxena, 'The Ordinance Amending the Land Acquisition Law (2013): Farmers Lose Out in the Unequal Contest of Power' (2015) 45(2) Social Change 324.

⁸⁵ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Second Amendment) Bill, 2015.

⁸⁶ Wahi and others, 'Land Acquisition in India: A Review of Supreme Court Cases From 1950 to 2016' (n 7).

⁸⁷ Naoyuki Yoshino and others, 'Land Acquisition and Infrastructure Development Through Land Trust Laws: A Policy Framework for Asia' (2018) ADBI Working Paper Series No 854 11 <<https://www.econstor.eu/bitstream/10419/190275/1/adbi-wp854.pdf>> accessed 8 December 2020; Anil Sasi, 'Centre's Bill on Hold, States Move on Land Acquisition' *The Indian Express* (25 December 2015) <<https://indianexpress.com/article/india/india-news-india/centres-bill-on-hold-states-move-on-land-acquisition/>> accessed 8 December 2020.

B. The Role of the Judiciary: Legal Interpretation Matters

The second issue that has recently arisen with regard to the 2013 Act has to do with the scope of application of its provisions to instances of land acquired *prior* to its coming into force. Specifically, Section 24(2) of the 2013 Act provides that in cases where land was acquired and an award was passed under the Land Acquisition Act, 1894, five years or more before the coming into force of the 2013 Act, but where physical possession of the land has not been taken or compensation has not been paid, the acquisition proceeding will be deemed to have *lapsed* and the Government may initiate fresh proceedings under the 2013 Act.⁸⁸ A number of cases have since been brought before the higher judiciary where the delay in taking possession of land under the old Act had resulted from the refusal of landowners to accept the compensation awarded, and the compensation amount was consequently deposited with the government treasury.⁸⁹

Conflicting interpretations of this provision have been rendered by two three-judge benches of the Supreme Court, calling into question the legal rights of numerous landowners who found themselves caught between the application of the old and new land acquisition laws. On the one hand, the Supreme Court in 2014 held that “the deposit of compensation amount in the government treasury is of no avail and cannot be held to be equivalent to compensation *paid* to the landowners/persons interested.”⁹⁰ This was inferred on the basis of Section 31 of the Land Acquisition Act, 1894 that mandates the deposit of compensation amount in court rather than in the government treasury upon refusal by landowners to receive the amount.⁹¹ Subsequently in another case brought before it in 2018, the Supreme Court held that the failure to have deposited the compensation amount in court in the cases described above does *not* mean that compensation has not been ‘paid’ for the purposes of the 2013 Act.⁹² The Court’s view in this case was that Section 24(2) was intended to benefit those who had not been offered compensation despite an obligation on the acquirer to pay such an amount. It was not meant to benefit those who had refused to accept payment for their land, and consequently caused a delay to the acquisition proceeding. The deposit of the compensation in the government

⁸⁸ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, s 24(2).

⁸⁹ *Pune Municipal Corporation v Harakchand Misirimal Solanki* (2014) 3 SCC 183 (Supreme Court of India); *Indore Development Authority v Shyam Verma* (2018) 3 SCC 405 (Supreme Court of India). In this regard, see also, K Venkatraman, ‘Explained|What is the Furore Around the Land Law Case?’ *The Hindu* (20 October 2019) <<https://www.thehindu.com/news/national/what-is-the-furore-around-the-land-law-case/article29745931.ece>> accessed 8 December 2020.

⁹⁰ *Pune Municipal Corporation v Harakchand Misirimal Solanki* (2014) 3 SCC 183 [20] (Supreme Court of India).

⁹¹ *ibid* [15].

⁹² *Indore Development Authority v Shyam Verma* (2018) 2 SCC 405 [153] (Supreme Court of India).

treasury was hence considered to have amounted to ‘payment’ to landowners, with the effect that no new acquisition proceeding was required to be initiated under the 2013 Act.⁹³

The question regarding the correct interpretation of Section 24(2) of the 2013 Act has since been referred to a larger five-judge bench. This was settled by way of a recent judgment holding that land acquisition proceedings will not be deemed to have lapsed if compensation, even when it is refused by the landowners, is deposited with the government treasury.⁹⁴ Ultimately, this illustrates the extent to which legal rights, even when demanded, and subsequently supplied by way of an Act of Parliament, can remain a distant dream for some of its beneficiaries. Ultimately, as can be seen here, much hangs in the balance, in terms of the intricacies and technicalities of legal interpretation of such legal rights and the circumstances in which they may be granted.

V. CONCLUSION

This paper has analysed the relationship between the rule of law and eminent domain, in the context of their common association with economic development. The broad-based demand for reform of the land acquisition law in India has raised questions of procedural justice and democratic participation in the process of India’s economic development. The analysis presented demonstrates that this demand can be viewed as resulting significantly from the *legal empowerment* of rural landholders, facilitated by non-state actors who provided them with improved channels of information about the price of their land, as well as the law and how to challenge it. Overall, it is seen that it was significant that this took place in a political environment in which the Central Government was cognizant of, and conceded to, the injustices caused by the colonial-era eminent domain law.

The Singur issue, in the manner that it has broadly been viewed, has been a movement to facilitate the trickle down of profits from capitalist development rather than a direct challenge to capitalism itself, while spurring a larger democratic debate on the unjust exclusion of agricultural landholders from the rural land market economy.⁹⁵ It is significant that armed with knowledge about their rights and the value of their land, farmers in Singur have applied free market principles to argue against government intervention in determining the price of their land –to them this was essentially a denial of their opportunity to be free

⁹³ *ibid* [99].

⁹⁴ Ananthakrishnan G, ‘SC: Land Takeover Won’t Lapse if Money Deposited Even if Owner Refuses to Accept’ *The Indian Express* (7 March 2020) <<https://indianexpress.com/article/india/supreme-court-land-takeover-will-not-lapse-if-owner-refuses-to-accept-6303157/>> accessed 10 March 2020.

⁹⁵ Nielsen, ‘Contesting India’s Development? Industrialisation, Land Acquisition and Protest in West Bengal’ (n 27) 166.

market actors in negotiating with the Tata company. They were acutely aware that once their agricultural land was acquired for industry, their neighbours would benefit from soaring market prices – an opportunity they were deprived of, at least in theory.⁹⁶ It is in this sense that the inherent relationship between a “thick” or substantive conception of the rule of law, as demanded by the farmers of Singur, and a well-functioning *market economy*, comes into sharper focus. That the awareness of the market value of land went hand-in-hand with an increased understanding of legal rights sparking the demand for change, is a sign of the maturing, as well as the co-evolution of the market and legal systems in the country.

In conclusion, by emphasizing participatory governance, legal empowerment may be viewed as playing an important role in addressing issues around inequitable access to markets and services for the poor. The legal empowerment approach through its participatory mechanisms plays a significant role in ‘levelling up’ the playing field to ensure that the poor can effectively participate in the broader market economy.⁹⁷ Though many obstacles remain in the realization of the purpose of the Land Acquisition Act of 2013 for its intended beneficiaries, based on this law reform experience, it would seem that the legal empowerment approach is a powerful alternative to the *stand-alone use* of orthodox approaches to legal and judicial reform, addressing asymmetries of both power and information in developing countries. That the Land Acquisition Act was born of a specific domestic *demand* for legal reform, despite the many challenges it faces, is promising for the overall effectiveness of this legal institution and the prospect of economic development that it brings.⁹⁸

⁹⁶ *ibid* 455.

