



Critical Assessment of Labour Laws, Policies and Practices through a Gender Lens

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Preface

The National Mission for Empowerment of Women (NMEW) is a unique centrally sponsored scheme of Government of India to promote holistic empowerment of women. National Resource Centre for Women (NRCW), located within the Ministry of Women & Child Development has been created to address gender issues using an inter-sectoral and multi-disciplinary approach. The Centre functions as a national repository of knowledge, information and data on gender issues. It is a technical unit, with team of experts comprising different domains representing key thematic areas of the Mission.

The Centre is required to provide technical support to Ministry of Women & Child Development, the SRCWs (State Resource Centre for Women), DCFC's (District Convergence Facilitation Centre) and PSKs (Poorna Shakti Kendra) and support effective implementation of the Mission through training & capacity building, innovation, action research besides undertaking work related to monitoring and evaluation and creation of IEC materials.

The Gender Rights, Gender Based Violence and Law Enforcement (GR) Domain within the National Resource Centre for Women, National Mission for Empowerment of Women, monitors and evaluates legislations related to end gender based violence, provides expert technical inputs on concepts and develops briefs for the Indian delegation for representation at international meetings/Conventions. Overall, it generates a discourse around the need for policy intervention (e.g. amendments) in certain legislations and provides training on certain legislative interventions. It also collaborates with NGOs on Thematic Convergence Pilot Projects on safe spaces, legal awareness materials, One Stop Crisis Centers, impact of labour laws on women workers and its inter-linkages with eliminating violence against women and women's access to justice.

In House Labour Law Study is a policy initiative which involved generation of recommendations on the Maternity Benefit Act, Sexual Harassment at Work place Act, and other labour laws impacting women workers. The primary aim of this study was to identify areas where there is inadequate implementation of women friendly legislations and where an existing legislation has developed a gender blind spot in its implementation, thus

affecting the participation rate of women in the labour workforce. The key objective of this study is to identify opportunities for convergence between existing laws, policies and their implementing bodies, authorities and other agencies and develop models/strategies for achieving such convergence.

The Critical Assessment of Labour Laws, Policies and Practices through a Gender Lens is an intrinsic part of this broader study. It analyses the impact of all labour laws on women and gives a detailed account of the same.

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(Rashmi Singh)
Executive Director

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Introduction:

This paper assesses the impact of labour laws on female work participation rates (WPR) in India. It is argued that women workers in the informal/unorganized sector have minimal legal rights and social protections. It is also argued that even existing laws which govern the formal employment sector do not adequately cover legal rights of women in the labour force. In the formal sector, women workers who are employed as contract labour are not covered by regulatory legislations and cannot avail of all the protections of the law in the same manner as regularized employees. Women are discriminated at two levels, firstly, at the entry level, and secondly on employment, women workers are treated differently from male workers within the organized and unorganized sectors.

This paper suggests that only through effective processes of implementation of existing laws and through the formulation of new laws and policies can equality and non-discrimination of women workers, better conditions of work and social security be guaranteed and availed of.

Further, policies need to be evolved by the government to support women for paid employment during marriage and childbearing, to address what is commonly known as the 'double burden' (or 'triple burden' if the role of the woman as a consumer is considered) upon women for both production and reproduction. Formulation of policies by the government that creates conditions and opportunities for the increased employment of women in the paid sector is as important and urgent as the enactment and effective implementation of laws.

Women's employment options get controlled based on influences by family as well. Once women get married and have children, their participation in the workforce gets restricted based on her family's diktats. In cases where women exercise the option to work, they also spend large amounts of time on childcare and taking care of the house. This causes a great burden upon women since the demands of the employers at work is the same as the demands upon men who most often do not face the responsibility of childcare and running of the house in terms of time spent.

Right to care during the period of maternity which includes delivery of the child and childcare facilities after delivery is a basic right of every woman and should not be dependent upon whether or not a woman is employed and neither should the sector of employment be relevant.

Bala while analyzing work participation rates of women post childbirth in different countries including in Japan and European countries finds that 'women's latent workforce when graphed by age is trapezoid patterned not the well known M-patterned as can be seen in the women's labour force participation rates by age.' (Bala, 2012).¹ It is essential to study the impact of marriage and childbirth on work participation rates of women in India across the organized and unorganized sectors in order that support structures are set up through policy for women workers. This is essential to increase work participation rates of women in India.

This paper focuses on the legislations that govern workers in the organized and unorganized sectors to show that in fact, women workers particularly in the unorganized sector have no legal or social protections from unemployment, underemployment, poor remuneration, non-remuneration and poor conditions of work. This has been done with a view to seek increased participation by both Central and State governments to evolve law and especially policy to address the pressures of production and reproduction faced by women workers.

Part I of this paper outlines the findings and arguments which show the present work participation rates of women. Part II of this paper introduces the reader to labour legislations in India. In Part III, key labour laws are analyzed to understand the level of existing protections guaranteed to women workers. In Part IV, the absence of labour rights to domestic workers and sex workers is examined. Part V forms the Conclusions.

PART I- Work Participation Rates of Women in the Labour Force.

The increase in the Work Force Participation Rates (WPR) of women in India which took place in 2004-2005 has undergone a substantial decrease in the 2009-10 as per the quinquennial survey. The survey conducted for 2009-2010 on Employment and Unemployment in India reveals that the Work Force Participation Rates (WPR) of women have fallen quite substantially². Women's WPR has decreased from 44.16 percent to 33.65 percent and PWPR has decreased from 24.90 percent to 21.82 percent (Ghosh, 2013)³.

¹ Shashi Bala, *Labour Market Participation of Working Women Post Maternity*, NLI Research Studies Series No. 098/2012, V.V. Giri National Labour Institute.

² Employment and Unemployment in India, NSSO, 66th Round (2009-10), Government of India.

³ *Ibid.*

Ghosh argues that the decrease in the 'WPR of women in the last 5 years alongside a fall in PWPR (Paid Work Force Participation Rates) reflects withdrawal of women from not just unpaid work but also from the paid aspects of work' (Ghosh, 2013).⁴

This decrease in work participation rates is a cause for concern since effectively most of women's work is unpaid or unrecognized as work itself. In addition conditions of work have not qualitatively improved. Lack of equal wages, lack of unionisation, recognition of work, recognition of unpaid work, lack of maternity benefits and crèche facilities, sexual harassment, domestic violence, lack of access to credit and productive assets are some of the issues that women workers face.

Due to the assumed role of women as the caretakers of the household and child bearers upon getting married, many women either do not have the option of being employed for paid work or do not exercise the option due to existing responsibilities of child care and running of the household. Hence the percentage of women in comparison with men who are in the paid labour force is always substantially lower than the percentage of men who are in the labour force. In the Report on Employment and Unemployment Survey of 2011-2012⁵, the survey results showed that "the female LFPR⁶ is consistently low as compared to male LFPR based on all the four approaches. The highest LFPR in case of females is 305 persons out of 1000 persons under the CWS approach, followed by 300 persons out of 1000 persons under the UPSS approach. The lowest LFPR for females is seen under the CDS approach, where it is estimated at 252 persons out of 1000 persons."⁷

Several variables need to be considered while analysing the concept of women and work i.e. basic conditions of life and survival, basic consumption needs, basic capabilities, nature of economic participation, extent of social inclusion and freedom (Ghosh, 2009)⁸. Employers prefer to employ women for additional employment generation precisely because they assume women are willing to accept lower wages, work under inferior conditions and lower security of contract than men for similar work (Ghosh, 2009)⁹. Women engage in 'unskilled' work because they enter the job market already determined as inferior bearers of

⁴ Jayati Ghosh, *On Work Without Pay, A Brief Enquiry into the Gendered Space of Women's Unpaid Work in India*, 2013. <http://paa2013.princeton.edu/papers/131898>.

⁵ Report on Employment and Unemployment Survey of 2011-2012, Government of India, Ministry of Labour and Employment, Labour Bureau, Chandigarh.

⁶ Labour Force Participation Rates.

⁷ In the Report on Employment and Unemployment Survey of 2011-2012, Government of India, Ministry of Labour and Employment, Labour Bureau, Chandigarh, the Labour force estimates were based on the following 4 approaches. Usual Principal Status (UPS) approach where a person has worked for 183 days or more during the preceding year of the survey; Usual Principal and Subsidiary Status (UPSS) approach where a person has worked for 30 days or more during the preceding year of the survey; Current Weekly Status (CWS) approach where a person is found employed or seeking/available for work for one hour or more during the preceding week of the survey; and Current Daily Status (CDS) approach where the person has worked for 4 hours or more during the day she will be considered employed for a full day and if a person is works for between 1-4 hours she will be considered employed for half day.

⁸ Jayati Ghosh, *Never Done and Poorly Paid: Women's Work in Globalising India*, Women Unlimited, 2009.

⁹ *Ibid*.

labour rather than engaging in ‘unskilled’ jobs because they are the bearers of inferior labour (Elson and Pearson, 1997)¹⁰.

More than 90% of the workforce and 50% of the national product are accounted for by the informal economy¹¹. The high level of growth of the Indian economy during the past two decades has been accompanied by increasing informalisation.¹² It was found in the NSC Report that there were ‘indications of growing interlinkages between informal and formal economic activities’ and that sustaining high levels of growth is intertwined with improving the domestic demand of those engaged in the informal economy.¹³

Employment increased from 1999-2000 from 396 million to 456 million in 2004-2005.¹⁴ Despite the increase of employment by 14% in the organized sector, the entire increase was mostly informal in nature i.e. without job or social security.¹⁵ Majority of women are employed in the informal sector which is unregulated. For most workers, work in the informal sector is defined as part-time, self-employed, odd jobs, casual wage labour with no employment security. In many instances, women who are engaged in unpaid work are not recognized as workers and their unpaid work is not accounted for. There is thus a double burden of production and reproduction on women.

The terms ‘informal sector’ and ‘unorganized sector’ are used interchangeably.¹⁶ Much of women’s work in India is invisible, unrecognised, and under-remunerated or unremunerated. India has a total of 397 million workers, out of which women constitute roughly around 123.9 million, 106 million of women workers work in rural areas and 18 million works in urban areas.¹⁷ Only 7 per cent of India’s labour force is in the organized sector while 93 per cent is in unorganized sector. 96 per cent of the women workers are concentrated in the informal sector.¹⁸ There is a distinct “gender aspect to the problem of informalisation.”¹⁹

¹⁰ Diane Elson and Ruth Pearson, ‘The Subordination of Women and the Internationalization of Factory Production’, in Nalini Vishvanathan (co-ordinator), Lynn Duggan, Laurie Nisonoff, Nan Wieggersma (eds), *The Women, Gender and Development Reader*, Zed Books Ltd, 1997

¹¹ *Report of the Committee on Unorganized Sector Statistics*, National Statistical Commission (NSC), Government of India, 2012. The NSC quoting from the NCEUS Report, 2008 defines ‘informal economy’ as the informal sector and its workers plus the informal workers in the formal sector.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ National Commission for Enterprises in the Unorganized Sector, *The Challenge of Employment in India, An Informal Economy Perspective*, Volume I, Main Report, 2009.

¹⁵ *Ibid.*

¹⁶ The National Statistical Commission categorized informal sector units are those that “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 scale” and observed that labour relations are not based on “contractual arrangements with formal guarantees”. *Report of the Committee on Unorganized Sector Statistics*, National Statistical Commission, Government of India, 2012.

¹⁷ Ministry of Women and Child Development, *Report of the Working Group on Empowerment of Women for the XI Plan*, Government of India, 2006.

¹⁸ *Ibid.*

¹⁹ P.Visaria and J.Unni, *Self-Employed Women Population and Human Resource Development*, Gujarat Institute of Development Research, Ahmedabad, 1992.

The work participation rates of women is influenced by available opportunities, competition with men for the same job, role of families, childbirth, role of employers, and skills training, amongst others. Key factors that can push up women's workforce participation rates include higher education and skill development of women, reduction in time spent on housework, child bearing and child care arrangements, safety in workspaces and in public spaces (transport, lighting etc.).²⁰ Much research work stresses on the role of variables beyond the labour market and work space in influencing women's access to work opportunities. It is often commented that the time spent on care work is high, and working women are not able to reduce their house responsibilities very much. Several studies confirm that the decision to work outside the home for women is usually a function of the preferences of the marital home.²¹

Gender discrimination in skill training, among the formally trained and informally trained is a disadvantage to women workers. In rural and urban areas 8.9 per cent of women received vocational training (formal and informal) compared to 13.9 per cent men.²² Formal skills training was given to 3.1 per cent women between the ages of 15-29 compared to 4.5 per cent men.²³

Employers also have a role in controlling the participation rates of women. For example, in a Delhi-based study²⁴ of a group 500 women workers across 4 segments of employment, one of the segments of study was of the organized sector, i.e. factory workers. The owners of a factory, had shut down an industrial factory and had transferred the women workers to another district i.e. from Delhi to Manesar which was too far, thus disabling the women to travel so far from home to work considering the additional responsibilities of care and household work that the women were responsible for. It was observed in the study that the transfer of workers was a cover to bypass the legal restrictions on closures in larger factories, which is restricted by the Industrial Disputes Act, 1947.²⁵ Making a finding that this was not a one off case it was noted that relatively large employing factories ranging from 200 workers to more than 1000 had been closed even though the factories were doing well.²⁶

The decrease in women's paid labour and the rise in women's unpaid labour is

²⁰ Ratna M. Sudarshan and Shrayana Bhattacharya, *Through the Magnifying Glass: Women's Work and Labour force participation in urban Delhi*, ILO Asia Pacific Working Paper Series, Sub-regional Office New Delhi May 2008.

²¹ *Ibid.*

²² National Commission for Enterprises in the Unorganized Sector, *The Challenge of Employment in India, An Informal Economy Perspective*, Volume I, Main Report, 2009.

