Open Questions: Fact-finding within Borders

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Abstract

The importance of human rights and quasi-judicial inquiries into violent events is a productive entry into questions of the relationship between politics, truth, and justice. This paper provides a historical perspective into nationally-rooted fact findings in India and presents a case study of fact-finding reports on the communal violence in north-east Delhi in 2020 to illuminate its role in public life. It opens to inquiry the question of what enables the effective and successful use of fact-finding as a form for advocacy opens questions on the conditions that allow for the creation of a public and shareable truth about a significant political event.

Introduction: Do facts need to be found?

In the vast literature of protest and resistance, being precluded from the *space of appearance* is to preclude the individual from the right to have rights (Butler p.59). Sharon Sliwinsky even went so far as to claim that the act of encountering images of suffering, "such painful aesthetic encounters can be thought of as the pre-legal or perhaps the pre-political affective climate that galvanises human rights discourse"(p.24). Butler argues that "(i)f we appear, we must be seen, which means that our bodies must be viewed and their vocalized sounds must be heard: the body must enter the visual and audible field." This appearance articulates a certain set of "demands" but these demands do not exhaust the justice that is sought. It is a matter of recognition.

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A similar history can be found in the scholarship on testimony. A similar disposition is required in articulating the need for victims of structural violence to finally speak of the harm they suffered. But like the conditions of appearance the testimonial act is not guaranteed to victims. The claims for justice they make cannot be simply reduced to the redress provided to the harm they testify to. But the act of testifying itself has been accorded with exceptional importance to allow for reconciliation and acknowledgement. Annette Weiviorka's bold proclamation that the 20th century is the era of the witness (Weiviorka, 2006) holds true for the many epochal events, of collective trauma, of the century. Weivorika's observation that the Eichmann trial's choice to introduce oral testimony of survivors as opposed to the documentary survivor testimony employed in the Nuremberg trials marks the advent of the witness(ibid). But the tension underlying the evidentiary choices in Nuremberg echoed a deeper anxiety. Ruti Teitel (2002) observes that the preference was not just for documentary testimony but for documentary evidence(p.73). She links this to the significance of the criminal trial in securing historical justice arguing that one of the most significant ways a criminal trial offers the possibility of historical justice is that "the criminal trial enables the establishment of a historical record at the highest legal standard of certainty…truth beyond a reasonable doubt." (2002, p. 73). Teitel's argument comes within her framework of transitional justice where societies in radical political change require a new language of jurisprudence rooted in prior political injustice. Her suggestion is powerful in imagining law's role in political change, which she argues "suggests criteria beyond the fairness of elections, stability of institutions, or economic development by which to evaluate new democracies. Legal responses are both performative and symbolic of transition" (Teitel, 2002, p. 19). Citing this exceptional and constructivist role of law she finds that transitional justice isn't simply a by-product of political transition but co-constitutive of it (ibid). Echoing a similar sentiment, Mark Sanders observes of South Africa's Truth and Reconciliation Commission (TRC) that "for scholars of transitional justice, a truth

commission is a quasi-juridical body designed to establish the truth about an era of political wrong in ways that promote peace, democracy, and a culture of human rights in the country concerned" (2007; p.2). Testimonies in the TRC operated in various registers— the forensic and factual, the personal and narrative, social and the reparative— and for Sanders, when "testimony at the commission's hearings transformed its agenda it did so not in spite of the law but because of it." (ibid; p.4). Teitel observes of the TRC that "When the victims' testimony is narrated by the commissioners' quasi-state authors, it becomes a shareable truth, a national story, and the basis of transitional consensus" (2002, p. 82).

But more broadly conceived, truth commissions do not belong only to transitional regimes, they belong to a variety of what Stanley Cohen describes as "modes of acknowledgement", as the most "resonant symbol for the uncovering and acknowledging of past atrocities" (p. 227). He observes three possible ways the TRC navigates the vexing problem of the relationship of truth to justice: firstly, that truth commissions are empowered to look for the truth without the implementation of judicial punishment, secondly, that they foster accountability by referring prosecution to other authorities, and finally, that they are authorised to recommend policies such as compensation, reconciliation, mediation, and (more controversially) amnesty. But the form of the truth commission is not limited to the jurisdictions of transitional regimes, even as Teitel observes that transitional regimes have themselves endured cyclical and serious structural changes with changing political circumstances and observing that by the end of the 20th century transition itself becomes a persistent trope, "with apparently ongoing processes of transitional justice delayed" (2003, p. 85). She terms the contemporary phase of transitional justice to be one of "steady-state transitional justice" enabled by the entrenchment of post-conflict jurisprudence (ibid, p.90). In the context of second phase, she makes an important observation that underlies the spirit of most exercises in fact-finding, documentation, and human rights research- that "transitional justice relates to exceptional political conditions,

where the state itself is implicated in wrongdoing and the pursuit of justice necessarily awaits a change in regime" (ibid. p. 86). And the enterprise of fact finding holds on to this anticipatory structure even as they work to enter their narratives into official record, to be made sharable truth, and public record. It is this possibility that law may, in whatever political climate, occasion brief and fragmented spaces for registering political wrongs that drives the advocacy of many of the fact finding exercises described in this paper, as they direct their recommendations.

