

UNORGANISED WORKFORCE IN INDIA- GROWING CONCERNS AND SHRINKING RIGHTS

MEENA KUMARY S

Assistant Professor, Govt Law College, Trivandrum

Labor is prior to and independent of capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration.

Abraham Lincoln¹

ABSTRACT

History reveals that labour has always been stratified; on the basis of caste during the Vedic age, on the basis of social security and entitlements in the neo-liberal globalized age- as formal and informal²/ unorganized. This neo stratification of labour as informal not only poses challenges to the economy but also to the society and polity as large number of populaces remain as political citizens yet devoid of social citizenship in terms of social security and protection³. It also poses a Constitutional challenge as the livelihood and survival of more than 90% of the “We” who made the constitution now rest in the hands of non-state entities against whom the protective shield of fundamental rights does not hold. It is in this context that the present article estimates the stock of unorganized workforce⁴ in India so as to formulate strategy for their legal and Constitutional inclusion.

Keywords – Unorganized sector, Constitution, right to life, livelihood

UNORGANISED SECTOR OR INFORMAL SECTOR: MEANING AND SCOPE

The term “informal economy” was coined by Keith Hart in 1971⁵. He viewed that the masses that were surplus to the requirements for wage labour in African cities were not ‘unemployed’, but rather were “positively employed”, even if the returns were meager or erratic. He proposed that these activities should be contrasted with the ‘formal’ economy of government and organized capitalism as ‘*informal income opportunities*’⁶. Hart’s formulation of informality was explicitly derived from his

¹ Part of Abraham Lincoln’s First Annual Message on December 3 1861

² Barbara Harris- White and Nandini Gooptu, *Mapping India’s World Of Unorganized Labour*, 90 SOCIALIST REGISTER 89 (2001)

³ T.H.Marshall, *Liberty in Modern state* in CHRISTOPHER PIERSON AND FRANCIS G. CASTLES, THE WELFARE STATE-A READER 180 (2006)

⁴ The term unorganized is preferred to informal to stress on social and legal exclusion rather than nature of economic activity. See, RUDDAR DATT ED. ORGANISING THE UNORGANISED WORKERS 11(1977) for extensive description of unorganized sector workforce in India.

⁵ Kenneth Hart, *Informal Income opportunities and Urban Employment in Ghana* 11 JOURNAL OF MODERN AFRICAN STUDIES 61-89 (1973)

⁶ Idat 64

analysis of Max Weber's theory of rationalization, which refers to the growing scope for bureaucratic organization and calculation of rewards in the history of Western economic institutions. Weber believed that economic progress was inhibited by irregularity and unpredictability in social life and he saw the rational/legal state as guarantor of an emergent corporate capitalism⁷. Hart, though influenced by Weber was of the view that informal economy might be a passive adjunct of growth originating elsewhere or its dynamism might be a crucial ingredient of economic transformation in some cases.

Hart's notion of dualistic nature of employment i.e. formal and informal, hitherto gained international acceptance since ILO Employment Mission's visit to Kenya in 1972 which defined informality as "way of doing things characterized by (a) easy entry; (b) reliance on indigenous resources' (c) family ownership; (d) small scale operations; (e) labour intensive and adaptive technology; (f) skills acquired outside the formal sector; (g) unregulated and competitive market⁸". Embarking on this definition ILO symposium on the informal sector in 1999 proposed that the informal sector workforce can be categorized into three broad groups: (a) owners/employers of micro enterprise; (b) own-account workers, who own and operate one-person business, who work alone or with the help of unpaid workers, generally family members and apprentices; and (c) dependent workers, paid or unpaid, including wage workers in micro enterprises, unpaid family workers, apprentices, contract labor, home workers and paid domestic workers⁹.

Thus "Informal sector" can be conceived as "units engaged in the production of goods or services with the primary objective of generating employment and income to the persons concerned. These units typically operate at a low level of organization, with little or no division between labour and capital as factors of production and on a small scale¹⁰". Informal economy means such economy that includes the informal sector and its workers plus the informal workers engaged in formal sector. At a micro level, this would comprise of those economic enterprises which employ less than certain number of persons (e.g. 5 or 10, depending on the country's official procedures) per unit, and which simultaneously satisfy one or more of the following criteria: (a) it operates in open spaces, (b) it is housed in a temporary or semi - permanent structure, (c) it does not operate from spaces assigned by the government, municipality or private organizers of officially recognized marketplaces, (d) it operates from residences or backyards, and (e) it is not registered.