²³ *Ibid.*

²⁴ Neetha N. and Indrani Mazumdar, '*Study on Conditions and Needs of Women Workers in Delhi*', Centre for Study of Women's Development Studies, New Delhi. Sponsored by Delhi Commission for Women, New Delhi.

²⁵ *Ibid.*

²⁶ *Ibid.*

assisted by neo-liberal policies (Ghosh, 2009). The government has shown a lack of initiative and intervention to increase opportunities of paid work to women. Keeping women without opportunities to paid employment reinforces their role within the household and the community as persons unable to exercise financial control. Hence, the government must formulate policies and laws, through which women are given increased opportunities to move away from the sector of unpaid employment (be it in the form of productive work or work which entails performance of domestic duties) towards paid work.

In the aforesaid context, some labour laws are analyzed to examine whether provisions are made in these laws to aid in the increased participation of women in the workforce. Unfortunately, as will be seen most laws have not been drafted from the perspective of addressing the double burden of women workers. And where provisions are made for women to have access to labour rights, indifference in the execution of these laws adds to substantive discrimination in availing of labour rights.

PART II- Labour Laws

Labour laws which provide for labour rights and welfare provisions of workers are applicable mainly to the organized sector. The vast majority of the unorganised sector is practically unprotected due to the absence of legislation and policy. The organized and unorganized sectors are distinguished based on the extent to which these laws apply to different employment sectors. Though the organized sector workers, which constitute a small fraction of the labour force, are protected by numerous labour laws, which guarantees job security, regular wage revisions, retirement and other benefits, there is still an absence of welfare provisions such as education, health care, housing, public distribution system.

There are a few legislations, which are directly applicable to the unorganized sector although welfare measures, grievance redressal mechanisms and social security rights in these acts are meager or non-existent. With increasing in formalization of the formal sector it is absolutely essential that the social security and labour rights provisions in labour laws are amended so that they are applicable to all women workers irrespective of which sector they are engaged in.

Constitutional rights and duties enumerated in Part III and IV of the Constitution of India are pivotal to the demand for protection of laws of women workers. Article 14 guarantees equality before the law and equal protection of the laws; Article 15 prohibits discrimination on the grounds of sex; Article 16 (1) provides equality of opportunity in matters relating to public employment and appointments; Article 16(2) prohibits discrimination on the grounds of sex in matters of employment under the State; Article 23

(1) prohibits traffic in human beings and beggar and other similar forms of forced labour; Article 24 prohibits employment of children below the age of 14 in factories or mines or any other hazardous employment. Article 39 (a), (d), 41, 42, 43, 43A are the Directive Principles of State Policy.

Labour laws and its regulation are listed in the Union List and the Concurrent List in the 7th Schedule of the Constitution of India. The Parliament of India is thereby empowered to make laws with respect to the matters enumerated in the Union List and both, the Parliament of India, and the Legislature of any State is empowered to make laws with respect to the matters enumerated in the Concurrent List. The entries with regard to labour and its regulation in the 7th Schedule of the Constitution of India are given below.

Union List:

Entry No. 55: Regulation of labour and safety in mines & oil feeds.

Entry No. 61: Industrial disputes concerning union employees.

Entry No. 65: Union agencies and institutions for professional, technical or vocational training.

Concurrent List:

Entry No. 22: Trade unions; Industrial and labour disputes.

Entry No. 23: Social security and social insurance; employment and unemployment.

Entry No. 24: Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age person & maternity benefit.

PART III- Key Labour Laws Analyzed

Labour laws in India have been enacted to cover industrial relations, equal and minimum wages, conditions of work and non-discrimination of women. The NCEUS while analyzing the effectiveness of the coverage of different labour laws found that “the actual coverage of the labour regulations in India is very small; the laws themselves apply only to a small proportion of workforce and they are actually implemented in the case of even smaller segments.”²⁷ For the purposes of this paper, key legislations are being analyzed to examine whether the provisions in the Acts are adequate for the protection of women workers. The absence of necessary legal protections is also being examined since these in turn have a bearing on work participation rates of women. The classification given below has been made for a convenient and easy reading of this paper and is not based on any official classification.

²⁷ National Commission for Enterprises in the Unorganized Sector, *The Challenge of Employment in India, An Informal Economy Perspective*, Volume I, Main Report, 2009 at p.

Non-discrimination and Wage Payment:

- (i) The Equal Remuneration Act, 1976
- (ii) The Maternity Benefit Act, 1961
- (iii) Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- (iv) Minimum Wages Act, 1936.

Right to Work:

- (i) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005

Conditions of Work and Regulation of Employment:

- (i) The Factories Act, 1948
- (ii) Mines Act, 1952
- (iii) The Building and Other Construction (Regulation of Employment and Conditions of Service) Workers Act, 1996
- (iv) Beedi and Cigar Workers (Conditions of Employment) Act, 1966
- (v) The Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979
- (vi) The Apprentices Act, 1961

Social Security:

- (i) The Employees' Compensation Act, 1923
- (ii) The Employees' State Insurance Act, 1948
- (iii) The Employees' Provident Fund and Miscellaneous Provisions Act, 1952
- (iv) Unorganized Workers Sector Social Security Act, 2008.

Industrial Relations:

- (i) The Trade Unions Act, 1926.
- (ii) The Industrial Disputes Act, 1947.
- (iii) Industrial Employment (Standing Orders) Act, 1946

1. Non-Discrimination Laws:

(i) Equal Remuneration Act, 1976

The Equal Remuneration Act, 1976, enacted to implement Article 39(d) of the Constitution of India and the Equal Remuneration Convention, 1951 (I.L.O. Convention 100) was designed for the prevention of discrimination based on sex against women in employment.

Under the Act, the employer is obliged to pay equal remuneration to men and women workers for same work or work of a similar nature. By 'same work or work of a similar nature' is meant work in respect of which the skill, effort, and responsibility required are the same, when performed under similar working conditions. The Act also prohibits the discrimination against women during and subsequent to the recruitment of women workers for the same work or work of a similar nature. By the Equal Remuneration (Amendment) Act, 1987, discrimination against women during 'any condition of service subsequent to recruitment such as promotion, training or transfer' was prohibited.

The ILO coming to grips with the problem that 'same work or work of a similar nature', generated comparisons between the work done by men and women thereby rendering the entire exercise redundant since women often were forced to engage in stereotypical forms of labour, recognized that equal remuneration should be made for '*work of equal value*'. It was specified that job comparisons should not be limited to the same jobs, enterprises and/or sector²⁸ and that "determination of equal value methodologies to assess, identify and objectively compare the relative value of work" was necessary. The necessity to "develop job evaluation systems to avoid prejudices or stereotypes based on sex"²⁹ was stressed upon.

Adjudicating on the definition of same work or work of a similar nature, in the case of *Mackinnon Mackenzie & Co. Ltd vs. Audrey D'Costa* 1987 (2) SCC 469), the Supreme Court, dealing with a case in which the lady stenographers were being paid less than their male counterparts, stated that while deciding whether the work is the same or broadly similar, "the Authority should take a broad view; ...in ascertaining whether any differences are of practical importance, the Authority should take an equally broad approach for the very concept of similar work implies differences in details, but these should not defeat a claim for equality on trivial grounds. It should look at the duties actually performed not those theoretically possible".

²⁸ *Equal Pay for Work of Equal Value: How do we get there?*, ILO-UN Global Compact Webinar, March 2011.

²⁹ *Ibid.*

Although labour legislations can be effective when implemented, a national framework for implementation of already existing rights is necessary since it is at the sites of implementation that practices of wage inequality and discrimination are practised.

In the case of *People's Union for Democratic Rights and Others v. Union of India*,³⁰ it was alleged before the court that the workers engaged in construction work were being discriminated in matters of payment of wages on the basis of sex, which is violative of the provisions of the Equal Remuneration Act, 1976. It was contended in the writ petition that the women workers were getting paid only Rs. 7 per day whereas the fee fixed for the men was Rs. 9.25 (of which Re.1 was being appropriated by the contractors which was also before adjudication by the Court) and that the balance amount was being appropriated by the jamadars and contractors. In this case the Supreme Court held that the non-payment of equal wages was a violation of the Right to Equality under Article 14 of the Constitution of India and directed the Union of India and Delhi Administration to ensure that the provisions of the Equal Remuneration Act, 1976, were not violated.³¹

In the case of *C.B. Muthamma v. Union of India*,³² a complaint had been filed by the petitioner stating that she had unconstitutionally been denied promotion to Grade I of the Indian Foreign Service and further that at the time of joining foreign service the petitioner had to give an undertaking that she would resign from the Services if she got married. The petitioner challenged the constitutionality of Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, according to which a women member had to get permission from the government before she got married and that the woman member can be asked to resign if her domestic commitments came in the way of discharging her duties in the service. Rule 18(4) of the Indian Foreign Service (Recruitment Cadre, Seniority and Promotion) Rules, 1961, further provided that no married woman was entitled as of right to be appointed to the service. The government undertook to delete Rule 8(2) and stated that Rule 18(4) had already been deleted. The Court directed the respondents to appoint the petitioner to the deserved seniority. It is pertinent to mention that in 1979 when this case had been decided, the Equal Remuneration Act had no provisions protecting women from discrimination during promotion, training or transfer which was included by amendment only in 1987.

While the Act provides for Advisory Committees, Inspectors and registers which have to be maintained by the employers and even penalties for employers who digress from

³⁰ AIR 1982 SC 1473.

³¹ *Ibid*

³² AIR 1979 SC 1868

their duties, implementation of the Act has not been successful largely due to lack of monitoring at the level of the factories and establishments. Amongst unorganized workers, women are paid less than men in almost all forms of employment.

Under the Equal Remuneration Rules, a complaint may be made by the worker himself or herself or by any legal practitioner, or by any official of a registered Trade Union, authorized in writing to appear and act on his or her behalf or by any Inspector appointed under the provisions of the Act.

In the case of *Rajendra Grover v. Air India Ltd & Ors*,³³ adjudicated in the Delhi High Court, members of the male cabin crew moved the Court to challenge a directive issued by Air India Ltd. dated 27.12.2005 which allowed both male and female crew to perform the job of In-flight Supervisors. This effectively meant that male cabin crew could be expected to serve on a flight under the supervision of a woman IFS which was challenged by the pre-1997 male cabin crew as unconstitutional. The Court held that there was nothing unreasonable about this directive and that 'in effect it removes the men-only tag on the function of the IFS' and found that it enabled the female cabin crew to break the 'glass ceiling'. The provisions of the ERA itself were not the subject of interpretation in this case, but the facts in the judgement reflects the level of discrimination between men and women even in terms of access to the same kinds of work. Fortunately the Court was able to uphold the principles of non-discrimination in this judgement.³⁴

Employers divide the kind of work done between men and women and technically evade the provisions of the Equal Remuneration Act, 1976. The recommendations of ILO that equal remuneration must be made based on 'work of equal value' must be incorporated into national laws. It is recommended that the Equal Remuneration Act, 1976, particularly Section 2(h), Section 4, and Section 5 are amended to include 'work of equal value' in addition to or in lieu of the phrase 'work of similar nature.' Better implementation of the Act is also required to ensure that women workers in the unorganized sector get paid the same wages as the male workers, for work of equal value.

(ii) **The Maternity Benefit Act, 1961:**

The Maternity Benefit Act, 1961, is a social legislation whereby every woman employed, whether directly or through an agency, is entitled to the payment of maternity benefits at the rate of the average daily wage.

The Act follows the employer's liability approach, which means that the employer

³³ *Rajendra Grover & Ors v. Air India Ltd and Ors*, 8th October 2007, Delhi High Court.

³⁴ See also *Air India v. Nergesh Meerza*, AIR 1981 SC 1829.

solely bears the full amount of liability for providing maternity protection and the employees are not required to make any contribution for availing of the maternity benefits.

The Act extends to factories, mines, plantations, shops and establishments, and establishments to which the provisions of this Act have been declared to be applicable. The Employees State Insurance Act also provides for maternity benefits to specific employment sectors. Factories and establishments which are covered by the Employees State Insurance Act, 1948, do not fall under this Act, since the maternity benefits of the ESI Act will apply to those factories and establishments. The Mines Maternity Act, 1911, and Plantation Maternity Benefit Act, 1951 make provisions for Maternity Benefits. The Working Journalist (Conditions of Service) and Miscellaneous Provisions Rules, 1957 also provides for maternity protection.

There is no wage limit for coverage under the Act. The Act covers permanent workers, full-time workers, workers with identifiable employers and/or designated places of work, who form a tiny segment of the workforce especially in rural India. The unorganized sector i.e. temporary and casual workers and those employed through sub-contracting, outsourcing and so on – are not effectively covered under this Act because of the emphasis on an identifiable employer and workplace. That is not to say that if the Act were implemented in its true spirit, this would not be possible. However, implementation of the Act has been retarded and marked with malaise both on the part of the government and employers. In the absence of an effective monitoring system, there is no way to ensure coverage. The itinerant nature of these workers also poses a problem. Also, the use of the term “maternity benefit” itself is often misunderstood. The Act provides for “maternity benefit” in two ways – maternity leave and medical bonus for delivery and postnatal care. Both these components are essential to support a woman.

The average daily wage is the average of the woman’s wages that was being paid to her on the days on which she had worked during the period of three calendar months immediately preceding the date from which she absents herself. The woman should have worked for a period of at least 80 days in 12 months immediately preceding the date of her expected delivery. The maximum period for those institutions covered by this Act for which a woman is entitled to maternity benefit is 3 months of which she can only take maternity leave 6 weeks prior to the date of delivery. Despite the fact that these provisions are statutory in nature and will prevail over any contractual term, which provides for a reduced period, it is common practice in employment contracts to provide for lesser periods or even make this unpaid leave. Lack of awareness as well as lack of bargaining power allows such practices to flourish.