The practise of fact finding is as ubiquitous as it is under-theorised. Phillip Alston and Sarah Knuckey's 2015 book Transformation of the Human Rights Fact Finding is a vital resource but is also, unfortunately a singular effort in the theorisation of human right fact finding. They identify that fact finding missions generally attempt to "ascertain the facts about alleged human rights abuses, ideally through on-site visits"(p.5), assess state and (more rarely) individual responsibility, and do so with an aim to offer recommendations to remedy such harm. The reports described in this paper are no exception. Alston and Knuckey also identify the benefits of fact finding as a process that can be easily mobilised, flexible, and have the capacity to transform "public and governmental understanding of a situation, as well as having the potential to promote wide-ranging political or institutional reform" (p.7). They identify that fact finders are often able to undertake the crucial yet challenging task of identifying interrelationships between various forms of law- humanitarian, human rights, criminal, and administrative. The under-theorisation is makes it a productive site for theory building and refining practise. It is necessary to take into account an enormous proliferation and diversity in actual practices ranging from international criminal investigations, open source digital investigations, monitoring practices, to ad-hoc citizens and civil society reports. They also identify that the question of jurisdiction at the international, domestic, and local levels often blur in practice, as "(i)n practice, there is a complex interplay between the international and

domestic, and the standards and approaches are adopted at one level inevitably influence those used at the other."(p. 9). Their case study on Sri Lanka detailing the negotiations between fact finding teams and governmental response however looks at the dynamics of domestic responses to fact finding as being solely one of government response. The case study ignores the possibility of domestic and local fact finding missions. Domestic and local fact-finding missions do not necessarily suggest insular communities either, as fact-finding teams create new communities of collaboration and learning as local missions learn and find new ways of articulating their findings based on practises at the international level[2] even if they continue address their findings to national audiences and domestic legal frameworks.

Context: The case for independent missions.

India has seen enormous changes in its political culture over the past decade and patterns of regress can be observed in its democratic culture. Should one attempt to quantify a regress in democratic norms in India, India's democracy score fell from a peak of 7.92 in 2014 to 6.61 in 2020 and its global ranking slipped from 27th to 53rd (EIU, p.31) putting it in the category of being a flawed democracy. The report specifically cites one of the reasons for this decline as being the "increasing influence of religion under the Modi premiership, whose policies have fomented anti-Muslim feeling and religious strife, has damaged the political fabric of the country…(t)he enactment in December 2019 of the Citizenship (Amendment) Act 2019 continued to fuel riots in 2020, with several left dead following clashes in February in the capital city, New Delhi" (ibid). Should this be seen as a significant social trauma for minorities in India, the question of the avenues for redress is pertinent and valuable. It is also these events that form the central case study of analysis in this paper.

[2] A good instance of such collaboration is Amnesty's Investigative report described later on in this paper which is a collaboration between Amnesty in India and Amnesty's citizen evidence lab

To grapple with the challenges of securing justice for victims of communal violence it is crucial to understand the official avenues available for victims. Firstly, and central to the task of securing justice are the numerous criminal proceedings that are initiated against individuals and groups. Secondly, in exceptional cases, various state and central governments have the power to constitute a public commission of inquiry through the Public Commissions of Inquiry Act. The constitution of the commission, its terms, appointment of members, its powers, and the decision to publish findings are an entirely political decision, leading to numerous contestations and failures of this form to operate. A crucial extension of this act however is that certain bodies such as various state and national minorities commissions and the human rights commissions have been conferred some of these powers in their mandates. Thirdly, compensation and damages are often accorded to victims by state governments, but the assessments often do not deal with substantive questions about the events other than through the narrow view of assessing damages. Prone to routine delay and failures, such audits cannot create official truth about the events. All these methods are subject to sometimes fail even while civil society advocates utilise these provisions and call upon them in recommendations. Their failure isn't indicative of their futility but rather points to the need that they be invoked and monitored closely by civil society actors.

On the criminal proceedings of communal violence in India, Moyukh Chatterjee, in his essay "The Impunity Effect", understands the way majoritarian rule is legitimised through everyday legality, through the interrelated legal techniques of documentation, temporalities, and proceduralism in the trial of extraordinary violence. He studies cases against perpetrators in the communal violence in the state of Gujarat in 2002 as they proceed in local courts, decades following the events. Two things stand out in this article. Firstly, in the consideration of transitional justice studies, Chatterjee observes that the proceedings in the local courts destabilises processes of securing justice in reconciling with a violent past and how it acts as a

standpoint from which “the impunity effect in Gujarat reinforces the importance of “the local” in understanding forms of legality that make public violence unaccountable”(2017; p.121) . The discussion hints at the way the politics of high profile, mediatized, landmark cases in many senses serve to legitimise the myth of an impartial Indian state even as justice is in many senses disabled in the ordinary performance of justice at the local level. A crucial assumption in this consideration of securing justice against exceptional violence is that an atrocity of the past, belongs to the past. That the deployment of modes of transitional justice must be in a sense “complete”. I suggest that the possibility of fragmented and partial attempts at the principles of transitional jurisprudence can address ongoing political injustice through public commissions of inquiry. In using the language of transitional justice rooted in prior experiences of political injustice it creates necessary forms of official truth even as it may also serve to legitimate the myth of an impartial state.

