CHAPTER ONE
INTRODUCTION

1.1 There is a general air of cynicism about the role of law in social transformation. Cynicism becomes poignantly acute when we address the question as to how the law can assist amelioration of the unorganised rural labour. The basis for scepticism concerning law's role stems from several sources. *First*, the experience of enforcement of basic legislations like the Minimum Wages Act does not suggest any exciting potential for law. *Second,* even the progressive scenarios of the post-seventies legislation such as the Equal Remuneration Act, the Bonded Labour Act, the Inter State Migrant Workmen Act have been rather equally discouraging. *Third*, it is widely believed that a large number of economic factors and circumstances make the presence of law marginal in controlling unconstitutionality and illegality which attend the exploitation of the unorganised rural labour. *Fourth*, it is believed that in the absence of class consciousness and organization, or in the alternative broad societal consensus militating against such exploitation, legal action cannot in itslef contribute to any substantial change in the plight of the unorganised rural labour. One may add to this list of grounds for cynicism but it would be pointless to strengthen an already entrenched image of the law in the minds of the policy makers, beneficiaries, and victims of the present system. They all equally subscribe to an effete image of the law.

1.2 The important task, therefore, is to bring ourselves a more promising notion concerning the role of law in transformation of the conditions of the unorganized rural labour. The law has so far been conceived either as the enunciation of the will of the sovereign or articulation of the public interest through duly elected legislators; the making of law is considered to be one specialised domain and enforcement of the law is considered another specialised domain. The law making does not fully address the problem of enforcement; the enforcement process does not fully address the legislative aspirations. This dichotomy between the making of the law and its enforcement has been responsible to a very extent in the failure of law as an instrument of instruction to those who have to carry out the programme. It also must communicate its message equally to its beneficiaries and its victims. No programme of action can call itself as such without having an explicit regard for resources to carry out the programme objectives In the traditional legislative model, the law declares the overall societal goals, specifies the obligations of people, and the processes of adjudication; but the vital question of resources for realising the objectives of the law is always typically left to the other agencies of the state. It is absolutely necessary to redesign the legislative model as such if we are going to provide law with any programmatic significance.

1.3 Law as a programme of action cannot be reactive; in other words, it may not assign the mobilization of law to the party affected. Indeed, the law as a programme of social action must necessarily be pro-active; that is, legal administration should actively promote the goals of the law as a programme, without necessarily awaiting the activation of the legal process by the affected parties. The legislation in relation to unorganised rural labour although ostensibly pro-active is, in its essence, reactive in that instruments of pro-active administration of the law are lacking. The minimum necessary activity of administration to implement the law is lacking, not the least owing to indifferent resource allocation to the agencies of administration.

1.4 Law as a programme of action also invites constant monitoring of its implementation; difficulties and failures in implementation are constantly to be under surveillance The nature of resistance to change initiative by legal action must remain subject to careful and critical analysis and administrative learning considered of critical imporatnce for the implementation of the programme of law. In addition, the need to rewrite legal provisions, powers and procedures arising from this learning needs to be constantly kept in view; law reform, accordingly, does not remain a random and episodic exercise but is a structural feature of the implementation of the law. In the area of unorganized rural labour, constant review of legislative and administrative performance is of utmost importance; so is periodic reform and renovation of the law. If this is not done, the law naturally will adorn the statute book only in aid of cultivation of undemocratic cynicism and disregard the values of the rule of law.

1.5 It is not being suggested that thre are no limits to effective legal action. Undoubtedly, it is clear that economy—mode of production—society and political power will influence both the nature of legislation and its implementation. At the same time, it is possible to moderate these limits. It is possible to popularize the idea of law as a programme of social action on the lines so far suggested. It is possible also to ensure that the methods and models of legal drafting be suitably transformed at least in the area of unorganised rural labour. It is certainly possible to ensure that a substantial dedication of resources for law enforcement, monitoring of the progress of law, and law reform is made available. The limits of state intervention are not immutable; they appear as such by the way in which all of us have accustomed ourselves to think about the role of law.

1.6 Law as a programme of action entails a more imaginative model of management of sanctions. Fine, imprisonment or both are typical sentences. While they may have their place, they cannot certainly exhaust the repertoire of sanctions. Additional, alternative sanctions may prove more effective than fine or jail. These may include withholding or deferment of economic benefits (bank loans, farm equipment

facilities, subsidies) and social status symbols (e.g. domestic electricity connection, telephone, facilities for consumption credit). Sanctions should deter unlawful behaviour; in the area of unorganized rural labour alternative sanctions are more likely to be efficacious and less costly to operate

1.7 From this perspective, we recommend the following outline of an effective programme of legal action for the unorganized rural labour First, we stress the need for codification of labour law for the unorganized rural labour. The legislative movement in the field is uneven and episodic: barring the Minimum Wages Act, most rural labour legislations are of a recent vintage. A comprehensive code legislating amelioration of rural labour will have the advantage of redesigning the chaotic multiplicity of legal rules, procedures and enforcement institutions; and an integrated code will also help fashion a framework for adequate resource allocation for enforcement and implementation.

1.8 It should be unnecessary to celebrate the advantages of codification. Codification will end the present diaspora of piecemeal legislation and avoid piecemeal tinkering by way of law reforms. This is not small advantage as can be seen from the example of the recent amendment of the Bonded Labour Act which has expanded the tight definition of the bonded labour system to include other varieties of unfree labour without at the same time examining the procedures, power and apparatuses of implementation and enforcement. A code will also minimise the role of discretion of State and Union Governments in setting up of implementing authorities and judicial fora. A code will also unify legal and policy administration as well as development of jurisprudence on the subject. An attempt at codification will also ensure inter-ministerial coordination, facilitating an integrated policy approach for the resolution of the obdurate problems confronting unorganized rural Labour.

1.9 In addition, codification will also make law closer to life in the sense that myriad problems of unorganized rural labour are not faced one after another by such labour but as a totality. If the existential problems of the unorganized rural labour loom much as a totality of dense inter-linkage of exploitation and oppression, the law as a programme of social action just cannot succeed as a series of fragmented responses.

1.10 Further, the task of accessibility of officials, victims and beneficiaries to ameliorative labour legislation will be better served by an integrated code compared with a variety of adhoc and series of piecemeal legislations.

1.11 *Second*, interms of subject-matter of the code, it will be a mistake to think that the task of codification is accomplished by putting together under one legislative shelter all the assorted legislations on unorganized rural labour. India is a party to a large number of international instruments concerning unorganized rural labour, both in terms of norm setting and implementation for example, India has been an original party since the twenties to the I.L.O. Conventions and Recommendations on the subject. In preparing a Labour code for unorganized rural labour, valuable guidance available from these Conventions and Recommendations should not be surrendered as it has so far been, barring minor exceptions. In addition, the code must incorporate legislation/policy action on Conventions and Recommendations which have not yet found any implementation in India, like Convention 140 and Recommendation 142 concerning the duties of signatories States towards facilitation in the formation of associations of agricultural workers and rural labour. In addition, codification must be informed by salient Constitutional principles, specially, embodied in the Directive Principles of State Policy and the Preamble to the Constitution of India. In other words, we recommend an integrated legal approach instead of the present piecemeal legislation on various aspects affecting unorganised rural labour.

1.12 We believe that the Commission should insist on condification of this nature as its principal recommendation; and to facilitate this task the Commission should also insist on this extension as a forum for compilation of such a qualification in a time bound manner. It would be a sad mistake to make such a weighty recommendation and expect it to be followed up by the routine process of policy makers.

1.13 The task of amelioration of the plight of unorganized rural labour, which has virtually waned since four decades of independence, cannot, however, be at the present moment deferred. While insisting on the recommendations on the foregoing paragraphs, we also recommend, in what follows, to a series of modest and feasible changes in the existing legal framework until such time that a complete code is prepared.

1.14 *Third,* we also recommend, a continuing oversight of the implementation of the present legal policies. At the moment, the process of implementation is random, even to the point that full and complete information about compliance with the law is simply unavailable, excepting through a series of doctoral dissertations on one or other aspect of the matter. The lack of integrated policy generates demands for incremental additions to our knowledge and this knowledge in turn instead of presenting an integrated policy produces a series of piecemeal changes. We regard this is extremely unfortunate.

1.15 Accordingly, we earnestly recommend that the present Commission, even after submission of its report, continue as a forum for regular monitoring of information on administration/implementation of all legislation on unorganized rural labour; a specific task should be collecting information, and functioning as a clearing house of policy related information, which is a necessary step for any worthwhile codification effort.

CHAPTER TWO

MINIMUM WAGES ACT, 1948

2.1 The Minimum Wages Act as it presently stands is ill-equipped to respond to the developments of constitutional and national purposes and policies. The Constitution in its Preamble, the Part III on Fundamental Rights and Part IV on Directive Principles of state policy has been a subject to a steady process of interpretative expansion. The Act as it presently stands does not at all reflect constitutional developments; for example, Article 21 embodying the Fundamental Rights to life and liberty has been interpreted by the Supreme Court of India as guaranteeing the right to livelihood. Similarly, national policies since independence have moved vigorously, although contestably in terms of results and achievements, in the direction of identification of thresholds of impoverishment and pauperization from which citizens of Democratic Secular Sovereign Republic of India must be redeemed by purposive state action. Both constitutional interpretation and executive policy have moved substantially in the direction of recognizing the minimum entitlements of the impoverished strata of Indian society. Any consideration of the Minimum Wages Act must necessarily take fully into account those developments

2.2 Thus, for example, the provision in Section 26 of the Act which grants the power to exempt certain employments and establishments from payment of minimum wages is overwhelmingly unconstitutional. Denial of minimum wages amounts to exploitation of labour which is manifestly unconstitutional. Such power has no rationale to justify it forty years after independence. This Section should therefore, be deleted from the Minimum Wages Act.

2.3 It is well known that this power has been largely used by the Government to exempt their own drought relief programmes compelling drought affected persons to offer themselves for work at less than minimum wages: moreover, in such relief works the governments usually make a distinction between less than minimum wages offered to women workers. The Supreme Court of India struck down in *Sanjeet Roy* v. *Government of Rajasthan* the Raja than Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964. The Court held that such exemptions are violative of Articles 23 and 14. Despite this historic ruling in famine relief works and in public projects, wages less than minimum wages are the order of the day in Rajasthan, but not only there; and the gender-based discrimination continues. As long as Section 26 investing the State with the unconscionable and unconstitutional power to make exemptions from payment of minimum wages continues, there is no assurance that the executive of the day anywhere in India will be reticent in the use of this power. Legal and social activists' concern with the amelioration of the plight of the unorganized rural labour should not be put to a continuing effort to litigate right up to the Supreme Court the unconstitutionality of the exercise of this power. We, accordingly, recommend the deletion of any provision in the Minimum Wages Act which empowers Governments to dispense with the payment of minimum wages to workers.

2.4 The existing law does not define the term "minimum wage", so the meaning of the term is not very clear. The Report of the Fair Wages Committee, 1948, had observed that a minimum wage must provide not merely for the bare subsistence of life but also for the preservation of the efficiency of the workers, and for this purpose, the minimum wage must also provide for some measure of education, medical requirement and amenities. This now stands constitutionally recognized as a part of Article 21 rights to life and liberty in the decisions of the Supreme Court.

2.5 The Act does not define "minimum wage" it provides large discretionary power in the Committees and advisory boards in fixing and revising minimum wages; this has resulted in wide variations in the rates of minimum wages among the employments and among the states. For instance, the minimum wages for agricultural workers varied from Rs. 7 per day in Pondicherry (as on 3-12-83) to Rs. 31.75 in Haryana (as on 4-2-86). Such variation is constitutionally liable to be held as "arbitrary" under Article 14 of the Constitution.

2.6 It is *recommended* that the criteria accepted at the 15th Session of the Indian Labour Conference regarding a Need Based Minimum Wage be adopted. At least the following norms may be incorporated into the Act :

(i) In calculating the minimum wage, the standard working class family should be taken to consist of three consumption units;

(ii) minimum nutritional requirement calculated as net intake of 2,700 calories a day;

(iii) clothing requirement—18 yards per person per annum;

(iv) in respect of housing, the norm should be the minimum rent charged by the government in any area for houses under the subsidized Industrial Housing Scheme for low income groups; and

(v) fuel, lighting and other miscellaneous items of expenditure should constitute two per cent of the total minimum wage.

2.7 The question of exception to payment of minimum wages must be answered in the negative. Wage-determination Committee, however, may not take the following consideration while determining the minimum wages : the fact that an employer finds it difficult to carry on his business; or that the employer has

incurred losses during previous year; and that the employer has difficulty in importing raw materials. Such consideration should not be considered as justifying non-payment of minimum wages.

2.8 Further, minimum wage determination must at least be based on satisfaction of basic minimum needs of Indian citizen-workers. It should be applicable universally irrespective of the sector i.e. rural or urban, organised or unorganised. National minimum wage is more realistic considering the high inflation prevailing[1]. A National Minimum Wage may obviate schedule to the Act. This National Minimum Wage does not stop the government from declaring by official notification, a wage higher than this for any specified employment or occupation. In such cases the specified wage will be considered the minimum wage for that employment. This National Minimum Wage is the minimum must which every employer has to pay but it does not stop the government from fixing and paying any wage higher than this.

2.9 The Act should be made applicable to rural labour. It can be specifically included in the definition of 'employee' in section 2(i). The suggested definition is:

> "Rural Labour means persons who are engaged in any kind of work for any employer in a village or a rural sector and includes employment in handicrafts and agriculture, that is to say, in any farm or farming including the cultivation and tillage of the soil, dairy farming, the production, cultivation, growing and harvesting of any agricultural or horticultural commodity, the raising of livestock, bees or poultry and any practice performed by a farmer or a farm as incidental to or in conjunction with farm operations including any forestry, plantations or timbering operations and the preparation for market and delivery to storage or to market or to carriage for transportation to maket of farm produce."