In the Indian context, both informal and unorganized sector have the same meaning and context¹¹. Here, the organized sector, predominantly refers to those public and private enterprises which are either registered or come under the purview of any of the Acts/ or are maintaining annual

⁷ MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 77(1958) Original work published 1904–1905)

⁸ ILO, *Employment, Incomes and Equity: A Strategy for Increasing Productive Employment In Kenya*, (1972)

⁹ International Labor Organization, *Skill Development for the informal economy* (2001) accessed at <http://www.ilo.org/public/english/employment/skills/informal/who.htm> on 12/10/2014

¹⁰ See, Martha Alter Chen *Rethinking the Informal Economy* 1-14 (2003) accessed at <http://www.india-seminar.com/2003/531/531%20martha%20alter%20chen.htm> on 12/10/2014

¹¹ Nitika Diwaker & Tauffiqu Ahamad, *Problems and Challenges Faced By Unorganised Sectors: An Indian Perspective*, 1 NEW MAN INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY STUDIES 12, DEC(2014).

accounts and balance sheets. Public enterprises include departmental and non-departmental enterprises. In the private organized enterprises are included registered manufacturing, mining and quarrying, gas and water supply, private transport companies, registered schools, colleges and hospitals and corporate trading activities and services. The organized sector is also marked by regular workers having relatively more job security, leave and medical benefits, retirement benefits and reasonable wages¹². Whereas unorganized sector as described by the First National Commission on Labour under the chairmanship of Justice Gajendra Gadkar, consists of that particular share of workforce who have not been able to organize in quest of a common objective because of constraints like i. Casual nature of employment ii. Small size of establishment with low capital investment per person employed iii. Ignorance and illiteracy iv. Superior strength of the employer operating single or combined v. Scattered nature of establishment¹³.

A more accurate and expansive definition of unorganized sector is given by The National Commission for Enterprises in the Unorganised Sector (NCEUS)¹⁴ set up by the Government of India in 2004. Accordingly, ***“The unorganized sector consists of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis and with less than ten total workers¹⁵”***.

NCEUS¹⁶ defined unorganized or informal worker as follows: “Unorganised workers consists of those working in the unorganized enterprises or households, excluding regular workers with social security benefits, and the workers in the formal sector without any employment/ social security benefits provided by the employers”. This definition excludes casual or contract workers and thus captures unorganized sector employment in a more realistic manner.

By following this definition, in agriculture, only the plantations and other types of organized agriculture, i.e., corporate or co-operative farming are excluded. But a very large number of workers engaged in agriculture are included. Unorganised¹⁷ workers comprise a large variety of occupations and employment arrangements and can be categorized as follows:

1. Regular but non-permanent employees of formal sector such as large and medium sized public sector, Govt., private companies (including malls, hospitals, courts, educational institutes, cinemas etc.) and include operational, technical, maintenance, security services and clerical employees.

¹² Manshi Gupta, *Quality of Work and Employment Relations under Economic Reforms: A Research Agenda*, 2 JOURNAL OF RADIX INTERNATIONAL EDUCATIONAL AND RESEARCH CONSORTIUM 12 December (2013).

¹³ Report of the First National Commission on Labour GOI Chapter XXIX (1969)

¹⁴ REPORT ON THE CONDITION OF WORK AND PROMOTION OF LIVELIHOODS (2007) BY THE NATIONAL COMMISSION FOR ENTERPRISES IN THE UNORGANISED SECTOR, GOVERNMENT OF INDIA, NEW DELHI.

¹⁵ Ibid

¹⁶ Id

¹⁷ Ruddar Datt, *Unorganised sector and informalization of the Indian Economy*, 50 THE INDIAN JOURNAL OF LABOUR ECONOMICS 4 (2007).

2. Non regular-nonpermanent employees of the same as well as of smaller establishments and factories such as trainees, probationers, badlis (substitute workers for absenting permanent workers), temporary fixed term employees (FTE), casual, apprentices, contract workers, agency employees etc.
3. Regular but non-permanent employees of informal sector manufacturing (eg: sponge iron units, rice milks, batteries, marine products, handicrafts) and service organizations (eg: transport, cold storage), registered or unregistered domestic workers etc.
4. Non-regular workers in agriculture and animal husbandry, seasonal workers in agro-based units (eg: sugarcane), construction workers, workers of brick kilns, non-agricultural wage labourers, head loaders, beedi (country cigarettes) workers.
5. Self- employed, regular workers such as own cultivators, skilled artisans, carpenters, shop owners, hawkers etc.
6. Self - employed but non-regular workers such as in repair work, small construction, manual transport, community services etc.

The existence of unorganized sector in a vast developing economy like the Indian economy is not an appalling fact. But what is wearisome is the remarkable “achievement” of economic “development” in post-independent India that has not just resulted in the growth of the informal sector and of those being employed informally, but also the phenomenon of “informalisation of the formal sector”. What is also truly remarkable is the consistent manner in which disproportionately larger numbers of women and their “work” either become invisible in data systems or gets captured in categories that fall outside the purview of protective legislation¹⁸.

As per the estimates of the NCEUS, the total numbers employed (principal plus subsidiary) in the Indian economy, computed from NSS (National Sample Survey) 61st round 2004-05, was 458 million, of which the unorganized sector accounted for 395 million, accounting for 86% of total workers in 2004-05. Pertinently, while the total employment in the economy has increased between two NSS Rounds (that is between 1999-2000 and 2004-05), the increase in total employment has been of the informal kind, even if, sectorally, employment increased by 8.5 million in the organized sector. In other words, according to the commission there is “informalisation of the formal sector”. This assertion is supported by the revised figure presented by NSS Survey 1999-2000 that about 370 million workers constituting 92% of the total workforce in a country were employed in the unorganized sector.