The language of transitional justice is of course not universal if it is to be informed by a specific history of political injustice. The history of communal violence in India being this history in the case study presented in this paper. Specific histories of political violence inform the practices of such domestic, local, and non-juridical civil society fact finding missions. This isn’t just limited to the history specific history of political violence but also lapses in past judicial intervention, previous commissions of inquiry, previous work by civil society groups, and political fallout. Their actions are necessarily configured not just by the events of wrongdoing in the present, but a language of transitional justice inherited from the unaddressed wrongs of the past. They develop the language of advocacy through such institutionalised failures of documentation, temporalities, and proceduralism that, Chatterjee argues, are mobilised to disable the Muslim witness.

In another work “Against the Witness”, Chatterjee looks at how trials use legal procedures to transform the survivors of violence into unreliable witnesses, legitimising the subordinate

status of religious minorities in a majoritarian political regime. Two observations are crucial in this article. Chatterjee identifies the crisis of witnessing in what has come to be known as the age of the witness under a majoritarian political regime as emerging from the "active, productive and formative" (2019; p. 173) legal processes rather than "transcendental legal aporia, the ambiguous status of the witness, or even some deep historical trauma that the courts cannot address" (2019; p. 199), bringing attention to the "importance of the institutional settings and narrative logics that elicit and shape the witness's testimony" (ibid; 180). Challenging the faith that literature on the "age of the witness" has on the therapeutic or transformative effects of bearing testimony, Chatterjee focuses on contexts that disable testimony making "witnessing both dangerous and often futile" (ibid). Scholars signalling the advent of "the thing" and an object-oriented juridical culture share some of these concerns about the receding importance of the figure of the witness[3] (Weizman, 2014). Both scholars of the forensic turn and scholarship in trauma studies (Feldman and Laub, 1992) point to a certain crisis of witnessing in our recent past. But the way forward from the crisis of witnessing does not directly suggest that the centrality of testimony would slowly fade from human rights discourse. The answer might lie in something Chatterjee mentions in passing, the "NGO-supported witness" (2019; 178).

The nature of the NGO that Chatterjee identifies is precisely to provide legal aid- to provoke and create the circumstances under which a victim can "finally" bear witness in the trial. But the nature of the civil society reports described in the case study in the following section, do not allow for such a simple anticipation of the trial or defer justice to the trial. The context of such civil society reports is framed by the failures of justice, but two processes complicate their anticipation of the trial. Firstly, in many ways, these reports do not presume the question of

[3] Scholars observe this forensic turn in the posthumous trial of Josef Mengele where the central focus of the trial was the forensic expert testimony in ascertaining the remains of Mengele and not victim testimony as in the Eichmann trial.

justice to be exhausted by the law; they are themselves involved in various way of providing rich political and social context, framing the nature of the violence itself and are often directly involved in providing relief to the victims in very material terms. Secondly, these reports, while concerned with creating enabling conditions for the witness to "finally speak" they are also aware of the burden of such disclosure and are themselves implicated in various modes of framing and subjectification in the ways they choose to speak of the victims. The suspicion Chatterjee has towards closure in witnessing must be extended to its crisis. The crisis of witnessing is never settled temporally at the trial or the moment when the witness "finally speaks" because the testimony of the survivors of violence is continuous and happens in media res because the violence is situated in a long history of othering and living with violence. Chatterjee's account demonstrates how a majoritarian political regime legitimises the subordinate status of the Muslim witness by deeming them to be "unreliable witness" in a trial, which establishes a relation of the state to the Muslim witness. But the article does not purport to account for the Muslim witness in other contexts and times which might as well be the moment when the witness "finally speaks", whether they be in an FIR, the testimony to an NGO, a diary made public, letters discovered, on Twitter or in a trial —all of which can become shareable truth in the manner of official memory. To put a historical gaze on the matter, it might be possible that the archive of political violence can be plural and agnostic to the notarising force of the testimony in trial.

The fact finding as a genre is distinctly committed to enabling the speech of victims. Alston and Knuckey elaborate on this choice:

> Witness testimony is the primary source of evidence in most human rights reports, and this will likely continue to be the case for strong evidentiary, ethical, and advocacy reasons. Witnesses and victims often possess unique and critical information, physical or documentary evidence may be non-existent or difficult to access, the focus on victim

testimony centers the perspectives of and can empower the most directly impacted rights-holders, and the narrative form can be especially compelling in advocacy. The primacy of victims and witnesses in fact-finding also calls for continued examination of their role in fact-finding, and deeper analysis of the relationship between fact-finders and those they interview.

Given the sensitivity that independent missions show toward documenting the experiences of victims, they create valuable objects of public memory for advocacy.

Fact finding in India

Having said this, the practise of fact finding has a rich history in the Indian context that isn't simply a borrowed concept from international human rights practice. A comparison is imperative. Vinay Lal observes that the origins of the independent committee of inquiry in India, was an act of resistance in appropriating the committee-type of investigation used by the British. The independent reports were presented to a "nation that was not yet a nation-state" (Lal, p. 485). On the significance of these reports without official commission, he observes that the reports are "inquiries into the colonial state's prerogative to provide the sole interpretation of the events in question, as well as inquiries into the state's own adherence to the law which it claimed to uphold." (ibid).