2.10 Section 3(3) (a)(iii) of the Act provides for differential rates of minimum wages to be fixed for adults, adolescents and children. The social justice logic of this provision is eminently questionable. Besides, constitutionally, differential wages based solely on the ground of sex stand prohibited by Articles 14, 15 of the Constitution, and there is every justification for reading Article 24 (read on the Article 41 prescribing free and compulsory education for children under fourteen years of age) as entailing prohibition of child labour on the basis that any employment which deprives a child of its childhood is "hazardous" and therefore, prohibited. This Minimum Wages Act should not, at any rate, be an instrument of the subversion of constitutional text and vision; it should not encourage child labour by providing legal power for a lower wage fixation. Differential minimum wages based on age, and gender classification is *per se* unconstitutional. The provision, we *recommend*, be deleted from the Act.

2.11 The proviso to Section 3(1) provides that if the government does not revise the minimum wages after a period of 5 years, the existing rates should continue in force.

This proviso has virtually meant inaction. The Act does not compel state action in setting up committees. No sanction is provided for administrative default or inaction. Nor is any time shcedule prescribed for committees to complete their work and for corresponding governmental action. If this section is to remain, we *recommend* that these deficiencies be specifically removed by appropriate amendments. But even if this recommendation is accepted, we do not expect substantial attitudinal or behavioural change in the short run. This would mean the perpetuation of an unconstitutional *status quo*. Accordingly, we *recommend*, that if the government has not revised the minimum wages after five years, then the minimum wages would be *deemed* to have been revised by the additionality to the existing rate of a special allowance to compensate the employees for the rise in the cost of living index number since the last revision. Alternatively, this can be achieved by declaring the minimum wage to be linked to a varying dearness allowance formula (as in the case of government employees) to compensate the employees for variations in the cost of living. In this case, the minimum wages will keep rising even thrfough the five year period. This latter recommendation found support in the 37th session of the Labour Ministers Conference held on 7-11-88.

2.12 But as the sub-committee's Report of the Parliamentary Consultative Committee 1988 cautions, the adjustment of cost of living element should not be confused with the wage revision required under Section 4 of the Minimum Wages Act. The law clearly envisagesrevision of wages also for reasons other than cost of living increases. Hence periodic revision remains imperative

2.13 The Act is operative only in such cases where the industry/work in question has a minimum of a thousand workers employed in the whole State. We *recommend* that this requirement of the minimum number of workers should be done away with.

2.14 Many times, the employers employ workers through dubious and indirect means i.e. through contractor etc. Most of these labourers are unorganised, rural and many are home-based. Usually they are low paid but cannot invoke the provisions of the Minimum Wages Act for the reason that they cannot establish their status as being under the employment of the said employer. We recommend mandatory issuing of identitity cards, maintenance of work and wage registers and related records. Violation should carry a minimum jail sentence.

2.15 Since most of the rural labour is unorganised, it is very difficult for them to have a collective voice and fight for their rights. Also, they are unable to have any meaningful and rightful representation on the Advisory Boards and Committee on Minimum Wages. Hence it is *recommended* that the organisation

1. Suggested by National workshop on Minimum Wages held on March 25 and 26, 1989 at Ahmedabad

of Tripartite Boards and Committees under section 7 should have adequate representation of un-organised sector through non-governmental organizations, trade unions and independent persons of high social standing.

2.16 The basic requirement for fulfilment of the policy programme of the Act is the knowledge of the law with the people who are directly reflected by the Act. Unfortunately, it is seen that most of our labour force is deprived of the knowledge of their minimum wage entitlements. An awareness programme on mass-scale through radio, television, bus hoardings, adult education programmes coupled with the organizing of the rural work-force is now imperative. The organisation of rural workers into formal trade-union cooperatives and other voluntary associations is equally necessary. Most of these role-obligations have been crystallized in the I.L.O. Convention 140 to which India is a party.

2.17 The management of sanctions is a much neglected aspect of social welfare legislation. The typical sanctions are fine and a short imprisonment. No specialized prosecutoral staff exists with such obsolete model of enforcement, it is not a matter of surprise that the Act remains fallow. It was only during the 1975-76 emergency that substantial enforcement action was witnessed. But certainly one does not envisage a recourse of permanent state of emergency for the implementation of the Act. Accordingly we *recommended* that :

(i) mandatory minimum imprisonment be provided for offences under the Act provided for the employer, which is a greater deterrent;

(ii) any further default must be treated as a continuing offence, the penalty being additional fine for every day of default and longer imprisonment:

(iii) a continuing offender should also be blacklisted for purposes of bank loans, loan waiver, subsidies etc.

2.18 Section 22-B provides for prosecution of the employer for any offence committed under the Act However, this can be done only after instituting and succeeding, wholly or in part before a Claims Authority under Section 20 or with the prior sanction of an Inspector. This make the task of prosecuting an employer very difficult. It is *recommended* that this section be made wider along the lines of Section 16 of the Child Labour (Prohibition and Regulation) Act, 1986, which States.

> "Any person, police officer or Inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction."

This wide power will prevent victimization of the aggrieved employee since any person (individual of member of a voluntary agency) can move the court.

2.19 Under the law, generally, the burden of proof is on a person who asserts any right or liability. The application of this principle to the Minimum Wages Act, 1948 requiring a worker to prove that minimum wages have not been paid to him/her aggravates the difficulty of reducing benign the objectives of the Act We, accordingly recommend that this burden should be shifted to the employer because it is easier to prove the positive rather than the negative. If the employer has paid the minimum wages. it is easier for him to so prove by showing his records and receipts that it was paid. In this connection, reference may be had to Section 106 of the Indian Evidence Act, 1872 which provides that if a fact is within the special knowledge of some person, then the burden of proving it is on him.

2.20 Section 22(E) provides that any amount deposited with the appropriate government by the employer to secure the performance of a contract cannot be attached by a court order for non-payment of minimum wages. This should be deleted, as payment of minimum wages is in a sense 'first charge' upon the employer.

2.21 Last but not the least, it has been seen that the State enforcement machinery is very inefficient and tardy in the implementation processes. To gear up the administration, we *recommend* that Inspectors (Section 19) and Claims Authority (Section 20) who are present Labour Commissioners, Magistrates etc., should be at levels not higher than the Block or Panchayat Samiti. The Minimum Wages Act should be amended to provide for the appointment of claims authorities at these levels (as has been done in Maharashtra and Rajasthan).

CHAPTER THREE

EQUAL REMUNERATION ACT, 1976

3.1 In order to implement Article 39(d) of the Constitution to provide for equal pay for both men and women, the Government in 1975—the International Year for Women—promulgated the Equal Remuneration Ordinance which in the following year became the Equal Remuneration Act. The Act provides for equal remuneration to men and women workers and prohibited discrimination on the ground of sex against women in the matter of employment.

3.2 Before the Act was passed, discrimination in the wages of men and women workers doing the same work was widely prevalent and even State Governments were practising it ignoring the fundamental rights of equality of sexes and prohibition of discrimination on the ground of sex.[1]

3.3 With the enactment of the Equal Remuneration Act, there was a feeling that the past practice of paying a lower wage to women would not be practised, but the reality was different. Discrimination continued in many areas particularly in the agricultural sphere of the unorganised workers. The Dasgupta Committee in its Report on Unorganised Workers in the Agricultural Sector made the categoric statement that wage "discrimination on the basis of sex is palpable in many areas..... ..... Generally female agricultural workers are paid less than the male workers."[2]

3.4 A study conducted by the Deputy Director of the Labour Bureau referred to the same factual situation by reporting the disturbing fact of women workers being paid less even after the Equal Remuneration Act. This appeared to be more in the plantation where according to the Report, the women as a rule were getting less than men.[3]

3.5 Ten years after equal pay for men and women workers had become the law of the land, the Government had to admit that in spite "of the Equal Remuneration Act having been passed more than 10 years ago, there are several employers who continue to pay lower wages to women".[4]

3.6 What is the reason for the continuance of this discriminatory treatment to women workers ? It has little to do with their efficiency. The Dasgupta Committee found that women are preferred in many categories of agricultural activities.[5] A Labour Bureau Study mentions employers who were of the opinion that "in most of the occupations in which both men and women workers were employed, women workers were either as efficient as their male counterparts or were in some cases even more efficient.

3.7 The continuance of this discriminatory treatment is explained not only by male bias[7], but also due to the fact that women are not organised and often unaware of their rights. They tend, therefore, to accept what the employer gives them but the employer to stay within the letter of the law adopts the method of grading the work of the women as belonging to the lower grade. The Deputy Director of the Labour Bureau mentions this method which is often adopted by employers who "were found using covert means of fixing lower wages rates. For instance, in some plantations in South India, certain jobs were classified into grades, viz., Grade I and Grade II Almost all the women workers, except those engaged in plucking and picking operations were engaged in Grade II jobs and thus earned less than man".[8] The Dasgupta Committee strongly recommended that this system of fixing lower wages for operations performed by women was undesirable and should be stopped.[9]

3.8 Apart from the male bias or the ignorance of the women workers or their lack of organisation, the Government in their Statement of Objects and Reasons in amending the Equal Remuneration Act in 1987 mentions that "In spite of the known prevalence of disparity in wages between men and women, there have not been many reports of violations of the Act" They identify the factor of penalty for violation of this law as very low and not sufficiently stringent. This they feel was one of the main reasons for non-implementation. "The Amendment to the Act has now provided for stricter penalty."[10]

3.9 Another lacuna in the Act which the Government felt needed to be remedied was that the Act only prohibited discrimination at the time of recruitment and for wages of men and women workers. But once the women was recruited, she had no way to redress her grievance of not being given any training which normally leads to promotion. The Amendment to the Act now prohibits discrimination for training, transfers or even promotions. The Amendment is, however, silent about the devious ways adopted by employers to grade the work of the women. As mentioned, the Labour Bureau study had referred to this fact, but the amendment continues to leave grading to the employer.[11]

3.10 In addition to these factors, a study done by the National Labour Institute[12] points out an interesting factor which the two scholars reported. The ignorance of the Act was not only of the women workers of what the Act was wanting to achieve but the ignorance of those who are supposed to implement the law. They quoted examples of personnel officers with postgraduate degrees in personnel management and industrial relations informing them that they had never heard of the Act[13] The Shramshakti—the Report of the National Commission on Self-employed women and Women in the Informal Sector makes the same point after their tours. "It is also found that the provisions of this Act are still not widely known, in some cases, employers have been known to confuse this law with the Minimum Wages Act."[14]

3.11 Bad drafting of the Act has been given as another reason for its non-implementation. The study of the National Labour Institute writes about one of their interesting encounters in one of the Railway Departments. On finding that women clerks were being paid less than the men clerks, they pointed out to the officer that he was violating the law. The officer after having consulted the Equal Remuneration Act replied that he had consulted the book and his Department was not listed and therefore "the law was not applicable to this department."[15] The reason which became clear was that departments of the government are given in the Government Notification and, therefore, do not appear in a consolidated list. If the argument is taken to its logical conclusion, then it would mean none of the departments of the Government—Central or State—are governed by this law.

3.12 Apart from the ignorance of the workers and sometimes the employers, another factor which has impeded the implementation of the Act has been the important role which has been assigned to the Inspectors. They are the only ones who can visit the establishments and report on the non-compliance of the act. There is no accountability of the Inspectors—how many establishments they have visited and how many times and what violations they have been able to detect. If their Reports are made public, it is possible that they will carry out their work more systematically and the concerned authorities will also know what is the work load of each Inspector and whether with it, an efficient inspection can be done. This was highlighted in the National Labour Institute Study when they reported that during the course of their investigations, they found that "required inspections were not being carried out by officers of the enforcement machinery to check the violations of the Act".[16]

3,13 To remedy this drawback the Equal Remuneration Act has provided that recognised women's organisation should have the powers to inspect and file complaints on behalf of the aggrieved workers. But how effective this is going to be is debatable as the Government has so far recognised only four organizations—two in the South, one in Ahmedabad and one in Delhi. In a country as large as India without any financial resources, how only four organizations can really carry on the work is doubtful.

Recommendations

3.14 An all out effort to be made to educate employers and women employees about the provisions of the Act. Information should not only be about the principle on which the Act is based but the procedure to be followed when there is a violation. Information is particularly important in view of the recent amendments which prohibits discrimination in training, transfers and promotions.

3.15 To permit women's organizations and human rights organizations to inspect establishments which employ women and report and file complaints. Restricting this right to four organizations has no rational basis.

3.16 Advisory Committee should not only be strengthened but their Reports placed before concerned authorities preferably before the state Assemblies, otherwise the present position referred to in the National Labour Institute Report about the non-functioning will continue. Their Report about Delhi is a good example of this, "there seems to be some difficulty in getting the members to attend the meetings. The concern of the Committee appears to be primarily on the maintenance of sanitary conditions....."[17] About Andhra, which the team visited the Report has this to say "the main emphasis of the Committee has been on reservations of vacancies for women."[18]

3.17 Another difficulty has been grading of the jobs done by men and women and generally placing the women in the lower job.[19] The employer has been doing the grading and he does not have to answer to anyone why a particular job is grade 1 and not grade 2. The test of same work or work of a similar nature has so far not helped in a proper grading except perhaps in one or two cases when the victim of discrimination has been able to move the higher courts.[20] Shramshakti has rejected the concept of equal pay for work of equal value on the ground that "measuring value of work and equating them is a far more difficult task than identifying same work or work of a similar nature." Their suggestion is that "if a group of activities in any industrial occupation are broad banded into one category on the basis of enquiries and study....."[21], this difficulty can be overcome. It might be worth considering if the same or similar work criterion is to continue, then why Advisory Committees, if strengthened should not have the authority to ask the employer the basis of the grouping and if not satisfied, refer it to an expert group.

