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Using legal empowerment for labour rights in India

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WIDER Working Paper 2017/57

Using legal empowerment for labour rights in India

Rina Agarwala*

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Abstract: This paper brings labour back into the literature on legal empowerment against poverty. Employing a historical lens, I outline three waves of legal movements. Each wave is distinguished by its timing, the state-level target, and the actors involved. In all three waves, legal empowerment was won, not bestowed. Labour played a significant role, fighting in each subsequent wave for an expanded identity to address exclusions. These findings reveal the false dichotomy used to distinguish workers from citizens and class from identity-based interests. They underline the significance of symbolic power of legal recognition, even in the absence of perfect implementation. Finally, they highlight contemporary workers as an overlooked, identity-based group that addresses the intersectionalities between class and ascriptive characteristics.

Keywords: labour, judicial activism, legal empowerment, informal workers, social movements, India

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1 Introduction

This paper uses the case of India to bring labour back into the recent literature on the use of legal empowerment to address poverty and exclusion. In doing so, it urges scholars to move past the false dichotomy too commonly used to distinguish workers or class interests on one hand from citizens or identity-based interests on the other. As I illustrate here, this dichotomy relies on an outdated conceptualization of workers and contemporary citizenship-based movements that fails to account for the still burgeoning, but significant efforts of contemporary informal workers.

The Commission on Legal Empowerment of the Poor (CLEP) defines legal empowerment as ‘a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens’ (UNDP and CLEP 2008). Since the early twentieth century, legal empowerment for the poor has emerged in liberal democracies (starting in the North and then expanding into the South) through constitutionally guaranteed legislation designed to protect individual rights. In India, legal empowerment for the poor has been creatively expanded since the 1980s to also protect *group-based rights* among vulnerable communities.

In this paper, I argue that legal empowerment for the poor (in India and elsewhere) has evolved through three waves. Each wave is distinguished by its timing, the state-level target of the demands, and the principal actors involved. In each wave, legal empowerment was *won*, not bestowed from above. Not surprisingly, each victory was also met with direct and indirect resistance that undermined one wave’s sustainability and opened the door for a subsequent wave, which in turn was marked by new formations and strategies, as well as strings still attached to history. In short, the three waves are simultaneously distinct and connected through the dynamic forces of ever-shifting state–society relations.

Scholars have long discussed the first wave, which ran from the early 1900s to the 1970s and was marked in parliamentary democracies by national-level legislation. The first wave featured organized labour, albeit narrowly defined as industrial workers formally recognized as operating under registered employers (Marshall 1964). Recently, many scholars have debated the effects of what I call the second wave, which ran from the 1980s to the present and was marked by public interest litigations (PILs) in high courts (Liu 2006; Mehta 2007; Ruparelia forthcoming; Zweig 2010). In contrast to the first-wave literature, organized labour has been surprisingly absent in studies on the second wave. In place of labour, identity-based groups (organized by ethnicity, caste, race, and gender), civic rights groups, and issue-specific groups have been heavily featured. In this paper, I offer a corrective to this literature to highlight labour’s (albeit restricted) involvement in second-wave legal empowerment.

Less articulated has been what I call a third wave, which began in the mid-1990s and utilized a hybrid approach to legal empowerment by bridging the legislative, executive, *and* judiciary branches of the state. Third-wave movements underline the importance of attaining symbolic power from legal recognition, a power that is often muted in the recent scholarly focus on implementation. In addition, third-wave movements have been significant for enabling labour to re-insert itself as a group-based actor alongside other identity-based groups (organized around gender, ethnicity, caste, etc.). Like first-wave labour groups, third-wave labour groups are fighting for legal empowerment along class-based identities. Unlike first-wave labour groups, however, third-wave labour groups include sub-altern workers who were long marginalized from earlier organized labour groups (such as women, low castes, and ethnic and racial minorities). Third-wave class-based organizations, therefore, not only act as an additional identity group (that is too often

overlooked), but also address the intersectionalities of class and ascriptive identities. These characteristics provide an important corrective to the simplified labour-centric vs. ascriptive identity-centric analyses on legal empowerment.

Drawing on primary research with informal workers' movements in construction and domestic work, I examine the changing junctures between labour and each of the three waves of legal empowerment efforts in India. What are the key similarities and differences? What implications do these waves have in our understanding of transformations from below? I conclude with implications that might help us understand the contemporary third wave of legal empowerment for the poor among Indian construction and domestic workers.

2 First-wave legal empowerment

In the first wave of legal empowerment for the poor, rights were divided into two categories. The first guaranteed what Isaiah Berlin famously termed 'negative freedoms' or what T.H. Marshall delineated as 'civil and political citizenship' (Berlin 2002; Marshall 1964). These rights, which included voting, holding property, free speech, movement, and association, protected individuals *from* interference by others. Over time, liberal democracies guaranteed such rights to all citizens, regardless of class or ascriptive characteristics such as race, gender, and ethnicity. These rights were normally protected under constitutional law and enacted through national parliaments. To be sure, social movements were instrumental in pushing parliaments to enact such legislation. In the case of India, the national independence movement fought to make these rights universally enshrined and judicially enforceable (across class, caste, religious identity, and gender) as 'fundamental rights' in Part III of the newly independent nation's first constitution in 1950.

The second category of first-wave legal empowerment rights included socio-economic rights or 'positive freedoms', such as the right to food, housing, health care, education, and income. These rights guarantee individuals' ability *to* act. Unlike civil and political rights, socio-economic rights have been less consistently guaranteed through national legislation in liberal democracies. That socio-economic rights are not universally and equally guaranteed to all citizens is not surprising given liberal democracies' commitment to capitalist market economies, which in turn sanction income-based inequalities. Scholars have instead noted the diverse varieties of capitalisms that have arisen across the world's liberal democracies to guarantee degrees of socio-economic rights. The social democracies of Scandinavia, for example, offer an expansive set of socio-economic rights guaranteed through robust redistributed welfare legislation, while the United States offers the least generous guarantees of socio-economic rights. In between, lie a plethora of arrangements spanning the global North and South. In India, socio-economic rights are promised in the so-called Directive Principles of Social Policy under Part IV of the 1950 constitution. Significantly, these rights are *not* enforceable or justiciable by any court, rather they are enumerated as guidelines or aspirations that the government (at the national and state levels) should use when framing laws and policies.

By the mid-1900s, organized labour throughout the world had become a key actor pushing legislatures to enact justiciable laws that would guarantee at least *some* socio-economic rights to the poor (Rueschemeyer et al. 1992). By drawing on cross-class coalitions and structural-historical moments (such as financial crises and liberation movements), labour movements pushed parliaments to enact laws to regulate working conditions, mitigate exploitation, and protect workers' dignity; apex judiciaries were empowered to protect these rights (Chibber 2003; Przeworski and Wallerstein 1982; Swenson 2002). While levels of implementation of such laws varied across national contexts, countries across the globe shared a justiciable commitment to

formally recognizing workers under law and ensuring that capital decommodifies workers' productive and reproductive labour through minimum wages, job security, work contracts, health care, and old-age benefits. Through these efforts, 'labour' was defined in idealized terms to represent those operating in the so-called modern, non-agrarian public sphere. While this definition omitted the millions of workers still operating in the invisible spaces of homes, unregulated workshops, and agrarian economies, its applicability was envisioned to expand with development, particularly industrialization.

2.1 First-wave legal empowerment and labour in India

Labour has been instrumental in using the law to alleviate socio-economic poverty in liberal democracies of the North and South. Even under British colonialism, Indian workers organized into robust and institutionalized trade unions, and successfully struggled to attain legislation that recognized them and their contributions *and* protected them against exploitation by employers and state bodies.¹ During the mid-1900s, the newly independent Indian government added additional legislation (through statutes, laws, and rules) to help the national and state governments further decommodify labour and restrain capital, thereby shifting the labour legislation framework from ensuring continued accumulation to ensuring social justice and a welfare state (Thakur 2007).² The 1950 Indian constitution stipulated that the state would be responsible for securing public assistance for its citizens in the case of 'unemployment, old age, sickness, disablement and other cases of undeserved want' (Papola and Pais 2007). Indian labour laws aimed to assist the state in fulfilling its promise by holding capital responsible for labour's needs. In return, organized labour promised industrial peace. This shift enshrined a new social contract where the state provided for labour's social regeneration and economic betterment in return for citizens' labour.