The nationally rooted practise takes on a recognisable genre of fact-finding report writing post-independence. A monumentally important report in this regard, especially in looking at state accountability in public violence is the report "Who are the guilty?" produced as a result of a joint fact-finding conducted by the People's Union for Democratic Rights and the People's Union for Civil Liberties on the attacks against Sikh Communities in Delhi between the 1st to the 10th of November, 1984 following the assassination of Prime Minister Indira Gandhi by her Sikh bodyguard. This happens in the context of tense situations following the authoritative

government response to claims of self-determination by Sikh nationalists. The report forms a valuable guideline to numerous independent civil society fact finding reports with clear categories delineating involvement of the police, administration and media responses as well as an allegiance to the narration of incidents that seem to have purportedly triggered the violence, recounted chronologically. Veena Das considers the impact of the report in popular opinion and identifies "1984 to be a major marker in the understanding of communal violence in India and the role of civil society in contesting the received pictures of what constitutes collective violence. This is not because academic studies were lacking earlier, but because the relation between the production of knowledge and the needs of immediacy was articulated in important ways for salvaging the democratic project in India in 1984." (2006; p. 206). This form of critique informs the way reports described in this paper narrate concerns over governmental accountability. The report effectively mobilised popular support and this support led to the formation of a public commission of inquiry, a high-profile prosecution and even an apology in 2005 from the then-Prime Minister Manmohan Singh belonging to the same party that was in power when the violence happened.

But beyond the terms of advocacy, Deepak Mehta and Roma Chatterjee have shown how inquiry documents don't just shape public memory but through of the colonial archive of public commissions of inquiry, these documents shape individual testimony of Hindu-Muslim violence in India. They argue that the legacy of the colonial archive galvanises Hindu-Muslim violence in India as a riot. (2007. P.30). Given the force of such inquiries in determining not just memory but also articulations of injury, the counter-narratives of independent reports are vital.

This form of countering state narrative through independent fact-finding runs parallelly and is closely related to the history of the government-appointed public commission of inquiry. The appointment of such commissions is done through the Public Commissions of Inquiry Act,

1952 and is largely modelled upon the English legislation Tribunals of Inquiry (Evidence) Act, 1921 and analogous laws in other countries such as the Australian Royal Commissions Act, 1902-33, Canadian Inquiries Act, 1927, and the Commissions of Inquiry Act, 1948 in Ceylon (Sri Lanka). The Indian act defers from the English one in not requiring a resolution from both houses of the parliament, not having a clause for referring contempt to the high court, not requiring that the commission hold its hearings in public, and that the government may direct all or any of the provisions of the act toward any authority set up by the government to conduct investigations into matters of public importance. The last of these features is crucial to understanding the nature of inquiries led by bodies such as Minorities Commissions or the National Human Rights Commission.

Ankita Pandey, claims that the Indian version of fact-finding is distinct from, and pre-dates, the "well-known practice of fact-finding conducted in the context of the international humanitarian initiatives of the United Nations." (p.528) Studying the first generation of civil rights activists in India as the practice re-emerges from its colonial past in the 70s and 80s, she argues that their writing during the emergency constitutes a hybrid practice of left politics and legal liberalism, maintaining affinities with radical left movements while deploying engagements with the state through fact-finding and litigation to redeploy the states own accountability mechanisms. She argues that the fact-findings performed two crucial tasks- exposing state cover-ups and legalising public memory. She argues that the Indian version of the fact-finding works in tandem with popular movements and litigation, and "in doing so, fact-finding mounts a discursive contestation that exposes the partisan character of law, claims the normative promise of law and also extends legal reasoning outside the courtroom to the public sphere" (2021, p. 539). But such an "exceptional" argument needn't be mounted to appreciate the rich legacy of fact-finding in the civil liberties movement in India. The distinctiveness of the form is not unique to the India but is general to the genre of independent fact finding. What

is specific to India however is the practice of nationally rooted fact-finding missions, conducted by local voluntary groups, domestic civil rights activists, lawyers, and citizens (often through simple donations rather than organised funding) and addressing their recommendations to domestic legal and statutory frameworks. What often might make nationally rooted fact-finding missions rare, especially in matters of human rights violations, might simply be a matter of the risks faced by organisations in openly opposing their governments or even a matter of organisational capacities (Sharp, p. 78-82). A growing number of these risks and incapacities have been observed in the recent past as described in Part III of this paper. Despite the vibrant democratic culture that enable this exceptional Indian tradition of fact-finding as an independent, voluntary, and donation-based enterprise. So, it might be a worthwhile case study into investigating the exceptional conditions under which such a practice might have been possible in India even as debates regarding capacity-building and North-South collaborations in fact finding exercises remain fraught and unresolved globally.

A Multitude of Facts and Findings

This section outlines some key instances of fact-finding exercises conducted into the violence in north east Delhi in February, 2020 to enable a case study. First, it provides some context to the events to better appreciate the political stakes of fact finding. Secondly, it attempts the presentation of these reports within some typologies and outlines their distinct functions in the evolving aftermath of the violent events. Thirdly, in presenting the breadth of fact-finding practices inspired by a single event, it attempts to place these reports in relationships with each other in the public domain to enable analysis of these reports in following sections. This section moves past the question of the utility of human rights fact findings to prosecutorial processes. It also provides key details on the conditions of publications, methodologies, and institutions who partake in fact finding exercises.