⁹⁷ ‘Doing Justice to Sustainable Development: Integrating the Rule of Law into the Post-2015 Development Agenda’ (International Development Law Organization 2014) 5 <<https://www.idlo.int/sites/default/files/pdfs/Doing%20Justice%20to%20Sustainable%20DeveloDevel%20report.pdf>> accessed 8 December 2020.

⁹⁸ Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, ‘Economic Development, Legality, and the Transplant Effect’ (2003) 47(1) *European Economic Review* 165, 192.

ETHNOGRAPHIC STUDY OF RAPE ADJUDICATION IN LUCKNOW'S TRIAL COURT¹

—Neetika Vishwanath*

Criminal law has been a significant site of reform in the context of sexual violence in India. Beginning with the amendments in 1983, several Supreme Court decisions and legislations have brought changes to the rape law. The paper uses findings from an eight-week long ethnographic study of rape trials in Lucknow's Fast Track Court to argue that the legal changes have had little impact on the trial discourse. The author observed 95 rape trials, interviewed 12 lawyers, and conducted focus group discussions at 12 police stations in Lucknow. The paper exposes a chasm between the written formal law and the operational law in Lucknow's lower court. The paper also demonstrates the narrow understanding of 'real' rape amongst lawyers and police personnel involving stranger rapes resulting in serious injuries. Further, the paper uses two case studies from the ethnography to reveal the normalization of sexual violence in acquaintance rapes, resulting from a narrow conception of what constitutes 'real' rape. It is finally argued that the transformative potential of criminal law for sexual violence is rather limited. The paper concludes by advocating for strategies outside of criminal law to combat sexual violence.

¹ This paper is based on my MA in Women's Studies thesis submitted to the Tata Institute of Social Sciences, Mumbai, in 2016, under the guidance and support of my mentor Ms. Monica Sakhrani. I am grateful to the anonymous reviewers at the Socio-Legal Review for their feedback. I am also thankful to the participants at the Young Scholars Workshop (February 2020) at Humboldt University, Berlin. All errors are mine.

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I. INTRODUCTION

Criminal law has primarily driven the legal reforms on sexual violence in India. Beginning with the Criminal Law (Amendment) Act of 1983, significant changes have been made to both the substantive and procedural aspects of the law through various Supreme Court decisions² and legislative amendments.³ This paper exposes the limited role that the changes in formal criminal law have had on the trial discourse in rape cases. This is done by relying on findings from an ethnography of a Fast Track Court (‘FTC’) created in Lucknow for adjudication of rape cases, for eight weeks in April and May 2015. Courtroom ethnographies allow one to understand the interaction between social and legal processes and the manifestation of it in everyday legal practices. The paper also relies on semi-structured interviews with 12 lawyers and Focus Group Discussions (‘FGDs’) conducted at 12 police stations in Lucknow.

The findings from this ethnography reveal a chasm between the written law and the spoken law in the FTC in Lucknow. In doing so, it corroborates findings from Pratiksha Baxi’s ethnographic work on rape trials in Gujarat, in reference to which she suggests that, “state law is transformed in its localization, often to the point of bearing little resemblance to written law.”⁴ The actors within the criminal justice system continue to be guided by ‘phallocentric’ notions of sexual violence, which consequently impacts the way rape cases are argued and adjudicated in the trial court of Lucknow. By ‘phallocentric’, I do not merely imply sexist notions. Instead, I refer to a “specific disqualification of women and women’s sexuality” in rape trials in Lucknow.⁵ More than half of the trials I observed during the ethnographic period corresponded to criminalization of the exercise of sexual autonomy by a woman in choosing

² *Delhi Domestic Working Women’s Forum v Union of India* (1995) 1 SCC 14 (Supreme Court of India); *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490 (Supreme Court of India); *State of Punjab v Gurmit Singh* (1996) 2 SCC 384 (Supreme Court of India); *Railway Board v Chandrima Das* (2000) 2 SCC 465 (Supreme Court of India); *Sakshi v Union of India* (2004) 5 SCC 518 (Supreme Court of India); *Independent Thought v Union of India* (2017) 10 SCC 800 (Supreme Court of India).

³ Indian Evidence (Amendment) Act 2003; The Code of Criminal Procedure (Amendment) Act 2005; Code of Criminal Procedure (Amendment) Act 2008; Criminal Law (Amendment) Act of 2013; Criminal Law (Amendment) Act of 2018; The Protection of Children from Sexual Offences (Amendment) Act 2019.

⁴ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (OUP 2014) 27.

⁵ Carol Smart, *Feminism and the Power of Law* (Routledge 2002) 26.

a partner. 52 of the 95 trials involved runaway marriages between consenting couples, followed by a criminal complaint of rape against the man by the parents/guardian of the woman. Cases of acquaintance rape were subjected to the stranger rape framework and resultantly, reinforced problematic notions of consent.

The paper is divided into five parts. The first part discusses the significance of the methodology in offering an insight into the limited transformative potential of criminal law. The second part lays out the ethnographic site- an FTC, where all rape cases from the district were adjudicated. The third part describes the manner of conduct of rape trials in the FTC. The fourth part discusses the phallogentric notions about sexual violence and rape survivors that were revealed in the interviews and FGDs with lawyers and police personnel. This notion is bolstered by the empirical reality that more than 50% of the cases that I observed, that were being adjudicated as rape trials, were actually cases of runaway marriages involving consenting couples. The last part discusses the negative impact of the overarching narrow conception of what constitutes 'real' rape on trial discourse in the FTC.

The paper argues that changes in criminal law, without any efforts to address the social context of deep-seated structural inequalities which influence how law operates, are unlikely to bring any meaningful change in the trial discourse in rape cases. In doing so, the paper also acknowledges the limited role of criminal law in bringing about social change and advocates for conversations on alternative approaches outside of criminal law to address sexual violence.

II. EMPLOYED METHODS OF STUDY

A. Background

This paper is an extract from a larger study undertaken in 2015, which focused on understanding the construction of rape as a crime within the current legal discourse. The idea was to examine what the category of 'rape' encompassed in a given space and time, given the amendments to the rape law at that time. This was done by undertaking the ethnography of a courtroom that dealt exclusively with rape trials in the Lucknow district.

It is important at this point to reveal that most of the ongoing rape trials in the FTC during the ethnographic period corresponded to crimes committed before the coming into force of the Protection of Children from Sexual Offences (Amendment) Act of 2019 ('POCSO') and the Criminal Law Amendment Act ('CLA') of 2013. With the coming into force of the POCSO Act, cases where the survivor was a child (below the age of 18 years) were

heard in a special courtroom designated under the Act. However, since there were many pending cases with incidents prior to 2012, all such cases with child survivors were still being heard in the FTC. Most cases in the FTC corresponded to First Information Reports ('FIRs') dated as old as the year 2008. Therefore, the findings of this study cannot comment on the impact of the CLA 2013.