3.18 Another blatant violation of the Act has been advertisements which have appeared occasionally indicating that women need not apply. The suggestion is that a few of these should be prosecuted and adequate publicity to be given.[22]

FOOTNOTES

1. *Towards Equality—Report of the Committee on the Status of Women in India* (Government of India); Table 13, p. 165. The Table gives the wage rates in 6 of the States.
2. *Report of the Sub-Committee of the Parliamentary Consultative Committee for studying and Reporting on the Problems of Unorganised Workers in Agricultural Sector;* p. 7, para 10.
3. Balram "Women Workers and the Labour Legislation in India", vol. 25; Indian Labour Journal p. 1527.
4. Statement of Objects and Reasons of the Amendment of the Equal Remuneration Act—Digest of Central Acts; Vol. 22-24, 1987; p. 17.
5. Dasgupta Committee Report; p. 7, para 10. Supra n 2.
6. Socio-Economic Conditions of Women Workrs in Tea Coffee etc. Indian Labour Journal, Vol. 29; p. 859.
7. "A few employers were Biased, The Electrical Machinery Apparatus and Electronic Goods Components considered unmarried women more suitable for the job". Ibid.
8. Balram; supra n 3; p. 1528.
9. Dasgupta Committee Report; p. 16; para 7. Supra n2.
10. Instead of a penalty, maximum fine of Rs. 1,000, the amount has been considerably increased and imprisonment provided.
11. Balram supra n 3; p. 1528.
12. *Equal*—H. Pais and Ram Prakash, National Labour Institute (referred to as the National Labour Institute study).
13. The study has revealed that the workers who were to benefit———are not aware of this Act. Even the management in certain cases as well as some of the officers of the labour enforcement machinery were not aware about the provisions of the Act, Ibid. p. 57.
14. *Shramshakti*; para 32; p. 109.
15. National Labour Institute Study : Supra n 12; p. 5.
16. According to the Study, the reasons given are (1) no separate machinery under the Equal Remuneration Act and the Inspectors were responsible for the implementation of a number of Labour Acts; and (2) lack of transport facilities; supra n 12; p. 48.
17. Amendments of 1987.
18. Supra n 12; p. 7
19. Supra n 8.
20. Mackinnon Mackenzie and Co. Ltd. and Audrey D'Costa (1987) 2 SCC 469.
21. *Shramshakti;* para 33; p. 109.
22. Ibid, para 36; p. 110.

CHAPTER FOUR

BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976

4.1 The Act is a human rights law flowing from the constitutional right against exploitation enshrined in Article 23 of the Constitution of India. Although under Article 35, Parliament was under obligation to prohibit the practice of bonded labour "as soon as possible," the Act came into being only in 1976. And now, some fourteen years later, the working of the Act was disclosed some basic difficulties and flaws making the release and rehabilitation of identified bonded labourers difficult.

4.2. Despite the fact that the Act provides in Section 13, a participative machinery in the shape of a vigilance committee with a substantial nonofficial component and with wide functions and powers, identification, release and rehabilitation tasks are not being performed with any commitment or expedition. Undoubtedly, these tasks are difficult. But these should be seriously attempted as the Act does not merely prescribe statutory duties but also, for the first, time, makes public officials criminally liable for the dereliction of their duties.

4.3 Even so, human rights activists have to take recourse to courts under social action litigation. The courts including the Supreme Court of India, have appointed sociolegal commissions of enquiry to identify bonded labourers and passed many orders for their release can rehabilitation. This itself further shows the central weakness in the functioning, if not the very design of the implementation structures under the Act

4.4 Given this history, it is necessary to consider a renovation of the implementation machinery under the Act.

4.5 A research study[1] on bonded labour also found that the Act on the whole was a good piece of legislation except for some reservations shown regarding the definition of the term "bonded labour". The maior problem lies in identification and rehabilitaton of such labour and in the overall implementation of the Act.

4.6 Following, perhaps, the rulings of the Supreme Court in *Asiad and Badhua Mukti Morcha Cases* Parliament amended the Act in 1985 so as to include within its scope by way of "removal of doubts" the "system of forced labour or partly forced labour" workmen under Contract Labour (Regulation and Abolition) Act, 1970 and Interstate Migrant Workmen (Regulation of Employment & Conditions of Service) Act 1979. In addition, the Amendment further specified that such workmen would fall within the definition of Bonded Labour System if they are subjected to all or any of the disabilities "within the meaning of the Act".

4.7 This Amendment extends the meaning of the Bonded Labour System which is defined by the Act in Clause 2(g) as, among other things entailing "by reasons of his birth in any particular caste or community" the rendering of :—

(i) services for specified or unspecified period to or for the benefit of the creditor either without wages or for nominal wages, or

(ii) forfeiture of freedom of employment or other means of livelihood ;

(iii) forfeiture of the right of freedom of movement ;

(iv) forfeiture of the right to appropriate the product of one's labour.

4.8 It is clear that the definition of bonded labour in the Act was designed to deal with the horrible historical problem of debt bondage arising out of economic compulsions linked to the circumstances of birth in any particular caste or community. The Amendment, however brings the problem of determining whether the contract or migrant workmen defined under the respective Act are to be covered by he Bonded Labour Act if they manifest characteristic or servitude either by debt bondage or by reasons of berth in any particular caste or community. This would, obviously, mean that unless these migrant or contract workmen, can show that they fall within these categories they will be excluded from the application of the Bonded Labour Act. If the Amendment was designed to assist such categories of migrant and contract labour, Chapters IV, V and VI should also have been suitably amended to facilitate the objectives of the Amendment. In particular, the Amendment should have provided rules for determining ways in which one can say that migrant and contract labour fall within the categories of the Act ; the process of establishing such inclusion should have at least required modification of rules of evidence by way of presumption and by extending doctrine of judicial notice in the Indian Evidence Act. Further, the functions of the Vigilance Committee should have also been redefined because the needs of the new categories of bonded labour will need to be addressed some what differently in terms of programme of remedial action than the classical category of bonded labour. The offences against migrant and contract labour categories should also have been clearly prescribed. We *recommend* consideration of comprehensive amendments in this regard.

4.9 But mere amendments of definition, procedures, implementation and offences is going to have no substantial impact unless and until a close look is given to the present method of enforcement of the Act.

1. Bonded Labour Research Project, Papers of the Workshop on Bonded labour, Feb 1990; L.B.S. National Academy of Administration.

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4.10 The only justification of the Bonded Labour Act is that the technologies with such variety of unfree labour is a stigma on the Constitution in Indian democracy which must be swiftly annihilated; the stigma stands aggravated by four decades of virtual inaction. The Act cannot be seriously considered a programme of social action to eradicate this stigma-so long it overwhelmingly be relied on legal administrative structures.

4.11 We accordingly,, recommend, the augmentation of the existing implementation structure by the creation of a National Auhority. The Authority shall be charged with the duty to :—

(i) oversee the implementation of the Act, to identify through a national mapping the incidence of bonded labour,

(ii) raise the required resources for release and rehabilitation of the bonded labourers,

(iii) ensure that the released bonded labourers do not lapse into future servitude out of economic necessity.

The authority's powers will include powers of consultation and coordination of the implementation of the Act through the power to issue directions and the powers to direct prosecution under the Act.

4.12 The national authority shall also be invested with powers to raise resources for the rehabilitation of bonded labourers. In addition to the status (to be specifically recognized) to be associated wth the Planning Commission, the commissionerate of the scheduled castes and tribes and the finance commission, the national authority shall be entitled to raise contributions from the the public financial institution as well as private sources.

4.13 The national authority shall comprise concerned key officials at the national level, noted social and human rights activists with proven record of non-political engagement in the participatory organizations of rural poor, and eminent citizens including retired justices, leading social scientists and some leaders of the depressed classes.

4.14 Further, we *recommend* that the Act must be amended to provide for a special officer in each district charged exclusively with the duties to implement the provisions of the Act, under overall auspices of the national authority. The existing arrangements are not effective because the district magistrate is already overburdened by all kinds of duties.

4.15 All the powers currently vested in the District Magistrate under the Act should be invested in the special officer to be thus created. The special officer would function subject to the directions of the national authority and would be accountable to it.

4.16 The national authority shall from time to time, where necessary, have the power coupled with duty to initiate judicial proceedings. Furthermore, it shall submit an annual report to Parliament.

4.17 The authority shall be an autonomous entity with powers to create registered societies, cooperative societies and other relevant associations of bonded labourers designed to facilitate their release, identification and rehabilitation.

4.18 We endorse the Gujarat Committee [2] recommendation that suitable amendment should be made in Chapter VI of the Act prescribing stringent and mandatory punishment for various offences and also that such cases should be tried by an alternative forum, as suggested above, instead of by the Courts named now.

4.19 We also endorse the suggestion [3] that "while conducting court proceedings a summary procedure should be followed so that the process of identification and release can be simultaneous," as this will help in eliminating the gap between identification and release which in some cases extends to even two years.

4.20 It has been seen that as is the case in other welfare and labour legislations, most of the people are unaware of the existence of the said Act. Adequate dissemination of the information about the Act and particularly the penal provisions should be given wide publicity.

4.21 We also endorse the good suggestion that when the state government conducts household surveys to locate the poorest of the poor families to give assistance under various rural development schemes then simultaneous bonded labour can be located on a systematic basis.

2. Gujarat Report of the Second Labour Laws Review Committee 1983-84, Report IV. para 2.7 page 202. See also page 143 of Bonded Labour Research Project, Feb. 1990 papers.

3. Page 148 supra n 1.

4. Ibid.

CHAPTER FIVE

THE BEEDI AND CIGAR WORKERS (CONDITIONS OF EMPLOYMENT) ACT 1966

5.1 Although the Royal Commission on Labour in India was appointed as early as in 1931 to look into the rampant exploitation of beedi workers, it was only in 1966 that the Indian Parliament legislated the Beedi and Cigar Workers (Conditions of Employment) Act. The Statement of objects and Reasons categorically justified the need for state intervention in view of the fact that "labour is unorganized and unable to look after its interests." The Act seeks to regulate comprehensively the conditions of employment in the Beedi and Cigar industry.

5.2 The number of duties created by the Act is truly vast. It provides for maximum work span (nine hours per day and 48 hours per week), wages for overtime work, rest intervals, weekly holidays, annual leave with wages, and maternity leave. The Act strictly prohibits child labour and forbids employment of women after 7 P.M.[1] Not merely this, the Act solicits the health and safety of beedi and cigar workers: standards of cleanliness are prescribed; so are the requirements of "lighting, ventilation and temperature". The Act also prohibits working conditions where there is "dust or fume or any other impurity.....as is likely to be injurious or offensive to workers,"[2] All kinds of facilities including toilet,[3] washing facilities,[4] first-aid,[5] canteens,[6] creches,[7] have to be adequently provided. Over-crowding has to be avoided; in every premise at least "four and a quarter enbic meters of space" (excluding "any space which is more than three meters above the level of floor or the workroom") are mandatory.[8]

5.3 Much before 1966 legislation it was well known and accepted that the bulk of beedi and cigar workers were home based workers. The National Committee Report in 1954, as well as 1949 Madras Committee Report, both judicially noticed by the Supreme Court, as early as in 1954, overwhelmingly documented this condition. Accordingly, the Act, rightly recognised in the definition of employer any person "who has, by reason of advancing, supplying goods or otherwise" a substantial interest of control in the manufacture.

5.4 The Act seems to address itself primarily to the variety of employers or employment contractors, managing agent, manager, superintendent of an establishment manufacturing beedi or cigar is one category of employers; the other category is a contractor, subcontractor, agent, munshi, thekedar or sattedar; and the third category is any person who has ultimate control by reason of advancing money, supplying goods or otherwise, a substantial interest in the control of affairs of any establishment...." In spite of this wide legislative net trying to encompass every type of "employer", experience has shown a whole variety of successful evasive practices. For example, there exists now the well documented device of intermediary who is neither a contractor nor has any precise legal relationship with the principal employer; this device has been increasingly used to defeat the application of the Act; indeed a "class of intermediary is introduced so as to break the link and claim between the principal employer and the actual worker."[9]

5.5 The test of control spelt out by the Supreme Court in upholding the validity of the Act of 1966 in terms of the rights and the powers reserved by the principal employer to reject beedis not rolled according to the specification has not proved very effective in this context.

5.6 We recommend, reiterating the recommendations of the Second Gujarat Labour Laws Review Committee, that the following explanation to clause (m) of Section 2 be legislated:

Explanation: It shall be presumed unless the contrary is proved which proof shall include the details under the relevant sales-tax laws, that the persons who rolled Beedi with the assistance of his family members were home workers and not contractors, if no sale or purchase transaction takes place and the payment is according to the units of beedies rolled and that the ownership of the raw materials was never divested.[10]

This explanation reorganizes the burden of proof by way of evidential presumption so that the intermediary or the real disguised employers cannot escape the full force of the relevant provisions of the Act.

5.7 Even so, the application of many welfare provisions of the Act becomes impossible in case of home workers. Where the preparation of beedi and cigar is not undertaken in industrial establishments, requirements of cleanliness (Section 8), ventilation (Section 9), space (Section 15), rest intervals (Section 19), weekly holidays (Section 21), restrictions on hours of work, and prohibition of employment of child (Section 25), and annual leave (Section 26) will have little relevance whatsoever. Only the provisions with regard to wage will remain applicable with the abolition of intermediaries. The latter, of course, is not going to be an easy task given the history of the implementation of the Beedi and Cigar Workers Act 1966. It is for this reason that, from time to time, the need to set up workers cooperative for beedi and cigar workers has been emphasized.

5.8 We *reiterate* this suggestion. There is no reason why the industrial establishments violating the provisions of the Act cannot be taken over by the State for the purposes of forming a labour cooperative. With the deletion of the right to property under Article 31 and with the judicial expansion of the power to take over business under Article 19(6) of the Indian Con-

stitution, there should be no difficulty whatsover for the State to take over beedi and cigar business where a persistent pattern of law-violating behaviour is prima facie established.

5.9 There is no proper census or survey of the Beedi and Cigar workers in India, although it is roughly estimated that about 50 Lakh workers are engaged in beedi and cigar manufacturing processes.[11] Out of this more than 50% of the beedi workers are women[12]. They are employed "industrial premises", as contract labour at industrial premises, through contractors or manufacturers or commission agents at industial premises or at home (known as "home workers"). Some workers along with the help of their family members are also engaged in the manufacture of beedies as "self employed workers".