This protective legal framework continued to grow through the early 1980s. For example, the 1947 Industrial Disputes Act, which protects workers against lay-offs, retrenchment, and enterprise closures, was amended in 1972, 1976, and 1982—with each amendment giving ever more protections to workers (Papola and Pais 2007). Throughout, policy makers aimed (at least in their rhetoric) to eventually protect all Indian labourers under these laws (NCL 1969).

2.2 Limitations of first-wave legal empowerment

By the late 1970s, the first wave of legal empowerment for the poor was beginning to wane. Much has been written about the gradual chipping away of last century's hard fought socio-economic rights (be it labour rights or broader welfare rights to health and education). The 1973 oil crisis, mounting global debt, inflationary pressures, and the failure of the Keynesian Consensus and Fabian Socialism to alleviate poverty gave rise to the stellar political hegemony of market fundamentalism. These principles, popularly enshrined in the so-called Washington Consensus

¹ Colonial-era labour laws that remain today include: the 1926 Trade Union Act to enable labour to organize and register unions free from harassment; the 1880 Factories Act which set minimum conditions of hygiene, safety, and work hours; the 1923 Workman's Compensation Act which provided for work-related injuries; the 1936 Payment of Wages Act which regulated timely payment and overtime payments; and the 1929 Trade Disputes Act which created an institutional framework to settle disputes.

² For example: The 1948 Factories Act, which replaced the British act, calls for the registration of 'factories' and regulates their work conditions to ensure workers adequate safety, sanitation, health, welfare measures, work hours, breaks, paid holidays, and a weekly day off. The 1948 Employees State Insurance (ESI) Act protects workers and their families against the risk of accidents and injury at work, sickness, maternity, and old age. Under ESI, workers receive medical care and cash benefits. Other welfare provisions for workers in certain establishments employing more than 20 workers are the 1952 Employees' Provident Fund Act (EPFA), the Maternity Act (MA), and the 1923 Workmen's Compensation Act (WCA), designed for workers in occupations recognized as 'hazardous' and not covered under the ESI.

under the stewardship of Ronald Reagan and Margaret Thatcher, famously led to strong and successful calls to decrease the state, which in turn was depicted as corrupt, failed, and inimical to the market. Increased privatization and decreased public expenditure necessarily translated into a decline in welfare provisions and thus socio-economic rights. Underlying the massive literature critiquing neoliberalism is a claim that neoliberalism directly undermined the gains made by organized labour during the first half of the twentieth century.

There is no doubt that governments motivated by neoliberal policies orchestrated significant assaults on labour protections. Although the long list of labour laws have remained in place in India since the government launched its liberalization reforms in 1991, the budgets of the labour ministries (at the national and state levels) have been substantially trimmed, which in turn has neutered labour ministries' ability to enforce any labour legislation. In addition, increasingly decentralized production has taken place as the Indian state overtly promotes unregulated, informal work for all Indians.

At the same time, blaming neoliberalism alone for the mass of unprotected, informally employed labour is too simplistic. Twentieth-century labour protections failed to protect the vast majority of Indian workers long before the start of neoliberalism. In India, the majority of workers *always* operated outside the jurisdiction of labour laws, because small-scale enterprises, understood to be a temporary function of poverty, were exempt from most labour legislation. A couple of exceptions, such as the 1948 Minimum Wages Act and the Payment of Wages Act, aimed to ensure that *all* workers subsist above the poverty line and thus apply to small enterprises.³ But these are rarely enforced. Under the Minimum Wages Act, an autonomous wage board is to set and regularly revise minimum wages for all occupations by industry. But these boards are inactive and revised wages are rarely indexed for inflation, so they decline in real terms (Zagha 1998). Workers in large firms are unaffected because their wages are determined by collective bargaining agreements and exceed the minimum wages. For workers in small firms, we know the law does little to protect their incomes (NCEUS 2006).

The official and unofficial exemption that labour laws provided to small enterprises created an obvious disincentive to grow enterprises.⁴ As a result, Indian business has long been notorious for managing multiple small-scale operations in unregulated conditions.⁵ From 1984–94, employment in firms with more than 100 employees was stagnant, whereas it increased by 3.6 per cent per year in firms with less than 100 employees (Zagha 1998). This exemption enabled a mass labour force of unregulated, unprotected, informally employed workers to remain extant in India, despite its progressive labour laws. The incorrect assumption made was that labour movements would successfully struggle to bring all workers within the ambit of existing labour laws.

Therefore, more than affecting the *size* of informal labour, I argue that globalization and liberalization reforms have affected the *power* of Indian labour. Specifically, the post-1980s era of neoliberalism undermined formal labour as an organized, legitimate, and worthy group actor fighting for the legal empowerment of the poor. In doing so, neoliberalism shattered the promises of first-wave legal empowerment for the poor.

³ The Payment of Wages Act ensures the timely and regular payment of wages.

⁴ In addition to labour, small-scale enterprises enjoyed other benefits, such as excise concessions, directed credit, exclusive rights to produce over 800 goods, and lighter reporting requirements.

⁵ Although it should also be noted that in addition to being excluded from labour legislations, there were several other incentives to remain small in India. For example, small firms benefitted from excise concessions, exclusive rights to produce over 800 goods, directed credit, and much lighter reporting requirement.

3 Second-wave legal empowerment

Given the strong push for diminished state legitimacy in the 1980s, it is surprising that in the 1980s a second wave of legal empowerment and socio-economic rights *via the state* emerged to address poverty in the global South. Unlike the first wave, which was marked by labour movements pressuring the state's executive and legislative branches to enact legislation to de-commodify labour, the second wave was marked by *civil society and ascriptive identity groups partnering with the judicial branch of the state* to hold the legislative and executive branches accountable for socio-economic deprivations and exclusions through constitutionally guaranteed rights-based claims. In the wake of organized labour's declining power and legitimacy since the 1970s, alternative groups emerged to fight for legal empowerment in the 1980s.

This second wave has been especially highlighted in the global South. In Brazil, citizen groups famously succeeded in using the amendment process to incorporate the right to health, education, and land, as well as the right to participate in municipal budgeting into the 1988 constitution (Holston 2008). In China, the 1982 constitution provided new 'citizens' rights to legal justice' in response to growing social unrest and demands for entitlements to work and land (Lee and Hsing 2010). In India, even Maoists parties who refuse to participate in India's parliamentary system, have used judicial activism to fight the state's counter-insurgency efforts (Sundar 2016).

3.1 Second-wave legal empowerment in India

In India, the 1980s brought forth an unprecedented era of progressive 'judicial activism', where high courts at the national and state levels partnered with civil rights groups to uphold *enforceable* socio-economic rights for the poor for the first time in India's history (Baxi 1985). Using a creative version of PIL, also known in India as 'social action litigation', activists from within and outside the judiciary tried to 'rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content' (Cassels 1989: 497). In most cases, PILs were filed against the Indian state's legislative and executive branches. Indian PILs used judicial powers to enforce civil, political, *and* socio-economic rights among the poor through a three-pronged strategy.

First, in contrast to most legal avenues of activism that aim to protect individual rights, a PIL is pursued by filing a writ petition in a state-level high court or the nation's Supreme Court in the name of a vulnerable *group*, such as the poor. As outlined by Chief Justice Bhagwati:

Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of Government. (Bhagwati 1982)

Second, the early PILs involved high court justices reaching out to representative groups (such as non-governmental organizations (NGOs) or a union) who sought legal remedies for gross violations to public rights, thereby reversing the earlier trend where an aggrieved party had to approach the courts for justice. India has been noted for being unique in the world, because its early PILs were often initiated by a few judges, such as Justice P.N. Bhagwati and Justice Krishna Iyer (Cassels 1989). In 1986, the Supreme Court expanded the responsibility of legal aid, something

Bhagwati and Iyer had been fighting for since 1945. The case of *Suk Das v. Union Territory of Arunachal Pradesh (SC 991)* determined that legal aid would not only provide legal services to the poor, but also outreach by providing the poor with awareness about their legal rights, policies, entitlements, and how to fill in forms.⁶ In 1998, the government established the National Legal Services Authority (NALSA) under the judiciary to perform this function. This approach increased access to the judiciary among vulnerable groups who might not know how to approach courts. Once a violation was determined, courts (often alongside a representative body of the people, such as an NGO) would file a case on behalf of the people who had been violated, usually against the state or 'the Union of India'. According to Chief Justice Bhagwati:

The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality. (Bhagwati 1982)

The early PILs, therefore, aimed to protect vulnerable populations' civil liberties as illustrated by the pioneering case protecting the fundamental right to bail and legal aid in *Madhav Hayawadanrao Hoskot v. Maharashtra (1978)*. Equally important, however, was a subsequent set of cases that aimed to expand the sets of rights that the judiciary could protect.

