

# RESURRECTING/RENEGOTIATING LABOUR RIGHTS IN A GLOBALISING WORLD : CRITICAL THEORY AND CONTRACT LABOUR

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## Using Critical Legal theory in Contract Labour

### Introduction:

Critical Legal Studies with its focus on transformative efforts is particularly relevant to labour law. The need to identify a vision for the law from which reasoning must proceed is relevant at a time when this vision for labour law seems to be either absent or disorganized. The vision of a socialist state of India, dominated labour jurisprudence for a long time. It helped judges read into a statute, rights that were not expressly provided for<sup>1</sup> and also paved the way for statutes to be enacted to provide for social justice. One such instance is the Contract Labour (Regulation and Abolition) Act, 1970 in short the CLRA<sup>2</sup>. Recent Judgements have been seen as a setback to this legislation. There has been a marked shift in judicial stance towards this issue, which is being highlighted in this paper.

Contract Labour in India represents a system of hiring people through middlemen, i.e. contractors, who are informal hiring agencies, by employers in both the public and private sector of the industry. This system of hiring is an ancient system, prevalent since colonial rule in India. Indentured labour was contract labour, who worked to pay off a debt or advance paid to them or their families. Modern industry introduced a system of hiring that was transparent and dignified, being based on skills rather than bondage. However, in the area of unskilled labour there continued a practice of hiring through contractors, which remained unchanged.

The system of contract labour denies workers their status of workmen of the employer and a denial of liability and responsibility by the employer. It

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- 1 The provisions of the Industrial Disputes Act on the scope of the conditions of recruitment, or the definition of an industry, or the industrial adjudicators power to intervene and set aside unfair terminations have all been cited as examples of reading into the Act rights that improved the condition of labour.
- 2 The legislation was drafted following the recommendations of the National Commission of Labour, which observed that the contract labour system worked to the disadvantage of the employee and recommended that it should be abolished. The Commission was chaired by Justice P.B.Gajendragadkar who gave the judgement in the Standard Vacuum refining Co. of India v. Its workmen and ors. All India Reporter 1960 Supreme Court 948, a decision that influenced the drafting of the provisions of the CLRA

results in uneven benefits at work between those in regular employment and contract workers. It often results in what is termed as disguised employment, where the employer can deny that the worker is in a relationship of employment.

This system of contract labour is now being promoted actively as the simple solution to all labour 'problems', i.e. problems of unionization, demands for benefits and responsibilities at the workplace, complete control over recruitment and removal, profits linked to wages, in short all legal protection at the workplace. This system till now a feature of unskilled labour is now becoming a feature of employment across the board with contract workers replacing a regular workforce reaching a situation of permanent temporary workers or workplaces and industries with no workers. Contract workers are now commonly seen in government departments, universities even, where the work is often perennial and continuous in nature.

This paper is examining judicial response to the issue in the background of two cases of the Supreme Court, the judgement in the SAIL case<sup>3</sup> and the judgement in *State of Karnataka v. Umadevi*<sup>4</sup>.

### **The SAIL Judgement:**

The decision of a Constitutional Bench in this case was deciding on the validity of an earlier three judge bench decision rendered in *Air India Statutory Corporation v. United Labour Union and others*<sup>5</sup>. The case reached the Supreme Court on appeal from the decisions of various High Courts, which had given judgements based on the *Air India* decision.

The issue was whether the Contract Labour (Regulation and Abolition) Act, 1970 envisaged the automatic absorption of contract labourers as regular employees on issuance of a Notification prohibiting Contract Labour.

The *Air India* case was a decision based on a petition to enforce a notification issued in 1976 prohibiting "employment of contract labour on and from December 9, 1976 for sweeping, cleaning, dusting and watching of buildings owned or occupied by the establishments in respect of which the appropriate Government under the said Act is the Central Government". The petitioners brought to the notice of the Court the fact that the notification was not enforced till 1992 and asked for directions to enforce the notification and absorb the workers into the establishment.

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3 *Steel Authority of India v. National Union Water Front Workers*, LLJ 2001 SC 2394 AIR 2006, SC 1806.

5. LLJ 1997 SC 1806.

The Court in this case held that the term appropriate government must be understood in the light of the development of law under Article 12 of the Constitution of India and a public law interpretation is the appropriate principle of construction. Holding that the worker had a fundamental right to work, the Court held that meaningful right to life springs from continued work to earn their livelihood. In effect, the Court held that the right to employment, therefore, is an integral facet of the right to life. The contract labour once a prohibition notification was issued were entitled to be absorbed in the establishment.