5.10 There cannot be proper enforcement of welfare laws unless the beedi and cigar workers are properly identified through a proper census. As a first important step, therefore, a census needs to be caried out throughout India. The census through he official machinery may not be very helpful and effective because they lack grassroot contacts. Such census may be carried with the help of trained students in summer vacations. For the proper enforcement of welfare laws to beedi workers top priority should be given to issuing of identity cards to such workers so that whatever littel welfare laws are existing can be made available to them at the earliest. It has been rightly suggested, in a recent meeting of the Labour Secretaries, that the represntatives, local bodies and panchayat boards should be used for maintaining the proper registers of all types of beedi workers all over India.[13]

5.11 Not much light has been thrown on the peculiar probems of women workers Not merely are women workers preferred by the beedi manufacturer and checkers, but they are also subjected to sexual exploitation :

> "A woman who is young and good looking must put up with a lot of (literal) manhandling while bundles of beedi and tobacco change hands. She puts up with it to prevent the checker from rejecting too many beedies. This encourages the checkers who address the women in the most familiar terms. It is also the checker's duty to procure women for his boss. If a spirited woman does not stand this kind of behaviour, the checkers start rejecting large number of her beedis. She will soon get the message."[14]

5.12 Therefore, we recommend that such sexual harassment should be made a penal offence in the Act itself with stringent punishment. *Further,* the onus of proof should not rest on the prosecution but the burden should be on the accused to disprove the charge brought against him.

5.13 The difficulty is not so much in the provisions of the Act but in its implementation. Since most of the workers in beedi rolling industry are home-based women labourers, the benefits of the Act do not reach them. Trade unionism among the workers has increased after the enactment of this law and three is a demand for similar provision for the benefit of home-based workers.

5.14 The major problem lies in the fact that a woman worker is unable to establish that she is an employee and hence is unable to get any benefits under the Act. This is so because the employer does not register women workers in his books and nor does he issue any identity cards. As a result the woman-worker is robbed off all the benefits under the Act like fall back wages, maternity benefits etc. In most cases names of only male-members (workers) of the household are there in the log-book. We agree with *Shramshakti* that the basic proof necessary to establish the relationship of employer employee in case of a woman employee should be done away with.[15]

5.15 Further, we also agree with Shramshakti that the authorities mentioned in section 39 sub-section 2, should not be farther away than the Block or Panchayat Samiti Headquarters and the appellate authority referred in sub-section 3 of section 39 should not be farther than the sub-divisional headquarters. The worker can bring the disputes relating to the issue of raw materials, rejection of beedi and payment of wages for the rejected beedis, before the local authority under Section 39(3). This provision will be helpful to women workers in particular but only if she can prove her employee status. Therefore, in this light the provision recommendation becomes all the more pertinent.[16]

5.16 The enforcement of the provisions of the Act has been wholly entrusted to Inspectors to be appointed by the State Governments under Section 6; the powers of the inspectors and the Chief Inspectors are provided in Section 7. It is typical of legislation concerning the unorganized labour that the enforcement of the welfare law is, first, solely entrusted to a bureaucracy, and second, while the powers of bureaucracy are defined, duties of the officials are no where prescribed. The result is that the enforcement of the Act becomes wholly bureaucratized and *wholly discretionary.* Indeed it is impossible to ascertain at any given point of time the precise number of inspectors appointed and functioning under the Act; nor is it possible to have annual State-wise information concerning inspections, investigations, prosecutions and convictions under the Act.

5.17 What is more, the State Government is, under Section 6 of the Act, under no legal obligation to sanction, create and fill the posts of inspectors. We discovered during the inquiries of the Second Gujarat Labour Laws Review Committee that in 1980 all posts of Inspectors under the Act were vacant throughout the year and the task was carried by other officials of the Labour Department who had to simultaneously perform other duties.[17]

5.18 If the Act is to be at all made operative, Section 6 should be mandatory and *not* directory. In other words, it should prescribe that the State Government shall appoint a Chief Inspector and that at no given time the active officers under Section 6 shall fall below the prescribed minimum. Similarly,

Section 7 should prescribe, besides the powers of inspectors, a concrete code of duties which should at least include the submission of quarterly report concerning the state of workers and of the implementation of the various provisions of the Act. Such a report should be required to be made public.

5.19 To enforce the provisions of the Act the Inspectors and Chief Inspectors are appointed by the State Government[18], and the powers are defined under section 7 of the Act. The welfare provisions relating to cleanliness[19], ventilation[20], drinking water[21], creches[22], first aid[23], and for a canteen[24] are provided for 'industrial premises'.

5.20 Section 24 provides for phohibition of employment of children (below the age of 14 years) in industrial premises. But there is no such prohibition if they work at home.

5.21 In the year 1985 various manufacturers of Beedies challenged the applicability of the provisions of Employee's Provident Fund Act, to the 'home workers' in the beedi manufacturing establishments. However, in *M|s. P. N. Patel and Sons & Others, etc. petitioners V. Union of India etc.*, respondents [Lab. I.C. (1986) 1410 SC] Pathak J. held that it cannot be said that the Employee's Provident Funds Scheme cannot be implemented in respect of workers rolling beedies at home as no retirement age is fixed with regard to them. The law does not envisage the fixation of retirement age before the provisions can apply. The provisions of the Act were also. challenged by the manufacturers under Articles 19, 14, of the Constitution but the provisions of the Act were upheld by the Supreme Court in the above mentioned case. It was also held in this case that there is a relationship of master and servant between the employers and the 'home workers'.

5.22 Despite the above judgement of the Supreme Court it is reported that the employers are unwilling to pay their share towards Provident Fund to the workers, who largely belong to unorganized sector. The employers have not yet paid their share towards contribution to the Provident Fund.[25] It is reported that since the applicability of Employee's Provident Funds Act, the manufacturers have started deleting the names of many beedi workers from the employment rolls. Moreover, because of the applicability of the Maternity Benefits Act, 1961, to the beedi making women workers at home also many manufacturers have also started manipulating deletion of names of women workers from their employment rolls.[26]

5.23 It has been recently admitted by the Labour Minister that there is a lack of implementation of labour laws relating to Beedi and Cigar workers because of inadequate implementation machinery[27]. Therefore, it is *recommended* that adequate number of Inspectors should be appointed under Section 6 of the Act by the State Governments for the purposes of proper implementation of labour laws relating to Beedi and Cigar Workers. If lack of funds is the constraint then additional cess may be collected under the Beedi Workers Welfare Cess Act, 1976 (As amended in 1981) for the purposes of appointment of Inspectors.

5.24 As there is a likelihood of challenge of labour laws relating to beedi workers before the courts by the beedi manufacturers particularly in case the cess is increased, it is *recommended* that various laws relaitng to the beedi industry should be incorporated in the Ninth Schedule of the Constitution of India on the pattern of agrarian reform land laws and related measures.

5.25 The penalities provided in Sections 32 and 33 of the Act require to be provided with more stringent punishments. Therefore, the Study group *recommends* that the substantative punishment prescribed in section 33 be enhanced from 3 months to one year and fine from five hundred to two thousand five hundred rupees. The substantive fines collected may be used for the welfare of the Beedi and Cigar Workers.

5.26 Further, we *recommend* the general penalty provided in Section 33(1) may be increased for the first offence from a fine Rs. 250 to a fine of Rs. 1000 and that for the second or subsequent offence to imprisonment for a term not more than 12 months instead of 6 months and fine which shall not be less than Rs. 2,500 or more than Rs. 20.000.

5.27 The jurisdiction to try offences under this Act should be conferred on the Labour Court instead on the Courts now empowered. Sub-section (2) of Section 36 of the Act be amended accordingly.

5.28 The time for instituting complaints provided in Sub-section (1) of Section 36 of the Act be enhanced to 6 months instead of 3 months and suitable amendment be made in this regard.

5.29 Section 15 of the Act requires to be amended so as to provide an additional amenity of medical aid to be provided to employees working in the establishment as defined in Section 2(h) of the Act. A suitable amendment may be made in this regard.

5.30 Under section 24 of the Beedi and Cigar Workers Act there should be a prohibition of employment of children under the age of 14 years at home also to provide for complete prohibition of children in this hazardous process of manufacturing of beedi's and cigars, we so recommend.

5.31 Under Section 43 of the Beedi and Cigar Workers Act, we recommend there should be a prohibition on employment of children below the age of 14 years even if beedi workers are self-employed at their own private dwelling house. Beedi manufacturing process being a hazardous occupation will encourage others to desist from employing children in other occupations in case children below 14 years are completely prohibited in working manufacturing process whether at home or otherwise

5.32 In case of 'industrial premises' employing 200 or more workers it should be made obligatory on the part of the manufacturers to employ one Labour

Welfare Officer for the welfare of the workers in the premises under the Beedi and Cigar Workers Act. A suitable provision for Labour Welfare Officer should also be introduced under the Act.

5.33 Under Rule 35 of the Beedi Worker's Welfare Fund Rules, 1978, the grant-in-aid to the Beedi manufacturing for the purposes of running dispensaries and maternity centres is very inadequate. The grant-in-aid should be substantially *increased* in order to provide proper dispensary and maternity centres for beedi workers and their families.

5.34 Similarly under Rule 39 the Beedi Worker's Welfare Fund Rules, 1978, subsidy and grant-in-aid for educational and recreational facilities should be substantially *increased*.

FOOT NOTES

1. Section 25
2. Section 9
3. Section 12
4. Section 13
5. Section 15
6. Section 16
7. Section 14
8. Section 10
9. U. Baxi, "State, Seth & Shiksha : The Saga of Sattemma", in *Problems of Home Based Workers* 334 (B.B. Patel *ed.*, 1989
10. See *Gujarat Report of the Second Labour Laws Review Committee*, Chapter III, p 205 (1983-84).
11. Mukul Kumar Shukla, *The Hindustan Times*, July 5, 1990.
12. Ibid.
13. *The Hindustan Times*, July 4, 1990.
14. "Beedi Workers of Nipani" EPW 1176 at 1177 (July 22, 1978)
15. *Shramshakti*, *113*
16. Ibid
17. Id. at 205-206, (Gujarat Report)
18. Section 6
19. Section 8
20. Section 9
21. Section 11
22. Section 14
23. Section 15
24. Section 16
25. Mukul Kumar Sharma, *The Hindustan Times*, July 5, 1990.
26. Ibid
27. The *Hindustan Times*, July 5, 1990.

CHAPTER SIX

HOME BASED WORKERS

6.1 Among the unorganized workers, a large percentage are home based but no reliable data is available about their numbers. But it is clear that in this group the largest numbers are women. They engage in a variety of occupations like beedi making, chikan embroidery, hand embroidery, zari work, making paper bags. In the last few years, many women are going in for home based production of garments. Irrespective of the occupations, the overwhelming reality of their lives is a very high and unconscionable rate of exploitation. They have long hours of work and do not get any benefit of the labour laws. This is due to their ignorance and lack of organization which is inevitable as they are scattered and work in isolation in their homes.[1]

6.2 In this group possibly the worst affected are the Muslim women. Due to their reluctance to go out to work they choose to work at home where the raw material is delivered to them by the contractor and so is the payment for their work. They are unaware of who their real employer is or what the rates are for the work they are doing. They accept whatever the contractor is giving them as payment who often arbitrarily rejects goods which have been produced as not being of the required quality. How are these women to know that a dispute between the contractor regarding the supply of raw material or of the rejection of work made by the employee can be referred to the proper authorities for settlement as provided under the Beedi and Cigar Workers (Conditions of Employment) Act.[2] One example of their exploitation and being paid well below the market rate is the case of the chikan workers. Of the chikan workers 97 per cent belong to the Muslim community and 70 per cent of them live below the poverty line. This is so even when "60 per cent of the total production of chikan work is exported which yields more than Rs 150 million in foreign exchange."[3]

6.3 The National Commission on Self Employed Women and Women in the Informal Sector in their Report, *Shramshakti*, gives two categories of home based workers. One group who gets the raw material delivered to women (usually by the contractor) and are paid not wages but piecemeal. This group of women workers deals only with the contractor without knowing who they are really working for. The other group of home based workers are "on their own account small entrepreneurs or small artisan hawkers, vendors, rag pickers."[4]

6.4 The problems of the two groups are different and different solutions are required. For the second category of home based workers what is needed is "better facilities for purchase of raw material, for making for credit..for protection against harassment from public authorities." Legislative protection is not what is needed but really an awareness of the problems they face and to help in their solution.

6.5 Regarding the first group of home based workers, *Shramshakti* reflected the discussion that proceeded before making any suggestion about legislative protection. The discussion was about the desirability of giving them legislative protection as that might be regarded as an encouragement for more women to take to home based work. The Report does not reflect the clear opinion that emerged except to point out that "home based workers must have a genuine free choice as to whether they would like to work at home or outside their home."[5] But as they were in such a large number unless legislative protection was given to them, the exploitation would continue.

6.6 *Shramshakti's* suggestion for legislation to cover the home based workers was to have one on the lines of the Beedi and Cigar Workers (Conditions of Employment) Act 1966. This Act specifically recognizes home based workers as an employee[7] and she gets the various benefits the Act provides including maternity benefit and leave with wages.[8] But in *Chhotabhai Purushottam Patel* v *State of Maharashtra*,[9] the High Court commented though wrongly that the said provision of the Beedi & Cigar Workers (Conditions of Employment) Act is misunderstood. Further, the Court held that the provision for a paid weekly holiday in Section 21(3) and the provisions of Section 26 and 27 with regard to annual leave with wages will not apply to a part-time workman in industrial premises who does not voluntarily choose to work for full hours of work notified under Section 22 read with Section 17 on all days are requisite number of days. Also Section 26 and 27 do not apply at all to home workers.

The Court held: "In the case of a home worker, it is impossible to determine what are the total full time earnings, and it is, therefore, not possible to determine the daily average of such full time earnings for the days on which he might have worked in the month immediately preceding the grant of leave."

6.7 *But in Mangalore Ganesh Beedi Workers* v. *Union of India*[10] regarding Section 27 of the Act, the Supreme Court said that the "total full time earnings for workers in industrial premises will attract the specified periods of work contemplated in Section 22. With regard to home worker the wages during leave period will be calculated with reference to the daily average of his total full time earnings for the days on which he had worked during the preceding month. In the case of home workers, it will be the average of 30 days earnings.

6.8 Therefore, *Chhotabhai* case judgment, has been explicitly overruled, and hence the legislation should provide for such leave benefits expressly for the home-based workers in consonance with the Supreme Court judgement to remove any further confusion in this regard.