In December of 2020 numerous protests opposing the Citizenship (Amendment Act), 2019 quickly gained momentum across India. The Citizenship (Amendment) Act, 2019 relaxed the period required for acquiring citizenship by naturalisation for certain groups of "illegal immigrants" with a preference towards non-Muslim immigrants, de-facto discriminating against Muslim immigrants" (Chandrachud, p.1). In popular discourse the amendment was seen as having the capacity to leave millions of Muslims without citizenship should the Act be followed by a National Population Register, a position also held by various civil society accounts of the events (Human Rights Watch, "Shoot the Traitors", p.1). The protests were largely spontaneous (Bhushan), leading to various sit-ins that lasted into the following winter months. One sit-in protest site in the south-eastern part of Delhi, Shaheen Bagh remained active for many months but from January 2020 onwards there was a growing sentiment against the sit-in sites for disrupting traffic and public life. Objections came from people who largely supported or were indifferent to the passing of the CAA. The resistance grew into an even more tense environment as the elections for the Delhi State Assembly drew closer in the first week of February. Two writ petitions were filed seeking the clearance of the arterial roads being blocked by the sit-in (The Wire Staff, "SC Defers Shaheen Bagh Hearing to March 23, Criticises Delhi Police Over Handling of Violence") and various political figures began targeting the protest sites in election campaign speeches (Arnimesh). On the night of 22nd of February, 2020 a group of protestors in North East Delhi's Seelampur locality moved their protest to block a major road below a metro train station in Jaffrabad in North East Delhi. A politician affiliated with the ruling party asked for crowds to gather not more than a kilometre away fromfrom this protest site and openly asked for the Delhi police to clear the road blockades (Vij). This call quickly escalated into clashed between protestors and people asking for the roads to be cleared. Over the next three days, North East Delhi saw one of the worst instances of violent communal clashes in recent history leading to the death of over 50 people,

most of whom were Muslim (The Wire, “Delhi Riots Death Toll at 53, Here Are the Names of the Victims”).

Over 17 fact-finding reports were produced in response to the events. It is necessary to intervene here with a typology to broadly map out the various kind of fact-finding missions. Stahn and Jacobs in their article attempt to bring out the complexity of the relationship between international criminal courts and tribunals (ICCTs) and human right fact findings and suggest that a “polycentric model” might help appreciate the relative strengths of both. They are responding to the popularly held belief that human rights fact finders do not form the most rigorous criminal investigators. They rightly observe that “(h)uman rights actors are particularly concerned with the ending of violence at the "earliest possible moment" and the improvement of the situations of individuals (e.g., humanitarian conditions). These goals do not necessarily coincide with the objectives of investigation and prosecution, which are typically ex post facto and rarely immediate tools of prevention” (ibid, p.257). Their typology is productive as they distinguish between not only between the criminal investigation and the human rights fact finding into two forms, the scoping report and the investigative report. Stahn and Jacobs observe that “(i)nvestigative commissions may be distinguished from broader scoping missions that have a different focus…(t)hey are geared at tracing patterns of violence in "situations" and fact-finding per se. They do not necessarily conduct legal or quasi-legal investigations. Their powers of inquiry have a broader focus, that is, to signal or alert human rights violations or identify accountability strategies.” (Stahn and Jacobs, p.259). While it may be entirely true for scoping reports to not be concerned with The reports described in the following section are divided into these two categories as they clearly have distinct purposes and require their own separate analysis.

The first few reports to emerge are situation or *scoping reports* by various individuals with civil society affiliations and work in northeast Delhi. These include:

1. '*Let Us Heal Our Dili'* by authors Farah Naqvi, Sarijini N, Navsharan Singh & Naveen Chander, published in The Citizen on the 28 February, 2020;
2. "Government completely absent from relief operations in the aftermath of communal violence in Delhi" a status report based on visit to Bhajanpura, Chaman Park and Shiv Vihar on February 29, 2020 by Anjali Bhardwaj, Annie Raja, Poonam Kaushik, Geetanjali Krishna, Amrita Johriand;
3. "An Account of Fear and Impunity" by Youth for Human Rights Documentation released on the 3rd of March, 2020;
4. "*Delhi Riots – Kardampuri and Kabir Nagar Fact Finding Report*" by Lawyers Against Atrocities on 11th March, 2020;
5. "*It's not a 'Riot', but a targeted anti-Muslim brutality colluded by Delhi Police*" by the National Confederation of Human Rights Organisations (NCHRO) on March 13th, 2020;
6. "An Inquiry in to the Anti-Muslim Violence in Northeast Delhi" by Progressive Medicos and Scientists Forum on the 20th of March, 2020.

All of these reports are characteristically narrow in their scope and have very targeted mandates with the single exception of the report by Youth for Human Rights Documentation. The reports often do not elaborate on methods or have a term of reference and are seldom more than annotated field notes. While seemingly ad-hoc if an attempt was to be made to present them in a larger typology, these reports would most closely resemble that of the scoping report. The reports so far identified as scoping reports align with Stahn and Jacob's typology. All the reports also quite forcefully articulate a humanitarian appeal that continued to unfold even as the violence abated. The need for immediate assessment of the extent of damages, internal displacement, need for medical attention, release of people arbitrarily arrested or detained etc.,

remained crucial appeals that helped shape public discourse and build pressure to address these humanitarian needs.