This expansion formed the third leg of the second-wave PIL strategy. In addition to enforcing the executive and legislative branches' responsibility to uphold poor citizens' civil and political rights, which are considered fundamental rights and are guaranteed by the Indian constitution, PILs enforced the executive and legislative branches' responsibility to uphold poor Indians' socio-economic rights, which are promised, *but not guaranteed* under the 'directive principles' of the constitution (Ruparelia forthcoming). To make socio-economic rights judicially enforceable, judges expanded the interpretation of Article 21 in Part III of the constitution that guarantees the 'right to life' and Article 14 on the 'right to equality' (Baxi 1985). Although the provision of the civil and political rights guaranteed in the constitution are acknowledged as the domain of the legislative and executive branches of the state, high courts asserted the role of the judiciaries in holding the government accountable for implementing these rights. By doing so, high courts could assert that the failure to implement a government scheme designed to improve the poor's material circumstances (through the provision of food or living wages, for example) directly undermined the poor's right to life. The state, therefore, could be held judicially accountable for a constitutional violation of its role. This approach was well-illustrated in another landmark case that aimed to protect rural workers' rights to minimum wages for their work on a government construction project in *PUDR v. Union of India (1982)*.

As Chief Justice Bhagwati, one of the pioneering leaders of Indian judicial activism, wrote in a landmark ruling on labour law enforcement in 1982:

The only solution of making civil and political rights meaningful to these large sections of society [i.e. the poor] would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights. Of course, the task...is one which legitimately belongs to the legislature and the executive but mere initiation of social and economic rescue programmes by the executive and the legislature would not be

⁶ From Annual Report of NALSA (see Government of India 1987).

enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective...The time has now come when the courts must become the courts for the poor and struggling masses of this country. (Bhagwati 1982)

The use of judicial activism to protect vulnerable populations' civil, political, *and* socio-economic rights in India began in the wake of the two-year state of emergency initiated by then Prime Minister Indira Gandhi from 1975 to 1977. The sudden suspension of elections, civil liberties, free press, association, and opposition, alongside an absence of socio-economic provisions for the poor, exposed the important role that civil and political liberties play in well-being (Ruparelia 2016). These experiences also undermined citizens' faith and trust in the state's commitment and ability to protect civic, political, and socio-economic rights. The state of emergency thus marked the end of the first wave of legal empowerment through constitutional rights and parliamentary action. To fill this void, the Indian Supreme Court, new social organizations, and non-party political formations galvanized into joint action to protect civil, political liberties, and socio-economic rights, especially among marginalized populations through the third branch of the state—the judiciary. As a result of these trends, India's Supreme Court has become widely recognized as the most powerful in the world.

An important feature of early, second-wave PILs was that they were primarily used to judicially enforce the implementation of existing laws or government schemes by the executive and legislative branches. As Bhagwati notes, it 'revolutionised the whole concept of access to justice in a way not known before to the Western System of jurisprudence' (Bhagwati 1982).

3.2 Labour in India's second wave

The second wave of judicial empowerment for the poor in India has been insightfully analysed and hotly debated among scholars and activists (Baxi 1985; Cassels 1989; Ruparelia forthcoming; Sathé 2004). But the literature to date is marked by a contradictory and under-analysed lens into the role of labour in these movements. On one hand, and in line with the general post-1980s trend in academia that privileged analyses of ascriptive identities, rather than class, labour is rarely mentioned as an organized group. The declining membership and rhetorical power of unions among formally employed urban workers is said to explain labour's absence in second-wave movements on legal empowerment. On the other hand, poor rural labourers who were denied minimum wages while working for government projects (such as publicly financed sports facilities in the capital city of Delhi in the early 1980s or drought-relief schemes and public works in the state of Rajasthan in the late 1980s), are repeatedly noted in the literature as being catalysts for early PILs (Dasgupta 2008; Pande 2014). Importantly, these rural workers' claims were not met through class-based organizations, but through civic rights groups comprised of cross-class networks including middle-class activists, lawyers, and judges.

Underlying the second-wave literature, therefore, is an acknowledgement that the central relationship of labour exploitation, or class-*in-itself*, remains extant in modern neoliberal economies but that class as an organizational category, or class-*for-itself*, is dead. In place of class-based organizations have come new social movements, comprising of civic rights groups and NGOs mobilized around ascriptive identities (such as caste, gender, indigeneity) or specific issues (such as land, environment, education). In India, the decreased attention to labour and labour organizations in academic analyses can in part be attributed to the post-1980s upsurge in identity and issue-based movements on the ground (Omvedt 1993). However, it must also be understood as part of a political push (conscious or not) to critique organized labour. Significantly, this push came from the left and the right (Herring and Agarwala 2006). From the left, sub-altern groups exposed the hegemonic reproductions of patriarchy, casteism, and ethno-centricism of many

twentieth-century labour unions. From the right, proponents of neoliberalism capitalized on these criticisms to undermine the legitimacy of labour's demands and to absolve capital and states of responsibility for protecting labour.

The lack of attention paid to labour and labour organizations in the scholarship on second-wave legal empowerment has incorrectly eclipsed labour's involvement in second-wave legal empowerment efforts and undermined our ability to analyse the changing realities of labour identities and group formation over time. Second-wave legal empowerment through judicial activism and PILs in India did attempt to protect vulnerable labour. However, the attempts were restricted to ensuring the implementation of existing labour legislation. Labour was assumed to already be protected (as a group) under law; PILs, therefore, focused on enforcing the implementation of those laws. Neither labour organizations nor courts sought to enact new legislation to protect labour through PILs.

The problem with this approach is that, as outlined earlier, most Indian labour legislation only applied to large businesses that employed more than ten workers. Small businesses, where the majority of informal labour was employed, were exempt from labour legislation (with a few exceptions, such as the 1948 Minimum Wages Act and Payment of Wages Act). Nor did labour cover those working without a legal contract in large businesses. Therefore, the majority of early PILs on labour addressed issues concerning vulnerable workers—bonded labour, child labour, and rural labour—whose rights were being violated under existing labour legislation that banned slavery and child labour, and ensured minimum wages for all.

In a stark break from first-wave movements, where unions were the primary representative bodies for labour rights, and the Ministry of Labour under the executive branch was directly responsible for implementing and enforcing existing laws, second-wave PILs were brought by NGOs and unions, and the Supreme Court pushed innovative mechanisms to implement existing legislation against labour exploitation. For example, in response to a letter from a District *Bidi Workers' Union* about the (illegal) employment of children in *bidi* factories, the Supreme Court ordered an NGO to investigate and write a report for the court, and then mediated a plan of action between state officials, the employers, and the petitioners. The court appointed the Tamil Nadu State Legal Aid and Advice Board to ensure the plan was implemented within the state of Tamil Nadu for 3 years (Dasgupta 2008). In another case, *M.C. Mehta vs. Union of India*, the Supreme Court sent the police commissioner and the labour commissioner to investigate child labour at a hazardous electroplating unit in Delhi. The court even held the labour commissioner in contempt for delaying the investigation. Upon finding that child labour was extant, the court fined the employers and used the money to fund education and health care for the child workers (Dasgupta 2008).

With regard to bonded labour, the Supreme Court went even further than simply identifying and liberating exploited labour; the court forced the state to aid in their rehabilitation. In 1986, for example, Justice Bhagwati ruled that freed bonded labourers should be given financial aid upon release by their state governments as well as subsidies from central government. In 1984, the court simplified the procedures for workers to fit under the legal category of 'bonded labour' to facilitate their ability to apply the Bonded Labour System (Abolition) Act, 1976 (Dasgupta 2008).