B. Methods and Tools

Ethnography primarily entails the researcher participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, and/or asking questions through informal and formal interviews, collecting documents and artefacts— gathering whatever data is available, to throw light on the issues that are the emerging focus of inquiry.⁶ Conventional ethnography therefore requires that the researcher spend an extended period of time in the field of study, which I was unable to do. To overcome the constraint of time, I used the method of focused or micro-ethnography. Focused ethnography is a method of research wherein a particular setting or topic is chosen and studied, instead of portraying the entire culture.⁷ It compensates for the shorter duration of field study with a more intense specific topic of study.⁸ The ethnography for this study focused on one particular courtroom in the District and Sessions Court, Lucknow in India, for a period of eight weeks from April 1, 2015 to May 31, 2015. Since all rape cases in the district were being adjudicated in this courtroom, the ethnography is comprehensive and representative of the whole district. But the period of eight weeks was not enough to track the journey of a case, since each case was, on an average, listed once a month, given the workload of the FTC. The time period, however, was nonetheless very instructive to understand the local practices and attitudes of the prosecutors, defence lawyers, and the presiding judge.

During the ethnographic period, I was a non-participant observer of proceedings in one courtroom, throughout the working hours, from 11 am to 4 pm, for a period of eight weeks. I took field notes using pen and paper. The selection of the courtroom for the purpose of ethnography was based on the area of research. This study focuses on rape trials, and there was just one courtroom at that time in the District and Sessions Court of Lucknow District, which heard and decided rape cases. I obtained consent from the presiding judge to observe the proceedings.

⁶ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (Routledge 2007) 3.

⁷ Harry F Wolcott, 'Making a Study "More Ethnographic"' (1990) 19(1) *Journal of Contemporary Ethnography* 44, 64.

⁸ Hubert Knoblauch, 'Focused Ethnography' (2005) 6(3) *Forum Qualitative Sozialforschung/ Forum: Qualitative Social Research* <<http://www.qualitative-research.net/index.php/fqs/article/view/20/43>> accessed 15 January 2020.

Another tool of data collection used for this study was in-depth, semi-structured interviews with lawyers. I conducted the interviews in a mix of English and Hindi, depending on the ease of the participant lawyers. Informed consent was taken from the participants. I made a conscious attempt to not use a fixed interview schedule, but asked participants to engage with broad themes and narrate and reflect critically on the subject matter. I interviewed 12 lawyers, which included 2 prosecutors who were posted in the FTC at the time, and 10 private lawyers who had represented both survivors and accused in rape trials. Two out of the 12 lawyers were women, including one prosecutor and one private lawyer. The selection of private lawyer participants was based on purposive snowball sampling. The duration of the interviews ranged from 30 minutes to an hour. The interviews were recorded after obtaining consent from the participants. One of the private lawyers did not consent to his interview being audio recorded. The interviews with the prosecutors were conducted in the courtroom, after working hours. The interviews with the private lawyers were conducted with them in their chambers, after the working hours of the court i.e. after 4 pm and over the weekends.

I used FGDs as a method of data collection while interacting with the police participants. In-depth interviews with investigating officers in rape cases would only give a partial understanding of such cases. This is because it is not just the investigating officer, but also the other staff at the police station who are involved in a case in different capacities. The criminal law is set into motion by lodging of the complaint by the clerical staff, followed by an investigation by several sub-inspectors and constables, headed by the investigating officer, along with the police officers who facilitate the recording of statements of witnesses and medical examination of the survivor. Hence, FGDs were chosen over in-depth interviews while collecting data from the police participants. FGDs allow a researcher to tap into the natural processes of communication, such as arguing, joking, boasting, teasing, persuasion, challenge, and disagreement. FGDs help to avoid decontextualization by providing an opportunity to examine how people engage in generating meaning, how opinions are formed, expressed, and modified within the context of discussion and debate with others. This was particularly insightful in understanding the opinions, notions, and myths held by the police in the context of rape cases.⁹ The FGDs were conducted in the Hindi language. The selection was done so as to be comprehensive and representative of the entire district. Hence, police stations were selected from the old, new, and rural parts of the district. Five police stations from the new part of the city,¹⁰ four from the old part,¹¹ and three from the

⁹ Sue Wilkinson, 'Focus Groups: A Feminist Method' (1999) 23(2) *Psychology of Women Quarterly* 221, 224-225.

¹⁰ Vibhuti Khand, Hazratganj, Mahila thana, Mahanagar, and Ghazipur.

¹¹ SGPGI, Talkatora, Saadatganj, and Bazaarkhala.

rural part¹² of the district were selected. I noted my observations using pen and paper, since the informants were not comfortable with audio recording.

C. Relevance of Trial Courts as Sites of Study

The relevance of this study lies in the fact that it uses sociological methods to detail the processes of law, unlike most existing literature on rape in the Indian context which have critiqued the legal discourse through textual analyses of higher court judgments. This study details the processes of law in a trial court in Lucknow. Trial courts are an important site to understand how the state law is transformed in its localization, often to the point of bearing little resemblance to written law.¹³ Empirical studies on sexual violence located in trial courts have been rather limited in India. Pratiksha Baxi's (2014) work on the trial courts of Gujarat was the first ethnographic work in the area. Besides this, Partners for Law in Development, based in New Delhi, undertook a study of 16 rape cases at the pre-trial and trial stages in Delhi, between January 2014 and March 2015.¹⁴ However, this study was published in May 2017, a year after I had completed the current study. This study was the first ever empirical ethnographic study to be located in a trial court in the state of Uttar Pradesh.

III. FAST TRACK COURT, LUCKNOW

Lucknow is the capital city of one of the most populous states - Uttar Pradesh - in India. According to the latest crime statistics by the National Crime Records Bureau, Uttar Pradesh, with 59,853 cases, recorded the highest numbers of crimes against women in India.¹⁵ Amongst 19 cities including Delhi, Lucknow took the fifth spot in the category of crimes against women, with 2,425 crimes being reported in 2019.¹⁶ The city of Lucknow has one District and Sessions Court complex where all civil and criminal matters within its geographical limits are adjudicated. The ethnography was undertaken in one courtroom in this complex which was designated as an FTC. They are essentially meant for speedy disposal of cases since pendency of cases is a big concern in the Indian judicial system. All rape trials in Lucknow were adjudicated in the FTC. This court did not deal with cases involving sexual offences against children. In 2012, a special legislation, the Protection

¹² Nigoha, Nagram, and Gosaiganj.

¹³ Baxi (n 4) 340.

¹⁴ 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi' (Partners for Law in Development January 2014 – March 2015) <<https://doj.gov.in/sites/default/files/PLD%20report.pdf>> accessed 16 March 2020.

¹⁵ 'Crime in India 2019: Statistics Volume-1' (National Crime Records Bureau 2019) 195 <<https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>> accessed 6 December 2020.

¹⁶ *ibid* 265.

of Children from Sexual Offences Act ('POCSO') was legislated for crimes against children, along with a designated special court. Therefore, the FTC only dealt with cases involving adult women and cases involving children corresponding to incidents before 2012.

The court staff comprised a presiding judge, one stenographer, one clerk, two attendants, one police constable, and three prosecutors, including one woman and two men. The courtroom was approximately 240 square feet in size. The presiding judge sat on a raised platform in the centre. The clerk sat at a distance of five feet from him on the right side. One-fourth of the courtroom was used as a record room. The *almirahs* (a cupboard) functioned as walls between the two rooms. On the opposite side, near the entrance, in the left corner of the room, there was a large table with chairs around it. The prosecutors occupied three of these chairs and the remaining were occupied by visitors. I sat on one of these chairs throughout the ethnographic period. In the right corner, there was an enclosed space created for accused persons where they were made to stand during trials. Right after this space, on the outside, a table and chair was placed for the constable.