6.9 The Commission was conscious of the fact that inspite of these provisions the enforcement of the Act had not been satisfactory and "the victim is the worker for whose benefit the laws are *enacted*."[11] To overcome this difficulty the suggestion in the *Shramshakti* is that there should be a Tripartite Board created on the pattern of the Board under the Dock Workers (Regulation of Employment) Act 1948. The three parties will be Government, employer and home based workers in equal numbers[12] and as women workers are the largest in the last category, they should be mostly women workers. The creation of the Board will help in the implementation of the new law and not leave it to the Inspectors to do so. The membership of women on the Board will give them a "position of responsibility and authority....a visibility which they have been lacking so far."[13]

6.10 The creation of the Board in the proposed legislation will obviate the difficult question usually faced with home based workers of who the employer is and how does one make him accountable. This difficulty will be overcome as the responsibility of the Board will be to have proper implementation of the rules relating to the safety, working conditions and welfare of the workers. The presence of a large number of women workers on the Board will facilitate the implementation of the Minimum Wages, Equal Remuneration and Maternity Benefits which so far have remained on paper as far as the home based workers are concerned.

6.11 The creation of the Board will solve the vexatious question of employer-employee relationship as that will be "replaced by a group relationship between the corpus of employers and of the workers under the aegis of the Board." The implementation of the social security scheme will need a flow of money. This *Shramshakti* suggests "on a rough calculation..... 36% of the wages will have to be collected additionally from the employers...."[14]

6.12 *Shramshakti* is not unaware of the difficulties of the problems of home based workers even if there is the proposed legislation as the workers are scattered over a large area "unlike the case of Dock Labour Board....which function within a limited and compact geographical areas."[15] But some steps need to be taken and a Bill prepared should be widely circulated so that "voluntary organizations, trade union organizations, academic institutions and other bodies which are interested....."[16] may give their suggestions.

6.13 While the suggestions of the National Commission in their Report understandably focus their attention on women, the Tripartite Board must also look after the interests of the children. The hours of work, rest and their education must no be forgotten. Just as any violation by an employer is punishable, so also when parents do not conform to the needs of the children, penalty must be provided, which may be the withdrawal of certain benefits which the family would have otherwise got. In short, there should be no conflict between the interests of the woman worker and that of the children in the family.

6.14 Without positively deciding that it is in the interest of the women to be working at home rather than outside with others, the reality of the situation today is that there are so many of them working as home based workers that legislation is required to stop their exploitation by contractors or sub-contractors.

6.15 In order to give the women a free choice to decide whether they prefer to be home based workers, it is necessary to provide the infrastructure for them to make the decision. The most important is to provide for child care facilities so that the mother can work without the worry of what is happening to the child. It has also been found that child battering takes place when the mother is under pressure to finish some work for the contractor and the child is demanding her attention. In order to avoid such a possibility the Government, both at the Centre and in the State must provide for child care facilities on a priority basis.

6.16 The proposed legislation for home based workers should be on the lines of the Beedi and Cigar Workers (Conditions of Employment) Act 1966 (duly mentioned as suggested by us) which recognizes home workers as employees entitled to most of the benefits available to the other workers.

6.17 As home based workers are engaged in various occupations and are spread over the country, it is not practicable to leave the implementation and enforcement of the new legislation to the Inspectors, as it is in the other legislations. It is also a long drawn process o establish the employer-employee relationship. The Commission, in their Report *Shramshakti* has proposed that a Tripartite Board of Government, Employers and Employees in equal number be created as it is in the Dock Workers (Regulation of Employment) Act. This will obviate the question of identifying the employer or establishing the need for the employer-employee relaitonship and have in its place by a group relationship between the Corpus of employers and of the workers under the aegis of the Board.[17]

6.18 The responsibility of the Board will be not only to see that there is a proper implementation of the provisions of the Act which deal with the welfare of the workers and working conditions but also be responsible for registration of workers and employers, and for payment of wages and other provisions applicable like accident compensation.

6.19 The funds for this will come from the additional wages which the employer will have to pay.

FOOTNOTES

1. V. Balasubramaniam "Invisible Unorganised and Underpaid"- *Mainstream* (1986 August)—She points in her study that it is because of their lack of organisation that their work remains not only underpaid but also invisible.

2. Section 39 -talks about disputes (employer -employees) Applicability of the IDA in certain cases (industrial premises)

3. UNI Report based on a paper by S.K. Sarkar on "Women of the Minority Community" May 24, 1989.

4. Para 64 p. 115. Report referred to as *Shramshakti*.

5. *Shramshakti* ibid.

6. *Shramshakti* para 66 p. 116.

7. Section 2(f)(i) where a home worker is included in the term employee.

8. A home worker is entitled to leave and maternity leave and the method of calculations of her wages is given in Section 27, Explanation 2 of the Act.

9. AIR 1971 Bom. 244 (V 58 C 43).

10. (1974) 4 SCC 43 : 1974 SCC (L & S) 205.

11. *Shramshakti* para 68(1).

12. Section 3 Dock Workers (Regulation of Employment) Rules 1948 where it lays down that the three categories will have equal number of members.

13. *Shramshakti* supra n 11.

14. *Shramshakti* para 71 p. 117

15. Ibid.

16. *Shramshakti* para 74 p. 117

17. The National Commission in this Report expresses strongly the view that only a Tripartite Board can benefit the women as they all have a major hand in the implementation of the laws which will be for the benefit and protection of women workers—*Shramshakti* 170 p. 134.

CHAPTER SEVEN

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

7.1 Amongst the various grievances against the management that the worker class have, one is the farming out of jobs to labour contractors instead of recruiting regular workmen for it. The contractors hire men and women (contract labour) who do the work on the premises of the employer, known as the principal employer, but are not deemed to be the employees of the principal employer.

7.2 Though the Supreme Court laid down the principle that industrial adjudication should not encourage the employment of contract labour as early as in 1960[1], it was only 1970 that the Contract Labour (Regulation and Abolition) Act came into being. On the enactment of the same, it became an exclusive legislation for the purposes of regulation and abolition of contract labour.[2]

7.3 Though the Act of 1970 does not expressly oust the jurisdiction of the Industrial Tribunal to adjudication disputes regarding abolition of conract labour, nonetheless, since a specific adjudication machinery regarding abolition of contract labour system has been evolved the jurisdiction of the Industrial Tribunal is deemed to be ousted. This aspect has been further bolstered by the decision in *Veg Oils Pvt. Ltd.* v. *The Workmen*,[3] wherein the Supreme Court has reasonably concluded that the determination of the abolition of conrtact labour is now to be proceeded only in accordance with Section 10 of the Act of 1970. Thus the Industrial Tribunal will have no jurisdiction in the matter.

7.4 Thus, it is apparent that Section 10 is the provision that must be invoked for the abolition of contract labour. The concept of abolition of contract labur was evolved with a view that where the circumstances did not justify the employment of contract labour, the same should be abolished. The legislation of 1970 provided for a forum for the abolition of contract labour in the form of Section 10 of the Act. It has to be seen that before coming into force of this Act, industrial disputes relating to abolition of conract labour like any oher industrial dispute, could be referred under the Industrial Disputes Act, 1947 for adjudication. Thus, the Industrial Tribunals were vested with the power to not only abolish the prevailing contract system where the circumstance justified it, but could also direct that the workmen displaced from their jobs on account of the abolition of the system be regularised in the same esablishment where they were hitherto contract workers But the Act of 1970 by Section 10 impliedly took away the power to abolish contract labour from the Industrial Tribunals.

7.5 Unfodtunately, the Act of 1970 is silent about the consequences emerging on the operation of Section 10 of the Act. The serious question that arises is that when once the notification of abolition of contract labour is issued by the Appropriate Government under Section 10 of the Act, what is the status of the hitherto employed contract labour : This query arises since after notification, the hitherto contract labour cannot be retained since the same will be illegal, and it will be tremendously difficult to seek instances where the principal employer will optionally regularise the services of the hitherto contract labour. On strict application of law, the hitherto contract labour workers are, in this situation, rendered unemployed.

7.6 While the Supreme Court has held that the Act of 1970 being a piece of social legislation should be liberally construed,[4] yet the courts have been reluctant to incorporate an elasticity to the ambit of Section 10 of the Act by providing regularization.

7.7 The Kerala High Court[5] has held that even if the conditions under Section 10 are satisfied and a notification issued abolishing the contract labour system in the establishment, the legal consequences that follow from the issuance of such notification is the abolition of contract labour. If the services under contract labour stand terminated as a consequence of the issuance of the notification under Section 16, persons who lose their jobs have not been given any statutory right for absorption in one or the other establishment.

7.8 It is ironic that while prior to the enactment of the Act of 1970, the Industrial Tribunal could not only abolish the contract labour system but could also direct that the same workmen be regularised, the Act of 1970 while creating a specific adjudication machinery to abolish the contract system is not vested with similar ancillary powers and the courts have further put manacles and resorted to strict interpretations.

7.9 While the situation remains so, the abolition of contract labour system, instead of proving to be a remedy for the contract workers is functionally a malady as he is deprived of what little he is getting. In the present set up it appears as though the workers have been left in a lurch after abolition and thus feel cheated of employment. Thus, the aim of abolition bcomes meaningless.

7.10 If abolition of contract labour is to prove fruitful, the law should be restructured. Powers should be given to the authorities under the Act to take into consideration the after effects of abolition of contract labour. As seen above the major drawback of this Act is that though it does provide for abolition of contract labour in certain circumstances, it does not deal with the aftermath of such abolition. The contract worker who seeks the abolition of the contract labour system does so only in the face of regularisation. If he cannot get regularised, then why should he seek abolition ?

7.11 The most appropriate remedy would be to direct by way of an amendment, that if a particular system of contract labour warrants to be abolished then all those workers previously on the job as contract labur be regularised by the principal employer. In this light, the Appropriate Government should be vested with powers to make suitable directions for regularisation of the same workmen. These powers should be in the form of ancillary powers as are vested with the Labour Court and Tribunals while trying a dispute before them[6]. The said amendment can be made to Section 10 of the Act itself. After sub section (2) a new sub section i.e. sub section (3) can be added reading as follows :

(3) While issuing a notification under sub-section (1), the Appropriate Government may take suitable directions for the regularisation, of the hitherto contract labour, in the establishment of the principal employer.

7.12 Another issue which calls for attention which perhaps is common to all labour laws is that under the prevailing galaxy of labour laws there is no provision for job security of the workers during the pendency of the proceedings. Speaking particularly of the Act 1970 itself, there is no provision to safeguard the interests of the workmen during the pendency of proceedings regarding abolition of contract labour. It is quite possible and understandable that the management principal employer under fear of impending regularisation may do away with the services of contract labour in order to frustrate the proceedings under Section 10 of the Act. To arrest such manoeuvres of the principal employer, there should be an inbuilt insulation against such tactics This could be attained by vesting, the authority before whom the proceedings are pending, wih powers to order status quo. As such there is further scope for amendment to Section 10 of the Act. New sub-section (4) could be added after the proposed new sub-section (3) which would reads as follows :

(4) The Appropriate Government may at any time as it may deem fit, make appropriate directions to ensure that there is no change in the conditions of service of the contract labour, any such change can be effected only with the previous permission of the Appropriate Government.

7.13 The Act is silent about the wage rates payable to the contract labour. In this context there should be an amendment to Chapter V of the Act and a new Section i.e. Section 17A be inserted which should read as :

Section 17A. Wage Rates and other conditions of services of Contract Labour

The Wage rates, holidays, hours of work and other conditions of service of a contract labour workmen shall,—

(a) in a case where such workman performs in any establishment, the same or similar kind of work as is being performed by any other workman in that establishment, be the same as those applicable to such other workman; and

(b) in any other case, be such as may be prescribed by the Appropriate Government :

Provided that a contract labour workman shall in no case be paid less than the wages fixed under the Minimum Wages Act, 1948 (11 of 1948).

7.14 Further, we endorse the Gujarat Second Labour Law Committee recommendation that the "Act must be amended so as to prohibit the employment of contract labour altogether, allowing room in exceptional cases for an application to be made to the Government which then act on the advice of the Board"[7]

7.15 Also, Section 10 of the Act should be amended so as to enable permission for contract labour in special cases. It is only when an establishment has been specifically permitted by a notification in the official gazette that it must be allowed registration under section 7. Similarly licensing of contractors under chapter IV. shall also be subject to the overriding requirement that the "licenses are valid only to the extent that the notification under the amended Section 10 permit"[8].

7.16 As an alternative, power may be granted to Industrial Tribunal to grant exemption to any establishment to employ contract labour[9].

FOOT NOTES

1. *Standard Vacuum Refining Co. of India Ltd.* v *Their Workmen* (1990) 11 LLJ 233.

2. *Burmah Shell Oil Storage and Distilling Co. of India Ltd.* v *The Industrial Tribunal,* 1975 Lab IC 165 (A.P.)

3. (1971) II LLJ 567. Also see *BHEL Workers Association Hardwar* v *Union of India* (1985) I LLJ 428; *Catering Cleaners of Southern Railway* v *Union of India* (1987) I LLJ 345; *Phillips Workers Union Thane* v *State of Maharashtra* (1988) II LLJ 92.

4. *Lionel Edwards Ltd.* v *Labour Enforcement Officer* 1977 Lab IC 1037 (Cal).

5. *P. Karunakaran* v *Chief Commercial Superintendant.*

6. See section 10 (4) of the Industrial Dispute s Act, 1947.

7. Gujarat, Report of the Second Labour Laws Review Committee, Report III. page 164.

8. Ibid

9. Ibid

CHAPTER EIGHT

INTER-STATE MIGRANT WORKMEN (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE ACT, 1979 AND ABOLITION ACT, 1979

8.1 To minimize the cost of production and economize in various ways in order to maximize projects, employers often resort to engaging contract labour. By recruiting contract labour, the employer would also evade the responsibility of various benefits extendable to the labour.

8.2 To regulate the conditions of work of the contract labour, the Contract Labour (Regulation and Abolition) Act was enacted in 1970. However, this being a general legislation governing all contract labour, these were some peculiar issues relating to labour recruited from one State through contractors or agents called Sardars|Khatadars, for work outside the State. In this system of Inter-State migrant labour, the contractor take the labour to a far off place on payment of the railway fare only. Therefore, the workers are made to work in inhuman conditions with no hope of reprieve. The provisions of various labour laws are not observed in this case and they are subjected to various malpractices.