In 1982 the Supreme Court heard the famous case, *PUDR vs. Union of India*. PUDR, the People's Union for Democratic Rights, brought forth a PIL on behalf of rural migrant construction workers who were hired to build facilities for the ASIAD Games in New Delhi. The court ruled that the national-level government, the Delhi Administration, and the Delhi Development Authority must ensure that all workers received the minimum wage (under the 1948 Minimum Wages Act), equal pay for equal work (under the 1976 Equal Remuneration Act), were at least 14 years old (under the 1938 Employment of Children Act), and had been given all of the proper required facilities

and conveniences under the 1970 Contract Labour (Regulation and Abolition) Act and 1979 Interstate Migration Workmen (Regulation of Employment and Conditions of Service) Act. In addition, the court appointed as ombudsmen, to protect labour interests, two independent institutions—the Indian Social Institute and the People’s Institute for Development and Training (Dasgupta 2008).

These rulings had an enormous impact on the populations directly affected. Furthermore, they had an important symbolic effect in highlighting human rights atrocities through a labour lens. That these rulings arrived just as organized labour and labour protections were being questioned by liberalization reform policies is significant. As Justice Bhagwati wrote in the PUDR vs. Union of India case:

Labour laws are enacted for improving the conditions of workers, and the employers cannot be allowed to buy off immunity against violations of labour laws by paying a paltry fine which they would not mind paying, because by violating the labour laws they would be making profit which would far exceed the amount of the fine...with meager fines...[labour laws] would remain merely paper tigers without any teeth or claws. (Bhagwati 1982)

3.3 Limitations in the second wave

By the 1990s, however, the second wave of legal empowerment marked by political jurisprudence (i.e. when judicial decisions are motivated by politics, rather than unbiased judgement), began to show signs of limitations in empowering the poor. First, the court began to face an insurmountable backlog of cases, so it was able to accept less than 2 per cent of all writ petitions filed in the 1990s (Ruparelia 2016). Second, several PIL cases ended with decisions that favoured middle-class elites, rather than the poor, highlighting the inconsistency of PILs and their dependence on the proclivities of individual judges. For example, in the early 2000s, judges used PILs to launch one of the most ruthless court-led slum demolition drives to have taken place in New Delhi. During this period, the Supreme Court issued several rulings curtailing the rights of labour, tenants, and students (Sathe 2004), weakening the 73rd and 74th Amendments, which sought to empower local elected representatives over state bureaucrats (Mehta 2007: 80), and overturning progressive jurisprudence on environmental issues. In 2000, the apex judiciary ruled against the *Narmada Bachao Andolan*, a grassroots anti-dam movement that sought to protect local tribal groups (Ruparelia 2016). In short, the progressive legislation that emanated from PILs’ unique procedural frameworks and the power PILs vested in individual judges in the 1980s, were equally capable of doing the exact opposite in the 1990s (Bhuvania 2016).

With regard to labour, PILs were limited by existing legislation, most of which did not cover the vast majority of workers. These trends raised important questions as to the sustainability and constantly shifting nature of legal empowerment for the poor, as well as whether, how, and through whom legal empowerment movements could *expand* the coverage of existing labour legislation.

4 Third-wave legal empowerment

The limits to progressive judicial activism during the second wave of legal empowerment efforts in India forced civil society groups to once again shift their strategies by the mid-1990s. This time, legal empowerment movements turned toward a hybrid approach bridging the legislative, executive, and judiciary branches of the state to launch campaigns for national-level legislation,

alongside PILs. Third-wave movements' focus on national-level legislation campaigns indicate a return to focusing on the legislature (as in the first wave), and remind us of the significant symbolic power vulnerable groups secure through legislation, even in the absence of perfect implementation. At the same time, third-wave campaigns used second-wave court rulings as precedents for their demands and were thus a direct output of progressive judicial activism.

In other words, third-wave PILs were not only used to implement existing laws, but were also used to force the state to enact *new* legislation. According to Article 142 of the Indian constitution, a Supreme Court or high court order is enforceable by law. Therefore, a court order can force the legislature to either make a guideline or an act. This particular use of PILs to assert the judiciary's role in the socio-economic empowerment of the poor through court-ordered legislation is considered unique to India.

During the third wave, PIL-initiated court orders provided a springboard from which grassroots campaigns eventually won several new rights-based national legislation guaranteeing welfare. These included the 2002 Right of Children to Free and Compulsory Education Act (RTE), the 2005 Right to Information Act, the 2005 National Rural Employment Guarantee Act, and the 2006 Scheduled Tribes and Other Traditional Forest Dwellers (recognition of Forest Rights) Act (FRA). Since the early 2000s, the Indian state has been noted for having the largest welfare programmes in the world.

This approach has not come without deep controversies. On one hand are the staunch advocates of judicial power, relative to legislative campaigns toward parliament. As Colin Gonsalves the Founder and Head of Human Rights Law Network, an active NGO of lawyers that fight PILs, said:

We are not enamored by legislation. The government will always come up with laws that are rubbish. We [i.e. lawyers filing PILs] operate at the group empowerment level to use enforcement to force the government to implement the legislation. We take a combative approach. We hold the government accountable! The campaign side can only get up to some point. In India the Administration is colonial, throwing all representation in the waste basket. The Administration is unmoved...we have an alternative weapon.⁷

Despite his strong words against campaigns, Gonsalves also ended by saying, 'We always say people should pursue both tracks [campaigns and legal PILs]'.⁸ On the other hand are activists who are weary of judicial overreach and place much more faith in grassroots campaigns. As Gautam Mody, Head of the National Trade Union Initiative (NTUI), a federation of independent unions of formal and informal workers, said:

I don't have a positive view of PILs. They are a product of a broken relationship between the legislature and executive. So the judiciary grandstands on issues. PILs work on the implementation of the rule of law. But when there is so much violation of law, lawyers filing PILs, representing people rights are just grand

⁷ Interview, 7 January 2017.

⁸ Interview, 7 January 2017.

standing. This just advances people's lack of rights. We need agency for a new society. We need a rights-based language.⁹

At the same time, Mody also noted that he felt two PILs (the 1992 case for workers during the ASIAD games and the right to food bill) 'were good'.

One of the most controversial aspects of PILs is their use in enacting new legislation. According to Mody, 'Using PILs for implementation of existing laws is OK. But the problematic part is using them to create law. That shows how broken our democracy is. The judiciary should not be filling this role! It is a complete collapse of the social contract'.¹⁰ Whereas, Gonsalves merely saw court-ordered legislation as 'an alternative weapon' in the arsenal of activists' options.¹¹

Finally, PILs have unsurprisingly created frictions within the state. According to Gonsalves, 'The courts and judges have a soft spot for us. That's how we survive. But the government sees and calls us "enemies of the state"'.¹² In stark contrast, Alok Agarwal, Member Secretary (Head) of NALSA, the government's legal aid authority, depicted PILs as cooperative with the state:

The beauty of PILs is that it's not adversarial. No one takes it that way. The Court is only helping the government do its job. We never expected the PILs to bring a bad result. And generally the government has been cooperative and not upset. How can they deny it?...No government officials oppose the ideas behind the PILs. The question is always how to do it? We can pass all sorts of orders to the government to give people more money and land and food etc. But where will the money come from?¹³

4.1 Labour in India's third-wave of legal empowerment

Although it has been less featured in the literature, organized labour has once again played an interesting role in third-wave movements. In particular, new organizations have emerged to redefine and mobilize an expanded labour/class identity that includes the long-excluded mass of informal workers.

That labour has re-emerged as an organized group should not surprise us. Labour's instrumental role in spearheading the first wave of legal empowerment for the poor brought forth institutions (such as unions and political parties) that (although dwindling in number and power) continue to hold sway in many countries. More importantly, history has shown that labour and capital constantly reinvent themselves to sustain their privilege and resistance (Marx 1976; Polanyi 2001). Empirical evidence across space and time suggests that organized labour resistance is alive and well the world over (Silver 2003). Finally, informal workers have been shown to be finding new ways to advance their rights through alternative workers' struggles in India, Mexico, Brazil, South Korea, South Africa, China, the US, and Canada (Agarwala 2013, 2014, 2015; Chun 2009; Milkman and Ott 2014).

⁹ Interview, 13 January 2017.

¹⁰ Interview, 13 January 2017.

¹¹ Interview, 7 January 2017.

¹² Interview, 7 January 2017.

¹³ Interview, 14 January 2017.

Underlying these movements is a politics of recognition where informal workers are asserting themselves as a vulnerable group with a distinct identity that needs attention. Like other identity groups, informal workers are fighting for protections within their informal work identity, rather than fighting to get rid of this identity (by becoming formalized, for example). In other words, class-based groups practise a form of identity group politics.