The second set of fact-finding missions in response to the communal violence in north east Delhi are investigative reports in the manner that Stahn and Jacobs describe human rights investigative reports. A majority of these reports were released between June and December, 2020 owing to the stringent pandemic-related shut downs that were imposed at the end of March, 2020 and relaxed following June, 2020. These reports include the Delhi Minorities Commission fact finding report "Report of the DMC fact-finding Committee on North-East Delhi Riots of February 2020". The Delhi Minorities Fact Finding Committee submits its report to the chairman of the Delhi Minorities Commission on the 27th of June 2020. The commission was given a mandate of conducting the inquiry and presenting the report within four weeks but received and extension up to 30 June 2020 due to the lockdown and restrictions on movement put in place to curtail the spread of the COVID-19 pandemic. Being a fact finding committee instated by a statutory body for the protection of minority rights, its methodology is more streamlined. It is described as follows:

> Upon constitution, the Fact-Finding Committee held meetings at the Commission and in the affected area of Mustafabad. The Fact-Finding Committee members camped in the relief camp in Eidgah at Mustafabad for collection of information on damages, to document victim statements, and assist victim families to approach the helpdesk set up by Delhi Police in Eidgah for registration of complaints. Before the lockdown, at various prominent places across North East Delhi, the DMC put up banners (see next page) asking people to come forward with information regarding the violence. Phone numbers of volunteers and other methods of getting in touch with the Fact-Finding Committee were prominently displayed through the hoardings. (DMC, p. 19)

It also includes civil society reports such as "*Delhi Riots of February 2020 Causes, Fallout And Aftermath*" which is entirely based on secondary sources by Citizens and Lawyers Initiative and released in September, 2020. The use of secondary sources, they argue, provided them with the ability to analyse the material and build a narrative:

> This report is an effort to traverse published reportage on the Delhi violence in order to piece together multiple pieces of evidence into a credible narrative of the events. It is based upon, and recognizes, the work done by published fact-finding initiatives in the public domain, as well as contemporaneous news reports during the days of the violence as well as in its aftermath. An effort was made to gather information solely from unimpeachable and publicly available news sources. The opportunity to collate and analyse these reports with the luxury of time gave the research team the opportunity to identify and determine the genesis, and emergence of patterns in the unfolding of incidents and events. (p.12)

"*Chronicling Truth, Countering Hate: Responding to the violence and state action in North-East Delhi in February 2020*" which is a report by Karwan-e-Mohabbat released in July, 2020. A report was also released as part of a book Delhi's Agony published in July, "*Delhi's Agony Essays on the February 2020 Communal Violence"* and the fact finding was conducted by the Communist Part of India (Marxist) (CPI-M) Delhi's State Committee. "*Investigative Briefing*" by Amnesty International India released on 28 August 2020, looking at the role of the Delhi Police in the violence. They describe the methodology of the report and documentary as follows:

> Amnesty International India interviewed more than 50 riot survivors, eye witnesses, lawyers, human rights activists and retired police officers. It also analysed several videos on social media platforms like Twitter to analyse the role of the Delhi police

> during the riots...To verify the evidence of human rights violations in the user-generated social media videos, Amnesty International India collaborated with Amnesty International's Crisis Evidence Lab. The Lab uses cutting-edge open-source and digital investigation tools to corroborate and analyse serious human rights violations. It authenticated these videos by verifying the time, date and location of the videos. In addition, Amnesty International India visited the locations where the videos were shot and interviewed the eyewitnesses and survivors. (Amnesty, "Investigative briefing")

Apart from these reports which point out the targeted and discriminatory nature of the violence against Muslims and as retaliatory violence to the Anti-CAA protests another narrative began gaining currency in right-wing circles often using the arguments of a loosely connected front of advocates for the protection of Hindu Human Rights. This narrative maintains with minor differences that the violence in north-east Delhi was a targeted conspiracy to internationalise the movement against CAA by orchestrating riots during then US president Donald Trump's visit to India and framing them as targeted violence against Muslims. The theory explains away any violence by Hindus or political figures associated with the ruling party to be entirely defensive in nature. And while inquiries of fact often are designed to respond to state narratives of denial or erasure, these reports largely conform to the state and police's investigative narrative. The appeals and reccomendations they make are also often congruent with the state's response. While this cannot be the entire substance of critique, the methods employed by these reports are unreliable and hint at the need for a common standard for independent investigations. The contestations over these reports are discussed in greater detail in the following sections, but the existence of such reports points to the cultural importance of fact finding practices in creating shareable truth that can be used to legitimise or challenge state responses to violent events.

These reports include "*Delhi Riots 2020 - The Untold Story*" by Prerna Malhotra, Monika Arora, and Sonali Chitalkar part of a group called Group of Intellectuals and Academicians (GIA) which was first set to be released by Bloomsbury, but was ultimately published by Garuda Prakashan in August 2020 due to concerns raised from various quarters regarding its claims. The report describes its methodology as follows:

> GIA went to North East Delhi from 29 February 2020 onwards and made multiple visits to gather data till the submission of the report to the minister of state for home (MoS [Home]) Shri G. Kishan Reddy on 11 March 2020. We had held extensive interviews with victims, residents of these areas and law-enforcement personnel. We met religious leaders from both communities who worked to de-escalate the situation. The GIA ground report was an outcome of intense research and data gathering from violence-affected areas in North East Delhi. (GIA, p. xii)

With the Untold Story received rigorous public scrutiny, two other notable fact-finding reports were published around the same time. The first is "*Report of Fact Finding Committee on Riots in North-East Delhi During 23.02.2020 To 26.02.2020"* by a group called Call for Justice and "*An OpIndia Report -Delhi Anti-Hindu Riots of 2020: The Macabre Dance of Violence Since December 2019"* by the online news portal OpIndia. Both reports echo similar narratives and which have not been so rigorously tested through public debates or in courts.