8.3 The inter-state migrant workmen are generally illiterate, unorganized and normally work under extremely adverse conditions and in view of these hardships and to secure effective protection against their exploitation, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 was enacted.

8.4 Under the Act, an Inter-State Migrant Workmen means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State whether with or without the knowledge of the principal employer in relation to such establishment.

8.5 One of the members of the study group was of the opinion that the Inter-State Migrant Workmen Act should be abrogated since practically the entire Act, apart from the definition of migrant workman, is on the pattern of the contract Labour (Regulation & Abolition) Act, 1979. Therefore, the few peculiarities of the Inter-State Migrant Workmen Act can be added to the Contract Labour Act. But this suggestion only indicates the need for an integrated code as unorganized Rural Labour as *recommended* in Chapter One. Until this is done, we proceed to recommend piecemeal law reform.

8.6 The Labour Ministers Conference in 1976, recommended the setting up of a Compact Committee to study the problems of migrant labour. The Committee was constituted in February 1977 and it recommended the enactment of a separate central legislation to regulate the employment of inter-state migrant workmen as it was felt that the provisions of the Contract Labour Act would not adequately take care of the variety of malpractices indulged in by the contractors|Sardars|Khatadars etc. and the facilities required to be privided to these workmen in view of the peculiar circumstances in which they have to work.

8.7 Some of the special features of the Act are that it applies to every establishment and also to every contractor whosoever employs more than five Inter-State migrant workers. Further the contractor has to furnish all the employment particulars in the home State of the recruited worker as well as in the State of employment. Also, such migrant worker is entitled to displacement allowance and the journey allowence over and above the usual minimum wages. Further, the wages are to be paid from the date of recruitment and not from the date of employments. A migrant worker under the Act can raise an industrial dispute either in the home State or the host State. Therefore, we do not think that the Act is redundant and can be done away with.

8.8 In order to make the Act more effective, we suggest that the penal provisions be made more stringent. In case of any violation, a deterrent punishment requires to be prescribed. The fine should be increased from Rs. 2000 which is currently prescribed. Hence Section 25 and 26 should be *amended* accordingly.

8.9 Further, as suggested by Gujarat Report*, "Section 28 of the Act be amended and the offence be made triable by a Labour Judge instead of a Metropolitan Magistrate or Judicial Magistrate."

8.10 Also "Section 29 be *amended* so as to substitute a period of 6 months instead of 3 months for cognizance of offences by the court. A corresponding *amendment* be made in the proviso to Section 29 of the Act prescribing the period of 9 months instead of 6 months."

8.11 The management of sanctions needs to be more imaginatively designed. Apart from mandatory minimum prison sentence, a whole range of sanctions which really may transform the behaviour of target groups is necessary; some of these additional sanctions are recommended in Chapter One.

* Report of the Second Labour Laws Committee, Report IV, Chapter II.

CHAPTER NINE

CHILD LABOUR (REGULATION AND ABOLITION) ACT, 1986

9.1 The 1986 legislation on Child Labour was preceded by an intense public debate. The debate was marked by two closely antagonistic positions: the *fundamentalist position* insisted that child labour should be totally outlawed: the *reformist* position advocated a vigorous ameliorative law and policy action programme by the State.

9.2 The *reformist* position won the day because it was able to marshal evidence and rhetoric against the idea of abolition. They traced the tenacity of child labour in the economic matrix of India. Even if an evil, they argued that it was a necessary evil, given the overall harrowing improverishment of the masses. They further argued that mere enunciation of illegality of child labour will be ineffective; to make it effective, an unprecedented state intervention would be required. The task, rather, wa to seriously regulate conditions of work and provide opportunities of growth alongwith labour. Some children's activist groups sought and saw in the proposed legislation a pioneering encouragement to their effort.

9.3 The *fundamentalist* position advocated by a few (Justice D. A. Desai, Dr. Lotika Sarkar. Dr. Vasudha Dhagmwar and Upendra Baxi) was based on the constitutional conception of childhood. It took its position on Article 24, a right against exploitation, which reads as under.

> "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

9.4 The *fundamentalist* reading emphasized that child labour stood constitutionally *outlawed* in "hazardous employment." And any employment for a child below fourteen years was a *hazard.* This was so because to put a child to work would be to confiscate her *chidhood* which it was the intention of the Constitution to protect and promote. This intention was made abundantly clear in the directive Principles, in particular Articles 45, and 39(*e*) and (*f*). Article 45 reads :

> "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Clearly, the Constitution included that children would be eligible as a charge on the State, to receive "free and compulsory education". Article 39(*e*) and (*f*) casts a duty on the State to ensure :

> "That the health and strength of workers, men and women; and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

Any *work* by children must, by definition, leads to the abuse of the "tender age of the children" and any *recource* to work by children would be an example of "being forced by economin necessity to enter avocations unsuited to their age of strength." And clause (f) introduced by the Constitution (Forty Second Amendment) Act, 1976, reinforced the outlawing of child labour which would, by definition, deny; (i) "opportunities and facilities" to children "to develop in a healthy manner and in condition of freedom and dignity" and contradict; (ii) the immunity granted to children from "exploitation and against moral and material abandonment."

9.5 Further, Article 37 made these Directive Principles "fundamental in the governance of the country" and cast a non-negotiable "duty" on "the State to apply these principles in making laws".

9.6 The *fundamentalist* position maintained any legislation aimed at legalization of child labour violated Article 24 read with Articles 45, and 39(*e*) and (*f*). Even if the *reformist* position was seen justified on *pragmatic* grounds, the Constitution as it stood forbade recourse to it

9.7 The narration is necessary in the context of unorganised rural labour, where 90 per cent of labour is estimated to comprise child labour. And as pointed out in Chapter Fleven, most, if not all agricultural operations, *are* hazardous for the young workers. Although most special invitees to the Study Group adopted the *reformist* position, two members of core groun (Lotika Sarkar and Upendra Baxi) maintained the *fundamentalist* position.

9.8 We do not expect to be able to persuade the Commission as a whole to the *fundamentalist* approach. But we do at least hope that it would be fully taken note of in its Report as a Constitutional imperative. No matter how well intentioned the child labour reforms may be, it should be at least fully acknowledged and realized that they deviate *totally* and *frontally* from the *text* and *context* of the Constitution. Such defiance of the Constitution should be impermissible in a rule of law society. We further *recommend* that the commission urge full implementation of Article 45 as free and compulsory education of an enormous mass of young (child) agricultural workers besides being a Constitutional imperative is the only *empowering* strategy for the eventual *emancipation* of the unorganised rural labour.

9.9 The ultimate aim of the enactment on child labour should be to eradicate the employment of Children totally and to provide to them free and compulsory primary education as envisaged by the Directive Principles of State Policy in the Constitution. Furthermore, the right to life should include the right to education without which the uneducated person opens himself to omnipresent exploitations.

9.10 It is *recommended*, therefore, that such schemes of the Government as are directed to the opening of school, and free and compulsory education should be reinforced. It has been observed that anti-social powerful groups in villages oppose the establishment of schools and discourage the children from studying in such schools with the view to have a supply of cheap labour. Criminal sanctions should be provided to prevent such practices.

9.11 The 1986 legislation (Act 61 of 1986) prohibits the employment of children in any of the occupations set forth in part 'A' of the Schedule. These include transport, cinder picking, clearing of an ash pit or building operation in the Railway premises; catering in railways; construction work in the railways; and the port authority. The Act further prohibits employment of the children in workshops where any of the processes given in part B of the Schedule is carried on. These processes include bidi making, carpet weaving, cement manufacture and begging, printing dyeing and weaving of cloth, manufacture of matches, explosives and fireworks; mica cutting and splitting; shellac manufacture; soap-manufacture; tanning; wool cleaning; building and construction industry. The Central Government has the power to add any other employments to the Schedule after due notification.

9.12 The Act, however, does not apply to any workshop where any process listed in Part-B of the Schedule is carried on by the occupier with the aid of his family or to any government recognized school.

9.13 A person violating such prohibition for the first time is punishable with a minimum three months imprisonment or with a minimum fine of ten thousand rupees or with both. The maximum fine could be upto twenty thousand rupees or/and imprisonment upto one year. Any person can file a complaint in this regard in any competent court which would not be inferior to the court of a first class magistrate.

9.14 In as much as the Act does not apply to the industrial processes carried on by an occupier with the help of his family members. It permits the employment of children in processes which are hazardous and, therefore, the Act is violative of the Fundamental Right of the Children not to be employed in hazardous occupations It is a matter of common observation that clever employers instal looms for carpet weaving in children's homes. So also, bidi manufacture is similarly carried on. It is, therefore, *recommended* that the Act should be amended to delete this exception.

9.15 Also, in as much as the Act does not apply to recognized schools, it is violative of the same fundamental right. The Government has opened training centres in carpet weaving employing young children which is hazardous to the children's health. We *recommend* that this exception should also be deleted.

9.16 It is commonplace that where in labour laws both fine and imprisonment are provided, the employer gets away with the payment of a mere fine. Imprisonment is never awarded. To make it deterrent the employer should be punishable with imprisonment only even in the case of first offence. In case of continuing offences harsher punishments are called for as already provided by the Act (six months to two years imprisonment). We so *recommend.*

9.17 Regulation of conditions of the work of children is contained in Part III of the Act. It deals with such matters as hours and period of work, weekly holidays, inspectors, disputes as to age, maintenance of registers, display of notices and health and safety. It applies to establishments as defined in the Act. An establishment includes a shop, commercial establishment, workshop, *farm*, hotels, restaurants, theatre or other places of entertainment.

9.18 The Act provides that the total period of work inclusive of one hour's rest shall not exceed six hours.

9.19 Perhaps this is an improvement on the existing conditions of work for children but runs counter to the Directive Principle of State Policy of providing compulsory and free primary education to the children. A child who is occupied for six hours a day in the place of his work will have no energy or concentration left for education. It is, therefore, *recommended* that the total period of employment inclusive of the period of rest should not exceed four hours. The period of rest should be after two hours of work rather than after three hours as provided by the Act. Such period of rest could, however, be suitably reduced in duration.

9.20 Minimum wages should be fixed to ensure the principle of equal wages for equal work. The children should not be paid a lower wage under the Minimum wages Act. If this is not done there will be a tendency to employ children on low wages leading to their exploitation and the practice of children's employment will never come to an end. We so *recommend.*

9.21 The definition of establishment, as already noted, is very narrow and does not include the children who are engaged in other areas of employment. For example, domestic servants, and newspaper vendors whom you find on every dangerous crossroad in Delhi, are left out. Power should, therefore, be given to child Technical Advisory Committees envisaged by the Act to suggest rules in respect of employment of children in other areas of employment not covered under the definition of establishments to prevent the exploitation of such children.

CHAPTER TEN

MATERNITY BENEFIT ACT, 1961

10.1 Maternity benefit to women workers was promised by the Congress as far back as 1931 at the Karachi Congress. But at the time of framing the constitution, it was placed in the Directive Principles[1] —which meant that giving maternity benefits to all working women was postponed. But there were some Central Acts like Mines Act, 1952 and the Plantation Labour Act 1951 as well as some State Acts, which provide for maternity benefits. In addition to these there was he Employees State Insurance Act 1948 under which one of the most beneficial provisions was giving of maternity benefit to working women. This Act, however, did not apply to all working women as it had certain eligibility rules. To reduce the disparities under these various Acts, the Central Act—the Maternity Benefit Act—was passed in 1961. The purpose was to provide the maternity benefit and have uniform rules for qualifying for the benefit period as also for the rate of benefits.

10.2 The object of the Act as explained by the Supreme Court[2] was to attain social justice for women workers and to "enable the women workers not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency and output". Neither the wording of the Act nor the object (as explained by the highest court of the land) of social justice, made any reference to the marital status of the worker. But a couple of years ago, the P&T Department brought out a rule which denied maternity benefit of paid leave to an unmarried woman who was pregnant. In the case of the public indignation and widespread protest from the women's organisations the Department had to withdraw this rule.

10.3 The attempt to deny maternity leave after two or three children also finds no place in the Act. The maternity benefit is given to a woman to help her preserve her efficiency as a worker and for her this is necessary whether she is having her first child or the fourth. The Fourth Pay Commission's suggestion to deny maternity leave after the second child found support from some members of the study group as they found it in consonance with the Government's Family Planning programme. But it met with vehement opposition from the other members of the group. But the group, after deep deliberation, agreed that maternity benefit cannot be used as a device of family planning for the following good many reasons.

10.4 *First*, the suggestion clearly goes against the very principle of the Act; as has already been stated that this welfare legislation is to preserve the health and efficiency of a woman worker and not for any other reason. To propagate disincentives to large families is one thing; to propagate those in such ways which are clearly detrimental to the health of the child and the mother is open to severe constitutional criticism. Some State Governments have already introduced this disincentive—Orissa being one such state. But as is widely believed, improving health facilities for the child and the lactating mother will itself lead to a woman limiting her family. What is needed is not disincentives to help the population policy but better health facilities and educating the mother, father and the family to space her family.

10.5 *Second*, our legal system does not recognise marital rape as an offence except in a limiting instance where the bride has yet not completed fifteen years of age. Under the circumstances where our socio-legal system gives an absolute and unconditional rights to the husband over his wife's body and specially when incidence of child marriage is quite high, irrespective of the law to the contrary, the woman has hardly any say in the matter; certainly not in how many children she would like to have and when she wants to have them. Her body is subjected to abuse with or without her consent; so we do not suggest a further abuse by depriving her and the child of the basic health facilities.

10.6 *Third*, even if we presume for the arguments' sake that such disincentives will help propagate among the people, the need for family planning, it does not serve the required objective because the use of contraceptives and other family planning devices is not a foolproof guarantee against chances of conception. Instances abound where a woman has got pregnant even after going through tubectomy. Also, many times various contraceptives fail to give the required protection. In one such case when the aggrieved couple approached the consumer disputes redressal forum for compensation, the case was dismissed. So we find no reason to compromise on a woman's/child's health just to pursue faulty family planning policy of the Government.