The Act defines a 'woman' as a woman employed directly or through an agency for wages. The Supreme Court has held that not just regular women employees but even women who are engaged on a casual basis or on muster roll on daily wage basis can avail of the benefits of this Act³⁵. The Supreme Court held that the Delhi Municipal Corporation was an 'industry' under the Industrial Disputes Act, 1947 and that the workers on the muster roll were 'workmen'. The Court applying the non-discrimination provisions of the Convention on the Elimination of all forms of Discrimination Against Women, (CEDAW) to the women workers held that the benefits of the Act, was directly applicable to the women employees on the muster roll as much as regularized employees.

The amount of the maternity benefit entitled to the women prior to her expected delivery must be given to the woman within 48 hours of her producing proof of her expected delivery. The employer is under a duty to make a payment of Rs. 3,500 to the woman as medical bonus if no pre-natal confinement and post-natal care is provided for by the employer free of charge. In 2008, the Act was amended to increase the amount from Rs. 250 to Rs. 1000. The amended act also empowered the State government to increase the amount of medical bonus every three years as a result of which the Central government through a notification which took effect from 19.12.2011 increased the bonus to Rs. 3,500. Since most employers do not make arrangements for free medical care and medical aid during maternity and delivery, the medical bonus is an essential provision. However, most employers do not give this. As most women do not know their rights in this regard, there are hardly any cases registered against employers. For the few women who may due to education or legal literacy be aware, the amount is too small a goal to fight for considering the costs of litigation.

A woman who goes through a miscarriage or medical termination of her pregnancy is entitled to 6 weeks maternity leave with pay following the day of her miscarriage or medical termination of her pregnancy. A woman going through a tubectomy operation is entitled to two weeks maternity leave with pay, immediately following the day of her operation, on producing proof of the same. If a woman suffers from an illness related to the pregnancy, delivery, premature birth of the child, miscarriage, medical termination of her pregnancy or tubectomy she is entitled to leave with wages for a maximum period of one month. There is very little awareness of these provisions.

Two nursing breaks in addition to her intervals are allowed to a woman till the child becomes 15 months old. Usually, nursing breaks are provisioned to be fifteen minutes long. This presumes that the mother is able to reach her infant within this period and complete

³⁵ *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, 2000 LLR 449.

feeding. However, this is practically impossible on two counts – firstly, access to the infant and secondly, the practical time taken to breastfeed which is usually between 15 to 40 minutes in the third month of the infant’s life. In terms of access, the Act is silent on the provision of crèches in the workplace. Hence, for a successful nursing relationship between mother and infant, the rationale of such few and short nursing breaks is not understood. This provision is also not supportive of infant feeding practices such as exclusive breast feeding for six months which is a WHO determined best practice particularly for addressing malnourishment in children. As India has endorsed the goals set in the World Summit for Children, which include ensuring a healthy future for children by bringing down malnutrition, legal provisions must be supportive of such practices. There is hence a need for either increasing the quantum of maternity leave under the Act to six months as is also available to central government employees on this rationale or for statutorily provisioning for crèches near workplaces. However, the latter solution may run into difficulties due to resistance from employers and also the issue of unidentifiable physical workplaces or employers.

In the case of *B. Shah v. Presiding Officer, Labour Court*,³⁶ wherein the petitioner claimed that she was paid her maternity benefit wages by deducting the wage due to her on Sundays, the Supreme Court defined the term ‘week’ to include wages for 7 days including Sundays and not 6 days. The Court applying the principles of Article 4 of Convention No.103, i.e the Maternity Protection Convention (Revised), 1952 held that the Act was a beneficial social legislation and thus will fall under the purview of Article 42 of the Constitution of India.

The employer is not allowed to discharge or dismiss a woman employee while she is on maternity leave or to give notice of dismissal or discharge on a day that the notice will expire while she is on leave or to change and jeopardize her conditions of work in her absence. If during her pregnancy she is given notice of discharge or dismissal, she is still entitled to her maternity benefit and medical bonus. Gross misconduct, which has to be communicated to the woman in writing disentitles her from claiming her maternity benefit and medical bonus. The State government is given the power to make rules of what constitutes gross misconduct. The lacunae in these provisions are protection of employment per se during the periods of pregnancy, which are not under maternity leave.

The Act mandates the keeping of registers by employers. In order to evade giving the women these statutory benefits, the names of women workers are not entered in the

³⁶ AIR 1978 SC 12

register or the women are employed through contractors.³⁷ In seasonal factories, employers do not maintain any record or service registers and do not pay benefits on the ground that the qualifying period for which the women should have worked is not satisfied.³⁸

The Act mandates the appointment of Inspectors who are given the function of overseeing implementation of the Act but the number of inspectors is inadequate with insufficient women inspectors on the job. Further, the number of inspections under the Act are also insufficient.

Section 4 of the Act, denies the woman the right to get employed immediately after her pregnancy for 6 weeks for no legitimate reason. Section 4 prohibits an employer from employing a woman during the 6 weeks immediately after the date of her delivery, miscarriage or medical termination of her pregnancy and also prohibits a woman from working in any establishment during the 6 weeks after her delivery. This prohibition is without any legitimacy and must be repealed with immediate effect.

A National Assessment of Maternity Protection commissioned by the Ministry of Labour and Employment and the International Labour Organization 2010-11 found that job destruction has outpaced job creation in the formal sector, forcing those who lose employment in the formal sector to find work in the informal sector.

Government policies related to maternity and child care are Maternal and Child Health Centres, Integrated Child Development Service, Cash Benefit Schemes, Indira Gandhi Matritva Sahyog Yojana which is a Conditional Maternity Benefit Program, Rajiv Gandhi National Creche Scheme for the Children of Working Mothers (Bala, 2012).³⁹

Women workers who do not fall within the scope of this law or other laws which provide for maternity benefits are excluded from receiving maternity benefits. As a result, a large section of working women in India does not have maternity coverage. Hence, it is recommended that: (a) there is universal availability of maternity benefits and childcare facilities to all women workers across the organized and unorganized sectors. This recommendation has been made in the Shramshakti Report, 1988. (b) Provisions for paternity leave must be provided for in the Act. (c) Maternity leave should be increased from the present 84 days (12 weeks) to 180 days (6 months) and made equivalent with what the Central Government provides to central government employees. (d) Upon expiry of the period of maternity protection, measures such as staggered hours and breast-feeding breaks

³⁷ C.L.Patel, *Justice for Women*, Central India Law Quarterly.

³⁸ *Ibid*

³⁹ Shashi Bala, *Labour Market Participation of Working Women Post Maternity*, NLI Research Studies Series No. 098/2012, V.V. Giri National Labour Institute.

for the first two years of the child may be considered. (e) Adoptive parents should be covered by maternity benefit provisions.

(iii) **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.**

Sexual harassment is a form of gender discrimination. In 1993, in an ILO Conference held in Manila, it was recognized that Sexual Harassment of Women at the Workplace was a form of gender discrimination. Article 11.1 of CEDAW requires ratifying States to “take all appropriate measures to eliminate discrimination against women in the field of employment”. The International Labour Organization through the adoption of the Discrimination (Employment and Occupation) Convention, 1958 (No.111) also provides for non-discrimination.

The Supreme Court in the case of *Vishaka v. State of Rajasthan*,⁴⁰ held that sexual harassment at the workplace is a form of discrimination against women. The Court held that it violated the Constitutional rights under Article 14, 15, 19(1) (g) and 21 and laid down a set of guidelines to deal with sexual harassment at the workplace till the legislature enacted a suitable legislation. In *Apparel Export Promotion Council Ltd. v. A.K.Chopra*,⁴¹ also the Supreme Court, recognized that sexual harassment had been committed by the respondent against a female employee and upheld the order of the Disciplinary Authority and Appellate Authority and removed him from service. In accordance with and pursuant to the *Vishaka* judgement, several educational institutions and other establishments set up complaints mechanisms and formulated guidelines to inquire into and prevent sexual harassment at the workplace.

In pursuance to the *Vishaka* judgement, the Act of 2013 has been enacted to fill the gap in statutory law on sexual harassment at the workplace. Sexual harassment has been defined as ‘unwelcome acts of behaviour (whether directly or by implication) namely (a) physical contact and advances or, (b) a demand or request for sexual favours or, (c) making sexually coloured remarks or, (d) showing pornography or, (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The Act mandates the constitution of an Internal Complaints Committee (ICC) by the employer in every one of his offices and also mandates that the Presiding Officer shall be a woman. A minimum of four persons constitute the ICC, nominated by the employer and atleast half of the members shall be women. An ICC can only be set up in offices with more

⁴⁰ AIR 1997 SC 3011

⁴¹ 20.01.1999

than ten workers. The Act also mandates for the constitution of a Local Complaints Committee (LCC) which receives complaints from establishments having less than 10 workers or if the complaint is against the employer himself. The appropriate government notifies a district officer to discharge the functions of this Act. The Act mandates that the Chairperson of the LCC shall be a woman. A minimum of four persons constitute the LCC, and at least half of the members shall be women.

Once a complaint is made to the relevant complaints committee by the aggrieved woman, the committee is mandated to conduct an inquiry into the complaint. The Act's most regressive feature is that prior to conducting an inquiry the relevant complaints committee at the request of the aggrieved woman shall take steps to settle the matter between the parties through conciliation, thereby defeating the purpose of a non-discriminatory law. The Complaints Committee shall give the report to the employer or District Officer with the conclusions of the inquiry. Sexual harassment is deemed to be misconduct in accordance with the provisions of the service rules applicable and appropriate action in accordance with the service rules will be taken against the respondent if the allegations are found to be true. The Act empowers an employer or District Officer to deduct wages from the salary of the respondent to be paid to the aggrieved woman or to her legal heirs. The Act lists the factors based on which compensation to the aggrieved woman may be determined. This provision excludes the employer from all liability. Another questionable provision of the Act is that it makes provision for action to be taken against a woman who is found to have made a false or malicious complaint. This provision departs completely from the intention behind *Vishaka* and goes against the principles of Article 14 and 15 of the Constitution of India.

Domestic workers are covered by the Act. The aggrieved women shall approach the LCC with her complaint and if the LCC finds that a prima facie case exists, a complaint shall be forwarded to the police within a period of 7 days for registering the case under Section 509 IPC and other relevant sections, if any, are made out.

The Act has been critiqued by institutions, both educational and otherwise, as well as by academicians/researchers and lawyers for not considering the best practices that had been formulated by other institutions in pursuance of *Vishaka*. The Legislature failed to take into consideration the best practices that had been evolved by Universities and other establishment before enacting this Law.

Further, the Act gives too much power to the employer and District Officer without any accountability mechanisms to either of the entities. Hence a lot of the manner in which

the Act is enforced and applied will depend upon the discretion of the employer or a District Officer and the ramifications of the same are yet to be seen.

Women workers in both the unorganized and organized sectors can seek remedies under the provisions of this Act. Workers especially in the unorganized sector will first have to be informed of their rights under this law and also be provided with support through trade unions or NGO's for making complaints against either co-workers or employers.

(iv) Minimum Wages Act, 1948

The Minimum Wages Act, 1948, guarantees minimum rates of wages to workers who work in scheduled employments listed in the Act. The scope of this act can be increased by adding new schedules by the government. Any process or branch of work forming part of the scheduled employment is also covered by this Act. This Act covers units employing even one worker and includes wage workers, home-workers, piece-rated work, time rated work but excludes the self-employed. Similarly, minimum rates of wages may be fixed by the hour, day, month, or by such other wage period as may be prescribed. The minimum wage is not uniform since it varies from one employment to another and the government can fix a different minimum wage for different industries or even similar industries in different localities. It is applicable to agricultural, non-agricultural and to rural as well as urban workers.

For the scheduled employments, the government may fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals; provide for a day of rest in every seven days, which shall be allowed to all employees by payment of remuneration in such days of rest; and pay not less than overtime rates to employees who work on the day of rest.

A distinction is made between 'minimum wage' which is the statutory minimum wage, 'fair wage' and 'living wage. The minimum wage fixed by most governments provides bare subsistence and is at poverty-line level. The minimum wage, fair wage and living wage has been introduced in the report of the Committee on Fair Wages and the need-based minimum wage was defined in the 15th session of the Indian Labour Conference held in January 1957.

Courts have observed that the concept of minimum wage is likely to undergo a change with the growth of the economy and with the change in the standard of living and that

concomitants must necessarily increase with the progress of the society.⁴² In the case of *Raptakos Brett*⁴³ the Supreme Court specified that additional factors such as children's education, medical requirement, provision for old age, marriage, etc. which should constitute 25% should be used while fixing the minimum wage.

In the case of *Delhi Council for Child Welfare v. Sheela Devi and Another*⁴⁴, two workers, Sheela Devi and Ramesh Kumari, were not being paid minimum wages by the Appellant, a voluntary organization working on child welfare services. The Appellant had contended that the employment of the workers did not fall under the purview any scheduled employment under Section 2(g) of the Minimum Wages Act. The Court pointed that vide a notification of the Government of India an amendment was made to the Schedule to the Act. Vide the amendment employment in all shops and establishments, covered by the Delhi Shops and Establishments Act, 1954, came under the purview of the Schedule to the Act. The Court held that the petitioners therefore, came under the purview of the Act and directed payment of minimum wages to the aggrieved respondent with arrears.

It was reported in the *Shramshakti* Report in 1988, that the minimum wage legislations were not strictly followed at an all India level across various industries, with the exception of some regions of Kerala where trade unions exist. In many cases the workers were switched to piece-rate basis so that it was not covered by the Minimum Wages Act.⁴⁵ Though this Act is a legal protection for unorganised sector workers it is often found that among construction workers, *beedi* workers, *agarbatti* workers, agricultural workers, workers in small shops and hotels, wages actually paid to the workers are below the prescribed minimum wages fixed by the government for the respective industry.