The working hours of the FTC were from 11 am to 4 pm, with an hour long lunch break between 1 pm and 2 pm. An average of 20 cases were put up for trial every day. The cases put up on trial were listed on a soft board on a sheet of paper outside the courtroom in illegible handwriting. There was a practice of calling out the cause title of the case when it was being taken up for hearing. Cases were never called out in any order, unless the witnesses in a particular case came up to the prosecutors and informed them of their presence. Once a witness informed the prosecutor of his/her presence, the case was called out to inform the accused and the defence lawyer that it was being taken up for hearing. Out of the nearly 20 cases that would be listed every day, proceedings would take place in an average of five to six cases within the limited number of working hours.

During the working hours there was absolute chaos in the courtroom. It was filled with litigants and defence lawyers enquiring about the status of their cases, phones ringing, and people conversing. It was difficult to observe and understand a trial proceeding if one were seated on the chairs. I often had to stand close to where the judge sat to make sense of the proceedings. A peculiar feature of this FTC was simultaneous proceedings in two cases, with the judge recording the evidence manually or hearing the arguments in a case and the clerk recording the evidence in another case. The prosecutors would often not be present when the prosecution witnesses were being cross-examined by the defence lawyer. An average of twenty people were present in the court at all times during the working hours.

I observed a total of 95 rape trials during the ethnographic period. Less than 10 of the total cases involved rape by unknown perpetrators. 52 of the 95 trials involved runaway marriages between consenting individuals.

IV. MANNER OF CONDUCT OF TRIALS

In eight weeks, I observed that survivors were almost always accompanied by their family members. Most survivors and other prosecution witnesses appeared extremely anxious and intimidated. Most survivors and accused persons appeared to be from the lower socio-economic strata with little or no education. The law in India mandates rape trials to be conducted in a closed court to ensure confidentiality of the survivor and to provide a friendly environment to allow her to easily depose about the incident. However, the FTC rape trials were conducted in an open court, contrary to the law.¹⁷ *In camera* rape trials were unknown to the Lucknow courts, and therefore no concerns were raised about it. I enquired about the same from lawyers in my interviews. They seemed to be unaware of the concept of *in camera* trials and told me that even cases under the POCSO Act 2012 were tried in open courts. One possible reason for this that I could gather, after spending eight weeks in the FTC, was the quantum of workload. Adjudicating one trial at a time in a closed courtroom may have severely affected the disposal rate of the FTC, so the requirement was conveniently ignored.

Cases of survivors who had engaged private lawyers were given preference over the others and taken up for hearing first, since the cases were listed in no particular order. Accused persons faced the same situation. The ones who had engaged senior and successful defence lawyers were treated with more respect than most others who were visibly poor (but still had engaged a private and not a legal aid lawyer). Thus, the socio-economic status of the survivors and the accused persons played out as a very significant category in the courtroom.

The recording of evidence was often contrary to the provisions of the Indian Evidence Act 1872. During deposition, witnesses' oral statements were reformulated to be recorded in a written report.¹⁸ The reformulation has the effect of changing the original intended meaning of the statements. This has been explained in greater detail using a case study, in the next section of the paper. The word rape or *balatkaar* (Hindi word for rape) was not a prevalent one. Instead, *bura kaam* (bad act) was the used vocabulary for rape in the FTC. The lawyers and the survivors were hesitant to name the offence. This practice is indicative of the notions of honour and shame that are associated with sexual violence.

¹⁷ The Code of Criminal Procedure 1973, s 327(2).

¹⁸ Daniela Berti, 'Hostile Witnesses, Judicial Interactions and Out-of-Court Narratives in a North Indian District Court' (2010) 44(3) Contributions to Indian Sociology 235, 246.

During cross-examination of the witnesses, questions relating to the survivor's previous sexual experience, though prohibited by law under Section 53 of the Indian Evidence Act 1872,¹⁹ were posed to the survivor.

The level of preparation at the public prosecutors' end was extremely poor. When the survivor's examination-in-chief was recorded, the prosecutor would first ask her about the incident. This would also be a way of acquainting themselves with the facts of the case. They did not prepare for the case in advance, before the day of the hearing. One possible reason for this was the enormous workload of the prosecutors. However, in cases where the survivors had engaged a private lawyer, there was thorough preparation of the witnesses. It is important to iterate here that the socio-economic background of the survivor had an obvious bearing on their ability to engage private lawyers.

V. PHALLOCENTRIC NOTIONS OF SEXUAL VIOLENCE

Considerable amount of feminist analyses on sexual violence has demonstrated the phallocentric notions that surround it. As early as 1986, Susan Estrich examined the connections between the rape law as written by the legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors. She argued that the rape law envisions rape by strangers as 'real' rape, when in reality, acquaintance rape without extra violence was more common. In addition, she problematized the interpretation of consent in law and argued that it should be defined in a way that 'no means no'. According to her, a study of rape law is an illustration of sexism in the criminal law.²⁰ Similarly, Carol Smart has argued that the entire rape trial is a process of disqualification of women and celebration of phallocentrism. She identified women's bodies as a sexualized terrain which becomes a prime site of disqualification in rape trials. Her work elaborated that in a rape trial, a woman knows that she must name parts of her body, parts which in the very naming, openly reveal their sexual content.²¹ Catharine MacKinnon saw the law of rape divide women into spheres of consent according to indices or relationship to men. She argued that the category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. According to her, in rape jurisprudence, the meaning of the act is always derived from the perspective of the accused. While the injury in the rape lies in the meaning of the act

¹⁹ A new provision, s 53A, was inserted by the CLA 2013 which deals with 'evidence of character or previous sexual experience'. As per this section, in a prosecution for an offence of rape, where the question of consent is in issue, evidence of the character of the survivor or of such person's previous sexual experience with any person shall not be relevant on the question of such consent or quality of consent.

²⁰ Susan Estrich, 'Rape' (1986) 95(6) *The Yale Law Journal* 1087.

²¹ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194.

to its victim, the standard of criminality lies in the meaning of that act to the accused.²²

Indian scholarship on sexual violence reveals a similar assessment of the rape jurisprudence. Veena Das' seminal text looks at the judicial processes through which sexual and physical violence through the mechanism of rape is 'normalized' in Indian society. She argues that the 'consent' of the woman turns out to be the most significant category for distinguishing between non-punishable sexual commerce with a woman and the offence of rape against her. She assesses that consent is read as the absence of consent and non-consent as consent, depending upon where the woman stands in the system of alliance. She analyzes various High Court judgments to show how judges interpret the absence of injuries in a rape trial depending upon their understanding of the character of the woman and whether a woman 'habituated to sexual intercourse' is strongly bound within the structure of alliance or whether she can be treated as someone outside it. During judicial verification, courts construct the category of young males who are acting out their impulses and 'irrepressible sexual urges' when they rape women. She argues that it is not the protection of women from such men on the hunt, which is the purpose of the judicial intervention. According to her, through intervention, courts define the category of women on whom these urges may be acted out and separate them from the women on whom these acts may not be committed. The former are defined as women of 'easy virtue', while the latter are women who, in the future, may be integrated into the system of alliance or are already within it.²³ In her review of rape laws enacted during the 1980s, Flavia Agnes argued that the judgments of the post-amendment period reflected the same old notions of chastity, virginity, premium on marriage, and fear of female sexuality.²⁴ Pratiksha Baxi's book based on the ethnography of rape trials in Gujarat reveals multiple ways in which rape trials inscribe extreme indignity and humiliation on women's bodies. It exposes the localization of rape law in trial courts to an extent that it bears little resemblance to written law. Rather than bringing justice to the survivor, Baxi argues that rape trials reinforce deeply entrenched phallogocentric notions of justice.²⁵

Findings from my interviews with lawyers (including the two public prosecutors at the FTC) and the FGDs at police stations were consistent with the concerns that have been highlighted in the existing feminist scholarship on sexual violence. The conversations exposed a very strong notion that most rape

²² Catharine Mackinnon, 'Rape: On Coercion and Consent' in Katie Conboy, Nadia Medina, and Sarah Stanbury (eds), *Writing on the Body: Female Embodiment and Feminist Theory* (Columbia University Press 1997) 42.