While overruling this decision the constitutional bench in SAIL held

*“We are afraid we cannot accept the contention that in construing that expression or for that matter any of the provisions of the CLRA Act, the principle of literal interpretation has to be discarded as it represents common law approach applicable only to private law field and has no relevance when tested on the anvil of Article 14, and instead the principle of public law interpretation should be adopted.”*

Thus while *Air India* held that the CLRA must be read in the light of Fundamental Rights, Directive Principles of State Policy and particularly the Right to Equality the SAIL case proceeded almost entirely on the statute itself holding:

*“Of course, the preamble to the Constitution is the lodestar and guides those who find themselves in a grey area while dealing with its provisions. It is now well settled that in interpreting a beneficial legislation enacted to give effect to a directive principle of the State policy, which is otherwise constitutionally valid, the consideration of the Court cannot be divorced from these objectives. In a case of ambiguity in the language of a beneficial labour legislation, the Courts have to resolve the quandary in favour of conferment of, rather than denial of, a benefit on the Labour the Legislature but without re-writing and/or doing violence to the provisions of the enactment.”*

The Court then concluded that the CLRA only provided for prohibition of contract labour and not for their absorption in the establishment.

The SAIL judgement does justice to the principles of statutory interpretation and holds that violence must not be done to clear statutory provisions. The Court felt that when the legislature is totally silent on the consequences of prohibition of contract labour, solutions must not be provided for by judiciary.

The judgement is faultless in its interpretation that when statutory remedies are provided there must not be any other remedy added on however fails in another principle of statutory interpretation that the legislation must be interpreted to prevent the mischief that it was meant to address. If the CLRA was enacted to address the issue of prohibition of contract labour and the legislation is flouted by the State itself in total defiance of the Law, then must the Court interpret it to serve the needs of contract labour or interpret it in a way that no worker would want the prohibition which must entail loss of employment is one of the questions this decision raises. In order to understand the judgement a little better a brief mention of the Contract Labour (Regulation and Abolition) Act, 1970 is important.

The Contract Labour (Regulation and Abolition) Act, 1970 was drafted following the decision in the case of *Standard Vacuum Refining Co. of India v. its workmen and Ors*<sup>6</sup>, and by section 10 of the Act provided for prohibition of contract labour and its regulation. It does not provide specifically for the absorption of the contract labour once it has been abolished.

In the *Standard Vacuum* case the Court laid down the principle that *“In a given case, the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions on which contract labour is employed”*.

Following this reasoning and finding that the workers were treated unfairly the Court upheld the tribunals order prohibiting the use of contract labour and set up a scheme for their regularization.

Thus, the three judgments in *Standard Vacuum*, *Air India* and *SAIL* reflect three approaches to an issue, one to judge a situation on its facts and in case it was on observable fact that there were discriminatory working conditions then contract labour would need to be interfered with by an adjudicator, without any reference to constitutional or fundamental rights. The other approach as demonstrated in *Air India* was to judge a situation in the light of constitutional obligations and provide remedies that were appropriate and completely within the jurisdiction of a court to do ‘complete justice’. The *SAIL* case rejects both approaches and favours one which gives effect to the letter of the legislature.

### **Principles emerging from the cases:**

The value emerging from the *SAIL* decision is that the role for judges is to interpret statutes as dealing with a given situation completely with little role

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6 AIR 1960 SC 948.

for judges to be creative in dealing with disputes. The role of a judge would be a mechanical one to give effect to the law as it appears. Further, the impact of the judgement on entitlements, or on the capacity of the statute to address the situation competently seems to be beyond the role of the adjudicator.

One of the arguments made in the SAIL case is worth examining especially since it has been reflected in the following case of Umadevi. The argument made against the automatic absorption of contract workers was that such absorption would violate statutory service rules. It was argued by the Solicitor General that in every government company/establishment which is an instrumentality of the State there are service rules governing the appointment of staff providing among other things for equality of opportunity to all aspirants for posts in such establishments, calling for candidates from the employment exchange and the reservation in favour of Scheduled Castes/Scheduled Tribes/Other Backward Classes, so a direction by the Court to absorb contract labour en bloc could be complied with only in breach of the statutory service rules. The Court agreed with and upheld this argument.

It is interesting that the Court did not consider the engagement of contract labour in the first instance to be violative of the statutory service rules depriving not only contract labour but also all others equal opportunities for employment. It may be worth examining whether the Government and its instrumentalities in engaging contract labour for several years violating the service rules by avoiding regular employment is an illegality or to direct absorption of persons who have anyway put in several years of service would be perpetuating an illegality.