The commission has also found that in 2004-05, of the 148 million women workers in the Indian economy, 142 million or almost 96% were unorganized workers (against 91% unorganized male workers). This included 91% of women workers in the unorganized sector plus those working in the organized sector. In terms of status of employment, the bulk of unorganized sector employment

¹⁸ Martha Alter Chen, *The informal economy– Definitions, Theories and Policies*, Working paper No: 1 WIEGO13(2012)

was self-employed, followed by casual employment. For the country as a whole, a great majority of the workers (males and females) were either self-employed (56.6%) or casual workers (28%). Only 15.3% of the workers were regular salaried/wage workers. The self-employed category consisted of own account workers, employers and unpaid family workers. Within this, the rural female workers constituted the most disadvantaged in terms of workforce characteristics. Not only the share of unpaid family workers among rural females was the highest, it also had increased by 10 percentage points from 38% in 1983 to 48% in 2004-05¹⁹.

This has to be read in conjunction with the fact that 30 million workers in India are constantly on the move (migrant labour) and 25.94 million women workforce has been added in the labour market from the year 2000 onwards. All the more every day 13000 Indians turn 60 years and they are expected to live another average of 17 years. Unfortunately only 10% of the Indians save for old age. The tragedy is that the existing social security legislations cover only 8% of the total workforce of 459 million in India. Thus the casualisation of labour coupled with deterioration in the quality of employment in terms of job security and precarious terms and conditions at work has led to the rise of a new social class, which is significant economically but excluded socially²⁰.

MAJOR CHARACTERISTICS OF UNORGANISED WORKFORCE IN INDIA

The unorganized labour is overwhelming in terms of its number range and therefore they are omnipresent throughout India²¹. They present the following characteristics in general:

1. **Seasonal employment:-** As the unorganized sector suffers from cycles of excessive seasonality of employment, majority of the unorganized workers do not have stable durable avenues of employment. Even those who appear to be visibly employed are not gainfully and substantially employed, indicating the existence of disguised unemployment.
2. **Stratification:-** In rural areas, the unorganized labour force is highly stratified on caste and community basis. In urban areas, such considerations are much less. This does not mean that such stratification is altogether absent but is not pronounced as the bulk of the unorganized workers in urban areas are basically migrant workers from rural areas.
3. **Prevalence of bonded labour and child labour²²:-** Workers in the unorganized sector are usually subject to indebtedness and bondage as their meager income cannot meet their both ends. There is no formal employer- employee relationship. Bonded labour is a natural phenomenon that one can see among the unorganized labour force in India. Bonded labour or forced labour implies compelling a person to accept employment at wages or remuneration

¹⁹ Supran 15

²⁰ Amartya Sen, *India: The doing and the undoing*, 18EPW237(1983).

²¹ Jan Breman, *A Dualistic Labour System? A Critique of the 'Informal Sector' Concept: II: A Fragmented Labour Market* 11 No. 49 EPW1905(1976)

²² Srijit Mishra, *Informal Workers and their Rights*, 13 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION, INDIA, 277-300, (2014), seealso, K.Satyarthi., *Let Us Globalise Compassion, and Set Our Children Free*, Nobel Lecture, (31 January 2015) http://www.nobelprize.org/nobel_prizes/peace/laureates/2014/satyarthilecture_en.html

which is much lower than the legally prescribed minimum wage or at times, even without any payment in lieu of debt. As NCRL states, *“the kernel of bondedness lies in unrepayable debt and loss of freedom to seek alternate employment through the market process²³”*. Considering the fact that this system is violative of human dignity, it was sought to be abolished under Bonded Labour System (Abolition) Act, 1976. Even then, according to NCEUS, “While bonded labour was considered a thing of past, prevalent in the colonial era, it has been found that new forms of attachment have been rising in developed agriculture, the phenomenon of a ‘U’ shaped relationship between labour attachment and agricultural development that is, after an initial decline as agriculture develops, it starts to increase at later stages²⁴.”

Considering the gravity of the situation, the Supreme Court in *M C Mehta v. Union of India²⁵*, held that the existence of child labour is in violation of Article 21 and 23 of the Constitution of India and therefore banned child labours in hazardous jobs and ordered the setting up of a Child Labour Rehabilitation Welfare Fund. The court warned of penal action in case of non-compliance of the directive. In the context of non hazardous jobs, the court directed the appropriate authority to see that the working hours of the child do not exceed four to six hours a day and at least two hours are set aside daily for the child’s education. It would also ensure that the entire cost of education²⁶ was borne by the employer.