Given the number of narratives arrived at by different investigations conducted by different organisations with various motivations, it becomes crucial to think of the fact finding as a contested practice, but also as a vital and ordinary practice outside of the drama of international human rights fact findings. It must be kept in mind that most of these reports would not meet criteria of admissibility, but the claims they make are often crucial in creating the political conditions for public accountability and memory.

Contestations of Truth

The story of the communal violence in North-East Delhi in 2020 are indicative of the stakes involved in telling the truth about violent events. Even as numerous criminal proceedings continue in the cases, the contestation over the truth of these events holds enormous political stakes and illustrate even more grave concerns over the mechanisms of legal redress available to victims of large-scale discriminatory violence. In the absence of targeted mechanisms to address communal violence through hate crime provisions, reconciliation commissions, or independent judicial inquiries of fact the only avenues for victims to seek justice is through ordinary criminal proceedings and compensation commissions. These struggles over the truth and interpretation of the violence have led to a unique set of circumstances in which the fact-finding reports play a central role.

The book Untold Story by the GIA is based on a fact finding report that was submitted to the minister of state for home (MoS [Home]) Shri G. Kishan Reddy on 11 March 2020 and was to be published by Bloomsbury on the 20th of August 2020. However, before the book could be published, Kapil Mishra, a politician affiliated with the ruling Bhartiya Janata Party, who had made inflammatory speeches that are believed to have instigated the violence, tweeted an invitation to a book launch (@KapilMishra_IND). Following this, concerns were voiced by many people including authors such as William Darlymple and Meena Kandasamy and the unpublished manuscript was fact-checked by popular online new outlet The Quint (Dahiya, Kritaika, and Himanshi). The book was dropped by Bloomsbury India (Ellis-Petersen). One of the authors Monika Arora, also standing counsel for the govt of India, filed a complaint against Bloomsbury and then took the book to another publisher, Garuda Prakasam, They launched their pre-orders on the 23rd of August via a tweet and have since been defending and promoting the book.

The story of the publication of the book has created an enormous amount of discussion but beyond questions of freedom of speech surrounding the publication controversy more substantial political questions were raised. A review of the book by a voluntary citizens' collective of academics and activists, anchored by Karwan-e-Mohabbat, Anhad and Muslim Women's Forum (Sifting Evidence) pointed out how the book seems to form the template for the conspiracy narrative by the police, "We did, however, find evidence, which forces us to take this book very seriously. For alongside this book, we also read the charge-sheets being filed by the Delhi Police in the riot cases… The theories in this book have been replicated down to details in the charge-sheets being filed by the Delhi Police in the Delhi riots cases. These criminal cases have already incarcerated scores of people who participated in the movement against the CAA."(ibid., p.5) irrespective of the truth of a conspiracy, the reinforcing of state narrative places in jeopardy the nature of the fact-finding as a democratic practise. It creates a deferential position in what has been a critical practise. And more importantly raises questions about the space of human rights work in the public imagination.

But this isn't the only fact-finding that became embroiled in controversy. The Delhi Minorities Commission is a statutory body and therefore the fact-finding report was commissioned through its mandate. The notification to commission the fact finding team invokes the mandate of the Delhi Minorities Commission as per the Delhi Minorities Commission Act, 1999 under Clause 10 (1) and Clause 10(3) to form a fact finding commission about the "causes of violence, persons responsible, lists of victims, lists and quantum of damaged properties, role of police, administration and others, and related issues" and to submit the findings of the commission to the government of NCT of Delhi as per its mandate under clause 10 (g). The imperative of the report follows from a statutory obligation to protect the rights of minority communities allowing for it to speak not just as a statutory body having the capacity to investigate questions of culpability and has a "right to be heard" by the Minister in Charge`. The official character

of the Delhi Minorities Commission distinguishes it from the other reports produced around the same time not just because of its mandate to be involved in these events but also certain quasi-judicial powers it holds in conducting such investigations as underlined in Clause (5) of the Delhi minorities Commission Act drawn from the public commissions of inquiry act. Clause 6 of the act further authorizes the Commission to, "for the purposes of conducting any examination under this Act, utilize the services of any agency of the government with the prior approval of the government." Without the co-operation of the police (the report observes the un-cooperative attitude of the Delhi Police), the report relies solely on its capacity to elicit testimony and receive evidence on affidavit. The statements made to the Commission also enjoys special protection under Clause (7) whereby, "no statement made by a person to the Commission in the course of giving evidence shall be used against him in any court proceeding except for perjury". This quasi-judicial character of the Delhi Minorities commission allows for crucial space making that is central to the study of testimony in terms of the conditions which make testimony possible and what legal procedures of verification enable testimony to speak to the truth of the event, and more importantly offers the condition of amnesty. Here the only verificationary procedure is the punitive potential of perjury- which enables a suspension of verification at the moment testimony is elicited.