Bonded labour and forced labour are prohibited by Article 23 of the Constitution of India. The scope of this provision was discussed by the Supreme Court in the *Asiad Workers Case*⁴⁶, which concluded that where a person was working for less than the minimum wages, it would be considered forced labour which is prohibited by Article 23. The law is settled on the point that if a worker receives less than the minimum wages, it is considered to be forced/ bonded labour unless proven otherwise.⁴⁷

However, due to the absence of unionisation, low literacy levels of women workers, and lack of implementation infrastructure it is often easy for the employers to violate the

⁴² *Chandrabhavan Boarding and Lodging, Bangalore v. State of Mysore and Ors*, AIR 1970 SC 2042 (1970) LIC 1632

⁴³ *Workmen Represented by Secretary v. Management of Reptakos Brett and Co. Ltd. & Anr.*, AIR 1992 SC 504; See also *Unnichoyi v. State of Kerala*, 1961 SC 1111

⁴⁴ 132(2006)DLT 696

⁴⁵ *Shramshakti Report*: Report of the National Commission on Self-Employed Women and Women in the Informal Sector, New Delhi, 1988.

⁴⁶ *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473

⁴⁷ *Bandhua Mukti Morcha V. Union of India*, (1984) 3 SCC 161.

provisions under this Act. Lack of adequate numbers of inspectors for ensuring the implementation of the Act, in the unorganised sector, is one of the reasons that the provisions of the Act are constantly violated.⁴⁸ Women are exploited even more than the male workers and in many employments get even less wages than the male workers. Middlemen i.e. the contractors take advantage of the absence of workers organizations and the poor bargaining power of women workers and exploit the workers by taking a portion of their wage. Thus the workers who are already not getting the minimum wage end up with even less once they give the middlemen the cut of the wage agreed to, whether in advance or otherwise. Hence, unionization, availability of legal grievance redressal mechanisms and legal awareness are necessary to thwart these processes of exploitation of the woman worker.

A National Floor Level Minimum Wage has been recommended and proposed by the Ministry for Labour and Employment in order that the minimum wage fixed by either the Centre or State in different employments does not fall below a particular limit. In the question and answer session in the Rajya Sabha⁴⁹ on 08.05.13 it was stated that the Cabinet has approved the proposal to make the NFLMW statutory and to provide minimum wage to all employments irrespective of the number of workers engaged. It is recommended that: (a) There should be a statutory imposition of a NFLMW. That the NFLMW should not be a mere subsistence wage, but should enable the worker to provide for herself and her family the essentials of food, clothing and housing, education of children, medical security, social security needs and insurance against contingencies such as old age. (b) That the Minimum Wages Act should apply to all employments including those which are not amongst the scheduled employments. (c) The total number of Inspectors should be increased. Lack of adequate number of Inspectors is one reason for poor implementation of the Minimum Wages Act, 1948. There should be provisions to increase their numbers and efficiency levels.⁵⁰ (d) The penalty for non-payment of minimum wage on the employer is only Rs. 500 or imprisonment upto 6 months. The penalty must be increased to Rs. 5000 or 6 months imprisonment or both for the first contravention and for every subsequent violation penalty of Rs. 10,000 or imprisonment for 6 months or both must be specified (Upadhyaya, 2012)⁵¹ (e) The penalty for contravention of other provisions of the Act is only Rs. 500 or

⁴⁸ T.S. Papola, G.S Mehta, Vinoj Abraham, *Labour Regulation in Indian Industry*, Volume 3, Labour Regulation and its impact A review of Studies and Documents, 2008.

⁴⁹ <http://labour.nic.in/upload/uploadfiles/files/Divisions/Parliament/rs582%281%29.pdf>

⁵⁰ T.S. Papola, G.S Mehta, Vinoj Abraham, *Labour Regulation in Indian Industry*, Volume 3, Labour Regulation and its impact A review of Studies and Documents, 2008

⁵¹ Sanjay Upadhyaya, *Evolution of Minimum Wage Policy and Regulatory Framework: An inter-country perspective*, NLI Research Study Series No. 100/2012.

imprisonment upto 6 months. The penalty must be increased to Rs. 5000 for the first contravention and to Rs. 10,000 for every subsequent contravention (Upadhyaya, 2012).⁵²

2. Right to Work

(v) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA).

MGNREGA was enacted with a view to enforce the right to work. The Act guarantees 100 days of work per household per year at a statutory minimum wage. Any adult individual who applies for work under the Act is entitled to be employed on public works within fifteen days. Failing that, an unemployment allowance (one fourth of the minimum wage for the first thirty days and one half thereafter) has to be paid in accordance with the law. The Act places an enforceable obligation on the state and gives bargaining power to the workers, as it creates accountability. It is not an end but only a means for people living on the brink of hunger and starvation to slow down distress migration to urban areas. The Act also provides an opportunity to create useful assets in rural areas, e.g. labour-intensive public works in the field of environment protection, watershed development, land regeneration, prevention of soil erosion, restoration of tanks, protection of forests and related activities. It can help activate and revitalise the institutions of local governance, including *Gram Panchayats* (village councils) and *Gram Sabhas* (village assemblies). Lastly, the Act is a tool to enhance the bargaining power of the unorganised sector workers as it would help them to struggle for other important entitlements like social security and minimum wages.⁵³

There are several provisions in the Act which are focused on women workers. The Act ensures one-third of the workers to be women. It has stipulated work to be located within five km of the residence and increases the possibility of women's participation.⁵⁴ As the Act does not place any restriction on how each household's quota is shared within the household. The wages earned is equal for both men and women. Lastly, the Act provides for crèche facilities in worksites when more than five children under the age of six are present.

⁵² *Ibid.*

⁵³ Jean Dreze, 'Employment Guarantee and the Right to Work', in Niraja Gopal Jayal, Pratab Bhanu Mehta (eds), *The Oxford Companion to Politics in India*, Oxford University Press, 2010

⁵⁴ Reetika Khera and Nandini Nayar, 'Women Workers and Perceptions of the National Rural Employment Guarantee Act', *Economic and Political Weekly*, October 24, Vol XLIV No 43, 2009

In some areas, such as Uttar Pradesh and Bihar, there were social norms against women working outside the home, therefore, in many areas women were told that MGNREGA was not applicable to them and were sent back by officials. Some of the reasons for this were: non-recognition of women as workers, no child care facilities as promised by the Act, delayed payments such that in some cases women prefer not to take up employment.⁵⁵ Some women reported that women were the first to be turned away when there were more workers than the requisite numbers needed at the site. In many places, the contractors would come looking for able-bodied men and if women asked for work their request was ignored.⁵⁶ Some studies show instances of older widows being refused labour cards on the grounds of their age. Also, migrant women are sometimes not registered due to the non-continuous registration process which takes place at the time of seasonal out-migration, migrant women whose husbands have migrated for work are refused cards as they do not qualify as 'head of the household'. Although, the Act calls for verification on family, local residence and age, local bureaucrats administering the scheme demand illegal and unsound eligibility conditions and ask for documentary evidence (ration cards, voter identity cards, census list). Therefore, despite women's inclusion ensured in the scheme, women (elderly, migrant, physically challenged, member of a female-headed household) are often excluded due to lack of documentary evidence and eligibility criteria. Due to complicated procedures for application and hurdles created in the process (unnecessary paper work and rounds of the bloc office) many women have given up pursuance of their claims. Added to this, there has been a rise of a system of informal intermediaries, private contractors who act as middlemen and extract a share of the wages from workers.⁵⁷

It has been argued that the Act by no means guarantees employment and is missing on various factors to be able to meaningfully define 'right to work': there is not full coverage of rural-urban areas, no individual entitlements, limited days of guarantee of work, no decent living wage given, exclusion of non-manual workers. In the absence of any universal Public Distribution System and only two schemes (Food for Work Programme and the *Sampoorna Grameen Rozgar Yojana*), which directly address food security in some rural pockets, some theoreticians argue that the MGNREGA at least in part should offer essential food items along with the wage to cater to the issue of food security.

Certain changes need to be brought about in the MHNREGA for greater applicability to women workers. It is recommended that: (a) Instead of 100 days of

⁵⁵ Aruna Bagchee, 'Political and Administrative Realities of the EGS', *Economic and Political Weekly*, XLI(42), 2005

⁵⁶ Smita Gupta, 'Women in India's National Rural Employment Guarantee Scheme', in Shahra Razavi (ed), *The gendered Impacts of Liberalization, Towards "Embedded Liberalism"*, Routledge, 2009

⁵⁷ Ibid, 2009

entitlement of the household, entitlement for 100 days should be made to the individual. (b) There should be separate, instead of a joint bank accounts for women. (c) Information should be released to the local community on the amount of funds released and the funds actually spent in the process of implementation.⁵⁸ (d) Initiatives should be made to include some categories of women workers i.e. elderly, migrant, physically challenged, member of a female-headed household, who are often excluded due to documentary evidence and eligibility criteria.⁵⁹ (e) The procedures for application should be simplified and unnecessary paper work and rounds of the bloc office, has to be eliminated. (f) The rise of the system of informal intermediaries and/or private contractors, who extract a share of the wages from workers should be checked and eliminated.

3. Conditions of Work and Regulation of Employment

(i) The Factories Act, 1948

The Factories Act, is a legislation which provides for the regulation of the functioning of a factory and makes provisions for health, safety and welfare of the labour force employed in a factory. A factory has been defined by the Courts as any premises, including the precincts thereof, which carry on manufacturing processes. The Act applies only to those places where 10 or more workers are working with the aid of power or 20 or more workers are working without the aid of power. As a result, the labour force which is not involved in a manufacturing process or where the number of workers is less than the statutory number required in the Act, are not covered by this Act. For example, women in home based work; sub-contracting work or self-employed workers are not under the purview of this Act.

A 'worker' is defined as a person employed, directly or by or through any agency - including a contractor - with or without the knowledge of the principal employer. A worker may be employed whether for remuneration or not. The worker must be employed in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

The Act provides that adult workers shall not be made to work for more than 48 hours per week or work more than 9 hours per day and also provides for weekly holidays

⁵⁸ Reetika Khera and Nandini Nayar, '*Women Workers and Perceptions of the National Rural Employment Guarantee Act*', Economic and Political Weekly, October 24, Vol XLIV No 43, 2009

⁵⁹ Smita Gupta, '*Women in India's National Rural Employment Guarantee Scheme*', in Shahra Razavi (ed), *The gendered Impacts of Liberalization, Towards "Embedded Liberalism"*, Routledge, 2009

and a half hour interval after working for 5 hours, extra wages for overtime of more than 9 hours at double the worker's wage rate.

The Act provides for separate and adequately screened washing facilities for male and female workers. Section 43 of the Act provides for facilities for storing of clothes not worn during work hours and for the drying of wet clothing. (b) Shelters, restrooms and lunch rooms (c) women representative on canteen managing committees. Sections 44 provides for sitting facilities for workers who have to work in a standing position. Section 46 provides for canteen facilities in factories where more than 250 persons are employed. Section 47 provides for the facility of shelters, restrooms and lunch rooms for workers. In a review of the provisions of the Factories Act, the National Commission for Women, recommended that these provisions be amended in order that the Act provides, for separate facilities for men and women under Section 43; representation of women workers in Canteen committees under Section 46; and separate shelters, restroom and lunchrooms for women workers under Section 47 of the Act.⁶⁰

The Act provides for the setting up of crèches. Section 48 states that in every factory where more than 30 women workers are ordinarily employed, there shall be provided and maintained a suitable room or rooms for the use of children under the age of 6 years of such women. The Act provides for the provision of free milk or refreshments or both as well as breast feeding facilities. Employers evade this responsibility by underreporting of the number of female workers in the muster rolls. Linking crèches to the number of women workers does not allow the development of an egalitarian society as it further reinforces the stereotype that child care is the predominant concern of the woman. It is pertinent to mention that there is no need for a minimum number of workers to be employed in order for a crèche to be set up by an employer. Even if one worker, either man or woman has a child, it is the duty of the employer to provide child care assistance in the form of crèches.

The employer has a duty to set up Safety Committees, in those factories where hazardous process takes place, or where hazardous substances are used or handled. The Safety Committee is mandated to consist of equal number of representatives of workers and management to ensure proper safety and health at work and to review periodically the measures taken in that behalf. It is essential that the Act is amended to mandate that half the workers in these safety committees should be women.

Section 59 guarantees extra wages for overtime at the rate of twice her ordinary rate of wages. The Act mandates that a register of adult workers be maintained by the manager

⁶⁰ Review of Laws and Legislative Measures Affecting Women by National Commission for Women, No. 15, The Factories Act, 1948. <http://ncw.nic.in/fmReportLaws15.aspx>

of the factory available for inspection by the Inspector at any time. This register is required to contain the name of the worker, nature of work, group, shift and other particulars, if any. Sub-Section 1A of Section 62 provides that no adult worker shall be required or allowed work in a factory unless her name has been entered in the Register. Section 63 provides that no adult worker shall be required or allowed to work except in accordance with the notice for period of work displayed in the factory.

Section 85 empowers the State government to apply the Act to those premises which are manufacturing units notwithstanding (i) that the units have less than ten persons and working with the aid of power or less than twenty persons and working without the aid of power or (ii) if the persons are not employed by the owner but are working with their permission or are in agreement with them. Once such premises are declared, it is deemed to be a factory under the Act and the owner shall be the occupier and any person working therein the worker. By this section the government can bring many units under the scheme of the Act thereby allowing for regulation of all manufacturing units thus regulating conditions of work which are currently unregulated.

The Act provides that a complaint can be filed only through an Inspector. This provision needs to be amended so that an individual worker or her representative or a trade union can directly file a complaint in the Court. The factum of providing only an Inspector with the right to file a complaint in Court restricts the rights available to workers regarding their grievances.

The following provision of the Act statutorily forbids some forms of work to be performed by women workers which are discriminatory and must be repealed with immediate effect.

- Section 22 (2) prohibits a woman to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while it is in motion.
- Section 27 prohibits women from being employed in any part of a factory for pressing cotton in which a cotton opener is at work.
- Section 87 provides that if the state government is of the opinion that any manufacturing process or operation carried on in a factory exposes any person employed in it to a serious bodily injury, poisoning or diseases, it may make rules applicable to any factory or class or description of factories in which the manufacturing process or operation is carried on – prohibiting or restricting the employment of women, adolescents or children in the manufacturing process or operation.