4. **Poor health and vulnerability to diseases:-** The place of work of unorganized workforce is often scattered and fragmented. They accrue only poor working conditions especially wages, primitive tools and equipment, low sanitation and hygienic environment, low technical know-how thereby low productivity. This in turn leads to poor health and other connected diseases. Low standard of living necessitates these workers to live a life of poverty and ailments. The situation of women workers is more vulnerable than that of men with regard to health²⁷. Even schemes and measures undertaken by the government to develop and improve the health of the informal workers have not succeeded in achieving the required objective.
5. **Primitive production technologies** and feudal production relation are rampant in the unorganized sector. They do not permit or encourage the workmen to imbibe and assimilate higher technologies and better production relations. Large scale ignorance and illiteracy and limited exposure to the outside world are also responsible for such poor absorption.
6. **Low Literacy and lack of training:-** The quality of a worker can be determined by assessing the level of education and training that one can attain before and after employment.

²³ Ministry of Labour, *Report of the National Commission on Rural Labour* (NCRL Report), New Delhi: Government of India (1991)

²⁴ Supran15

²⁵ 1996(6)SCC756

²⁶ Srijit Mishra, *Informal Workers and their Rights*, 13 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION, INDIA, 277-300(2014).

²⁷ Renana Jhabvala, *Informal Workers & the Economy*, 48 THE INDIAN JOURNAL OF INDUSTRIAL RELATIONS 3, 373, January (2013). See also, Ratna M. Sudarshan, *Women Workers: Addressing Constraints to Work*, 48 THE INDIAN JOURNAL OF INDUSTRIAL RELATIONS 3, 428 January (2013).

Education and training play a crucial role in determining the level and quality of labour force and thereby their survival and growth. These factors also increase productivity and production efficiency for withstanding technological changes and market competition under global regimes. They have a direct impact on employability, capabilities, productivity and hence the income and earnings of the workers.²⁸ It is recognized that absence of knowledge and education may lead to discrimination in the labour market and subsequently becomes the basis of social exclusion of large number of workers. The majorities of the informal workforce are poorly educated and therefore possesses fewer capabilities. The prevailing illiteracy leaves them with little other choice but to work in the informal economy.

7. **No guaranteed minimum wages:**-The primary objective of fixing the minimum wage is to improve the standard of living of the lowest paid workers and those who are least able to form a collective strength to voice their interests. The Minimum Wages Act, 1948 is primarily designed for the protection of workers in the unorganized sector. While the Act provides a mechanism for fixing and revising minimum rate of wages, it does not give any guide lines as to the basis on which the minimum wages are to be fixed or revised. The lack of minimum wages is also manifest in case of distress migrants.

In addition to minimum wages, there is also blatant violation of equal remuneration. The Equal Remuneration Act is hardly applied in case of unorganized workforce. Incidentally, even while notifying the wage rates, women workers are fixed lower than that of male workers by giving a different designation for the same work. For example, even in the airlines, the stewards have been given higher wages than that of the airhostess though both of them are doing the same job. At the unskilled level the difference between the two is very clear. The authority overlooks and allows the violation of Equal Remuneration Act.

8. **Lack of Union Intervention:** - The ILO²⁹ Convention No 87 on Freedom of Association and Protection of the Right to Organize applies to all workers and employers without distinction whatsoever. Similarly, the right to organize and Collective Bargaining Convention 1949 (No. 98) seeks to ensure that workers enjoy adequate protection against interference in the establishment, functioning and administration of their representative organizations. This facilitates the workers to represent themselves before the management through their representatives so that they can enjoy the collective bargaining power. However, there is hardly any union intervention in the unorganized sector as they are hugely fragmented.
8. **Migration³⁰:** - The presence of migrant labour is another scandalous feature among unorganized workforce. There is prevalence of both rural-urban migration within the state as well as inter-state migration. The recent surveys of NSSO have reported acceleration in migration in the post reform period. The main reason of migration is lack of employment

²⁸ ILO REPORT VI ON DECENT WORK AND THE INFORMAL ECONOMY (2002).

²⁹ Santanu Sarkar, *The Struggle to be a Part: Story of Dignity of Indian Labour*, 50 THE INDIAN JOURNAL OF LABOUR ECONOMICS 2, 354(2007).

³⁰ Gouri Manoj Sattigeri, *Urban Poverty Vis-A-Vis Informal Sector*, 3 INTERNATIONAL JOURNAL OF SCIENCE AND RESEARCH 11(2014)

opportunities in the home state. The urban migration is posing a big pressure on the existing civic facilities thereby leading to slums and unhygienic living conditions³¹. Migration also disempowers the unorganized workers from the benefits of social security measures.

9. **Vulnerability of women workers:** -Exclusion of women from the formal sector is a natural phenomenon in India. The inflexibility of women employees compared to their male counterparts in terms of overtime works, work shift systems involving night work etc are often cited as the prominent reasons. Being excluded from the formal sector, they are a referred workforce in informal sector such as family enterprises and small establishments.

Discrimination at workplace³² in terms of promotions and growth opportunities at work places are also prevalent. Women workers in unorganized sector do not enjoy welfare measures like maternity benefits like their counterparts in formal sector. Sexual harassment at work place is another major issue faced by the women workers. Women face sexual harassment on way on transports, at working places, educational institutions and hospitals, at home and even in police stations. Most of the women tend to be concentrated in the poor service jobs whereas men are in an immediate supervisory position which gives them an opportunity to exploit their subordinate women³³.