Recent informal workers' movements hold important implications for our understandings of labour as an organized group, a class-based identity, and an actor in legal empowerment. Informal workers' movements emerged in India in the late 1970s and early 1980s—i.e. at the same time as the second-wave of legal empowerment. However, informal workers' movements did not join the second-wave movements for legal empowerment through PILs during the 1980s for a simple reason: *there were no legislation or programmes in place to protect their unique needs*. Unlike the poor, rural workers on government construction projects that were represented in second-wave cases, informal workers could not claim minimum wages since they had no proof of employment.

Instead, informal workers' organizations invested their energies into launching national campaigns toward the executive and legislative branches to create new legislation. In addition to continuing first wave-like struggles for minimum wages and working conditions, informal workers used their power as voters to demand new legislation that ensured state responsibility for informal workers' social consumption or reproductive needs through the provision of welfare benefits (Agarwala 2013). In addition, they struggled to create a new group-based identity and demanded informal workers' identity cards. An innovative institutional structure, called a 'welfare board', was proposed to disperse the identity cards and welfare provisions to informal workers. Welfare boards, which are unique to India, are tripartite institutions implemented by the state or central government. In return for being a member of a board, workers are entitled to welfare benefits, such as housing, education scholarships for children, health-care clinics located in workers slums, funeral expenses for work-related accidents, and pensions. Currently, welfare boards in India are occupationally based and benefits differ according to trade. As I analyse elsewhere, their success (which has been mixed) depends on the political and economic context in which they are implemented. Those operating under competitive populist parties (even neoliberal) have been more successful than those operating under a single, hegemonic party rule (even when that party is left-wing) (Agarwala 2013). Throughout the 1980s and 1990s, informal workers' organizations focused on pressuring elected state politicians in the executive and legislative branches to enact legislation to protect the working conditions and welfare needs of informal workers in various industries (Agarwala 2013).

Despite their vulnerabilities and in contrast to popular belief that informal structures of production prevent labour organization, informal workers are clearly organizing to defend their humanity. But their struggles have differed from first-wave labour movements in several ways. First, to attain state attention for new legislation, informal workers have appealed to *citizenship*—rather than labour—rights. Second, to mobilize the dispersed workforce whose lines between work and home are often blurred (with some working in their homes and others living on their worksites), informal workers have organized at the *neighbourhood*—rather than shop floor—level. Third, to attract vulnerable, unprotected workers in a labour-unfriendly polity, informal workers have drawn on their struggles for new legislation for *welfare from the state*, rather than on their struggles to formalize their work and entitle them to employer-provided benefits and minimum wages.

While the struggles for employer-provided benefits no doubt continue, it is the welfare struggles that have yielded greater state response and attracted more new members. Importantly, the language of citizenship, space-based mobilization, and welfare demands on the state have enabled informal workers' organizations to include several sub-altern groups (such as women and lower-caste members) involved in hidden forms of contract and self-employed work in homes and slum-based unregistered work-sheds. At the same time, their demands are not for universal benefits.

Rather, they assert a class-based identity (certified by government-sponsored worker identity cards) that demands welfare and work benefits only for fellow-informal workers.

This calls on us to question and re-examine the supposed disjuncture between labour movements (often associated with first-wave legal empowerment) and ascriptive identity and civic rights movements (often associated with second-wave legal empowerment). I argue here that these distinctions are outdated. Informal workers' movements provide insights into an emerging and important bridge between the two movements, because they organize around a class-based identity, but include the interests and members of sub-altern groups that felt marginalized from twentieth-century labour movements (including women, lower castes, as well as racial and ethnic minorities).

By the 1990s and early 2000s, informal workers began to see the fruits of their efforts in newly enacted legislation designed to protect their welfare. These included the 1996 Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act; the 1996 Building and Other Construction Workers Welfare Cess Act; and the 2008 Unorganised Workers Social Security Act. Once these acts came to fruition, informal workers turned to PILs to capitalize on the judiciary's potential ability to enforce the executive and legislative branches to implement these acts. In particular, informal workers' organizations used PILs to force state governments to enact their welfare boards. This hybrid approach of toggling between campaigns against the legislative and executive branch for new legislation and employing the arm of the judiciary through PILs to enforce this legislation marks the third-wave of legal empowerment for the poor.

Examining informal workers' use of legal empowerment, therefore, provides an important corrective to the legal empowerment literature to date and illuminates our understanding of the continuities and contradictions between the three waves. Before examining informal workers' movements for legal empowerment in detail, a brief discussion on the concept of informal labour is in order.

4.2 Informal labour: a regulation-based definition

Scholars have long debated the meaning of informal labour, also known as 'the precariat' in the North. In recent years, the debates have re-emerged as the prevalence of such work has increased in the global North and South. Underlying these definitional debates is an attempt to distinguish the informal economy from the formal economy, the latter of which has come to typify advanced, industrial modernity—for more on this discussion, see Agarwala (2009).

Scholars looking at the global North have defined precarious work as a continuum comprising of four criteria: the degree of certainty of continuing employment, control over the labour process, degree of regulatory protection (through unions or laws), and income level (Cranford et al. 2003). Guy Standing (2011) popularly expanded this definition, defining the precariat as a social category of people who lack seven forms of labour security.¹⁴ These definitions, while useful in describing the concept, are weak in their analytical leverage as they include too many disparate characteristics and do not help us understand *why* informal work continues to persist in the modern era.

¹⁴ The seven securities are: labour-market security (adequate income-earning opportunities); employment security (protection against arbitrary dismissal); job security (opportunities to 'retain a niche in employment' and access upward mobility); work security (protection against accidents, illnesses, and arduous working conditions); skill reproduction security (opportunities to gain and use skills); income security (assurance of an adequate stable income); and representation security (a collective voice in the labour market).

In contrast, scholars analysing informality in the global South have narrowed their definitions to focus on the *relationship* between labour, capital, and the state. Specifically, they emphasize the role of *regulation* in this relationship. Portes et al. (1989) draw on Latin America to define informal workers as those engaged in producing and providing legal goods and services but who operate *outside* labour, health, and financial regulation. Similarly, Breman and van der Linden (2014) draw from South Asia to define informal work as ‘a type of waged employment thoroughly flexibilized and *unregulated* by public intervention’ (Breman and van der Linden 2014: 926). Here informality includes: part-time, flexible jobs; low wages and decreased secondary benefits; outsourcing and self-employment; irregular work days (lengthened and shortened); and relaxed controls on work conditions.

By highlighting informality as those operating outside labour regulation, these scholars exposed the structural reasons for why formal workers, employers, and the state would rely on informal work in so-called modern capitalist economies—unregulated work helps *foster* growth. Informal workers, formal workers, employers, and states have therefore long been tied together in intricate relationships of interdependence. As Vladimir Lenin (1939) and Rosa Luxemburg (1951) famously illustrated, informal workers are not a remnant of a feudal past or a temporary step in the transition to a capitalist future. Rather, the informal economy provides a necessary subsidy to the growth of modern, formal capitalist economies. Under imperialism, Europe drew on alternative modes of production (such as pre-capitalist, artisan, feudal, and petty-bourgeois modes) in the colonies to secure raw materials for Europe’s growing manufacturing structures. In addition, class struggles that increased European wages forced European capitalists and formally protected workers to rely on colonies’ cheap, flexible, informal workforce for low-end manufactured goods and services. After independence, the political and social institutions enshrined throughout much of the developing world continued to ensure that informal workers absorbed the formal economy’s cost of low-end production and labour reproduction by not receiving benefits or minimum wages. Informal workers in Bogotá’s shoe-making industry, for example, worked as sub-contractors for formally regulated firms in Colombia (Peattie 1987). By working in the privacy of their homes or unregistered work-sheds, they mitigated employers’ overhead costs and helped employers and states constrain the expansion of a costly, protected formal working class. Like formal labour, informal labour performs a crucial function in capitalist growth. Unlike formal labour, however, informal labour is not regulated or protected by so-called modern institutions of social justice.