These prohibitions, unreasonably classify women into a highly vulnerable category who are not on par with male workers and is therefore violative of the right to equality guaranteed under Article 14 of the Constitution. Article 14 forbids hostile discrimination. While these provisions appear to protect women from exploitation and bad conditions of work, it effectively jeopardizes a women worker's right to equal opportunity and employment. Undoubtedly, guidelines for safety whether the workers are men or women while performing work that could be potentially dangerous must be evolved but a blanket ban on the engagement of women in these processes is illegitimate. Hence these provisions must be amended to maintain equality before the law.

Night Work

The Act also prohibits women from working at night between 10 p.m. and 5 a.m. Section 66 (1) (b) states that no woman shall be required or allowed to work except between 6 A.M and 7 P.M in any factory. While the Act permits for State Governments to vary these limits by notification, it mandates that the notification cannot make a variation which allows a woman worker to work between 10 p.m and 5 a.m. Prohibiting women workers from working at night, based on sex is unreasonable and amounts to discrimination by the State since it take away the right of choice of a woman worker to work at night and legitimizes the role of the State in enacting arbitrary laws which curtails the freedom of association and right to opportunity and employment of women at any time they choose. This prohibition has resulted in a decrease of the employment of women workers by employers because it means adding more people to the muster rolls as one entire shift of workers becomes unavailable for work. No prohibition through protective legislative can be made which denies women their right to equality of opportunity and treatment.

The Madras High Court in the case of *Vasantha R. v. Union of India*⁶¹, struck down Section 66(1)(b) on the grounds that it was violative of Article 14, 15 and 16 of the Constitution of India. The petitioners were women workers who were working in the mill and some who were on the management of the various mills or factories filed petitions challenging the constitutionality and the batch of writ petitions was filed on the grounds that no discrimination should be practiced against women on account of their gender. The petitioner could not work in the third shift between 10 p.m. and 6 a.m. due to the statutory provisions banning night work of women. The Court held that, "potential employment cannot be denied on the sole ground of sex when no other factor arises" and struck down

⁶¹ (2001) II LLJ 843 Mad. See also *Triveni K.S. v. Union of India*, 2002 (5) ALT 223 (High Court of Andhra Pradesh)

Section 66(1) (b) The Court laid out detailed guidelines in order to ensure the safety and welfare of women workers in the night shift.

The position in international law, regarding the question of whether night work was detrimental to the health and welfare of women workers has changed over the decades. The ILO Conventions have shifted from the position of a blanket ban to a position which recognizes that all work in night shifts need not be detrimental to the health of the woman.⁶² The Protocol to Convention No. 89⁶³ stipulates that national laws or regulations may provide, in consultation with employers and workers' organizations, variations in the prescribed time limits and exemptions from the prohibition of the night work contained in Convention No. 89. Thereafter the Night Work Convention, 1990 (No. 171) has also been adopted by the ILO on the premise that night work itself has effects which are detrimental to health, is generative of difficulties for the family and social life of the worker and provides for special compensation and regulations for men and women alike. It is necessary that Convention No. 171 is ratified by the Indian State and labour laws are harmonized to more egalitarian values.

Vide the Factories (Amendment) Bill, 2005, an amendment to the Act was proposed to address the issue of the right of women to night work, but it was not passed. Several other laws including the Mines Act, prohibits night work of women. It is essential that the law is amended as soon as possible in order that women are able to do night work along with effective regulations to protect the health, safety and welfare of the women workers.

(ii) **The Mines Act, 1952**

The Mines Act, 1952, was built upon a similar legislation enacted by the colonial government in 1923, the Indian Mines Act. The 1952 Act improved upon several deficiencies of the previous legislation and introduced new administrative changes, better safety requirements, health and sanitary facilities, reduced working hours for mine workers, provided for compensatory holidays, defined the rate of payment for working overtime and prescribed punishment for contravention, in addition to imposition of fines, among other things. The Act provides specifically for women workers in four areas: with respect to the prohibition of underground work (Section 46); prohibition of night work even above ground (Section 46); separate toilet facilities and crèche facilities (Section 58 read with the relevant Rules).

⁶² See Night Work (Women) Convention, 1919 (No. 4); Night Work (Women) Convention (Revised), 1934 (No. 41); Night Work (Women) Convention (Revised), 1948 (No. 89)

⁶³ Protocol to the Night Work (Women) Convention (Revised), 1948.

Women have worked in underground mines since the setting up of the first coal mines in the country. The 1923 legislation prohibited the employment of women underground, but later exempted the mines in Bihar, Bengal, Orissa, Central Provinces and the salt mines of Punjab to address the needs of the war economy.⁶⁴ Post-independence, the 1952 Act prohibited the employment of women underground altogether.⁶⁵ The legal prohibition combined with a number of changes, including mechanization of mines over time has resulted in extremely low employment of women in the main mining activities.⁶⁶ In course of the last century, the percentage of women workers in the mining industry to the total female population fell from 1.02% in 1901 to 0.05% in 2001.⁶⁷ As a result there are a considerable number of women workers employed in the mining sector as unorganized workers, in casual, lowly paid and dangerous work. In many instances the mines which hire women workers are illegal and hence conditions of work are dismal.

The policy of prohibiting women from working underground needs to be reviewed as it keeps women away from the technical aspects of the mining industry and pushes them into devalued, low paid work. The thrust of reform should be on improving workplace safety and imparting training to the women workers.

The employment of women on the surface is prohibited by the Act between 7 pm and 6 am. The central government is empowered to vary the timings, subject to the prohibition that no woman shall be employed between 10 p.m. and 5 a.m. The Act specifies that for women workers, there must be a gap of minimum eleven hours between the end of work on any day and resumption of work the next day. There are a number of other legislations that prohibit women from working on night shifts in certain sectors, including the Factories Act, 1948, which has been discussed above. In a number of recent cases, high courts have held such restrictions on women's employment as unconstitutional. Instead of barring women from working in night shifts, it must be the statutory responsibility of the employer to provide safe working conditions for women.

The Mine Crèche Rules, 1966 under the Act, states that where women are employed for more than twelve months, suitable rooms or crèches with trained staff and caretakers, must be available for the children (below the age of six) of such workers. Several mine owners can jointly provide for such crèches also. The Act also specifies that there must be separate

⁶⁴ Dhaatri Recourse Centre for Women and Children & Samata, *Contesting Women's Rights Within the Political Economy of Mining in India*, 2010, at 82. Available at http://www.dhaatri.org/dhaatri/publications/mining_women_rights.pdf (Last accessed on 27 May, 2013)

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

toilet and washing facilities for women in every mine site. A 2010 study of women in the mining industry found that since women were employed as casual workers, there are no crèches, nor do women workers demand crèches and other facilities from the employer.⁶⁸ The same study also recorded that separate toilet facilities were not present in any of the sites covered by the study. Similarly, a 2006 study of women's livelihood in small mines and quarries also recorded the same findings.⁶⁹ Both these studies point out that owing to the informal and casual nature of employment of women in the mining industry, they are neither found in the muster rolls of the companies, nor considered as members by the trade unions, nor enumerated as workers by the Census. The first step towards protecting the rights of women mine workers is therefore to make them visible to the legal machinery.

(iii) **The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979**

The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, was enacted in recognition of the exploitation of labourers by contractors who recruit labour for work outside the State by paying poor wages and engaging labour under extremely difficult work conditions. This Act is applicable to any establishment or contractors, which hires five or more inter-state migrant workers. The term "workmen" would mean workers employed to engage in skill, semi-skill, unskilled, manual, supervisory, technical or clerical work (does not include persons involved in administrative or managerial work/ or draws a salary of more than five hundred Rs. per month). The act provides for equality on the basis of payment of wages, wage rates, holidays, hours of work, and other conditions of service which are non-discriminatory towards inter-state migrants' workers. Wages paid to the inter-state workmen should comply with the minimum wages legislation and shall be payable only in cash. This act also provides for displacement allowance and journey allowance. Overall, the contractor has the primary responsibility for registering the worker, issuance of passbooks, regular payment of wages, equal remuneration to men and women, ensure suitable conditions for work, provide suitable residential arrangement, provide medical facility, provide clothing, in case of serious injury to the worker inform the next of kin and the state authorities. The State government is empowered to make Rules for carrying out the purposes of this Act.

This Act has been ineffective because of the lack of proper implementation as well as lack of awareness about labour rights among the workers regarding the existence of labour

⁶⁸ *Ibid.*

⁶⁹ <https://crawford.anu.edu.au/rmap/pdf/docs/Smallscalemining.pdf>

laws. Very few contractors have been issued licenses as very few enterprises employing inter-state migrant workers have registered under the Act. Also the record of prosecution and dispute settlement has been very weak. Migrant workers do not possess passbooks, prescribed by law, and which is the basic record of their identity and their transactions with the contractor and employers.⁷⁰

The Act provides that a complaint can be filed in Court only by or with previous sanction in writing of the Inspector or authorized person. This provision needs to be amended so that an individual worker or her representative or a trade union can directly file a complaint in the Court. Providing only an Inspector with the right to file a complaint in Court restricts the rights available to workers regarding their grievances.

Migrant workers are amongst the worst off, most of them barely making a minimum wage, work in very bad conditions with any access to basic amenities such as housing, toilets, etc. Women migrant workers get a worse deal, get paid even less than male migrant workers and are compelled to work very long hours. Since migrant workers come away from the State of their origin they have no social network to rely on in cases of crises situations. Women migrant workers also face sexual harassment, and have no access to maternity benefits or crèche facilities. This Act is a typical example of a law which covers unorganized sector workers which has barely any provisions for the legal and social protections of women workers.

(iv) **The Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act 1996**

The Building and Other Construction Worker's (Regulation of Employment and Conditions of Service) Act, 1996, is applicable to the establishments engaging ten or more building and other constructions workers. It seeks to regulate the employment and conditions of work for building and other construction workers and provides for their safety, health and other welfare measures. The establishments engaging less than ten workers are not covered under this Act. The Act provides for fixing hours for normal working day inclusive of one or more specified intervals; provides for a day of rest in every period of seven days and payment of work on a day of rest at the overtime rate, wages at the rate twice the ordinary rate of wages for overtime work. It also provides for adequate drinking water, latrines and urinals and accommodation for workers, crèches, first-aid, and canteens at the work site. The appropriate government (Central or State) is empowered to

⁷⁰ National Commission for Enterprises in the Unorganised Sector, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*, Government of India, 2007

make rules for the safety and health of building workers. It provides for the constitution of Expert Committee to advise on matters relating to framing of rules by the appropriate government for registration of establishments, employing construction workers, appointment of registering officers, registration of building workers and issuance of their identity cards, lastly the establishment of welfare boards by the state governments.

Section 22 of the Act describes the functions of the Board applicable to the beneficiaries. These are: to provide immediate assistance in case of accident, to pay pension to those who have completed the age of sixty years, to sanction loans and advances for construction of a house, to pay some amount in connection with premium for Group Insurance Scheme, to give financial assistance for the education of children of the beneficiaries, to meet medical expenses for treatment of major ailments of beneficiaries or dependents, to pay maternity benefit to the female beneficiaries, and to make provisions and improvement of other welfare measures as may be prescribed. Further, the Board can also grant aid, loans, and subsidies to local authorities and employers in aid of any scheme relating to the welfare of the building workers.

There are special provisions regarding fixing responsibility of employers to ensure compliance with regard to prevention of accidents, timely payment of wages, and safety provisions, etc. The Act, describes the power of appropriate Government to make rules for the safety and health of building workers.

The Building and Other Construction Workers' Welfare Cess Act, 1996, provides for levy and collection of cess on the cost of construction incurred by the employers to be added to the resources of the Building and Other Construction Workers' Welfare Boards. These Boards are to be constituted under the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act 1996 in the states. There are provisions for various social security measures (which may be different for different states) for workers who register with the Welfare Board in a particular state. Maternity benefits, accident compensation, education for children, loans (for the purposes of building houses, marriages), old age benefit, pension, money to buy construction tools and equipments are some of the social security benefits which these Welfare Boards offer to registered workers. The Act specifies that the rates of the collection should not exceed 2 per cent and should not be less than 1 per cent of the cost of construction. There are certain clauses (Section 9) in this Act which has provisions of penalty (for instance by paying interest, imprisonment or payment of fine) depending on the nature of non-compliance to the Act.

This Act is also applicable to casual workers and daily wage workers. In *Municipal Corporation of Delhi v. Female Workers*,⁷¹ the Supreme Court declared that there is nothing in the Maternity Benefit Act which entitles only regular women employees to the benefit of maternity leave and should be extended to women engaged in work on casual basis or on muster roll on daily-wage basis. The provision for maternity benefit is also granted to women employees who are covered under the Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act 1996, from the welfare fund.⁷²

There are many states where the Welfare Boards have been created and cess collection has started, but partly due to the non-registration of workers and partly due to bureaucratic proceedings, very often the Board has not been functional in disbursing the social security benefits to the workers. There are numerous case studies on the construction sector and the conditions of work for construction workers which reveal that workers are not provided with facilities of drinking water, toilet, crèche, canteen, safety measures and first aid, accommodations at the worksite along with other social security provisions (maternity benefits, old age benefit, pension, compensation of accidents).⁷³

Most of the workers in this industry are contract, migrant workers without any social security benefits. The workers are highly exploited as most of the time they are not paid minimum wages and that too at irregular intervals.

The government should make efforts through the notification of NGO's working on labour rights or trade unions to work with workers for the registration and renewal of registration of workers to the Welfare Board. The notified NGO's/trade unions should on behalf of the workers claim social security benefits through the Welfare Boards. Conditions of work, payment of wages, safety, and security of workers in the case of women construction workers should be the focus of these notified bodies.