While the DMC has these capacities, the fact-finding team is termed a "committee", which betrays an indeterminate legal status making the report open to contestation as official record. While the quasi-judicial character of the commission allows it to enter the testimonies of the victims into official record it is important to remember that the Delhi Minorities Commission acts as a legitimating body much like the National Human Right Commission. Having the capacity to also investigate state actions, it becomes an "inside out body" (Singh, 2018). Drawing its mandate from the Delhi Minorities Commission Act, 1999 the report has some statutory force although the nature of this force is unclear. The report is brought into judicial

scrutiny along with other civil society reports, in a writ petition challenge asking for the report to be quashed. The petition is brought on by Dharmesh Sharma, the administrative head of DRP Convent School in Shiv Vihar that his family had established and manages. The writ petition challenges five reports:

(i) Report dated 27.06.2020 published by the Fact Finding Committee constituted by the Delhi Minorities Commission headed by Mr. M R Shamshad, Advocate-on-Record –Hon'ble Supreme Court;

(ii) Report published by Human Rights Watch titled as "Shoot the Traitors – Discrimination against Muslims under India's New Citizenship Policy";

(iii) A report by Citizens and Lawyers Initiative titled as „Delhi Riots of February 2020-Causes, Fallout and Aftermath".

(iv) A report dated 28.08.2020 published by Amnesty International India;

(v) "the constitution and the proceedings undertaken by extra-judicial private tribunal called "– "Citizens Committee on the Delhi Riots of February 2020: Context, Events and Aftermath as set up by one "Constitutional Conduct Group"; (Dharmesh Sharma vs. Union of India)

The petition claims that the reports directly affected the cases registered by police on the DRP Convent School fire and interfered with the due process of the trial. The challenge is mostly jurisdictional. It is important to note that the grounds of the petition do not in fact challenge the facts pertaining to the case of DRP public school but the larger narrative about the violence articulated in the chargesheet as only one report (by the Citizens and Lawyers initiative) mentions the school which is the subject of the FIR and relevant to the petitioner. Even this single mention does not contradict the events at the school per se, but the report in general disputes the police narrative of the riots. Finally, irrespective of the outcomes of the case it would be a key moment in determining the relationship of human rights groups to the courts.

Broadly the grounds articulate a few key assumptions that bring into question the relationship of law and cultural modes of truth telling. By praying for the report to be quashed, it assumes a hierarchical structure over who has the right to "truth telling". This is done, not in the least, by the invocation of the writ of mandamus and certiorari, which asks that the courts create a closed and controlled system of public judgement/adjudication of truth in matters of such public and political importance. It also deems the capacity of public and citizen-led inquiry investigation to have a contaminating effect on police/juridical investigation, and asserts that the criminal investigation is the only form of acceptable investigation in such a matter of public violence. It treats the civil society reports as emulating the DMC committee-report even as independent reports of this nature have always existed This leads to a claim that this form of truth telling has a contagious nature in alluding to human rights reports as copy-cats of the DMC report, which is counter-intuitive as the Minorities Commission report takes an unprecedented form that neither strictly adheres to previous inquiry commission reports nor independent human rights reports. Finally, the petition argues that the forms and genres of inquiry necessitates the processes of judicial inquiry for an investigation to not be considered mala-fide in its intent. It asks if cultural documents of conform to standards of admissibility rather than standards of ordinary reason.

As the proceedings are still ongoing, the questions the petition raises are crucial. The form of the fact finding for advocacy is crucial to right-based practice and political discourse. But the contestation over the truth claims of the report suggest a possible rupture in what seemed to be a longstanding and exceptionally conducive environment for a nationally rooted fact-finding practise. Ruti Teitel's claim is worth repeating, that "when the victims' testimony is narrated by the commissioners' quasi-state authors, it becomes a shareable truth, a national story, and the basis of transitional consensus" (2002, p. 82). If this was to be the case, the Delhi Minorities Commission report should have created the legitimate narrative counter to the narrative of state

investigating agencies. But its failure to establish public truth opens up the co-constitutive character of law and politics in creating spaces for addressing social trauma. It suggests that political contingency and democratic culture might not only influence the practice of truth finding in creating quasi-judicial mandates but also in how this may translate in the absence of a society in transition. But the nature of quasi-judicial and human rights inquiries continues to be informed by prior wrongs and distorts the temporality of seeking justice. The number and diversity of such reports produced in themselves might indicate that the seemingly exceptional practise of fact finding in India might be possible under vastly changing political conditions, making serious theorisation of the form all the more pertinent. It requires more theoretical consideration of the practises of human rights fact finding not just with regard to its methods but an evaluation of its efficacy as a tool for advocacy.

Conclusion

The significance of normative ground shared by human rights fact-finding and quasi-judicial commissions of enquiry is an important and under-theorised domain of studying the relationship of law and politics. India has had a long tradition of nationally rooted fact finding that has managed to surpass the usual obstacles of establishing robust local fact-finding practices. The paper looks at fact-findings responding to a recent and significant event of political and majoritarian violence as a case study to understand how human rights practise changes in the face of a changing democratic culture. The contestations of truth about events illuminate the limits of such public claim-making can be practised and the relationship of law and politics seems to be at the heart of the contestation over truth. The form of the fact finding itself requires greater theorisation comparatively and in understanding its efficacy as a tool for advocacy.

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