Another advantage of the regulation-based definition is that it includes the range of informal workers in the rural and urban sectors, operating within pre-capitalist and capitalist systems. Again, they are often inter-dependent. Finally, this definition avoids making subjective claims on the informal economy’s ‘traditionalism’ (Portes and Haller 2005). This is an important corrective to the modernization literature of the 1970s, where scholars first highlighted informal work but viewed it as a temporary, pre-capitalist waiting room (comprising mainly of self-employed entrepreneurs) that would be eliminated as workers were absorbed into the modern, urban, formal economy (Harris and Todaro 1970; Hart 1973). It is also an important corrective to the neoliberal development literature of the 1990s that celebrated informal work as a solution to so-called over-regulated, neutered, markets (De Soto 1989).

One important draw-back to the regulation-based definition, however, is that it does not accommodate contemporary informal workers’ efforts to establish *new* legal regulations of protection. As noted above, informal workers throughout the world are launching alternative labour movements and new legislation, but many are demanding legal protections within their informal work status and thus building their identity around informality/precarity, rather than dropping it. Therefore, in my own work, I have qualified the regulation-based definition to specify that informal workers are those not regulated or protected under *traditional labour laws based on a formal employer–employee relationship* (Agarwala 2013). In other words, informal workers are

demanding that non-traditional employment relationships are not equated to lack of power and protection.

This approach directly confronts the weaknesses of first-wave legal empowerment approaches that sought to protect workers from exploitation by formally, but narrowly, defining an employer–employee relationship, which in turn ironically solidified a distinct underdog of informal workers. To avoid first-wave regulations, employers simply hid employer–employee relationships by hiring contract workers through sub-contractors that could not trace a direct relationship to a principal employer or employing self-employed workers, who own small, unregulated businesses that provide cheap inputs for capital production, as well as services to employers and employees. In cases where contract workers are protected, employers claim to buy finished products from self-employed workers, who in fact are operating on employers’ orders.

Together contract and self-employed workers comprise the mass and heterogenous category of informal or precarious workers. They are prevalent throughout the economy in agriculture, manufacturing, construction, and services. They work in the hidden abodes of their own homes, unregistered work-sheds, or employers’ homes. With the overt sanctioning of informal work in recent years, they have also become more prevalent in public spaces, such as the street or the factory floor itself. Both groups make legal goods and services, yet neither has a legal labour contract. Therefore, informality or precarity necessarily features *non-traditional employment relationships*, which, by definition under first-wave labour law, are unregulated.

Drawing on this definition of informal workers—i.e. all those that are unregulated by laws based on the standard employment relationship—let us now examine how informal workers have fought for alternative forms of legal empowerment.

4.3 Third-wave legal empowerment and labour in India

During the late 1970s and early 1980s, informal workers began organizing into their own unions that were distinct from formal workers’ unions. As in the first wave, informal workers returned to pressuring parliamentary bodies to enact national-level legislation to protect workers. In contrast to the first wave, however, they pushed forth new legislation that directly addressed their unique needs as informal workers operating in non-standard employment relationships. Furthermore, their demands often reflected the needs of previously ignored identity groups, such as women and low-caste members. In some ways, informal workers in the third wave utilized the progressive PILs for labour that emerged in the early 1980s as a springboard to legitimize their fight for new national-level legislation. In particular, the chief justices that led the PIL movements of the early 1980s were actively involved in leading the third wave of informal workers’ movements in the second half of the 1980s. Lastly, informal workers in the third wave continued to use PILs to ensure the proper implementation of the new national-level legislation, if and when it was attained. In short, the third wave of labour empowerment indicates a hybrid model where informal workers’ organizations toggle back and forth between first- and second-wave tactics.

Drawing from a comparative study of two industries (construction and domestic work), I illustrate below the importance of the judiciaries in the successes and failures of contemporary third-wave national campaigns toward the legislatures.

4.4 Construction workers’ movement for legal empowerment in India

Construction workers in India were among the earliest informal workers to organize in India. Although their movements are mired with challenges of scale and effectiveness, they have become a role model for informal workers organizing in other sectors.

As in many countries, India's construction industry has witnessed a rapid expansion since the 1980s. Today, it constitutes 11.3 per cent of India's total economic output (NCAER 2014: viii). In 2014, the construction market totalled US\$157 billion. Infrastructure accounted for 49 per cent of the market, housing and real estate 42 per cent, and industrial projects 9 per cent. The industry is expected to grow in all three areas, but especially in real estate, by 7–8 per cent per year. According to Deloitte (2014: 22), India is poised to be the world's third-largest construction market by 2025–30. In addition to its contribution to India's gross domestic product (GDP), construction is a major source of employment. From 2004 to 2011, employment within construction rose by nearly 10 per cent (Ghose 2016). Today, 40 million workers are estimated to be employed in construction (or 10 per cent of the nation's total employment), making it the second-largest employer in India after agriculture (RBI 2012). Forty-four per cent of India's urban informal workforce are estimated to be in construction (Jayakrishnan et al. 2013: 225). Eighty per cent of total employment in construction is informal; in the residential sector of the construction industry, 99.41 per cent of the jobs are estimated to be informal (NCAER 2014: 20).

Informal construction workers in India work through chains of sub-contractors and rarely interact directly with principal employers. Indian construction workers can be divided into two labour streams. The first reside in a local slum and sell their labour at a local market place to a sub-contractor that hires them on a daily basis. These workers are hired for local projects that include house repairs, smaller roads, and new multi-story buildings. The second category comprise of rural migrants (within and out of the state), who are brought into the city by a sub-contractor to work on a specific project. These workers may live on the site or in a local labour camp. These projects include new multi-story buildings, office parks, shopping malls, and major, government-sponsored infrastructure projects, such as metros and highways (otherwise known as 'mega projects').

In the late 1970s and early 1980s, informal construction workers began organizing into independent unions (i.e. unaffiliated to any political party) in some Indian states. Unlike second-wave movements, these unions fought for *new* legislation to protect informal workers' unique needs. In 1985, a group of these unions launched the National Campaign Committee for Central Legislation on Construction Labour (NCCCL). NCCCL aimed to expand informal workers' movements across India and to create a single central-level legislation that could regulate informal construction workers. On 5 December 1986, NCCCL submitted a draft bill for national-level legislation to the Petitions Committee in the *Lok Sabha*, the lower house of the Indian parliament. For the next ten years, organized construction workers fought against builders' associations to lobby chief ministers, ministers of parliament, and successive prime ministers of India to pass the bill. In 1989, NCCCL submitted a petition with 400,000 signatures of construction workers demanding legislation to regulate their working conditions and welfare needs. On 19 August 1996, then Prime Minister H.D. Deve Gowda finally enacted two acts: the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, which aimed to regulate work conditions, and the Welfare Cess Act, which called on each state to create and implement its own Construction Workers' Welfare Fund and Board.

The first act aiming to regulate working conditions, catered to the demands of the builders' association to apply minimal protections, and the NCCCL was understandably very unhappy with the result, especially because a suitable enforcing body was absent. But the second act on welfare boards has been heralded by other informal workers' campaigns for specifying a funding mechanism to support the board. Under the legislation, a fund is financed through state contributions, fees from workers, and the construction workers' welfare tax. The tax is 1 per cent of the building cost applied to all building projects that employ ten or more workers and cost more than Rs.1 million (US\$2,000). In addition, the identity cards promised by the welfare board are often cited as one of the greatest benefits attained, because they have given workers a legitimate *claim* to basic socio-economic rights.

Particularly noteworthy for our purposes, is that the NCCCL was formed under the Chairmanship of Dr Krishna Iyer, a member of the Communist Party of India-Marxist *and* the very Supreme Court justice who stood at the helm of second-wave PILs. It was Dr Iyer who helped draft the legislation bill and suggested submitting it through the Petitions Committee of Parliament, which was the first time new legislation was said to proceed in this way. Moreover, it was Dr Iyer's personal relationship with Deve Gowda that eventually urged Gowda to enact the legislation when he became prime minister. In my interviews with leaders and activists of the NCCCL, Dr Iyer was repeatedly evoked for his instrumental role in getting the legislation passed (even with its imperfections). The involvement of second-wave leaders in the national campaign for construction workers' legal empowerment might explain their reliance on a rhetoric of citizenship rather than labour rights.