²³ Veena Das, 'Sexual Violence, Discursive Formations and the State' (1996) 31 (35-36-37) *Economic and Political Weekly* 2411, 2420.

²⁴ Flavia Agnes, 'Protecting Women Against Violence? Review of a Decade of Legislation, 1980-89' (1992) 27(17) *Economic and Political Weekly* WS19.

²⁵ Baxi (n 4).

cases where women actually engage in consensual sex are false. The fact that a significant number of rape cases in the district were actually cases of runaway marriages where women were consenting parties bolstered this notion.²⁶

In runaway cases, couples elope to get married. Their families are opposed to it because they belong to the same *gotra* (considered to be equivalent to a clan. Marriage within the same *gotra* is prohibited by custom as it is regarded as incest) or to a different caste or religion.²⁷ In response to this, the woman's parents invoke the law by lodging a complaint of kidnapping against the partner, often stating that their daughter is a minor (even if she was an adult).²⁸ This method is adopted because it only requires proving that the 'child' was taken out of parental custody, and her own will is considered irrelevant in law. Otherwise, the intention of the accused would have to be proved, which would make conviction that much harder.²⁹

The Indian Supreme Court in *Lata Singh v State of Uttar Pradesh* ruled that:

... this is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate

²⁶ The interpretation of runaway marriages as rape cases is not unique to the FTC, Lucknow. Rukmini S, 'The Many Shades of Rape Cases in Delhi' *The Hindu* (29 July 2014) <<http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>> accessed 15 January 2020; Bharti Ali, Maharukh Adenwalla, and Sangeeta Punekar, 'Implementation of the POCSO Act: Goals, Gaps and Challenges' (HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children 2017) 101 <<http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>> accessed 31 October 2020; 'Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, 2018' (Centre for Child and the Law, National Law School of India University, Bangalore 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-special-courts-challenges-and-issues-1.pdf>> accessed 15 January 2020; Preeti Pratishruti Dash, 'Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings From Trial Courts of Delhi' (2020) 4(2) *Indian Law Review* 1; Madhu Mehra and Amrita Nandy, 'Why Girls Run Away To Marry: Adolescent Realities And Socio-Legal Responses In India' (Partners for Law in Development 2019) <https://www.academia.edu/40718265/WHY_GIRLS_RUN_AWAY_TO_MARRY_ADOLESCENT_REALITIES_AND_SOCIO-LEGAL_RESPONSES_IN_INDIA> accessed 16 March 2020.

²⁷ Prem Chowdhry, 'Private Lives, State Intervention: Cases of Runaway Marriage in Rural North India' (2004) 38(1) *Modern Asian Studies* 55.

²⁸ Indian Penal Code 1860, s 363 deals with the punishment for kidnapping. It states that 'whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine'.

²⁹ Chowdhry (n 27).

acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.³⁰

Despite this ruling, patriarchal, familial, and legal forces continue to collude to frame consenting women as 'victims' under criminal law by contesting their majority.³¹

My observation of runaway cases as rape trials, and interviews with lawyers and police personnel about which I have written in detail elsewhere,³² corroborated Prem Chowdhry's analyses in the context of Haryana. In the 52 such cases that I observed in the ethnographic period, the woman's family was opposed to the marriage because the man belonged to the same *gotra*, different caste, or different religion. The opposition took the form of a criminal complaint through which, as argued by Chowdhry, the state colluded with the patriarchal family in controlling females and in maintaining the caste and kinship ideology which governs marriage alliances.³³ The ambiguities in the legal system were used to sidestep the rights of individuals. In doing so, there was blurring of love and rape, or consent and lack of consent, in such cases.³⁴

For the purposes of this paper, my reference to runaway cases is limited to highlighting its role in impacting the discourse on rape that became increasingly evident through my conversations with lawyers and police personnel. The fact that more than half of the cases at the ethnographic site were runaway cases involving consenting couples had the impact of such cases being identified as a 'typical' rape case and thereby bolstering the notion that most rape cases are false. While speaking to me about rape cases, lawyers and police personnel only used examples of cases involving runaway marriages. Women were tagged as 'habitual liars' and many police participants spoke about the

³⁰ *Lata Singh v State of Uttar Pradesh* (2006) 5 SCC 475 (Supreme Court of India).

³¹ The increase in the age of consent from 16 to 18 years with the POCSO Act has increased the possibility of young men being convicted as 'rapists'. The new Juvenile Justice (Care and Protection of Children) Act 2015 allows children aged between 16-18 years accused of heinous crimes like rape, murder, arson, etc. to be tried as adults under the Indian Penal Code. According to the Amendment, the Juvenile Justice Board ('JJB') will make an assessment of the mental state of the juvenile, and whether the crime was committed with an understanding of its consequences. Based on this assessment, the Board will determine whether to try the child as a juvenile or as an adult through the procedure laid down in the Code of Criminal Procedure 1973. Changes in the age were made despite the recommendations of the Parliamentary Standing Committee, which advised against reducing the age of juvenility based on established international human rights standards contained in the Convention on the Rights of the Child. The amendment to the age of juvenility was made despite major opposition from child rights groups, who have consistently emphasized the need for reform of juvenile offenders instead of retribution through adult incarceration. This increases the probability of young boys in consensual relationship with minor girls being convicted of rape.

³² Neetika Vishwanath, 'The Shifting Shape of the Rape Discourse' (2018) 25(1) *Indian Journal of Gender Studies* 1.

³³ Chowdhury (n 27).

³⁴ Baxi (n 4) 3235.

need to 'control' women. My probes on the fact that it was actually the parents of the women misusing the rape law were repeatedly dismissed. The only female private lawyer I interviewed told me that it was 'impossible' to rape an adult woman (unless it was a brutal gang rape), and in all cases of rape filed by an adult woman, she was always a consenting party.³⁵ Similar views were expressed by a constable who said that, "it is unbelievable that a woman above the age of 18 years could be raped."³⁶ One of the woman constables at Nigoha police station said that women were always at fault because they were a consenting party in most cases.³⁷

In the eight weeks that I spent in the courtroom around public prosecutors, it became evident to me that trials involving rape of (almost) adult women by former sexual partners or known persons were often characterized as 'fake' cases. In reference to a trial involving rape by a former partner, one of the male prosecutors remarked, "First you roam around with him and then you lodge a complaint of rape against the same person. How can this be allowed?"³⁸ On another occasion, an ongoing trial involving gang rape of a college-going girl by her boyfriend and his friends was characterized as 'fake' to me. I was told by the female public prosecutor that it was impossible for a survivor to appear so calm and composed in a courtroom with her rapists around. The prosecutor was convinced that this was a case of consensual activity.³⁹

Such views also find mention in a book on medical jurisprudence by Modi, which states that:

In the majority of rape cases of an adult woman, the charge is made with the object of blackmail, or the act is done with the consent of the woman but when discovered, to get herself out of the trouble, she does not scruple to accuse the man of rape. If the complaint is made a day or two after the act, the case is probably one of concoction. It is also necessary to note the previous character of the female, and her relations with the accused.⁴⁰

³⁵ Interview conducted on 16 May 2015.