(v) **Beedi and Cigar Workers (Conditions of Employment) Act, 1966**

This Act provides for the welfare and regulates conditions of work for workers engaged in Beedi and Cigar establishments and also applies to wage workers and home workers but not the self-employed workers/persons in private dwelling houses. The Act was enacted since employers were splitting their establishments into smaller units so that the provisions of the Factories Act, 1948, were not applicable to them. The Act defines a

⁷¹ AIR 2000 SC 1274.

⁷² Surinder Mediratta, *Handbook of Law, Women and Employment: Policies, Issues, Legislation, and Case Law*, Oxford University Press, 2009

⁷³ See Anand, S Harjit, From the report on Construction Sector Workers, Street Corner markets, Micro- Enterprises and A Demonstration Initiative in Delhi; Support for Policy and Programme Development (SPPD) Project, United Nations Development Programme and International Labour Organisation, 2005.

contractor to mean a person who engages labour for a manufacturing process (including in a private dwelling house) and includes a sub-contractor, agent, *munshi, thekedar or sattedar*. Contract labour has been defined in the Act as any person engaged or employed in any premises, by or through a contractor, with or without the knowledge of the employer, in any manufacturing process. The Act provides for cleanliness, has provisions for maintaining proper lighting, ventilation, temperature, overcrowding, drinking water, cleanliness, sufficient latrine and urinal accommodation, adequate washing facilities, crèches, adequate first aid facilities and canteens. It also provides for working hours in any one day and in any week, wages for overtime, interval for rest, spread over in any day, weekly holidays etc. There is a prohibition of employment of children altogether and prohibition of employment of women or young persons except between 6 a.m. to 7 p.m. It also contains provisions regarding annual leave with wages and wages during the leave period.

The Act mandates that an employee who has worked for a minimum period of 6 months or more be given one month's notice or wages in lieu of such notice before dispensing of the services of the employee. It is provided that a complaint can be filed in Court by or with previous sanction in writing of the Chief Inspector or Inspector. This provision needs to be amended so that an individual worker or her representative or a trade union can directly file a complaint in the Court. The factum of providing only an Inspector with the right to file a complaint in Court restricts the rights available to workers regarding their grievances. The Act specifically states that the provisions of the Maternity Benefit Act, 1961 shall apply to every establishment. The provisions of the Industrial Employment (Standing Orders) Act, 1946 applies to industrial premises where 50 or more persons are employed or were employed on any day preceding 12 months. The provisions of the Industrial Disputes Act, 1947 applies to matters arising in respect of industrial premises. The State government is empowered to make Rules for carrying out the purposes of this Act.

Beedi work done by women is an example of the workplace entering the home (Meena Gopal, 1999)⁷⁴. As a result, women employed in *beedi* making work without any social security or benefits and work under extremely exploitative conditions. Women workers are rarely paid the minimum wage, conditions of work are dismal and pressure of the work is high. A policy must be evolved so that only a minimum number of *beedis* should be rolled per hour by any worker and overall work conditions must be improved through better implementation mechanisms.

⁷⁴ Meena Gopal, *Disempowered Despite Wage Work, Women Workers in Beedi Industry*, Economic and Political Weekly, 1999.

(vi) **The Contract Labour (Regulation and Abolition) Act, 1970**

The Contract Labour (Regulation and Abolition) Act, 1970, regulates the employment of contract labour and prohibits its use in certain circumstances. The primary object of the Act is to stop the exploitation of contract labourers carried out by contractors and establishments. It applies to all establishments and contractors who currently, or in the preceding year, employed 20 or more contract workers. Contractors who employ contract labour in connection to the work of an establishment are required to provide drinking water, toilets, washing facilities, first-aid and certain other basic facilities. Registration of employers to which the Act applies, licensing of contractors, inspections, maintenance of registers and filing of complaints only on receiving sanction in writing from the Inspector are some of the features of the Act. Contract labour is allowed to be used in all kinds of activities, until it is prohibited by the appropriate government in accordance with section 10 of the Act.

Under Section 10 of the Act, the government is empowered to prohibit the employment of contract labour in any process, operation or other work in any establishment. The Act does not enumerate the process to be followed by the employer regarding the procedure to be followed on the prohibition by the government of contract labour and the question of whether or not the contract labourers are to be absorbed by the employers comes under dispute. Courts have held that unless it can be proved in Court that the contract was a sham, it is not mandated that the employer absorbs the contract workers.

In the case of *Gujarat Electricity Board v. Hind Mazdoor Sabha & Ors.*⁷⁵, it was contended that the workers had been exploited by contractors to work in a Thermal Power Station of the Gujarat Electricity Board at Ukai in Gujarat. The Court dealt with the question of who can abolish contract labour, in what circumstances can contract labourers be absorbed as employees and whether an industrial dispute can be raised in these circumstances. The Court held that is only the appropriate Government which has the authority to abolish genuine labour contract. The Court further held that 'even after the contract labour system is abolished, the direct employees of the principal employer can raise an industrial dispute for absorption of the ex-contractor's workmen and the adjudicator on the material placed before him can decide as to who and how many of the workmen should be absorbed and on what terms.'

⁷⁵ AIR 1995 SC 1893

The Supreme Court in the case of *Steel Authority of India v. National Union Water Front Workers*⁷⁶ held that if contract labour was prohibited, it did not naturally follow that the workmen would be automatically absorbed on the principal employer's rolls. In the previous judgment of the Supreme Court in the case *Air India a Statutory Corporation's v. United Labour Union & Ors.*⁷⁷ case, it was held that on abolition of the contract labour system, by necessary implication, the principal employer is under an obligation to absorb the contract labour. The judgment of *Steel Authority of India* overruled *Air India a Statutory Corporation*.

It is extremely essential that the law is amended so that the benefits that accrue to regular employees is extended to contract labourers.

Further, in line with the NCEUS recommendation, contract workers, must be protected by various provisions of laws – minimum wages, timely payment of wages, safety and welfare provisions at the worksite, ESIS and PF benefits. The recommendations of the NCW that the debts owed by contract labour to the labourers are waived; contract labourers are treated as workmen so that they can avail of the benefits of the Employees Compensation Act; the Industrial Disputes Act is made applicable to contract labourers; and provisions for equal remuneration may be implemented.⁷⁸

(vii) **The Apprentices Act, 1961**

The Apprentices Act of 1961 came into force with a view to regulate the training of apprentices in various industries to fulfill the need for skilled workers. An 'apprentice' is defined as a person who is going through apprenticeship training in pursuance of a contract of apprenticeship. The Central Government vide its notifications has issued a list of designated trades and industries to which this Act is applicable.

Under the Act it is mandated that every employer covered under the Act has to train a prescribed number of persons. Section 18 states explicitly that an apprentice is a trainee and not a worker. It also states that the provisions of labour law shall not apply to an apprentice. The beneficial provisions on health, safety and welfare under the Factories Act, 1948, and the Mines Act, 1952, are applicable to persons undergoing training in a mine or factory, like as if they were workers. The Employees Compensation Act, 1923, has been amended so that a workman includes an apprentice. The ESI Act has provided that it does not include any person engaged as an apprentice under the Apprentices Act, 1961, or under the Standing Orders of the establishment but now by amendment with effect from 01.06.2010, the

⁷⁶ 30.08.2001.

⁷⁷ 06.11.1996.

⁷⁸ Review of Laws and Legislative Measures Affecting Women by National Commission for Women, No.33, The Contract Labour (Regulation and Abolition) Act, 1970. <http://new.nic.in/firmReportLaws33.aspx>.

exemption of coverage of apprentices under the Industrial Employment (Standing Orders) Act, 1946, has been withdrawn.⁷⁹

An apprentice has to be paid a stipend and the stipend so specified shall be paid at such intervals with such conditions as may be prescribed. Further, once an apprentice has completed her training period it not mandatory for the employer to hire her as a worker and to regularize her employment.

It is essential of the number of apprentices taken in each establishment a prescribed percentage should be reserved for women apprentices.

4. Social Security Laws:

(i) **The Employees Compensation Act, 1923**

Originally enacted as the Workmen's Compensation Act in 1923, this legislation was renamed as the Employees Compensation Act in 2009. This Act is one of the earliest social security legislations in India. The Act establishes a statutory duty of the employer to pay monetary compensation to an employee, in case the latter acquires injury or contracts any illness, in course of his/her work. To be eligible for compensation, a person must be engaged in an employment listed in Schedule II of the Act, which has a range of occupations. Additionally, contract workers and casual workers are also covered by the Act. In addition to death or injury arising out of accidents, an employee is also eligible to claim compensation of contracting certain occupational diseases, listed in Schedule III of the Act.

What the Act seeks to compensate is the loss of earning capacity caused due to the injury. As a result, disablement under the Act is conceptualised as either 'permanent total disablement', which incapacitates a worker from all kinds of work; 'permanent partial disablement', which reduces the capacity of the worker to carry out work that he/she had been doing at the time of the injury; and 'temporary disablement', either total or partial, which incapacitates the worker from doing any similar work for the period of disablement. Since 2010, the minimum quantum of compensation has been revised and fixed at Rs. 1,40,000 for permanent total disablement and Rs. 1,20,000 in case of death. In case of permanent partial disablement, the amount of compensation is decided either on the basis of Schedule I of the Act or based on independent medical assessment of the extent of injury.

⁷⁹ H.L.Kumar, *Labour Laws: Everybody Should Know*, 2013.

In case of death of a worker, compensation is paid to his/her immediate dependents or those partly dependent on the worker. The Act is administered by Commissioners appointed by the state governments.

(ii) **The Employees State Insurance Act, 1948.**

The Employees State Insurance Act, 1948, is a legislation that provides social security to Industrial workers in India. The Act extends to employees of factories, including government factories and seasonal factories. The Central or State government is empowered to extend the provisions of this Act by notification to any establishment, which is industrial, agricultural, commercial or otherwise. As a result, any employee doing work in a factory or establishment registered under the Act is covered by this Act.

Under the Act, temporary and casual workers are covered and the wages paid to them are liable for contribution. This question was settled by the Courts which have held that “a casual worker is entitled to payment of contribution by the employer towards employer's contribution as well as employee's contribution, though he is employed even for a day or two or a few days in a week. The effect of these two clauses is emphatic enough to declare that the word 'employee' as defined under Section 2(9) of the Act includes casual worker also.”⁸⁰ A full Bench decision of the Karnataka High Court in *ESI Corporation V. Suvarna Saw Mills*,⁸¹ observed that Courts have held time and again that there is no such difference between a casual or temporary or permanent employee for the expression “employee” as defined under the Act and held that the term is wide enough to even include a casual employee who is employed just for a day for wages.

In the case of *Director General, ESI Corporation v. Scientific Instrument Co. Ltd.*⁸², the question that came up for consideration before High Court of Allahabad was whether employees who worked outside of the State of Allahabad which is where the registered office was, could avail of the benefits of the ESI Act, since the main work of the branch office outside Allahabad was to distribute products of a foreign company. The Court answering in the affirmative held that, “If the main business of the company itself at the branch sales offices, is to sell and distribute products of foreign company and the employees working

⁸⁰ *A.P.S.E. Board v. E.S.J.C., Hyderabad*, 1977 L.I.C. 316.

⁸¹ 1980 (57) FJR 154; 1979 L.I.C. 1335 (FB).

⁸² 1995, lab. IC 651, (1990)70 FLR 184,

have been employed by the company basically in connection with this work, it would be difficult to hold that the employees at branch sales offices are not 'employees' within the meaning of the term defined in Section 2(9) of the Act.”

Employees employed through a contractor are covered by the Act and the principal employer is liable to pay the contribution. An apprentice, not being an apprentice engaged under the Apprentices Act, 1961, including an apprentice whose training period is extended to any length of time can also claim the benefits of the Act.

In practice, due to the high rate of migration of labour, relative legal illiteracy as well as lack of awareness initiatives to educate women workers of their rights under the Act, the benefits of the Act are not availed of by women workers, in many instances.

With effect from 01.05.2010, the employees whose wages are up to Rs. 15, 000 are covered by the Scheme of this Act. The benefits that can be availed of are sickness benefit, maternity benefit, disablement benefit and dependent benefit, medical benefit and funeral expenses of the insured person. Section 46(2) provides that periodical payments shall be made to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage. The Act recognizes the liability of the employer to the employee for injury caused by an accident or occupational disease arising out and in the course of his or her employment. Under the Act the principal employer has the primary liability to pay the contribution from the wages paid to the employee.

While medical benefits under the Act, are applicable from the first day of entering insurable employment for self and dependents, sickness benefit becomes admissible only after an insured has paid contribution for at least 78 days for a duration period of 91 days in any two consecutive benefit periods. The amount payable is 70% of the sickness benefit plan. Maternity benefit too, can only be claimed upon the insured women having contributed for at least 70 days in one or two consecutive contribution periods. In the case of a miscarriage or medical termination of a pregnancy the duration of the benefit period is 6 weeks. An additional payment for one month is made for complications arising out of the pregnancy before or after the delivery. The amount payable is the same as the sickness benefit plan i.e. 70%. In the event that the ESI hospital facility is not available for child delivery, a bonus of Rs. 5000 is given to the insured woman or to the wife of the insured person.

Employees who receive daily wages upto and inclusive of Rs. 70 are exempted from paying the employees share of contribution and it is only the employer who continues to pay the contribution.

Every principal and immediate employer has a duty to maintain registers of the details of the particulars of his/her employees.

- (iii) The Act clearly bars an employer from taking punitive action i.e. dismiss, discharge, or reduce or otherwise punish during the period of or maternity benefit, nor shall he, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations to arise out of the pregnancy or confinement rendering the employee unfit for work. The employer is also barred from giving of notice of dismissal or discharge or reduction given to an employee during the period specified above.