Since 2006, the NCCCL has used PILs to ensure the proper implementation of the welfare boards across states. To date, the Supreme Court has issued ten orders. As a result of these PILs, construction workers' welfare boards have been enacted in all states. A key feature of second-wave PILs was transparency and right to governance that enabled vulnerable populations to monitor government schemes. In this vein, NCCCL has initiated PILs to monitor the implementation of welfare boards. According to N.P. Samy, president of a construction union in Karnataka (KSCWCU) and founding member of NCCCL, 'Once they started monitoring and showing that the act was not being implemented in different states... all of the states started constituting their welfare boards'.¹⁵

Nevertheless, the campaign still has a long way to go. Now that all welfare boards are in place, they have amassed millions of dollars in funds. But disbursement of funds is still scant, registration of workers has been low, and the boards have become prone to politicians' abuse of the funds for their own political purposes. On 4 December 2015, the NCCCL gathered to commemorate the first anniversary of Dr Iyer's death with a meeting of unions, welfare board officials, and members of parliament to discuss the recent failures of the Supreme Court to address eight PILs already filed by the NCCCL on behalf of construction workers and violations of the Construction Workers' Welfare Board. By evoking the memory of Dr Krishna Iyer, NCCCL fortifies legitimacy in their claims for proper implementation and continues to uphold the potential power of judicial activism (NCCCL 2015). As Subhash Bhatnagar, one of the founding leaders of the NCCCL, said, 'The person who deserves the credit for pushing our petitions with the Supreme Court is the advocate at Human Rights Law Network [i.e. Collin Gonsalves]'. In other words, the NCCCL is continuing to rely on its network of lawyers and high court justices to ensure the implementation of the Welfare Board.¹⁶

At the same time, there is a keen sense that the high point of progressive judicial activism died with the early leaders of the movement. As Bhatnagar said:

'We can't achieve the unity that we achieved under Krishna Iyer when we got the National Act passed. He had a very strong reputation, and his Chairmanship was key. Also we had no political party affiliation, so all the political parties came out in support of us. Now the government is completely anti-labour. At that time it was not as anti-labour as it is now'.¹⁷

¹⁵ Interview, 19 October 2015

¹⁶ Interview, 16 November 2015

¹⁷ Interview, 16 November 2015

One important difference between third-wave construction workers' movements and the second-wave civic rights movements of the 1980s is that the latter were known for having successfully forged a cross-class alliance of middle-class activists, journalists, scholars, judges, and lawyers—all advocating for the rights of vulnerable, excluded populations. These groups' understanding of the language, perspectives, and manners of the state and employers enabled them to legitimize sub-altern claims (enshrined in the PILs) and advocate effectively for legislation (Pande 2014). In contrast, NCCCL is not as embedded among middle-class activists, scholars, and journalists apart from their relationships to some judges and lawyers. Further research should examine the relative impact on their campaigns for legal empowerment.

4.5 Domestic workers' movements for legal empowerment in India

Domestic workers' recent movements yield important insights into the successes and failures of third-wave movements for legal empowerment among informal labour. Domestic work in India has not traditionally been recognized as work. Therefore, data on its productivity and employment has been spotty. Domestic workers in India are classified in two categories: 'live-ins' and 'live-outs'. Live-ins are often young, unmarried, migrants who live in the employer's home or an attached servant's quarter. A large portion of their pay includes the housing and food. Live-outs live in their own homes in the city (usually in a slum) and tend to be married, middle-aged women (over 30). Live-outs are further categorized into 'part-time' and 'full-time' workers. A part-time worker, may work a full day, but for multiple employers for a specified number of hours and on specific tasks in each home. A full-time worker works for a single employer every day for a specified number of hours and multiple tasks. Due to the rising costs of real estate in India's major cities, live-outs have been the fastest growing group of domestic workers.

Unlike construction workers, domestic workers do not operate through chains of sub-contractors. Rather, they have direct, daily interactions with their employers. Moreover, although some live-ins are employed through placement agencies who charge for their service and thus directly profit from domestic workers' labour, most domestic workers are self-employed, finding employers through their personal networks.

The socio-demographic profiles of domestic workers indicate that the majority are illiterate (Neetha 2010). Although *Dalits* (the lowest rung of India's caste hierarchy) traditionally comprised the largest proportion of domestic workers, recent trends indicate that the sector is becoming more mixed in terms of caste, including members of 'other backward castes' and even 'upper castes' (Neetha 2013). This trend indicates the desperate need for any employment among poor women. Domestic workers are usually first-generation rural migrants (Rao 2011). Similarly, although most domestic workers have traditionally been Hindu, in recent years, Christian and Muslim women have also entered the sector.

4.6 Domestic workers' comprehensive legislation

Unlike construction workers, domestic workers still have no comprehensive legislation to regulate their working and living conditions. Although domestic workers have had some legislative victories, they are scant, and they remain at the state levels.

Domestic workers' organizations at present are determined to: (1) attain a sector-based, comprehensive law to regulate and protect the employment and working conditions of domestic workers (by fixing wages, holidays, medical leave, work safety, etc.); and (2) incorporate domestic work as a category covered by India's 14 labour laws (including the Minimum Wages Act 1948, the Maternity Benefit Act 1961, Workmen's Compensation Act 1923, Inter State Migrant Workers

Act 1979, Payment of Wages Act 1936, Equal Remuneration Act 1976, Employees' State Insurance Act 1948, Employees' Provident Fund Act 1952, and the Payment of Gratuity Act 1972).

At first glance, these demands are surprising. In an era when most labour organizations, scholars, and the public are mourning the *demise* of protective legislation for workers and the neutered impact of existing labour laws in India, these demands for *more* labour laws appear utopian. The dwindling capacity of Indian labour departments to employ labour inspectors guarantees that a minimum wage law for domestic workers would remain unimplemented. Even the Supreme Court appears to be pulling back on its earlier enthusiasm to implement labour legislation. So why fight for new legislation?

My interviews with domestic workers' organizations reveal that their fight for protective legislation (which appears out of touch with current political realities) is as much a *demand for recognition* (which is *not* a utopian impossibility). Although informal workers remain outside of this legislation in other sectors, domestic workers highlight the beneficiary impact of simply *having* such legislation in the first place, *even* when it is not implemented and/or does not cover the informal workforce. First and foremost, they serve as an official recognition of who is a worker (being exploited in a wage relationship) and what is work. At present, domestic workers are not recognized as workers in India, their employers are not recognized as employers, their relationship is not recognized as exploitative, and the home is excluded as a potential place of work. Therefore, domestic workers' fight for protection (in terms of employment conditions or welfare) is impossible. Many organizations spoke at length about the need to change the terminology to domestic work and shed earlier, derogatory terms for the occupation. Having a law in place would secure this change in the terminology.

Second, the fight for protective legislation is a demand for the *threat of power*. Although informal workers are regularly excluded from the laws in practice, having them in place enables unions and workers to exert some power over employers by using the threat of judicial action. Construction leaders regularly spoke about filing court cases and calling the police when employers refused to provide proper compensation to workers' families after work-related accidents. These cases were not numerous, but they served as an important tool through which unions could empower their members and mobilize new members. Domestic workers often spoke about the need to file such cases, so employers would have some 'fear'.

Domestic workers' attempts to attain comprehensive legislation to regulate conditions of work and welfare in India's domestic work sector began as early as the 1950s. But to this day, each attempt has failed. After a one-day solidarity strike in 1959 among domestic workers, two private members' bills were introduced in parliament. The first was the Domestic Workers (Conditions of Service) Bill introduced in the upper house (*Rajya Sabha*) by P.N. Rajabhoja, and the second was the All India Domestic Servants Bill. Both bills included clauses for minimum wages, maximum hours of work, a weekly day of rest, 15 days' paid annual leave, casual leave, and the maintenance of a register of domestic workers by the local police (Palriwala and Neetha 2011).

Both bills were stalled during the parliamentary sessions, so they could lapse. In 1972 and in 1977, another private members' bill was submitted to the lower house (*Lok Sabha*), called the Domestic Workers (Conditions of Service) Bill. This bill aimed to bring domestic workers under the purview of the Industrial Disputes Act. Both times, they were allowed to lapse (Neetha and Palriwala 2011). In 1974, the Committee on the Status of Women in India noted the need to regulate the conditions of domestic workers, but this too was ignored by the Government of India. During the 1980s, further attempts were made to legislate the working conditions of domestic workers, but all attempts failed to materialize into new laws. The 1988 National Commission on Self Employed Women and Women in the Informal Sector recommended (to no avail) 'a system of registration

of domestic workers, a minimum wage, a legislation to regulate conditions of employment, social security and security of employment' (Neetha 2013). Similarly, the 1989 House Workers (Conditions of Service) Bill, which proposed that every employer contribute to a House Workers' Welfare Fund, was ignored (Parliwala and Neetha 2011: 98–99). More recently, the National Commission for Women drafted the Regulation of Employment Agencies Act in 2007; the National Campaign Committee for Unorganised Workers and Nirmala Niketan drafted the Domestic Workers (Regulation of Employment, Conditions of Work, Social Security and Welfare) Bill in 2008; Shri Arjun Ram Meghwal introduced a private members' bill, the Domestic Workers (Conditions of Service) Bill, in parliament in 2009; and the Domestic Workers' Rights Campaign was launched in 2010.