10.7 *Shramshakti* has also very emphatically condemned this proposal of restricting maternity benefits to three confinements. They stated that "emphasis on a small family norm will be better served by improved maternity and child care which will, by reducing infant mortality and improving the health of the mother and her children, result in small families. The funds that are being spent in large quantities on family planning, can be better spent on providing maternity benefits and improved childcare."[3]

10.8 The maternity benefit is available for six weeks before and after the date of delivery. And the rate of this benefit includes not only the wages but covers all remuneration in the nature of cash allowances, incentive bonus, the money value of the concessional supply of food grains and other articles. Many of the employers tried to reduce the amount by calculating the wages for six days, i.e. the working days, the seventh day usually Sunday is a rest day and therefore to the employer wageless. If there were any other

wageless days, that too was taken into account in reducing the amount to be paid to her. But the Supreme Court came down strongly against this practice condemning the deviousness of the employers for this deduction by clearly stating the "computation of maternity benefit has to be made for all the days including Sundays and rest days which may be wageless". The Court reminded the employer that this was so as this legislation was a "beneficial piece of legislation intended to achieve the object of doing social justice".[4]

10.9 The law provides that in addition to the pre-natal and post-natal leave, the woman worker may request her employer to relieve her from arduous work or work which involves her standing for long hours or any type of work which may interfere with her pregnancy or adversely affect her health. The period for which the employer is bound to make this concession is limited to one month. There are some other benefits which she may claim in case of illness arising out of pregnancy, premature birth or delivery. She may claim a medical bonus Rs. 25 if the employers are to provide her with pre-natal or post-natal care.

10.10 The Act, it would appear, makes detailed provisions for practically all the situations one can contemplate which arise out of pregnancy and violation of any of these provisions is meant to be puished fairly severely. But the question is how many of the women workers have so far benefited leaving aside the question of how many employers have been punished? A study done by the Deputy Director of the Labour Bureau gives the following figures.[5] In mines other than coal and manganese the proportion of women workers claiming maternity leave was between two and eight percent. In stone mine, not even a single woman worker got this benefit. He has an explanation for this ridiculously low figure because, he says, of the "preponderance of female casual and contract labour.....only 43.68 women workers in mines were found to be permanent". He also reported that most of the "employers were reluctant to make women workers permanent to avoid paying benefits which have to be paid to permanent workers"[6]

10.11 The same study reported the condition on the plantations to be not better. 11 per cent of the women were paid maternity benefit in the year under study (1983). The reason was the same as the one in the mines and that is the large percentage of casual and temporary women workers and of course compared to the men workers. "The proportion of women workers holding permanent status was lower than that of men".

10.12 It has often been stated that employers are reluctant to employ women workers owing to the protective legislations like maternity benefit and providing creche for children. But this has not been substantiated by any of the studies done. On the contrary in a recent study done by the Labour Bureau, the findings were that "in most cases the additional financial obligations on account of protective legislative provisions did not have any adverse effect on women's employment"[7] *Shramshakti* cited a report which indicates that "in 1977-78 the average expenditure per woman worker in factories ranged from Rs. 1.31 to Rs. 4.54 per year—an absurdly low sum....."[8]

9.13 Another very important factor which is leading to one of the most beneficial legislations remaining not implemented is the fact that the procedure for getting the benefit is so cumbersome that most of the women workers are incapable of understanding it. Many of them are illiterate and, therefore, even if the employer, by following the letter of the law puts up the rules of maternity benefit in public places the women are not able to read or understand the procedure. Most of them are not even aware of their rights to the extent that the employer cannot bring about a brea kin their service only for the purpose of denying them maternity benefit.[9]

10.14 A very worthwhile provision in the Act is that even after a woman worker has joined work after her maternity leave, she is given two breaks for nursing the child. This is in addition to the normal rest intervals and this right she has, till the child is 15 months old. Each nursing break is for a period of 15 minutes plus the time taken to reach the place where the child has been left. But what makes this right almost meaningless is that the same law provides that the travel time cannot be less than five minutes and cannot exceed fifteen minutes. Unless the creche is attached to the working place, it is difficult to visualise a place where the mother takes only 15 minutes to travel to her child and get back.[10]

10.15 Some of the States are providing the maternity benefit must be borne by all employers and not by the individual employer. In order to do this, *Shramshakti* supports the suggestion of the National Commission on Labour that there should be a central fund to which all employers must contribute. The contribution should be "a percentage of the total wages (of both men and women workers) as monthly contribution. The fund may be controlled and administered by the ESI"[11] This will not cover the unorganised "self-employed women or even those in agriculture and construction work". The suggestion for them is that on the lines maternity benefits is being implemented in States like Andhra Pradesh, Karnataka and Gujarat, the entire expenditure should be borne by the State. In all cases where the employer employee relationship cannot be clearly established and the funds therefore, cannot come out of the Central Fund, the Government should bear the expenses. Under this scheme, no qualifying period of service on the part of the woman worker will be required. But maternity benefits without adequate child care will make it difficult if not impossible for a woman worker to continue to work. *Sharamshakti,* therefore, recommends very clearly that maternity benefit "will have to be supplemented by appropriate child care through provision of creche, to be located preferably in the village schools".[12]

Recommendations

10.16 Maternity benefit should be given irrespective of the marital status of the mother; and there should be no restriction placed on the number of times a working woman can avail of this right.

10.17 A central fund should be created to which all employers will contribute irrespective of whether women are employed or not. The contribution should be a percentage of the total wages. (While it is undoubtedly the duty of the State and Society to look after the pregnant worker and provide her with the rest she requires, it is worth considering whether this responsibility is also not of the father who in many cases is quite irresponsible about the number and frequent pregnancies of the woman. Even a small percentage of his wages paid monthly to the Central fund will perhaps help him to develop a greater sense of responsibility).

10.18 For the unorganised self-employed women, or agricultural and construction workers the Government should take the responsibility for maternity benefit.

10.19 Maternity benefit should be regarded as being interlinked with child care facilities. It is, therefore, necessary to provide creche facilities near either at the place of work or attached to the nearby village school as suggested by *Shramshakti.*

10.20 To make it possible for a nursing mother to give her child the two breaks the law allows her, it is necessary that the time limit prescribed for her to travel to the creche and back should be a realistic period and not the fifteen minutes permissible at the moment.

10.21 Even when it has been shown that maternity benefit paid by the employer has not proved to be a financial hardship for him because of ESI, he does not hesitate to keep the women worker as a casual worker or a temporary worker. The figures given by the studies show the small percentage, who have been able to benefit from it. It is, therefore, necessary that the right of inspection to examine that the records are properly kept by the employer should not be left to only the Inspector.[13] The right should also be extended to civil rights groups, women's organisations and other concerned group of persons.[14]

FOOTNOTES

1. Article 42 the State shall make provisions for securing just and humane conditions of work and for maternity relief.

2. *Shah* v. *Presiding* Officer, Labour, 197 , Supreme Court, p. 12.

3. *Report of the National Commission on Self-Employment Women and Women in the Informal Sector*; para 30. p. 108; referred to as *Shramshakti*.

4. Supra *n* 2.

5. Balram, "Women Workers and Labour Legislation in India"; Indian Labour Journal; Vol. 26 p. 1530 (1984).

6. Ibi

7. "Socio-Economic Conditions of Women Workers;" Indian Laour Journal; Vol. 29: p. 858 (1988.)

8 According to the *Shramshakti* -"One of the points often urged as the reason for the decrease in employment of women is the incidence of maternity benefits and the consequent reluctance of the employer to hire women workers. It is not as though the average expenditure incurred as maternity benefit is very large--- But even so, one can visualise a psychological---Barrier in the minds of the employer in recruiting women as employer". See para 27; p. 107. supra note 3.

9. The procedure is of different forms--Form b, Form c etc. for the various kinds of benefits required. Certificate from registered medical practitioner--all this must be extremely difficult for woman worker to understand. These are spelt out in the Rules.

10. The Act gives this right to the mother of the nursing breaks, Sec. 11, but the Rules give the period when she can be absent—Rule 6.

11. *Shramshakti*; p. 107; supra n 3.

12. Id; p. 108.

13. *Shramshakti* has recommended that all officials who function as Inspectors should have an auxiliary role. Powers of inspection should be given to women's organisations, trade union functionaries at the village level such as ANMs; *Shramshakti*—A Summary of the Report; p. 37.

14. This is, necessary because, as *Shramshakti* has pointed out that even when the employer does not find it a financial burden to provide maternity benefit and/or child care, there is a "psychological, if not a financial barrier in the minds of employers---"

CHAPTER ELEVEN

SOCIAL SECURITY

11.1 Organizational Management Theories have come a long way from structural to human relation and finally to behavioural approach. The Hawthorne Experiments conducted in 1927 to 1932 showed that increased production was a result of changed social position of workers. In fact, it is believed that every organization is a social system and major contribution of human relation school is that an individual is not only motivated by economic incentives like wages but also by diverse social & psychological factors like work-environment, social order, family welfare, social security etc. To achieve the desired goals, the organizational objectives should not be seen from organization's perspective alone but also from the individuals associated with it. Contributions of H.A. Simon, Maslow, Herzbeg and others in the capitalist world have done a great benefit in highlighting the need for social security and conducive work environment for greater motivation and enhanced productivity.

11.2 The need for social security is much recognized even in the free-market economy and hence it becomes imperative for us to move in the right direction to justifiably call ourselves a socialist democratic state. The Indian Constitution has been rightly described as the "first and foremost a social document," embodying "the goals of the social revolution." Parts III and IV (the fundamental rights and the directive principles of state policy), constitute, in the words of Granville Austin, "the conscience of the Constitution."

11.3 The Directive Principles of State Policy in our Constitution lay particular emphasis on labour welfare legislations and various social security provisions. Article 39 specifically requires the State to ensure for its people adequate means of livelihood, fair distribution of wealth, equal pay for equal work, and protection of children and labour. The main objective of this Article read with other Articles is, namely, building of a welfare society and an egalitarian social order. Article 41 (Right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want) : Article 42 (Provision for just and human conditions of work & maternity relief); Article 43 (Living wage, etc. for workers); Article 45 (Provision for free and compulsory education for children) and article 47 (Duty of the Sate to raise the level of nutrition and the standard of living and to improve public health), all direct the State to take recourse to an effective social security scheme.

11.4 But in practice, we have very few social security schemes in a fragmented form and the beneficiaries are mostly the organized industrial workmen. Schemes like the Workmen's Compensation Act and E.S.I. practically leave other sectors like rural & unorganized absolutely untouched. Workmen's Compensation Act is applicable only to a limited types of employments and is not applicable to casual workers at all. Casual workers should be included in the definition of workmen.

11.5 Therefore, we *strongly recommend* that for social security of agricultural, rural and casual workers a central fund should be created on the model of Kerala Agricultural Workmen Act, which should be administered by a Board. The fund should cater to the needs of these workers by providing comprehensive social security schemes. The contribution to the fund should be made by the State Governments, Central Government, the employers and the workers.

11.6 For the effective implementation of the provisions of any social security scheme, *it is recommended* that provision should be made for mobile office of the Commissioner under the relevant Act so that in the cases of serious injury, illness or other hardships where the workmen is not able to make an application before the Commissioner, he should be able to take cognizance of the situation and decide the liability and further direct the compensation/allowance to be paid immediately.

11.7 Further, we *recommend* that all occupational diseases peculiar to agricultural employments; medical benefits for seriously ill and injured workers (injured other than in course of employment) should also be included in social security schemes.

11.8 The agricultural labour occupation has become increasingly hazardous for variety of developmental factors. The extensive chemicalization of agriculture particularly the widespread use of herbicide and pesticide have posed new hazards. Pesticide poisoning among rural workers has led to disastrous injuries and also death. Similarly, the available literature documents the increasing exposure and risk of accident due to faulty farm equipment. For example, the use of unsafe threshers has caused severe incidents of loss of life and limb of agricultural workers during the progress of the so called Green Revolution. Unorganised agricultural labourers remain exposed also to lethal wages in kind as has been demonstrated in a Supreme Court proceedings for district of Rewa and Satna in Madhya Pradesh where toxic pulses causing lathyrism are offered to bonded labourers as wages in kind. There is clearly an overwhelming need to protect agricultural workers from risk and injury and to evolve a regime of compensation and rehabilitation for those injured in agricultural operations.

11.9 Perhaps, recently enacted Public Liability Insurance Act 1991 may need to be extended to agricultural workers. This Act innovates a specific regime of interim relief and the mode of recovery of it—

which is through the proceeding before the District Collector—is inadequate even in terms of redressing the needs of industrial workers. We, accordingly, *recommend* that a suitable legislation should be devised to provide compensation and rehabilitation for agricultural workers. Such a legislation should at least provide :

(a) precisely identify hazardous aspects of agriculture;

(b) a quick and efficient machinery at grassroot levels both for interim relief and final compensations;

(c) adequate programme of rehabilitation in cases of workers exposed to severe disability or injury;

(d) compulsory insurance for agricultural workers to be subsidised by the employer and the State.

CHAPTER TWELVE

THE RIGHT TO WORK

12.1 The recent campaign to make the right to work a fundamental right has brought out a wide diversity of opinion whether such a right should be recognized at all and implications on the national economy of such recognition. The terms of discussion have been largely confined to the problem of public revenue. The discussion has ignored the basic fact that Article 41 of the Constitution does recognize the right to work although as a Directve Principle. The Article reads as follows :

> *"Right to work, to education and to public assistance in certain cases* : The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

12.2 The State has a fundamental duty to provide effectively the right to work "within the limits of its economic capacity and development." Surely, after four decades of planning the limits of States' economic capacity and development must be such to permit effective action towards implementation of this right. The national discussion has assumed that the limits of economic capacity and development have remained relatively unchanged and will always remain so. Such thinking makes the provision of Article 41 a permanent dead *letter. The Constitution simply forbids such thinking.*

12.3 The notion of right to work has a long history in the discourse of rights in general. The right to work has been recognized by natural lawyers as a part of right to life; and has been conceptualized in terms of right to access to the basic necessities of life and need-satisfaction through work.