(iv) **Employees' Provident Fund and Miscellaneous Provisions Act, 1952**

This Act provides the legal basis for three social security schemes, to act as safety net in cases of old age, disablement, widowhood or to provide for health or education related contingencies. These schemes are the Employees' Provident Fund Scheme, 1952; the Employees' Deposit Linked Insurance Scheme, 1976; and the Employees' Pension Scheme, 1995. The schemes require compulsory contributions from the employee and the employer, the rates of contributions being different for different industries. The Act applies to all public and private sector organizations employing a minimum of twenty workers. On the death of an employee who was a member to the EPF Scheme, the accumulated amount is payable to the nominees or the family members, as the case may be.

(v) **Unorganised Workers' Sector Social Security Act, 2008**

The Unorganised Workers' Social Security Act, enacted in 2008, provides for the formulation of welfare schemes by the Centre and State for the benefit on unorganized sector workers. The Act provides for the registration of workers and issuance of smart cards to the workers with unique social security numbers in order to provide social security to workers in the unorganised sector.

The Act casts a duty upon the Central government to formulate suitable welfare schemes for unorganized workers on matters relating to (a) life and disability cover (b) health and maternity benefits (c) old age protection (d) any other benefit which the Central government may determine. There are 10 schemes formulated by the government under Schedule I to the Act. The Act further states that State governments may formulate welfare schemes relating to provident fund, employment injury benefit, housing, educational

schemes for children, skill upgradation of workers, funeral assistance and old age homes. National and State Social Security Boards are mandated to be constituted under the Act to perform the functions assigned to it under the Act.

The Act defines organized sector, unorganized sector, unorganized worker, and wage worker, self-employed worker and home-based worker thus covering a large area of paid workers in the unorganized sector. The 'unorganized sector' is defined so that it includes enterprises owned by individuals or self-employed workers and where the enterprise employs workers, the number of such workers is less than ten. The 'unorganized worker' includes workers who are home-based, self-employed or wage-workers including workers in the organized sector who cannot avail of the benefits of the six social security legislations given in Schedule II of the Act. It is pertinent to mention that unpaid workers are not covered by the Scheme of this Act.

The Act has come under criticism from various fronts on the grounds that it does not provide a minimum floor level social security for all workers. Further the Act includes a number of existing social security schemes and has not formulated new schemes. Rs. 1000 crores (in the 2010-2011 budget) has been allocated to the National Social Security Fund set up to fulfil the functions of the Act. (Tina Datta, Parthampratim Pal, 2012)⁸³. This is an extremely meagre amount in light of the fact that an allocation of Rs. 22,841 crores (i.e .39% of GDP according to NCEUS) should have been made in order to cover the unorganized sector workers of 423 million (Tina Datta, Parthampratim Pal, 2012).

The Act is silent on the issues related to minimum wages, non-payment of wages, delays in payment, unequal remuneration, and the national minimum wage.⁸⁴ Further, there is no provision to address the issues of women workers such as equal remuneration, special schemes for maternity and childcare benefits, decent work conditions and protection from sexual harassment.⁸⁵ The Act must be amended to include provisions that address the aforesaid issues. Further, it is recommended that the non-discrimination and social security laws are extended to workers in the unorganized sector. It is also recommended that a minimum floor level social security is guaranteed to all workers.

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⁸⁴ Paromita Goswami, 'A Critique of the Unorganised Workers' Social Security Act', *Economic and Political Weekly*, Vol.XLIV, No.11, March 14, 2009

⁸⁵ Recommendations for amendments in this regard were made by the *Report of the Working Group on Empowerment of Women for the XI Plan*, Ministry of Women and Child Development, Government of India.

5. Industrial Relations

(i) The Trade Unions Act, 1926

The Trade Unions Act was enacted in 1926 to give recognition, protection and legal status to trade unions. A trade union has been defined as any combination whether temporary or permanent, formed primarily for the purpose of regulating relations between workmen and employers or between workmen and workmen or between employers and employers or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more trade unions. A trade dispute has been defined similarly to an industrial dispute as defined in the Industrial Disputes Act. A minimum of 7 members is necessary for registration of a trade union. All trade unions must be registered in order to avail of the protection guaranteed under the Act. The Act gives immunity to trade unions from criminal conspiracy in trade disputes; and from civil suits in respect of acts done in furtherance of a trade dispute.

Article 19(1) (c) of the Constitution of India guarantees the fundamental right to every citizen to freedom of association. Workers in the unorganized sector can form trade unions and assert their rights. The question that often comes up for consideration by the Courts is whether a particular grievance is a trade or industrial dispute thereby giving a forum for the aggrieved trade union to air its grievances. Further collective agreements are absolutely essential in every employment for women workers to express and negotiate their rights.

While there is an increase in union membership of women in the recent past due to an increase of unionization of unorganized workers, there is no increase of women in positions of leadership both of industry level unions and central trade union organizations. (Sankaran, Roopa M., 2011).⁸⁶ Hence it is essential that women workers are empowered to become more active in collective bargaining and unionization.

(ii) Industrial Disputes Act, 1947 (“ID Act”)

The ID Act makes provision for the investigation and settlement of industrial disputes and provides certain safeguards for workers. An industrial dispute is defined as a dispute or difference, between employers and employers, between employers and workmen or even between the workmen themselves, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

⁸⁶ Kamala Sankaran & Roopa Madhav, *Gender Equality and Social Dialogue in India*, Working Paper 1/2011, ILO.

The Act provides for payment of compensation to the workmen on account of closure or lay off or retrenchment. It also provides for the procedure for obtaining prior permission of the concerned government for closure or lay off or retrenchment. The Act also specifies what amounts to unfair labour practices on part of an employer or a trade union or workers.

The Act was amended by the Industrial Disputes (Amendment) Act 2010 which came into effect on 15.9.2010. By the amended Act an individual aggrieved workman can approach the Labour Court or Tribunal directly. The Amendment Act further provides for the constitution of a Grievance Redressal Committee in industrial establishments where there are more than 20 workers. The Grievance Redressal Committee shall consist of equal number of members from the employers and workmen and the maximum number of persons in the Grievance Redressal Committee shall be six. Further, that if there are only two members then atleast one should be a woman and if there are more members then the number of women representatives should be proportionately increased. An individual workman/workwoman may make his or her grievances directly to the Committee.

A person employed in an industry to do any manual, clerical, skilled, unskilled, technical, operational or supervisory work for hire or reward is covered by the Act. The Act applies also to those persons who have been dismissed, discharged or retrenched in connection with or as a consequence of a dispute or whose dismissal, discharge or retrenchment has lead to that dispute. The Act however, does not apply to persons employed mainly in managerial or administrative capacities, persons in supervisory capacities who draw more than Rs. 10,000 per month or executing managerial functions mainly or persons subject to Army Act, 1950, the Air Force Act, 1950 or the Navy Act, 1957 or those in police service or officers or employees of a prison.

Section 2(j) of the Industrial Disputes Act, 1947, was amended by the Industrial Disputes (Amendment) Act, 1982, which, through section 2(c), substituted the existing section 2(j) by a new one, whereby hospitals and dispensaries were excluded from the definition of the term Industry. However, section 2(c) of the Industrial Disputes (Amendment) Act, 1982, has not yet been notified and enforced.

Over the decades, the definition of 'industry' has come under scrutiny and interpretation by the Courts. It is important that 'industry' has a wide ambit in order that workers can claim their legal rights by raising an industrial dispute. In 1953, in the case of *D.N. Banerji vs. P.R. Mukherji*⁸⁷, the question before the court was whether a municipality may be considered an industry. In a Constitutional Bench decision, the Court held that an

⁸⁷ AIR 1953 SC 58

industrial dispute includes disputes between municipalities and their employees in branches of work that can be regarded as analogous to the carrying on of a trade or business.

Thereafter, in 1960, in the case of *State of Bombay vs. Hospital Mazdoor Sabha*⁸⁸, the Court held that hospitals come under the definition of industry. In the case of *Corporation of the City of Nagpur vs. Its Employees*⁸⁹, the Court held that departments such as namely health, education, tax and general administration of a municipality were held to be industry. In 1970, in the *Management of Safdarjung Hospital, New Delhi vs. Kuldip Singh Sethi*⁹⁰, a six judge bench unanimously held that Safdarjung Hospital was not an industry and overruled the case of Hospital Mazdoor Sabha where hospital was held to be an industry.

In 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa*⁹¹, a seven judge bench overruled a number of cases, including the *Management of Safdarjung Hospital* case. The Court held that if an establishment fulfilled the triple test of systematic activity, co-operation between employer and employee and production and/or distribution of goods and services it would come under the definition of industry. This landmark Constitutional bench decision is presently followed even though there have been several judgements⁹² subsequently that have restricted interpretations to 'industry'.

Currently, chapters VA and VB are the relevant chapters which provide for steps to be taken for lay-off, retrenchment and closure. The Chapters VA applies only to industrial establishments employing 50 or more persons and Chapter VB applies to industrial establishments employing 100 or more persons. Effectively, grievance redressal mechanisms are not available to workers to whom this Act is inapplicable. Hence, apart from a very small minority of organized workers to whom the ID Act applies, all other workers are left with no alternative to raise disputes for the settlement of issues that arise in the course of their employment. Even though all the Acts that cover the unorganized sector impose penalties on employers for contravention of the provisions of the Act, the penalties are of a minimal amount and the grievance of the workers are irrelevant in this scheme.

One of the biggest drawbacks of workers in the unorganized sector is that they are not covered by the Industrial Disputes Act, 1947 if they cannot raise an industrial dispute. As a result unorganized sector women workers have no recourse if they are illegally dismissed or discharged from their services. Therefore even if women were to unionize, they can be arbitrarily dismissed from service and will have no recourse to challenge this

⁸⁸ AIR 1960 SC 610

⁸⁹ AIR 1960 SC 675

⁹⁰ AIR 1970 SC 1407

⁹¹ Air 1978 SC 548

⁹² See *Coir Board, Ernakulum, Cochin vs. Indira Devi*, AIR 1998 SC 2801; *State of Uttar Pradesh vs. Jai Bir Singh*, (2005) 5 SCC 1.

dismissal (Hensman, 2001)⁹³. Hence an amendment to the law is absolutely essential so that all workers, both in the organized and unorganized sector have adequate recourse for grievance redressal during employment.

Employees who perform supervisory roles are not covered by the IDA. As a result, women who are senior and who would ideally be a part of the negotiating team are excluded from the scope of collective agreements and therefore the interests of women workers are not reflected in collective agreements (Sankaran, Madhav, 2011).⁹⁴

(iii) **Industrial Employment (Standing Orders) Act, 1946**

Following the recommendation of the Labour Investigation Committee (1946), the government of India enacted this legislation to precisely define the conditions of employment regarding recruitment, work timings, holidays, termination, suspension, means of grievance redressal and so on. For the purpose of this legislation, industrial establishments include formal sector establishments such as factories, plantations, workshops, ports and mines that employ a minimum of one hundred employees. Standing orders are Rules relating to matters which are set out in the Schedule. The Schedule to the Act specifies matters to be provided in Standing Orders under the Act which are classification of workmen e.g. whether permanent, temporary, apprentices, probationers, badlis; shift working; means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants, etc.

The Industrial Employment (Standing Orders) Central Rules 1946, under this Act provides detailed description of what amounts to misconduct at workplace and provides for disciplinary action against the same. Provisions pertaining to sexual harassment are included in the Model Standing Orders that the Rules provide. These Rules will now have to be consistent with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, (SHA) and in the eventuality of any inconsistency the provisions of the SHA will prevail.

PART IV- Limited Applicability of Labour Laws:

1. Domestic Workers:

Despite constituting a significant segment of the working population of the country, there is very little legal regulation of the working conditions of domestic workers. This is

⁹³ Rohini Hensman, *Organizing against the Odds: Women in India's informal sector*, Socialist Register, 2001.

⁹⁴ Kamala Sankaran & Roopa Madhav, *Gender Equality and Social Dialogue in India*, Working Paper 1/2011, ILO.

attributable primarily to its location in the unorganized sector, which is not entirely within the regulatory framework of labour law. The domestic work sector is marked by heterogeneity with respect to mode of employment, skill requirements for different work, local practices and expectations of employer-worker relations and so on, which defeats any standardized form of regulation.⁹⁵ Additionally, the site of work being the domestic sphere, which has historically been seen as outside the scope of legal regulation, and the nature of the work being that which continues to be devalued as non-productive i.e. work mostly done by women in the household, such as cooking, cleaning, caring etc., are also factors responsible for the absence of any legal regulation of domestic work.⁹⁶ As a result, domestic workers have minimal legal protection. Some states, like Kerala, Karnataka, Maharashtra, Andhra Pradesh, Bihar and Rajasthan have notified minimum wages for domestic work. But for the most part, domestic workers do not have social security, maternity benefits, definite conditions of work or any other labour rights that they can enforce against their employers or placement agencies.

The Domestic Workers Welfare and Social Security Bill is under consideration. The Bill covers domestic workers who work in a 'household' or in 'similar establishments'. It mandates the setting up of a Domestic Workers Welfare Fund to be maintained by Funds from the Central and State governments as well as contributions from beneficiaries. The Bill further provides for working hours, weekly day of rest, minimum wages for both time-rate and piece rate, overtime wages and rest at periodic intervals. Minimum wages can be for hourly, daily or monthly employment.

Further, laws such as the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979; the Contract Labour (Regulation and Abolition) Act, 1970 and the Shops and Establishments Act, 1954 are applicable to domestic workers. The recently enacted Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2012, covers domestic workers, thus providing legal recourse to domestic workers.

It is essential that a law is passed with immediate effect in order that a legal framework for the rights of domestic workers is provided. The Act will provide for a regulatory mechanism and will also lead to the recognition of the devalued and invisible labour performed by domestic workers, and open up the private domain of the family to the application of labour laws.

⁹⁵ Neetha, N and Rajni Palriwala. 2011. *The Absence of State Law: Domestic Workers in India*, Canadian Journal of Women and the Law, Vol. 23, No.1, pp. 97-119

⁹⁶ Ibid.