Although these attempts have all failed to pass a national-level act, their cumulative failures have galvanized a range of domestic workers' organizations to come together in more joint activity at the national level. In 2013, after the International Labour Organization Convention, several organizations came together under a new banner, called the National Domestic Workers Platform. They held a mass rally in 2014 in New Delhi to urge the government to adopt a central law on domestic workers guaranteeing their rights, and the struggle continues. In December 2016, the National Platform members met once again to discuss yet another draft bill.

At present, the Indian government has agreed to form a policy for domestic workers, which will merely present a vision and advise state governments on potential regulatory options. It will not, however, hold any judicial weight. Although domestic workers' organizations refuse to accept this as a replacement for the act, many have expressed that it was a first step that they would be willing to accept. The Draft Policy on Domestic Workers (which is currently pending approval in parliament) sets out a labour rights framework for domestic workers, and obliges the central and state governments to bring domestic workers into the ambit of existing labour laws and schemes and to set up legislative mechanisms to address issues that existing legislation does not address. It also obliges state governments to set up an institutional mechanism which provides for social security, grievance redressal, and dispute resolution. It further urges governments to register workers, employers, and placement agencies and to promote skills development. Under these recommendations, governments will be urged to forbid sexual harassment and bonded labour, regulate working conditions by stipulating minimum wages, compulsory paid leave of 15 days/year, maternity leave, 1 day/week off, and a safe working environment (Ministry of Labour and Employment 2011).

The head of Human Rights Law Network and advocate of PILs, Gonsalves, has urged domestic workers to take the PIL route:

The domestic work discourse is at a standstill. Even elementary reform is not an option. The government is disinterested. DISINTERESTED. How long will you carry on with the same discourse?! Working conditions are bad etc. Instead we should compare domestic workers with slavery...Article 21 'right to life', bonded labour. And based on these, the conditions *must* be changed...With the PIL, the Supreme Court may make an order governing domestic workers, and then the government will have to come up with a law or an act. Then you can get medical benefits, minimum wages etc. Then the rights are binding. But equally important is a remedy in a court with a binding resolution. The current act does not discuss how disputes will be settled. Welfare Boards cannot replace courts!¹⁸

¹⁸ Interview 7 January 2017

Although the Indian government has refused to recognize domestic work under comprehensive legislation, it has now included domestic workers as an occupational category in a series of existing legislation (a contradiction that is not uncommon in Indian law). Domestic workers are now included as an occupational category under:

- The Unorganized Workers' Social Security Act (2008);
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013); and
- The Child Labour Act (2006).

At the state level, there have been some additional legislative victories. For example:

- Seven states have included domestic work in their minimum wages notifications;
- Some states have recognized domestic work in the Rashtriya Swasthya Bima Yojana (RSBY), a health insurance scheme for those below the poverty line; and
- Delhi has passed the Delhi Private Placement Agencies (Regulation) Bill (2012), which requires compulsory registration of all placement agencies of domestic workers and at least one kin of the domestic worker.

4.7 Domestic workers' welfare boards

In recent years, welfare boards have multiplied in several states. However, they face multiple challenges because many are no longer tripartite and lack defined funding sources. Nevertheless, informal workers' organizations across sectors remain committed to demanding and implementing welfare boards to consolidate informal workers' identity, provide a forum for their concerns, and provide an institutional mechanism for the delivery of worker identity cards and benefits.

Welfare boards for domestic workers now exist in three states. The earliest was established in the state of Kerala in 1977. Maharashtra's was established in 2008 and Jarkhand's in 2013. Further research needs to be conducted in Kerala to examine the impact of its welfare board. In the newer states (Maharashtra and Jarkhand), however, the boards were found to be woefully weak. In Maharashtra, they are not connected to a secure funding source. In Jarkhand, they merely fold in existing schemes, which do not leave domestic workers better off than before. Implementation is a constant and unsurprising problem.

5 Conclusion

The recent literature on the use of legal empowerment to address poverty and exclusion has tended to focus on groups organized around ascriptive characteristics (such as ethnicity, race, caste, and gender) or specific topics (such as environment, water, etc.). Using the case of India, I have tried to bring labour back into the discussions on legal empowerment.

First, I draw a historical lens onto the use of legal empowerment to fight poverty and reveal three waves of movements at the global level. Each wave is distinguished by its timing, the state-level target of its demands, and the principal actors involved. The first wave ran from the early 1900s to the 1970s and was marked by national-level legislation in parliaments. The second wave ran

from the 1980s to the early 2000s and was marked by PILs in high courts. Less articulated has been what I call a third wave, which began in the mid-1990s that utilized a hybrid approach to legal empowerment by bridging the legislative, executive, *and* judiciary branches of the state. Third-wave movements underline the importance of attaining symbolic power from legal recognition, a power that is often muted in the recent scholarly focus on implementation. Alongside their differences, the three waves share several commonalities. In each wave, legal empowerment was won, not bestowed from above; in other words, *social movement actors from below have always been critical to legal changes from above*. In addition, each wave's victories were met with resistance that undermined its sustainability and opened the door for a subsequent wave marked by new formations and strategies, as well as strings attached to the preceding wave.

Second, I illuminate labour's changing roles in legal empowerment movements across each wave. Although labour has been widely acknowledged as a significant actor in the first wave, it has become surprisingly understudied in the second and third waves. As I detail above, labour has played a significant role in the first, second, *and* third waves of legal empowerment. More interestingly, its role and its demands have shifted over time, underscoring the dynamic nature of group-based politics. With each subsequent wave, labour has fought for a more encompassing identity whose boundaries stretch beyond earlier exclusions. In India, first-wave movements and the resulting legislation protected labour narrowly defined as only those operating under formally registered employers.

Second-wave movements expanded this definition by enforcing the *implementation* of existing legislation designed to protect especially vulnerable groups (such as children, bonded labour, and rural labour) who nonetheless operated within a standard employment relationship. From above, second-wave movements expanded their state-level options and made use of the Supreme Court (and not just parliaments) to employ innovative methods to implement existing legislation against labour exploitation. From below, second-wave movements expanded the forms of organizations that could represent workers to include NGOs (as well as unions).

Finally, third-wave movements expanded the definition of labour even further to include sub-altern workers who were long marginalized from earlier organized class-based groups (such as women, low castes, and ethnic and racial minorities). From below, third-wave organizations address the 'intersectionalities' of class and ascriptive identities and thus provide an important corrective to the more simplified labour-centric vs. ascriptive identity-centric analyses on legal empowerment. Unlike earlier waves, third-wave movements have also witnessed the rise of new organizations that have mobilized alternative class identities among the long-excluded informal workforce. From above, third-wave movements' have returned to fighting for national-level legislation through legislatures (as in the first wave), thereby reminding us of the significant symbolic power vulnerable groups secure through legislation, *even in the absence of perfect implementation*. Informal workers in India have employed a language of citizenship to pressure parliamentary bodies to enact national-level legislation that directly addresses their unique needs as informal workers, women, and low-caste members. In addition, they have used second-wave court rulings as precedents for their demands for new legislation and are launching PILs to ensure the implementation of legislation that they have won for informal workers. I have employed a comparative analysis of third-wave movements in India's construction and domestic work sectors to showcase the victories and challenges of present efforts.

The findings outlined in this paper urge us to move past simplistic distinctions between labour/class versus ascriptive identities. Vulnerable groups are organizing along intersectionalities of class, gender, ethnicity/race, and caste. My research to date indicates some tensions between informal and formal workers' organizations, but relatively few tensions between informal workers' organizations and other ascriptive identity-based organizations. Results have been mixed and

varied across space and industry. But they remain under-analysed. It is time now for our scholarship to follow the lead of social movements from below to critically analyse the complex outcomes of their constantly evolving movements.

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