It is also worth examining the role of the state in the use and the perpetuation of contract labour. The public sector, which has the obligation to provide employment on fair and decent terms to all sections of society, is the largest user of contract labour. The inequities in terms of employment of contract labour and regular labour are disturbing. It has been brought before the Hon'ble Supreme Court in several cases, of contract labour not being paid a minimum wage<sup>7</sup>. In cases of contract labour, there have been instances of persons working for as long as twenty years in the same establishment and the existence of a contractor is only a device to deny entitlements. In none of the cases, has a serious note been taken about the role of the state in abolishing contract labour, or on casting special obligations on a state instrumentality. The only reference to state obligation to provide equal opportunities is made in an effort to stall the absorption of contract labour. No undertaking was ever asked nor was it given that the state will ensure that contract labour would be abolished in its

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7 *Catering Cleaners of Southern Railways v. UOI.*

establishments, or that action would be taken to ensure that contract labour where used, will not be subjected to discriminatory conditions of employment.

Following the decision in the SAIL case, the recommendations of the Second National Commission on Labour, which submitted its report in 2002, refused to recommend the absorption of contract workers on an order of prohibition. It is important to note here that in case of statutes for other vulnerable groups like child labour, abolition of manual scavenging and bonded labour there is an obligation to rehabilitate the workers once their employment is prohibited. A legislation like the CLRA which is openly flouted must have stringent measures against its violation. The employer must not be allowed to use and disengage labour at will, without paying attention to minimum conditions of work. This is only introducing a hire and fire policy into labour law, which has never been the intention of legislation. To introduce such a measure, in a back handed way by engaging contract labour is a fraud on the Constitution.

The reasoning in the SAIL case also finds a resonance in the case of Uma Devi, which is discussed below. If the SAIL case used a private law interpretation, the Uma Devi case uses a public law interpretation to arrive at the same result.

### **The Uma Devi case**

The case of *Secretary State of Karnataka and ors v. Umadevi and ors*<sup>8</sup> restated the law on an issue closely connected to the contract labour that is of contractual workers with the State. The petition was brought before the constitutional bench following conflicting decisions of the Supreme Court and various High Courts, on the issue of regularization of workers who had put in several years of service with the State but who were neither paid on par with regular workers nor were they receiving any benefits from the state. The petition was argued on the basis of Article 14 of the Constitution guaranteeing equal treatment and Article 16 which provides for equal opportunities in employment, alleging that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a long period.

It was also contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. In a country like India and unequal bargaining power between the workers and the employer-State, it would also be violative of A.21 to not regularize their services. The employees were relying on an earlier decision of the Supreme Court in *State of Haryana v. Piara Singh*<sup>9</sup>, which had held that:

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8 AIR 2006 SC 1806.

9 MANU/SC/0417/1992.

*“The main concern of the Court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of A. 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer.”*

The Court then proceeded to lay down that though the preferred route of recruitment was through the prescribed agency, but when exigencies of administration called for adhoc or temporary appointments, these appointments must also be made as far as possible from employment exchanges, and unqualified persons ought to be appointed only when qualified persons are not available and the case for regularization must be considered if the employee is eligible, qualified and the appointment does not run counter to the reservation policy of the State.

This position of Piara Singh was strongly disagreed with by the Court in Umadevi holding that this can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. The Court said that they would not grant a relief, which would amount to perpetuating an illegality. Going further, the Court also said that it could not impose a total embargo on such casual or temporary employment. The Court overruled the arguments on the basis of Article 14 and 21 contending that in the name of individualizing justice, the Court cannot close its eyes to the constitutional scheme and the right of the numerous as against the few who are before the Court.

Regularising workers who have put in work for several years and there is no sign that the work is at an end, does not have to be seen as a way of perpetuating an illegality but should be seen in the light of an unjust enrichment, and of the state being a responsible employer, taking responsibility for its delays that forced an employee in a temporary position without opportunities to permanent employment, neither for that particular employee nor for any other. Not to notify vacancies and using temporary workers is itself a violation of the constitutional obligation to offer equal employment opportunity. This should not be compounded with the right to summarily reject their demands without an undertaking from the State that this state of affairs will not be allowed to continue. The Court could have done complete justice by regularizing the services of workers who have put in several years of work and to warn the State that in case it is unable to notify vacancies and open recruitment opportunities, the Court is compelled to uphold

the rights of persons whom the state has taken advantage of.

It is clearly unethical to employ persons for work that is not temporary. This must be case for all establishments. There can be no justification for permanent temporary workers especially when they are discriminated against in terms of wages and benefits. The State being a model employer not oriented towards profit, must take greater responsibility of the ensuring that there is no illegality or deliberate flouting of the constitutional scheme. It cannot penalize those who are in position to set out their terms of employment. The reservation policy cannot be used to perpetuate an illegality. There must be a maximum period for which a person may be kept in a temporary position. The employee cannot be held liable for the illegal action of the appointing authority.