2. Sex Workers

Sex work in India is criminalized under the Immoral Traffic (Prevention) Act, 1956. Sex workers have been demanding the decriminalization and legalization of sex work on the grounds that it is a legitimate form of work. Internationally, the ILO in a Report brought out in 1998 observed that ‘policy makers have shied away from directly dealing with prostitution as an economic sector’ and recommended that in the cases of ‘adults who freely choose sex work the policy concerns should be improving their working condition and social protections so as to ensure that they are entitled to the same labour rights and benefits as other workers’.⁹⁷

The criminalization of sex work affects the bargaining position of sex workers and the criminality makes sex workers vulnerable to harassment and abuse at the hands of the police, local hoodlums and abusive brothel owners. It is therefore crucial to take into consideration that sex work is a legitimate form of work; and that the purpose of the law should be to protect the labour rights of sex workers and address workplace harms.⁹⁸ Child prostitution and trafficking of women and children for prostitution should, however, continue to be criminalized.

Sex workers collectives posit sex work in the unorganized sector, where sex workers work under unequal bargaining conditions, similar to domestic workers, construction workers, brick kiln workers and others. As a recent study of more than 3000 sex workers across India shows, that prior to doing sex work, most women had worked as domestic workers or as agricultural labourers, and chose to do sex work to supplement their meager income.⁹⁹ The same study also revealed that there is considerable fluidity between women doing sex work along with other occupations.

It is recommended that adult sex work is decriminalized and recognized as labour in order that sex workers may have access to labour rights. Further sex workers should also be covered by a group insurance scheme as recommended by the National Commission for Women.

PART V – Conclusions

Application of the law and access to labour rights to women workers in the unorganized sector and to unregulated workers in the organized sector is minimal. A closer look at some of the laws enacted for application to the unorganized sector reveals that

⁹⁷ The Sex Sector: The economic and social bases of prostitution in SE Asia, edited by Lin Lean Lim, ILO, Geneva, 1998

⁹⁸ Kotiswaran, Prabha, *Dangerous Sex, Invisible Labour*, Oxford University Press, 2012.

⁹⁹ <http://sangram.org/Download/Pan-India-Survey-of-Sex-workers.pdf>

firstly, many of these laws do not provide entitlements to very basic rights such as access to a grievance redressal system which is available to workers in the organized sector and in some instances even clean drinking water/decent living conditions, as in the case of migrant workers. In the organized sector itself, NCEUS findings indicate that actual coverage of labour regulations in India is very small.¹⁰⁰ Coverage of chapter VB of the Industrial Disputes Act, 1947, is 1.4% of the total workforce or 3% of the hired workforce; coverage of the ESI Act is 87.5%; that of the Factories Act is 73.5% and that of the Shops and Establishments Act is 44.7%.¹⁰¹ Additionally, lack of effective and stringent implementation of existing laws renders existing laws and rules useless.

The 'triple burden' on women's work i.e. inside the household, outside of it and within the larger economy must be recognized and addressed. Women workers have practically no control over their own conditions of work, starting from the process of doing the work till the proceeds of the work are received.¹⁰² There are structural constraints, which are specifically linked to the informal sector, such as the casual nature of work, insecurity in terms of employment and income associated with flexible labour. Unpaid work for women is one manifestation of the unjust terms of social division of labour between men and women.¹⁰³ Within the household, women engage in work that "frees" the male worker to work longer hours for capital and so increases the rate of surplus value.¹⁰⁴ Domestic work, mostly done by women, is often not recognised in terms of work or paid in monetary terms.

Due to the feminisation, sexual division of labour and gender division of work in the unorganized sector there is an imminent need for the coverage of women workers through labour laws and policy to address the exploitation faced. The National Commission for Enterprises in the Unorganized Sector (hereinafter referred to as 'NCEUS'), in its Report found that there was a need to consolidate labour laws in order that key terms such as 'employee', 'employer', 'establishment' are uniformly defined and proposed the formulation of a National Labour Code for this purpose.¹⁰⁵ The NCEUS also found that collective bargaining should be considered the main form of joint decision making in resolving

¹⁰⁰ *Ibid.*

¹⁰¹ National Commission for Enterprises in the Unorganized Sector, *The Challenge of Employment in India, An Informal Economy Perspective*, Volume I, Main Report, 2009 at p. 170.

¹⁰² Jayati Ghosh, 'Macro-Economic Trends and Female Employment; India in the Asian context', Paper presented at seminar on *Gender and Employment in India; Trends, Patterns and Policy Implications*, organised by the Indian Society of Labour Economics and Institute of Economic Growth, New Delhi, December 18-20, 1996

¹⁰³ Brinda Karat, *Survival and Emancipation Notes from Indian women's struggles*, Three Essays, New Delhi, 2005

¹⁰⁴ Selma James and Maria Rosa Dalla Costa, *The Power of Women and the Subversion of Community*, Bristol Falling Wall Press, 1973

¹⁰⁵ National Commission for Enterprises in the Unorganized Sector, *The Challenge of Employment in India, An Informal Economy Perspective*, Volume I, Main Report, 2009 at p. 134.

interest disputes.¹⁰⁶ Increased representation of women in trade unions and the constitution of women's wings in trade unions, where it is absent, are essential in this context.

Further home-based workers must be recognized as workers so that they may avail of legal rights. A system needs to be developed for calculation of wages of home-based workers including to collect data on home-based workers.

In line with the recommendations of the Second National Commission on Labour (2002), and the National Commission for Enterprises in the Unorganised Sector, it is recommended that an all India service for labour administration is created. This will provide for professional experts in the labour departments, autonomous bodies, and labour adjudicators. For purposes of faster adjudication process, the institution of Lok Adalats must be encouraged to enable faster disposal of cases.

Time use surveys must be used to document the unpaid labour performed by women workers in addition to national data sets. NSSO Surveys have been unable to capture work done by the 'difficult to measure sectors' ((Hirway, 2002)¹⁰⁷. It is therefore essential that this method is used as an additional mechanism to capture the extent to women's work in the informal sector which goes non-reported.

In addition, a National Policy for Older Women must be implemented by the Central and State governments. Older women who contribute to the informal economy through their unpaid labour and remunerated work in the unorganized sectors are a vulnerable group.

Finally it is recommended that legal literacy and legal aid should be provided at regular intervals to workers in the unorganized sector. Continuing social audits of the operation of labour laws with special emphasis on registrations, inspections, amongst others, must be carried out.

¹⁰⁶ *Ibid.*

¹⁰⁷ Indira Hirway, *Employment and Unemployment Situation in the 1990's: How good are NSS Data?*, Economic and Political Weekly, May 2002.

Table on Law Reforms and Recommendations on Some Labour Laws Impacting Women:

Name of the Law	Law Reform	Recommendations related to Implementation	Related Ministries
<p>The Maternity Benefit Act, 1961.</p>	<p>(a) Maternity leave must be at par with Central Government Maternity leave period for employees.</p> <p>(b) Paternity Leave provisions should be provided in the Act.</p> <p>(c) Adoptive parents must be included in the Act.</p> <p>(d) Provisions for Staggered hours and breast feeding breaks must be incorporated in the Act/Rules for the first two years after the child is born.</p>	<p>(a) There should be universal availability of maternity benefits and childcare facilities to all women workers across the organized and unorganized sectors.</p>	<p>Ministry of Labour and Employment</p>
<p>Equal Remuneration Act, 1976</p>	<p>(a) Remuneration based on 'work of equal value' must be incorporated into</p>	<p>(a) Better implementation of the Act is required to ensure that women workers in the</p>	<p>Ministry of Labour and Employment</p>

	<p>national laws.</p> <p>(b) Amendment of Section 2(h), 4 and 5 to include ‘work of equal value’ in addition to or in lieu of the phrase ‘work of similar nature.’</p>	<p>unorganized sector get paid the same wages as the male workers, for work of equal value.</p>	
<p>Minimum Wages Act, 1948.</p>	<p>(a) Statutory imposition of a NFLMW¹⁰⁸ so that wages do not fall below a minimum level. The NFLMW should not be a mere subsistence wage, but should enable the worker to provide for herself and her family the essentials of food, clothing and housing, education of children, medical security, social security needs and insurance against contingencies such as old age.</p> <p>(b) The Act should apply to all employments</p>	<p>(a) Unionization, availability of legal grievance redressal mechanisms and legal awareness are necessary to ensure access to minimum wages.</p>	<p>Ministry of Labour and Employment</p>

¹⁰⁸National Floor Level Minimum Wage (NFLMW).

	<p>including non-scheduled employments.</p> <p>(c) The total number of Inspectors should be increased.</p> <p>(c) The penalty for non-payment of minimum wage and contravention of other provisions of the Act must be increased from Rs 500 to Rs 5000.</p>		
<p>The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (NGNREGA)</p>	<p>(a) Instead of 100 days of entitlement of the household, entitlement for 100 days should be made to the individual.</p> <p>(b) There must be separate bank accounts for women instead of joint accounts.</p> <p>(c) Application procedure should be simplified.</p>	<p>(a) Better transparency with regard to the utilization and implementation of funds.</p> <p>(b) Elderly, migrant, physically challenged women must be better protected and not be excluded only due to documentary evidence and eligibility criteria.¹⁰⁹</p> <p>(c) The intervention of informal intermediaries and/or private</p>	<p>Ministry of Rural Development</p>

¹⁰⁹ Smita Gupta, 'Women in India's National Rural Employment Guarantee Scheme', in Shahra Razavi (ed), The gendered Impacts of Liberalization, Towards "Embedded Liberalism", Routledge, 2009

		contractors, who extract a share of the wages from workers should be checked and eliminated.	
The Factories Act, 1948	<p>(a) It is essential that the law i.e. Section 66(1)(b) is amended as soon as possible in order that women are able to do night work along with effective regulations to protect the health, safety and welfare of the women workers.</p> <p>(b) Discriminatory provisions as Section 22 (2), 27, 87 must be amended or repealed. These prohibitions classify women into a vulnerable category which is not at par with male workers.</p>		Ministry of Labour and Employment
The Building and Other Construction (Regulation of Employment and		<p>(a) Efforts should be made for the registration and renewal of registration of workers to the Welfare Board.</p> <p>(b) Conditions of work,</p>	Ministry of Labour and Employment

<p>Conditions of Service) Workers Act, 1996.</p>		<p>payment of wages, safety, and security of workers in the case of women construction workers should be the focus of the government with regard to construction workers.</p>	
<p>Beedi and Cigar Workers (Conditions of Employment) Act, 1966</p>		<p>(a) Additional measures must be taken to guarantee wages, better conditions of work etc. for women employed in household beedi making.</p> <p>(b) A policy must be evolved to regulate the minimum number of beedis to be rolled per hour by any worker.</p>	<p>Ministry of Labour and Employment</p>
<p>The Contract Labour (Regulation and Abolition) Act, 1970</p>	<p>(a) Contract Workers must also be protected under other acts such as IDA Act, 1947 etc.</p> <p>(b) A Contract Labourer must be treated as workman.</p> <p>(c) In line with the NCEUS¹¹⁰</p>	<p>(a) The recommendations of the NCW that the debts owed by contract labour to the employers are waived; contract labourers are treated as workmen so that they can avail of the benefits of the Employees Compensation Act; the Industrial Disputes Act is made applicable to contract labourers; and</p>	<p>Ministry of Labour and Employment.</p>

¹¹⁰ The National Commission for Enterprises in the Unorganized Sector (NCEUS)

	recommendation, contract workers, must be protected by various provisions of laws – minimum wages, timely payment of wages, safety and welfare provisions at the worksite, ESIS and PF benefits.	provisions for equal remuneration may be implemented. ¹¹¹	
Unorganized Workers Sector Social Security Act, 2008.	(a) Provisions related to minimum wages, non-payment of wages, maternity benefits, and decent work conditions must be included in the Act.	(a) Larger funds must be disbursed by the government so that new schemes can be set up under the Act. (b) A minimum floor level social security must be guaranteed to all workers.	Ministry of Labour and Employment
Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.	(a) Domestic Workers: The Domestic Workers Welfare and Social Security Bill must be enacted. The Bill covers domestic workers who work in a 'household' or in 'similar	(a) Workers in the unorganized sector will have to be informed of their rights under this law and also be provided with support through trade unions or NGO's for making complaints against either co-workers or employers.	Ministry of Women and Child Development

¹¹¹ Review of Laws and Legislative Measures Affecting Women by National Commission for Women, No.33, The Contract Labour (Regulation and Abolition) Act, 1970. <http://new.nic.in/firmReportLaws33.aspx>.

	<p>establishments'. It mandates the setting up of a Domestic Workers Welfare Fund to be maintained by Funds from the Central and State governments as well as contributions from beneficiaries. The Bill further provides for working hours, weekly day of rest, minimum wages for time-rate and piece rate, overtime wages and rest at periodic intervals. Minimum wages can be for hourly, daily or monthly employment.</p> <p>(b) Sex Workers: It is recommended that adult sex work is decriminalized and recognized as labour in order that sex workers may have access to labour rights. Further sex workers should also be covered by a group insurance scheme as</p>		
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	recommended by the National Commission for Women.		
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Note: The recommendations and the reforms suggested above are not exhaustive and are based on the research and feedback received from the civil society groups, academics and activists working with them. There is further scope of reforms and better implementation possible for all Labour Laws which has not been a part of this table above.

Moreover, the Acts mentioned in the table and the ones listed below are analysed in detail in the research paper itself. However, due to further research and time constraints no substantial recommendations have been made for the legislations listed below, therefore, are not tabulated above.

Following Legislations concerning Ministry of Labour and Employment have not been included in the table:

1. Industrial Employment (Standing Orders) Act, 1946 Ministry of Labour and Employment
2. The Trade Unions Act, 1926
3. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952
4. The Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979
5. The Apprentices Act, 1961
6. The Employees' Compensation Act, 1923
7. The Employees' State Insurance Act, 1948
8. Mines Act, 1952

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