³⁶ FGD conducted at *Ghazipur* Police Station on 11 May 2015.

³⁷ FGD conducted at *Nigohathana* on 27 May 2015.

³⁸ This comment was made by one of the male prosecutors on 13 April 2015 in connection to a case that was listed for hearing – *State of UP v Narendra Tripathi*.

³⁹ *State of UP v Ujjwal Handa* Crime No. 37 of 2014 and Sessions Case 742 of 2014 (District and Sessions Court, Lucknow).

⁴⁰ Jaising Prabhudas Modi, *Modi's Textbook of Medical Jurisprudence and Toxicology* (NM Tripathi 1969) 253-254.

This particular textbook occupies a very important place in rape trials in India and is widely used by lawyers and judges.⁴¹ The section of the book on sexual offences was recently revised to overcome misinformation and negative stereotypes relating to sexual violence and survivors thereof. However, I found defence lawyers in the FTC still using and citing the older version of the book which contains such problematic text. This found no opposition from the prosecutors or the judge, possibly because they also subscribed to a similar understanding of sexual violence.⁴²

Medico-legal certificates ('MLCs') in rape cases in India comment on injuries and the status of the survivor's hymen. This can be attributed to the narrow understanding of sexual violence involving penetrative violent rape with the assumption of a 'virgin' survivor.⁴³ The condition of the hymen is seen as indicative of the woman's sexual history.⁴⁴ In cases involving runaway marriages, since the couple has been sexually active, most MLCs record the condition of the hymen as "old, torn and healed". The hymen being "old, torn and healed" is interpreted to mean that 'real' rape cases are violent and result in injury to the hymen. This found iteration in the interviews and the FGDs.

Runaway cases forming a significant proportion of rape cases in the district also contributed to a very problematic understanding of what constituted 'real' rape in the minds of the lawyers (including prosecutors) and police officers. Susan Estrich writes that 'real' rape is constituted by a sudden, surprise attack by an unknown perpetrator. It occurs in an isolated, but public location, and the survivor sustains serious physical injury, either as a result of the violence or as a consequence of her efforts to resist the attack.⁴⁵ Cases that depart from the defining features of this paradigm are less likely to be accepted as genuine cases.⁴⁶

⁴¹ Durba Mitra and Mrinal Satish, 'Testing Chastity, Evidencing Rape' (2014) 49(41) *Economic & Political Weekly* 51, 53.

⁴² It is difficult to say with certainty whether there was lack of knowledge about the existence of an updated publication. But in the eight weeks I spent at the FTC at Lucknow, I found a general indifference amongst the lawyers and judges to keep themselves updated about legal developments. The use of an outdated version of Modi's textbook was one such instance.

⁴³ Based on her analysis of the judicial discourse on rape through High Court judgments, Veena Das argues that rape trials display a binary classification between women who are virgin and those that are sexually experienced. Virgin women and women in matrimonial alliances (good women) are seen as ideal victims who deserve the protection of the law. However, women who are 'habituated to sexual intercourse' with men who are not their husbands (bad women) do not have rights to the protection of the state. *See* Das (n 23) 2418.

⁴⁴ Mitra and Satish, 'Testing Chastity, Evidencing Rape' (n 41) 56.

⁴⁵ Mrinal Satish found that absence of injury in rape cases or cases entailing rape by a stranger were among the prime factors considered in rape sentencing. While absence of injury has the impact of lessening the quantum of sentence, stranger rapes are necessarily considered more traumatic than acquaintance rape and result in harsher sentences. *See* Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press 2016).

⁴⁶ Susan Estrich, *Real Rape* (Harvard University Press 1987) 1179.

Five lawyer participants spoke about the significance of medical evidence in a rape case. According to them, it was crucial in defence to show that the woman was habituated to sex and thus was a consenting party to the act. One private lawyer who had also represented survivors in rape cases was of the view that it was easier to get a conviction in a case of rape if the woman had suffered injuries. He used the word 'preferred' for such evidence because it made his task 'easier'. Similar views were expressed by barristers in a study conducted by Temkin. Strong medical evidence of injury was regarded as particularly important, indicating that stranger rape cases with injuries were easier for securing a conviction.⁴⁷

VI. THE NARROW UNDERSTANDING OF RAPE IN TRIAL DISCOURSE

This overarching narrow understanding of rape among actors within the criminal justice system had a damning impact on the everyday legal practices in the FTC. All cases that were listed in the FTC were subjected to a 'real' rape framework, which assumes an unknown perpetrator. This was at odds with the fact that less than 10 cases in the FTC involved rape by strangers. Even nationally, 93% of rapes against both women and children involve known perpetrators.⁴⁸ However, it was a 'real' rape framework of stranger violence that all cases were subjected to, in the way evidence was recorded and the witnesses were cross-examined. Cases involving children were exceptions to this: in these cases, the question of age was determinative of the outcome irrespective of the consent. Cases involving rape of adult women by known perpetrators revealed the deep-rooted phallogentric notions that plague the rape discourse.⁴⁹

The practice in the FTC was that the deposition of the survivor would begin with the prosecutor asking her about the incident, the response to which would be reformulated and recorded in the form of a statement. There would be follow-up questions on resulting injuries, resistance offered by the survivor, and her conduct immediately after the offence. The evidence was often a replica of the complaint submitted to the police, with no new facts, and a complete absence of the complexities of sexual violence. In the end, the prosecutor would ask the survivor to identify if the accused person(s) was present in the courtroom and point in that direction. The defence strategy across trials focused on imposing their version of events on the evidence. Irrespective of the facts of the case, the defence lawyers asked a similar set of questions

⁴⁷ Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219, 224.

⁴⁸ 'Crime in India 2017, Tables 3A.4 and 4A.10' (National Crime Records Bureau 2017) <<http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>> accessed 15 January 2020.

⁴⁹ Das (n 23); Baxi (n 4).

in cross-examination. In cases involving known perpetrators, and such cases were often the norm, they posed leading questions to the survivor, to bring into evidence the fact that the accused and survivor were known to each other. Defence lawyers asked questions to establish that the survivor did not 'resist' enough and therefore consented to the act. In cases where the MLCs recorded no injury and noted the hymen to be 'old, torn and healed', this was also used against the survivor to show consent on her part. This line of reasoning corresponded with the views expressed by them in the interviews with me.

I will now use two case studies from the ethnography to discuss the normalization of sexual violence in acquaintance rape, which results from a narrow conception of what constitutes 'real' rape. This will be done by detailing the processes of recording of evidence, which often does not make it to the official court records or judgments.