### **Role for judicial activism**

A conflict of interests is a phenomena that Courts have to address all the time. The Supreme Court while evaluating interests has many choices that it may take. An interesting range of options have been set out by Prof. Srivastava which are discussed here.<sup>10</sup> Before an evaluation of interests is undertaken it is important to identify the interests that conflict and decisions could be taken which adopt a theory of review that make little difference to the benefits and disadvantages of statutes and could decide on a net balance of social benefits over disadvantages. Alternatively, the Court could simply ask whether the government's choice is reasonable, or whether there is public benefit in the action taken. The fourth method could be for the Court to rely on some hierarchy of values or norms derived from the constitution.

These choices also represent different theories of law. The methods given above do not seem to reflect the need to judge on the basis of a vision for the law, which can transcend statutory limitations and do justice that the situation demands. The factoring in of social and lived realities of the parties before the Court must necessarily give way to a hierarchy of norms.

### **Vision for the law**

The process of recruitment often said to be one of the indicators of the employee-employer relationship, is an indicator of the extent of democracy at the workplace. When the offering of employment is in terms of a gratuitous appointment, liable to be terminated at will, liable to be continued on terms that are non-negotiable and non amenable to the jurisdiction of any law does not hold any promise of any legal protection at the workplace.

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10. Suresh Srivastava, "Constitutional Protection to weaker and disadvantaged section of Labour", JILI, 2000, Vol.42 2-4.

The decision of the appropriate government to abolish contract labour under the CLRA is also a non transparent decision, not amenable to judicial review. The fact that exploitation is not specifically factored in has made it easy to write out the discourse on discrimination and exploitation from understanding contract labour.

A deductive method used by the Court to look at legislation or to look for legal basis for rights without any reference to the exploitative nature of the practice also means that there is no reading in of remedies. Without the general theory on rights at work clearly enunciated the location of various rights, especially conflicting rights becomes difficult.

The decisions in SAIL and Umadevi raise the question of whether remedies exist where the rights have not been specifically laid down? The use of discrimination law and fundamental rights jurisprudence has been expressly excluded in one and in the other it has been held up against the many who may have their rights upheld against the few.

The followup of the decision in SAIL has been that in decisions following it, the Courts have refused to look at facts and circumstances of such cases, or examine violation of Fundamental Rights. Judicial discipline in following precedent can result in non-enforceability of fundamental rights at work<sup>11</sup>.

The SAIL Case has restated the law on contract labour bringing in, ostensibly closer to the Standard Vacuum case, but with results that are quite different. Further, the decision in that case followed by the First National Commission on Labour resulted in the enactment of the CLRA. But the reverse has followed the SAIL judgement. The Second National Commission set up after this decision has proposed a major watering down of the legislation and refuses to suggest the absorption of workers on the ground that the SAIL decision has laid down that absorption is not provided for in the statute, without addressing fundamental flaws in the legislation<sup>12</sup>. It is surprising to note that the commission seems to be accepting the logic of globalization and is finding ways to legitimize it.

### **Conclusion:**

The system of contract labour brings to fore the issue of “invisibilisation” of workers. Contract labour is dismissed as the responsibility of middle men and not the responsibility of the employer. This not only invisibilises workers but

11 See *Municipal Corporation of Greater Bombay v. K. V. Shramik Sangh* and ors AIR 2002 SC 1815, where the workers claimed that they were denied minimum wages, and basic amenities and facilities required for disposal of solid wastes and the decision hinged not on violation of fundamental rights but on whether the workers were workers of contractors or of the Municipal Corporation.

12 Report of the Second National Commission on Labour, Chapter VI p.364.

the work done by them is also dismissed as peripheral, not integral or as non germane to the work of the establishment. It introduces a hierarchy of workers and work that is important, and casts the responsibility of discriminatory work conditions on the persons carrying on work designated as incidental. Denial of entitlements at work as not seen as denial of the right to life and equality or dignity but rather as a condition of employment. The judicial interpretation of the control test to identify employee-employer relationship has further perpetuated the distinctions between regular and contract workers.

The results of a particular vision for the law and the Constitution are before us. It is important to now understand the process by which the decisions are reached in order to be able to influence them to do justice. It is far easier to simply say that a particular judgement is good or bad, but much more difficult is the job of understanding the values that they seem to represent and to be able to craft a set of values that can be alternatively argued. The first step in this direction is to be able to go beyond the instant facts of the case and to see the impact that the Judgements have in the lives of the people that are affected. If Law making is seen as a social function that is responsive to the needs of different sections of society and is seen as an ameliorative act it must accept social responsibility for the failure to address issues completely.