UNORGANIZED SECTOR WORKFORCE: MOUNTING CONCERNS

Constitutional and Legal Exclusion of Unorganized Workforce

Every state has a constitution at least in the sense that it operates its important institutions according to some fundamental body of rules. A political community is governed by law and its highest law is rooted in natural law concept³⁴. Every Constitution besides creating the institutions reflects the ideals of the time of its making and provides for valuable cherished freedoms of the people. While the freedoms entail 'rights', the ideals of social, economic and political justice for all, sets limits to these rights³⁵. Nevertheless, the fact that the policies of liberalization, privatization and globalization have been declared to be constitutional and are here to stay raises concerns as to their impact on the constitutional obligation of the Indian state to promote human rights— whether enshrined as fundamental rights or directive principles of state policy. Conversely on the same premise emerges another pertinent question i.e. *Whether the vertical application of fundamental rights based on the theory of 'Classical Liberalism'*³⁶ which emphasizes on the preservation of the

³¹ R.B. Bhagat and S. Mohanty, 'Emerging Patterns of Migration and Contribution of Migration in Urban Growth in India' 5 no.1 ASIAN POPULATION STUDIES 45 (2009)

³² Santanu Sarkar, *The Struggle to be a Part: Story of Dignity of Indian Labour*, 50 THE INDIAN JOURNAL OF LABOUR ECONOMICS 2, 354 (2007)

³³ M.Chen, V.Joan and J.Heinz, *Informality, Gender and Poverty: A Global Picture* May 27 EPW 2131-39(2006)

³⁴ S.S. Girisanekar, *Constitution and Regulation of Economy*, 22 AC.L.R23(1998)

³⁵ Id

³⁶ Dr. M. Suresh Benjamin and Sanu Rani Paul, *Legal Status of BCCI as Instrumentality of State under Article 12 of The Indian Constitution* accessed on 03/11/2015 <http://www.commonlii.org/in/journals/NALSARLawRw/2013/6.pdf>

private sphere against coercive State intrusion holds ground in the view of powerful non- state actors exercising public functions?

Regarding the first aspect it could be found that the Indian Constitution explicitly entrenched a series of economic and social rights including the right to livelihood, to health, to free legal aid, a clean environment, and to a minimum wage for workers as Directive Principles of State Policy while civil and political rights, such as the right to life, the right to equality, and freedom of speech and expression are protected in Part III of the Indian Constitution as “Fundamental Rights”. This construction of the Constitution is not a mechanical schema of provisions but living expression of the leaders of freedom struggle to establish a new social order based on social, economic, and political justice³⁷. While fundamental rights are protective shields, the directives represent the rock – bottom level of the socio- economic development which the state is obliged to secure and maintain. It is therefore asserted that protecting the fundamental rights and implementing the directive principles is that irreducible minimum state obligation that forms the *raison d’être* for its existence under the grundnorm of the Constitution.

As regards the second proposition as to vertical application of fundamental rights, it is averred that in the era of globalization when the power is given to non- state actors to exercise such functions that would affect the fundamental rights of citizens the restrictive definition of *state* will not suffice. In other words there is need for horizontal application of fundamental rights against private entities exercising public function³⁸.

The widely accepted approach as regards “State” under Article 12 is the instrumentality test propounded by Mathew J. in his concurring opinion in *Sukhdev Singh ‘s case* wherein Public Functions Test as laid down as the criterion to find out instrumentalities of state under the expression *other authorities* under Article 12 of the Constitution³⁹. The instrumentality test was more expressly articulated in *R.D.Shetty V. International Airport Authority & Another*⁴⁰. Here the Supreme Court accepted at the outset that rapidly expanding functions of the State in the welfare era, where “*the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power- holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise*”⁴¹.

After establishing this proposition, the Court held “*that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its*

³⁷ SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 178-183(2009)

³⁸ On horizontal application of social rights see Khosla’s seminal article, Madhav Khosla, *Making social rights conditional: Lessons from India* 8 No. 4 ICON739–765(2010) accessed at <http://icon.oxfordjournals.org/> on 15/11/2014

³⁹ *Sukhdev Singh V. Bhagat Ram* AIR 1967 SC 1857

⁴⁰ AIR 1979 SC 1628

⁴¹ Idat Para 15

functions. . The reason sufficed by the Court is the expanding role of the State, *which created the environment for the creation and flourishing of the public corporation, “as incidental to or in aid of governmental functions.”*⁴²

Two essential aspects deducible from the aforesaid proposition is that the expansive definition of state was given because (1) the *executive action of state- power holders are increasingly affecting the lives of people* and (2) it is possible that the *state exercise its functions through extended entities* which thereby become *instrumentalities* of the state. That poses the question why the same deduction cannot be applied to private entities exercising state- like actions affecting the lives of people?