A. State of Uttar Pradesh v Raj⁵⁰

I observed this case during the ethnographic period. A 19/20 year old girl was raped by a neighbour. The survivor was in court to testify. I sat next to her and the female prosecutor that day, in the morning. The moment the survivor saw the accused enter the courtroom, she started shivering and crying in fear. The female prosecutor asked the survivor what had happened. With a lot of difficulty, she managed to state that the accused had done *bura kaam* (the literal meaning of the term is 'bad act'. Here, the term is used to mean that the accused had raped her). Once the testimony was recorded in a few lines with utmost difficulty, the cross-examination was conducted.⁵¹

Question 1: Did the accused do a bad thing to you on his own or did you ask for it? [*Aapke saath battameezi khud se ki thi ya aapne kaha tha?*]

Answer 1: He did it forcefully. [*zabardasti.*]

Question 2: Did you ask the accused to marry you? [*aapne usse kaha tha shaadi karo?*]

Answer 2: I did not say that, I told him that I did not want to marry him. [*Humne nahi kaha, humne kaha hum shaadi nahi karenge.*]

Question 3: How old were you? [*Umra kitni hai aapki?*]

⁵⁰ Crime No. 261 of 2014. The text in this section within square brackets is the text in the original language Hindi.

⁵¹ Cross-examination conducted on 14 April 2015.

Answer 3: 20 years. [*Bees saal.*]

Question 4: Do you still want to get married to the accused ?
[*Aap abhi isse shaadi karna chahti hain?*]

Answer 4: No. [*Nahi.*]

Question 5: When he engaged in a bad act with you, what did you do? [*Yeh bataiyye jab isne aap ke saath galat kaam kiya, toh aapne kya kiya?*]

Answer 5: I told him to stop. [*Maine mana kiya tha.*]

The cross-examination was stopped at this point as the survivor was visibly nervous and was not doing too well. These short set of questions during the cross-examination are enough of an insight into the cultural assumptions that make their way into the trial discourse. Question 2 and 4 are of special significance in this analysis as they are good examples of how leading questions from the defence lawyers allow for their version of events to find a way into the evidence. In this case, it being the fact that the survivor had, at some point, wanted to get married to the accused. It is pertinent to note that while this was how the cross-examination was conducted, the recording of the same is in the form of a statement. Therefore, a response to Question 4 would be recorded by the clerk roughly as, “No, I don’t want to get married to the accused (now)”. Question 4 is an example of what has, in existing literature, been characterized as a ‘declarative portion’ or ‘presupposition’ of the defence lawyer’s question.⁵² These presuppositions allow for the creation of a powerful ideological lens through which the events in question are then understood. In this case, it was the fact that the survivor at some point wanted to marry the accused. Mrinal Satish’s work on rape sentencing in India demonstrates that such ‘extra-legal’ factors often make their way into the sentencing stage, resulting in lesser sentences.⁵³ In other instances, they may also become the basis for dismissal of rape charges altogether - by implying that if the survivor had wanted to marry the accused at some point in time, she may also have consented to the sexual act.

⁵² Susan Ehrlich, ‘Perpetuating—And Resisting—Rape Myths in Trial Discourse’ in Elizabeth Sheehy (ed), *Sexual Assault Law, Practice, and Activism in a Post-Jane Doe Era* (University of Ottawa Press 2012) 396.

⁵³ Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (n 45).

B. State of Uttar Pradesh v Kallu⁵⁴

This case was decided during the ethnographic period, and I had a chance to observe the trial and study the case file once the judgment was delivered. The entire defence strategy rested on establishing an existing relationship between the survivor and the accused, to discredit the charge of rape.

The incident dated April 2010 and the complaint of rape was lodged after four weeks, in May 2010. The accused was the survivor's neighbour and a distant relative. He had entered her house finding an opportunity when her parents had gone out, and then raped her. Following the rape, he threatened her not to tell anyone about it, or else he would kill her parents. The survivor, who was also the complainant in the case, was an illiterate woman. In the complaint submitted to the police, she was stated to be 16 years old at the time of the incident.

According to the prosecution, the police refused to lodge a complaint on the day of the incident. It took a month and the survivor had to approach a senior-ranking police officer to get the police station to register the complaint of rape. The mother of the survivor was one of the prosecution witnesses. She spoke about pressure from the accused's family to 'compromise' (*samjhauta*).⁵⁵ The survivor's father, who was also a prosecution witness, mentioned that the complaint was lodged only after the matter could not be 'settled' in the *panchayat* (village council). The *panchayat* had allegedly suggested that the accused marry the survivor as a punishment, to which he did not agree.

The medical examination of the survivor included the two-finger test. The test involves insertion of two fingers into the vagina of the rape survivor to note the presence or absence of the hymen and the size and laxity of the vagina. The state of the hymen is also inaccurately used to form an opinion on whether women are habituated to sexual intercourse or not. Kalpana Kannabiran refers to the two-finger test as a "demonstration of the patriarchal encoding of the female body".⁵⁶ The test has been held as inhumane and barbaric by the Supreme Court,⁵⁷ and is forbidden as per the 'Guidelines and Protocols: Medico-Legal Care of Survivors/Victims of Sexual Violence' issued by the Ministry of Health and Family Welfare in 2014.⁵⁸ In my time at

⁵⁴ *State of UP v Kallu* Crime No. 191 of 2010, Sessions Trial No. 1105 of 2010, decided on 7-4-2015 (Fast Track Court, District and Sessions Court, Lucknow).

⁵⁵ Pratiksha Baxi, 'Justice is a Secret: Compromise in Rape Trials' (2010) 44(3) Contributions to Indian Sociology 207, 209-211.

⁵⁶ Kalpana Kannabiran, 'Sexual Assault and the Law' in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (Sage 2008) 79.

⁵⁷ *Lillu v State of Haryana* (2013) 14 SCC 643 (Supreme Court of India).

⁵⁸ 'Guidelines and Protocols: Medico-Legal Care of Survivors/Victims of Sexual Violence' (Ministry of Health and Family Welfare, Government of India March 2014) 28 <<https://main>.

the FTC, I observed that there had been a change in the pro forma for medical examination after the coming into force of the CLA, 2013. Pro formas in cases instituted after the CLA no longer made mention of the two-finger test. This led me to conclude that perhaps the test was no longer part of the medical examination of survivors. However, in my conversations with at least seven defence lawyers it emerged that the two-finger test was still being routinely conducted. The only change in status being that this information was not being recorded now. This is one of many instances that expose the chasm between the written law and the practices in lower courts. Except that in this case, survivors will continue to be violated by the invasive two-finger test conducted on them without it ever making it to the official records.

In the present case, the MLC noted that the survivor's hymen was old, torn, and healed. The survivor was also subjected to an ossification test to determine her age, since she did not have any documentary evidence of her age.⁵⁹ The age was determined as more than 18 years at the time of the incident.

The deposition of the survivor recorded the happening of the offence with much emphasis on the fact that the survivor had tried to resist the violence and raise an alarm, despite the fact that the accused had stuffed her mouth with a piece of cloth.

The defence characterized the charges as false by presenting the existence of a sexual relationship between the accused and the survivor in the past. It was the defence's case that the survivor's family lodged this case of rape to extract money from the accused person's family.

While reading the case file, I managed to record a portion of the cross-examination of the survivor, which is very instructive for the purposes of this paper.

I didn't know these people from before, my parents did.

When Kallu raped me, I did not scream.