12.4 Making this right as constitutional and fundamental is not a radical novelty; many Constitutions of the world have already tried it. Countries like U.S.S.R., China, Czechoslovakia, Hungary, Honduras, Korea, Vietnam, Kuwait Libya, Cuba, Japan etc. have incorporated the 'Right to Work' as the principal right in their respective Constitutions. Majority of the countries of the world provide for social welfare schemes like unemployment allowance, old age pension, allowance to war widows or disabled persons, etc. etc. What is commendable in some of these constitutions[1] is that such a right is coupled with duty to work. Casting of such a duty on the citizens is essential for creating a responsible environment and inculcating efficiency and productivity. Also it is not merely the duty of the State but of every citizen to strive for oneself, live with dignity and reap the fruits of one's labour. Such a duty aspires to create an active citizenry.

12.5 If one makes a detailed perusal of Indian Constitution, one finds that the right to work stands already recognized, though in much fragmented form. Article 39(i) provides that the state shall ensure every citizen of India an equal access to the means of livelihood. Article 39 is the basic provision which lays down directions from which all other labour welfare legislations flow. Further *Article* 41, as noted, talks about right to work in explicit terms by providing that the State *shall within the limits of its economic capacity and development,* make effective provision for securing the *right to work,* to education and *public assistance* in cases of unemployment, *old age, sickness* and *disablement* and in other cases of *undeserved want.* But what is lacking is the enforceability of these provisions as they fall in Chapter IV of the Constitution.

12.6 In Fundamental Right, Articles 19, 21, 23, and 24 are of particular interest to us as they deal with work. Article 19 has been misunderstood by many as conferring right to work but it is not so. The said Article provides for right to carry on any trade, business or profession of one's choice (subject to certain restrictions) which means it guarantees *freedom of work* which is not synonymous with the right to work. Right to work is understood as the obligation on the State to guarantee employment to all eligible citizens in the absence of which the State must compensate by giving unemployment allowance or suitable sustenance allowance to the affected party. In contrast the freedom to work merely makes incumbent upon the State not to interfere with anybody's means of livelihood. Further, Article 21 guarantees "Right to life" and Article 23 and 24 entitled "Right against exploitation" clearly outlaw certain forms of 'work' or 'labour'. Article 23 forbids beggary, traffic in human beings, bonded labour and forced labour. Likewise, Article 24 prohibits child labour in hazardous industries.

12.7 Judicial activism has given wide interpretation to Articles 21 and 23 through various landmark Supreme Court decisions. The 'right to life' under Article 21 has been interpreted and understood as the *'right to life and livelihood'* by various social and legal thinkers, jurists and other legal luminaries. The judicial opinion, voiced through *Asiad Workers Case*[2], *Bandhua Mukti Morcha*[3], *Pavement Dwellers*[4] and *Sodan Singh,*[5] has been that Article 21 has a very wide import and the right to life should be construed to mean right to livelihood as well because without the means of livelihood there can be no life. Further, Articles 21, 23 and 24 have been interpreted as guaranteeing life with dignity in humane conditions. To have humane conditions, we must ackowledge certain basic human rights and the right to work has been read as one such basic human right. So what

is required now is the consolidation of all such rights under right to work and making them justiciable and also enunciating them explicitly in the Constitution so that they are not exposed to judicial interpretational vagaries.

12.8 Many contemporary scholars have shown their reservations on making right to work fundamental by citing the ills of public sector and eulogising the productive efficiency of free market economy. But we say that their fears and doubts are ill founded. No economy can function optimally where majority of its wage earning masses are underemployed or unemployed. Nor such an economy has any reason to be proud of its existence where masses do not have any means of livelihood and are trying to survive below subsistence level !

12.9 Further, Government tried to take recourse to Right to Work way back in 1970 by introducing Employment Guarantee Bill in the Parliament. The Bill, though a well thought and positive piece of legislation, failed as it seemed to be over-ambitious and enthusiastic about eradicating all at once, the miseries of unemployed, without being realistic of the economic strain it would have put on the Consolidated Fund of India. The Bill, if enacted would have involved a recurring expenditure of approximately Rs. 1,000 crores every year, then. Another Bill titled, 'Right to Work Bill,' which was an improvement over the prtvious ont, was introduced in 1988 but failed due to similar reasons.

12.10 Apart from the Constitution, some aspects of the right to work also stands recognised, in various ways in labour legislation both for industrial and unorganised labour. The labour legislation, in this comprehensive sense, acknowledges limitations on the power of the private employer to hire and fire: a similar acknowledgement is to be found in Article 311 of the Constitution which speaks the power of the Government terminating services of civil sevants—this has generated an enormous amount of judge-made law in the direction of protection of the right to work. This body of labour law and public services jurisprudence needs to be closely examined at the time of drafting a legislation on the right to work.

12.11 We *recommend, first*, the incorporation of the right to work as a fundamental right. This right will be enforceable like all other fundamental rights under Article 32 and 226 of the Constitution of India. In terms of its contents, it should address the precise categories of constitutional obligations imposed by Article 41. In this sense, the right to work will be constituency-specific and will not extend to every citizen. The following categories of the Indian citizens will stand entitled to justiciable and enforceable right to work :

(a) citizens identified, from time to time as falling below the 'poverty line';

(b) citizens falling within the category of Scheduled Castes and Scheduled Tribes;

(c) citizens who fall victims to natural calamities;

(d) citizens who fall victims to severe situations of communal ethnic or electoral strife or violence;

(e) citizens who fall victims to large scale industrial disasters (like Bhopal);

(f) citizens who are victims of sexual aggression;

(g) citizens who have served a prison sentence or remain stigmatise in relation to employment opportunities.

12.12 Any argument against creation of such fundamental rights would really be constitutionally obscene. The Constitution consistently articulates the duty of the State and Society to protect and promote, in concrete ways, the interests and entitlements of the weaker section of the society. If after four decades of the working of the Constitution the exhortations to accomplish these results have virtually gone unheeded, as is clearly the case, then there should be no justification whatsoever in not adopting an amendment which helps the Indian State and Society towards conferring the right on the above mentioned classes of the Indian citizens.

12.13 We *recommend, second*, that for other section of Indian citizens the right to work may be recognised not by constitutional amendment but by suitable national legislation. Such a legislation, in its design, should proceed on the following principles:

(a) the right to work should be coupled with a duty to accept suitable work (by suitable work we mean work appropriate to age and gender);

(b) no one should be entitled a right to specific kind of work commensurate with one's social status or educational qualifications;

(c) the right to work is a measure to design to alleviate existential distress and disability and not to distribute state's largest in inegalitarian ways;

(d) the right to work should be subject, clearly to a means test;

(e) any employment allowance as stated, be the same regardless of the social or economic status of the beneficiaries.

12.14 The legislation, should specify, keeping in view, the prohibition of child labour, the suitable age at which the right to work entitlement, or in the alternative subsistence or unemployment allowance may commence.

FOOTNOTES

1. U.S.S.R.; Kuwait, Libya, Korea, South Vitenam, Cuba etc.
2. AIR 1982 SC 1473.
3. 1984 (3) SCC 161.
4. 1985 (3) SCC 45.
5. 1989 JT SC 553.

CHAPTER THIRTEEN

EPILOGUE

13.1 We now revert to certain general considerations outlined in Chapter One. These considerations stand reinformed by available empirical study, in particular by the Twenty Eighth and Twenty Ninth Reports of Dr. B. D. Sharma as Commissioner of Scheduled Castes and Scheduled Tribes and by recent study by Professor Jan Breman "From Cane Fields to Court Rooms : Legal Action for and against Rural Labour in Gujarat, India" (*Capitalist Development Critical Essays*, pp. 270-288, 1990, Ghanshyam Shah ed.).

13.2 It should be clear by now that the modernization of agricultural production system in India has marked the advent of what is internationally called 'agribusiness.' This fundamental transformation of organization of local, regional, national and international productive forces has been matched by an equal degree of disorganization of agricultural labour in India. Law, policy, and administration in this area have to be so devised as to redress this balance. Our Report has been guided, overall, by a strategy of gradual and incremental empowerment of the people.

13.3 To this end, it is necessary for us, to address a substantial number of aspects of law and administration which go beyond the domain of all labour laws and as such. From the micro-studies of legal action and process in relation to agricultural labour pitted against agribusiness, it is evident that at the level of courts the existing law of evidence—the Indian Evidence Act—is loaded against the workers and social action groups trying to ameliorate their plight. The Indian Evidence Act needs to be reformulated in strategic ways to empower agricultural labourers. This can be done in several ways, all of which we *recommend*.

13.4 The Indian Evidence Act should erect a rebuttable presumption that in a dispute involving payment of minimum wages, and in the provision of associated statutory rights and privileges of the agricultural workers, that unless otherwise is proved by the employer|land owner, the averment of denial of statutory rights and privileges shall be presumed. This reversal of onus of proof is widely prevalent in regard to customs and excise and releated fiscal matters. There exists a self-evident justification for this initial reversal of onus of proof on the agro-industrial proprietors.

13.5 The law against perjury needs to be strengthened especially in relation to agricultural workers, most of whom are not in a position, being illiterate and powerless, to combat many falsified evidences. To this end, a short but separate enactment is necessary. It should precisely identify conduct which amounts to perjury in relation to offences relating to laws concerning agricultural workers. Such a law is a clear necessity, since the existing law applies to all general situations and does not cope with the variety of strategies evolved by the agro-industrialists class.

13.6 The Contempt of Courts Act also needs to be specifically strengthened by prescription of minimum mandatory punishment for obstruction of court processes in disputes relating to agricultural workers. The Contempt of Courts Act has been found to be inefficient as a resource for mobilizing the judicial power of the State in the quest for enforcement of constitutionally mandated laws for the amelioration of the weaker sections of the Indian society. The existing Act does not take account of the specific strategies of subversion to court process and judicial orders adopted by the resourceful rich. And the contempt jurisprudence is still guided not just by the British legal model but also by postures of judicial restraint which are not conducive to realization of minimal entitlements of agricultural workers, among other weaker sections of Indian society. Accordingly, the area of judicial discretion in taking note of the contempt must be narrowed by a legislative amendment requiring courts to act positively as a matter of duty to protect the entitlements of agricultural workers and by providing a minimum mandatory sentence. This will provide a credible programme of sanction, more so if the minimum mandatory sentence is short term imprisonment. Indeed, expression of sentiments of apologies should be not be allowed in such cases.

13.7 There is need to develop systematically a programme of action of law reform. As recommended in Chapter One, the present Commission should be converted into a permanent Commission and one of the major functions of this Commission should be to engage in the task of law reforms in the area.

13.8 We have also to think about the state of the Indian legal profession and legal services programmes, both voluntary and in the State sector, as well as patterns of legal education and research. We *recommend* that this, too, should form a part of the mandate of permanent Commission on unorganized rural labour. We here *recommend*, atleast the following priority tasks ;

(a) the existing curricular contents of legal education should be examined in terms of attention given to the problems of legal processes and problems of the unorganized rural labour. This may be accomplished with the cooperation of the Bar Council of India (which has the powers to lay down standards of legal education under the Indian Legal Advocates Act) and the Uni-

versity Grants Commission (which has the power to coordinate higher eduction) ;

(b) devising a continuing education programmes through the Bar Council of India and State Bar Councils and various Bar associations concerning law, administration and policy for unorganised rural labour courts;

(c) devising of similar programme of periodic learning for labour courts as well as the state labour bureaucracy.

The Second Gujarat Labour Law Reviews Committee has in fact proposed a curriculum and suggested details or organization of such courses and we *recommend* that the Commission adopt and proclaim it.

13.9 In addition we *recommend* that the existing activities of the National Labour Institute and their counterparts in the States be kept under review with a view to enhance padagogy *of* and *for* oppressed. We believe that without massive efforts of this kind in professional re-education the necessary energizing of the programme of legal change will not simply occur.

13.10 It would also be necessary for the Commission to consider ways and means to empower social action groups working on behalf of agricultural labour. As is well known, they are subjected to all kind of law and order inquisitions, including the threats to their safety and well being. Such conflicts are indeed unavoidable. What the law can do to reduce the harshness of the existing situation for the committed social action groups and activists is to decrease the scope of arbitrariness in arrests, retention and dealing with the complaints of harassment and violence filed by them to the law and order administration. The general law allowing the citizen scope for redressal of their grievances arising from arbitrary action and neglect of their just complaints is simply not adequate to the needs of activists groups. We *recommend* that the Commission proclaim this need for a series of legislative amendments, the details of which could later be presented for legislative adoption.

13.11 Finally (but not exhaustively) there is need for the Commission to attend to the media. The media plays an important role in disseminating legal information and legal knowledge. This role, on general impression is not effectively played in relation to the unorganized rural effective ombudsperson. Accordingly some attention should be given to the Prasar Bharti Act with a view to specific amendment which cast duties on state controlled media to perform both these roles in more sustained manner. Similarly, the Press Council of India, the Editors' Guild, the Small and Medium Newspapers Federation and the Unions of Working Journalists should be encouraged to evolve a code of responsibility and conduct in regard to reportage of violation of agricultural labour laws. An effective media policy on law and administration, and law relating to agricultural labourers needs to be indicated. We so *recommend.*

UPENDRA BAXI

ANNEXURE

TERMS OF REFERENCE OF THE STUDY GROUP ON LABOUR LAWS

1. Identify, and critically appraise, national and state legislations affecting unorganised rural labour with a view to suggest normative and institutional changes in the legislative regime;

2. examine the implementation in India law of the International Labour Organisation's Conventions and Recommendations concerning unorganised rural labour;

3. examine the unconstitutional forms of labour (with special reference to Article 23 and Article 24 of the Indian Constitution) and to propose suitable reinforcement of the legal order;

4. examine, with a view to reform, the situation of female rural labour in the unorganised sector, stressing ways in which wage discrimination, and sexual oppression, could be combatted by legal means;

5. examine health and occupational hazards, and the applicability of existing legal regimes (e.g., Workmen's Compensation Act) confronting the unorganised rural labour (This term will also explore the Bhopal type Hazards faced by Migrant labour) ;

6. examine social and religious disabilities and disadvantages attaching to certain forms of unorganised rural labour with a view to legal reform;

7. examine conditions of exploitation with a view to propose ameliorative legal action, of specifically vulnerable stratas of unorganised rural labour;

8. examine the role of judicial attitudes, the organisation of the legal profession and its attitude and the role of the social action groups in the achievement of the constitutional rights and social justice of the unorganised rural labour;

9. examine all matters incidental to, and arising from the above.

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