Subsequently in test of instrumentality or agency of state faced its major challenge in 1986 in the form of *M.C. Mehta v. Union of India*⁴³. The Court encountered the question whether a private entity discharging important public functions can be a State. Although the Court made some bold observations, it did not answer the question whether Shriram Fertilizers, a private company manufacturing fertilizers and chemicals, could be considered an ‘authority’ for the purpose of Article 12. Bhagwati J., though expressed his intention to include private authorities under State left the matter undecided on grounds of laxity of time but in spite of this the case remains important as the Court observed that the American doctrine of *State Action* might be applicable in India, and therefore, all the functions of a body judged as- State need not be public functions.

Thereafter in *People’s Union for Democratic Rights V. Union of India*⁴⁴ the Supreme Court entertained a writ petition in the public interest, seeking to enforce existing labour laws in the construction work for the Asian Games in Delhi. In this case, the petitioners alleged violation of fundamental rights under Article 21 and 23 of the Constitution by private contractors as well as by the state which had failed to enforce labour statutes. Despite finding that Article 23 imposed constitutional obligations on citizens, Bhagwati J devised a remedy that contemplated an indirect horizontal effect of fundamental rights. He emphasized that *‘whenever any fundamental right... is enforceable against private individual... it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring the observance the fundamental right by the private individual who is transgressing the same’*⁴⁵. Thus remedy for constitutional injury was extended in spite of the fact that the injurer is a private actor, even though the remedy was not directed at the private actor.

Another attempt at horizontal application of fundamental rights can be discerned from the decision In *MC Mehta V. State of Tamil Nadu*⁴⁶. Here the petitioner complained about child labour in Sivakasi and requested the court to stop this practice and institutionalize a rehabilitation scheme. He claimed that child labour violated the constitutional prohibition against child labour in hazardous industries, the directive principles which direct the state to ensure adequate nutrition and education to children below the age of six, besides other constitutional provisions, international commitments

⁴² IdatPara16

⁴³ AIR1987SC965

⁴⁴ AIR1982SC1473

⁴⁵ Idat 1495

⁴⁶ (1996)6SCC756

and statutory provisions. The respondents include the State of Tamil Nadu and private parties who employed the children. The Court did not distinguish between State and private parties as regards the right against employment of children in hazardous employment under Article 24 of the Constitution. Without finding that this right cast obligations on private parties or concluding that they would come within the purview of state for the purpose of Article 12, the courts imposed positive obligations on the state even where fundamental rights are violated by non-state parties⁴⁷.

In *Vishaka V. State of Rajasthan*⁴⁸, the Court was best with the predicament of sexual harassment of women at workplaces. Here in the absence of domestic legislation in this field, the court stepped in to issue guidelines and norms to be complied with in all work places and other institutions till such legislation is passed. This extraordinary remedy was justified as an exercise of the court's power to design suitable remedies under Article 32 and to declare law under Article 141 of the constitution. Though the court did not develop any reasonable argument about the horizontal dimensions of fundamental rights Justice Verma did articulate an overarching obligation of the institutions of state, including the court, to develop and give effect to legal regimes which protect its citizen's fundamental rights. He extracted this universal obligation from the rule of law, but did not specify the different roles of the executive, legislature and judiciary⁴⁹.

Thus, we can see some half-hearted attempts from the part of Indian judiciary towards horizontal application of fundamental rights. Nonetheless by and large the Courts have exercised restraint in extending the reach of fundamental rights against private parties. Here ensues the dilemma. The foray of liberalization, privatization and globalization has essentially whittled down the extent of state power. Increasingly employment is generated in the informal economy and admittedly nearly 93 % of the total workforce of this country falls within this unorganized sector and decisions affecting their subsistence and survival will be taken by non-state entities. These entities execute public functions which were hitherto executed by the state in the past and they impact the fundamental rights of a large populace of the country. In such circumstances the only solution to protect the freedom and autonomy of the individuals is to subject the private actors to constitutional limits by expanding the definition of State under Article 12.

An analogy can be drawn from Sir William Wade's illuminating opinion as regards the full horizontal effect on the sphere of private action between citizens in **Human Rights Act 1988**⁵⁰. He suggests that by including 'courts' in the section 6(3) definition of 'public authority', the legislature intended that the courts must, while adjudicating disputes, act compatibly with convention rights protected under the Act. This obligation would apply uniformly, irrespective of whether the courts were adjudicating disputes between two private parties or between public and private parties. By doing away with the distinction between direct and indirect effect, he proposes that the 'court must be an effective agent in all cases alike. By including courts in its definition of public authorities, Sir Wade argues that the Act renders the precise definition of public authorities, as a

⁴⁷ Idat 765

⁴⁸ AIR1997SC3011

⁴⁹ Idat 3017

⁵⁰ William Wade QC, *Horizons of Horizontality* 116 LQR217(2000)

controlling factor on the scope of human rights, irrelevant. Applying this analogy it can be argued that when the issue before the Court proves to be one of fundamental rights violation in its simple nomenclature, then the entity responsible for such violation *shall be notionally construed as "State"* thereby entitling writ jurisdiction of the Court for enforcement of such rights. Such construction alone will prevent the Constitutional exclusion of unorganized workforce in the globalised era.