(Then she mentioned how Kallu came in and said that he had come to meet her parents and kept waiting for an hour).

mohfw.gov.in/sites/default/files/953522324.pdf> accessed 9 October 2020.

⁵⁹ This test is conducted when there is no documentary evidence of age, as per the requirements of the Juvenile Justice (Care and Protection of Children) Act 2015. The test is an opinion on the approximate age of the woman based on the fusion of her wrists, elbows, and knees based on the X-ray examination conducted by a radiologist. A margin of error of two years is normally accepted in this test.

(The survivor is illiterate and it is evident from the record that she had a lot of trouble answering questions around her age and the date of the offence and complaint, etc.)

I was not wearing bangles on the day of the incident.

(She then added that the accused had come to give money to her parents.)

I have 6 siblings and everyone goes out to work.

Kallu had a piece of cloth which he stuffed in my mouth. I did not push him out of the house even though Kallu got a piece of cloth with him. (This was asked three times and hence mentioned thrice in the record)

I am not giving a statement against the accused because of the people from my locality. They do want the accused to be punished. (The record seems to indicate that the survivor did not understand the question properly)

I know that the accused wears underwear.

I did not bleed even though the accused raped me.

What the accused did with me did not make me feel good, he did a bad act with me.

It is wrong to say that I have filed this case to extort money from the accused persons' families. (Before this, the cross-examination focused extensively on the fact that the survivor's family was extremely poor.)

I am 20 years old. I was supposed to be married to Kallu. It is wrong to say that because I had a questionable character, Kallu refused to marry me and I have filed this case to get back at him.

The excerpts from the cross-examination reveal the encoding of damaging cultural mythologies into the declarative portions of questions. The defence lawyer has used these myths to cast doubt on the allegations of rape. The question around the piece of cloth is meant to introduce a doubt about 'utmost' resistance to the act from the survivor. The lack of bleeding is meant to suggest that the survivor was habitual to sexual intercourse and therefore, may have engaged in the act consensually. This is further supported by the

introduction of the fact that the accused and the survivor were once to be married to each other.

This case was decided during the ethnographic period in April 2015 after 131 hearings and resulted in an acquittal. The court relying on the ossification test held the survivor to be an adult. On the question of consent, the court concluded that, “the lack of consent could not be presumed in this case because the accused and the survivor were in a relationship in the past”.⁶⁰ The fact that, irrespective of a relationship in the past, a sexual partner could rape a woman, was completely delegitimized by the FTC. The court did not even bother to enter this exceedingly contentious terrain and conveniently relied on an extremely patriarchal approach to dismiss the sexual violence in the case.

The above-mentioned case studies are two amongst the many that revealed a strong influence of the stranger ‘real’ rape framework on the trial discourse at the FTC, Lucknow. The lack of nuance in approaching the deposition of the survivor in an acquaintance rape trial had a damning impact on the prosecution. The prosecutor prepared the survivor for the testimony by urging them to emphasize on the *bura kaam* and on the fact that the accused did it forcefully and that she tried her level best to resist or raise an alarm. However, the context and complexities in which acquaintance rape often occurs was completely kept out of the testimony. There was overemphasis on detailing the survivor’s attempt to resist the act and raise an alarm, to show that she in no way “asked for it”. The prosecution’s questions served to highlight that the survivor tried everything in her capacity to actively resist the sexual violence. It was almost as if the prosecutor anticipated a certain kind of blame allocation from the defence, which was attempted to be tackled by the survivor’s emphasis on utmost resistance to the act. The prosecution’s unwillingness to break out of the stranger ‘real’ rape framework in a trial allowed the defence to operate within the same context.

Writing about similar concerns in the Canadian context, Susan Ehrlich proposes to break out of the questionable cultural assumptions that circulate in acquaintance rape trials. She proposes the introduction of competing alternative narratives through the direct examination of the survivor by the prosecution. She uses a case study to display one such alternative approach. The (direct) examination by the prosecution in this case contextualizes the survivor’s actions within a sense-making framework. This approach acknowledges the structural inequalities that can characterize male-female sexual relations and the effects of such inequalities in shaping women’s strategies of resistance.⁶¹ However, the introduction of similar narratives in acquaintance rape trials in India first requires a fundamental shift in the patriarchal mindset that

⁶⁰ *State of UP v Kallu* Crime No. 191 of 2010, Sessions Trial No. 1105 of 2010, decided on 7-4-2015 (Fast Track Court, District and Sessions Court, Lucknow).

⁶¹ Ehrlich (n 52) 408.

equally affects the prosecutors, like the other actors within the criminal justice system.

VII. CONCLUSION

In this paper, I rely on the findings from non-participant observation of courtroom proceedings for eight weeks to reveal the scant impact of rape law reforms on the trial discourse in Lucknow's FTC. Further, I demonstrate the narrow understanding of 'real' rape prevalent amongst actors within the criminal justice system, through the interviews and the FGDs, and its resultant impact on the rape trials in the FTC. To set the context for the reader, I also offer a detailed description of the methods used and lay out the ethnographic field.

There is a wide dissonance between the written law and the operational spoken law in the FTC, Lucknow. Despite significant criminal law reforms, rape trials remain sites of phallocentric notions with an extremely narrow understanding of what constitutes 'real' rape. The treatment of acquaintance rape cases within the stranger 'real' rape framework has the effect of normalizing acquaintance rape, which in turn results in a differential treatment of 'good' and 'bad' women, as theorized by Veena Das.⁶² The empirical reality that most rape cases are in fact runaway marriages between consenting adults further adds to the belief in stranger rape as 'real' rape.

Changes in the formal criminal law, without factoring in and addressing the social context ridden with biases, has no real impact in making the criminal justice system more accessible and effective for women survivors of sexual violence. In fact, the biggest gaps for rape survivors relate to the pre-trial stage, starting with reporting the complaint at the police station, lack of support and guidance to the survivor during the investigation and pre-trial stage, through to trial stages.⁶³ The extremely low conviction rate in rape cases in India is one important indicator of the failure of criminal law in addressing sexual violence.⁶⁴

The findings of the ethnography also warn against the creeping hegemony of criminal law in addressing sexual violence against women. The fact that

⁶² Das (n 23) 2417-2418.

⁶³ 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi' (Partners for Law in Development January 2014 – March 2015) <<https://doj.gov.in/sites/default/files/PLD%20report.pdf>> accessed 16 March 2020.

⁶⁴ Crimes in India, NCRB 2018, reported the conviction rate in rape cases as 27.2%. 'Crime in India 2018: Statistics Volume I' (National Crime Records Bureau 2018) xv <<https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>> accessed 31 October 2020.

most rape cases being adjudicated in Lucknow correspond to the use of criminal law by parents to restrict the sexual autonomy of their daughters raises grave concerns. Not only do such cases dilute the rape discourse, they further a problematic notion about acquaintance rapes being false. In a context where more than 94% of the rape cases involve known perpetrators, it is perhaps time to also focus our energies outside of criminal law to combat sexual violence against women. Further, addressing sexual violence against women needs to be part of the larger movements to address caste-based violence, violence against religious and sexual minorities, class hierarchies, and violence against persons with disabilities. Unless there is an attack on these deep rooted structural inequalities which are created, sustained, and promoted by the society, criminal law will not play even the limited role it can, in addressing sexual violence.⁶⁵

⁶⁵ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage Publications 1996).

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