In addition to the mandate of the Constitution, there is rhetoric of labour laws that were expected to work as important instruments for empowering the powerless and the downtrodden so as to realize the cherished goals of the Constitution. These laws envisage a labour bureaucracy entrusted the role of ensuring compliance of these laws. An analysis of these laws reflects a centrifugal labour-justice model. The state has reserved for itself tremendous discretionary powers in certain aspects of labour-justice dispensation, especially in the area of labour relations law. The Indian judiciary has also played a salutary role in progressive articulation and interpretation of the scope of these laws. Unfortunately most of these laws operate only in the organized sector with formal employer-employee relationship. Even when some of them apply to the unorganized sector, their application is limited by bureaucratic apathy and unawareness on the part of workers.

Among the prominent labour legislations that are applicable to unorganized sector, the Equal Remunerations Act 1976 and the Bonded Labour System Abolition Act 1976 apply to all unorganized workers while the Minimum Wages Act, 1948, the Child Labour (Prohibition and Regulation) Act, (1986), The Dangerous Machines (Regulation) Act, (1983), Inter-State Migrant Workmen Act 1979, The Bidi and Cigar Workers (Conditions of Employment) Act, 1966 and Manual Scavengers Act 1993 that touch only some sections of unorganized workers. There are laws which can be extended like the Payment of Wages Act 1936, The Building and Other Construction Workers Act, (1996), Maternity Benefit Act, 1961, Workmen's Compensation Act, 1923 and Contract Labour (Abolition) Act 1970.

The simultaneous presence of extensive legislations and extensive right deprivations mandates a critical evaluation of the existing framework. On one hand most of these Acts do not apply to small units of five to seven workers and to the vast numbers of the self-employed. That leaves out millions of unorganized workers from their purview. On the other hand the applicable legislations suffer from loopholes that make their implementations difficult. For instance under the Interstate Migrant Workmen Act, 1979, a migrant worker is expected to complain to the labour machinery of his state which has no control over the industry in the state which has no control over the industry in the state where he is working. Most of the Acts comprehends a bureaucratic inspection as the methodology for its implementation. Such inspection becomes illusory in case of unorganized workers.

It is in this context that it is submitted that while framing labour laws or in determining the conditions of their application such as physical conditions, duration and timing, remuneration, employment relations, conditions of disadvantaged workers and others there is an urgent need to revisit and reformulate the terms of applicability criteria in order to become relevant for unorganized

work today⁵¹. Such progressive legislative measures alone will help unorganized workforce to face the persistent conditions of primitive accumulation, rapacious exploitation, absence of workplace democracy, market stranglehold, and the very threat of extinction.

SUGGESTIONS FOR SOCIAL AND LEGAL INCLUSION OF UNORGANISED WORKFORCE

The unorganized sector of the economy provides an easy access to opportunities of work and thereby means of livelihood to deprived segments of rural and urban society. In spite of their contribution to the GDP, the labour component of this sector is hardly recognized for its value. The sector is generally outside the regulatory framework of labour laws and beneficiary scaffold of social security measures thereby resulting in social and legal exclusion of a large segment of the population. A exemplar shift is therefore necessary to reconstitute them as a fundamental pillar of popular democracy. This shift shall be expansive in ambit and reach, inclusive in terms of policies and measures and consultative in terms of stakeholder participation.

1. **Constitutional Measures:-**As already mentioned, for protecting the fundamental rights of unorganized sector workforce as against non-state actors, an expansive definition of State under Article 12 of the Constitution is imperative. However the question is whether this should be left to the Courts to interpret or a constitutional amendment is necessary. The National Constitution Review Committee considered the fact that “there are private, non-State entities which discharge important quasi-governmental or important public functions, which have repercussions on the life and welfare of the community. Such entities and bodies can be regarded as “the State” as would appear from the concurring opinion of Justice Mathew. *“Institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the functions performed, government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government function⁵²”* It is a matter for consideration whether the definition of "the State" should be widened to include such non-State entities and make them subject to the discipline of fundamental rights. The consequence *will be not to make all actions and decisions of non-State entities subject to judicial review but only those acts or omissions which are violative of fundamental rights guaranteed in Part III of the Constitution*” and recommended an amendment to Article 12 of the Constitution to the effect that the expression, *“other authorities” shall include any person in relation to such of its functions which are of a public nature.*’ It is averred that this recommendation of Committee shall be given effect to.
2. **Policy initiatives:** - In commensuration with the concept of decent work, the policy initiatives in unorganized sector shall concentrate on employment generation, social security and promotion of social dialogue.

⁵¹ Prof. G. Saibba, Dr. K. Vijayalakshmi, *Globalization Economic Reforms and Social Sector Development: Some Emerging Areas in India* in **LABOUR AND DEVELOPMENT IN TWENTYFIRST CENTURY: CHALLENGES AND PERSPECTIVES** (PROF.G.SAIBABAED. 2005)

⁵² Supran 65 at 1862

A. Employment Generation: - The ideal type of employment creation is that of *formal employment in organized sector* enterprises. The reason is that this employment is characterized by security of tenure and wage rates well above agricultural labour, neither of which prevails in informal work in unorganized enterprises, and informal employment in the organized sector. In addition, there is complete social insurance (i.e., death and disability benefits, old age pension, and maternity leave and health benefits). None of these three are likely to prevail to the same extent in the remaining three types of employment in the economy, which together account for 93% of the total employment in the country.

B. Social Security: -

A new Welfare Board should be established in general under one umbrella in order to look after and monitor the working of these various schemes introduced into the welfare of the unorganized workers in each state. The functioning of the Boards shall be properly monitored with routine financial and social audits. Grievance Redressal Mechanisms shall be instituted for unorganized sector workers in conjunction with this Board. Steps should be taken to fix a National Minimum Wage applicable to all sectors, organized and unorganized. For bringing unorganized sector workers within the safety net of social security schemes, such schemes shall be broad based. Further category wise census of workers in the unorganized sector shall be periodically undertaken to take stock of their extent and functioning. Social security measures may be implemented on a timely basis. Detailed suggestions are given in later part of the study. Special provisions and schemes may be devised for protection of women working in unorganized sector.

C. Social dialogue:-

Absence of union is a characteristic feature of unorganized sector. As a result they are not represented in any forum nor are stakeholders in any tripartite deliberations. The existing trade unions should be encouraged to take active participation in the improvement of lot of unorganized sector workers. Conversely by furthering awareness campaigns and rights consciousness, the workers may be equipped to fight for their rights collectively even in their segmented sectors.

4. Formalization initiatives:-

The formalization of the informal economy is a comprehensive approach though it is contextual in application. Martha Alter Chen & Joann Vanek have devised a comprehensive strategy for formalizing the informal sector so to deliver better inclusion and protection⁵³. The strategy is biphasic, involving (1) Formalization of informal enterprises and (2) Formalization of informal jobs. **Formalization of enterprises can be achieved** by (a) Registration and taxation: Simplified registration procedures, progressive registration fees. (b) Appropriate legal and regulatory frameworks, including: enforceable commercial contracts, private property rights, use of public space, occupational health and safety regulation (c) Benefits of operating formally: access to finance and market information, access to public infrastructure and services, enforceable commercial contracts, limited liability, clear bankruptcy and default rules, access to government subsidies and

⁵³ See, Martha Alter Chen & Joann Vanek *Informal Employment Revisited: Theories, Data & Policies* 48 No.3 THE INDIAN JOURNAL OF INDUSTRIAL RELATIONS 390, 396(2013)

incentives, including procurement bids and export promotion packages, access to a formal system of social security. **Formalization of Informal Jobs** can be achieved by legal recognition and protection as workers, freedom from discrimination, minimum wage, occupational health and safety measures, employer contributions to health and pensions, right to organize and bargain collectively and membership in formal trade unions.

5. Social inclusion with the help of NGOs and Civil Society Groups: -

For the successful formulation and implementation of policies for the protection of unorganized sector workers, the role of Panchayati Raj Institutions, NGOs and Civil Society groups cannot be overlooked. There are a number of agencies and institutions in the country which impart various forms of social security for workers in unorganized sector. These could be strengthened and a national network created which would reinforce their efforts at all levels. On such organization is the Self Employed Women's Association (SEWA)⁵⁴ which plays a notable role in organizing and empowering women in informal sector. In view of the weak legal stature of informal sector workers, this organization is very crucial without which poor women entrepreneurs cannot stand firm in the market place. They need to fight against the unscrupulous traders, middlemen, money lenders and sometimes their own men-folk to pursue their goal of self reliance. Women workers need the solid backing of organization and cannot fight the system without it. Similar organizations are working for the protection of various sectors of unorganized labour. It is necessary that these activities be streamlined and better organized to bear fruitful results.

CONCLUSION

The need for protection of the rights of workers in the unorganized sector shall be a prime consideration given their expanse in terms of population, contribution to GDP and extent of social security deficit. Needless to say, the unorganized work sector is extremely difficult by any standard because, in many cases, there is hardly any capitalist to fight directly, there is the overwhelming presence of the wily contractor, and the existence of the State as the distant and illusory guarantor of social security provisions. In order to stabilize this sort of labour regime in the globalised era there shall be a paradigm shift in the very notion of economic growth and human development. This shall entail an inclusive economic growth where output growth is sustained over decades, is broad-based across economic sectors, creates productive employment opportunities for a great majority of the country's working age population, and reduces poverty⁵⁵.

⁵⁴ Debi S. Sani, *Securing Working Class Rights For Informal Sector Workers In India: A Case Study Of Self-Employed Women's Association*, 50 No.4 THE INDIAN JOURNAL OF LABOUR ECONOMICS 821(2007)

⁵⁵ Andrew G. Bergand Jonathan DOstry, *Inequality and Unsustainable Growth: Two Sides of the Same Coin?* IMF Staff Discussion Note 11/08 International Monetary Fund, 2011 Accessed at <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1108.pdf> on 22/11/2014