

INCUMBENCY OF LABOUR RIGHTS VIS-À-VIS HUMAN RIGHTS PROTECTION OF LABOURERS

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ABSTRACT

Migration is an essential test of utmost importance for the progressive debate and of equitable and effective governance, demanding harmonized action not only among states but at all levels of government in today's human rights regime. This paper analyses the distinct importance of human rights protection concerning different approaches in International Labour Organization (ILO) and other UN instruments that are vital in order to vitiate & analyze the wrongdoers against the labourer-migrant sector. It differentiates between various principles and amendments which surround the labour law in its true sense from its roots in the International Law and subsequent relevant laws thereof. The vital essence of this paper is to establish a parallel approach from theoretical as well as a practical based analyzed report stating various nuances of Labour Law, subsequent organizations, its role and responsibilities, various innovations through the development and its effects.

The purpose of this paper is to contemplate the background of different organizations with respect to Labour Laws, the role of such organizations in today's scenario and how vastly it impacts the human rights pertaining to labourers. Further, it undertakes a detailed comprehensive analysis of rights and conventions associated with migrants along with collective bargaining and the right to form an association as a widely recognized human rights instrument in international jurisprudence. Lastly, the paper seeks to discuss the scenario of labourers in India as well as abroad through sui generis approaches in the labour market and the recourse regime for better implementation of various executive theories and legislative intent as laid down by various treaties, laws, act, rules and codes of conduct and the jurisprudential essence.

Keywords: *Labour rights, human rights, employment, international convention, standards, flexibility, inflexible, labour market.*

I. LABOUR MIGRATION IN GLOBALIZING WORLD

INTRODUCTION

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

- Abraham Lincoln

1.1 WHAT IS LABOUR MIGRATION?

In simple words, a ‘labour migrant’ is a person or that type of labour who moves for the purpose of employment and the process of movement from one place to other is termed as ‘Labour Migration’. As per the International Labour Organisation (ILO)[2], a migrant worker is a worker who migrates from one place to another with a view to get employment. Such a labourer who is offering their services on a temporary basis could be a casual and unskilled worker and usually works on a seasonal basis.[3] Labourers can migrate internationally as well and such labourers are generally engaged in remunerated activities in the particular land where he is not a national.[4]

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While migration can be constructive empiricism for migrant workers, many feel wretched in scanty living conditions and poor working atmosphere including low wages, unsafe working environment, retraction of freedom of association and microscopic worker’s right. These conditions often leave the labourers in xenophobic feeling resulting in deterioration of their mental health as well.

1.2 IMPACT OF MIGRATION: NEXUS ON GLOBALIZATION

The term Globalization can be termed as a process of deterritorialization of politics, market and law leading to global interconnectedness.[5] The concept of Globalization in relation to labour sector is a unique denoting shift in focus from the nation-state to values of transnational concern. Most of the labour rights concept has been adapted from various different bodies and conventions which makes it transnational in nature. However, if we dig

deeper into the actual practicality and impact of migration, it could affect the globalisation of destination place in numerous ways.

1.2.1 ECONOMIC GROWTH

Migrants fill the labour market needs both in high skill and low skill sector which improves the efficiency, promotes entrepreneurship and injects dynamism and diversity into destination region or country. It was generally seen since World War II[6] that such migrations can provide incentives for capital accumulation yet have helped transform cities into gleaming metropolises. The labourers more or less form the backbone of the booming construction in the developing countries like India and developed nations like Dubai, Unites States and Canada.[7] This kind of shift also leads to economic gains to the global economy through international migrations leading to a positive impact overall. Therefore, the economic benefits to the region are overall small, yet if seen in the long run could work two-fold and work as an asset, providing valuable contributions to the overall GDP of any country.

1.2.2 EMPLOYMENT

There is also a dilemma whether the migrants cause higher unemployment among the natives. At certain levels, displacements take place to replace older and less skilled labours which could be one side of the debate. However, several EU countries depict that such kind of displacement has no negative effect on native worker's job opportunities and wages. Rather it plays an important role in increasing domestic demand for goods and services leading to the improvement of labour markets. Many times the urban residents avoid sectors such as dirty, difficult and dangerous jobs in informal conduct which is generally filled with migrant workers. Therefore, the employment demand elasticises for the migrant workers in destination place which has no mass [8]effect on the jobs of natives since most of the times, the work untaken by them is of lower levels of education and skill which does not impact the job in the urban sector.

1.2.3 MIGRANT ENTREPRENEURSHIP

It is vital to mention that the concept of migrant entrepreneurs is often described as the skills that are no longer inappropriate supply in the host economies and they are willing to work

long hours and use their capital to reduce transaction costs.[9] This is beneficial to the host regions as they broaden the services which prevent reversing deterioration. However, this is subject to mixed results and OECD[10] research shows that they often resort to self-employment because of a bleak prospectus in the formal labour market. Therefore, such dynamism of the this kind of sector must be linked in the terms of the many hinderances to self-employment imposed by industries, and the destination countries stand to gain by promoting migrant entrepreneurship, they should try to provide an enabling environment for it as well.

EMERGENCE OF INTERNATIONAL LABOUR ORGANISATIONS GUARANTEERING HUMAN RIGHTS

The international migration cannot be left to market forces alone and therefore requires governance and regulations at the international level. Migrant workers are always entitled to human rights irrespective of their status and thus three international instruments together comprise the International Bill of Human Rights- The Universal Declaration of Human Rights, The International Covenant on Economic Social and Cultural Rights and The International Covenant on Civil and Political Rights.

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2.1 HUMAN RIGHTS INSTRUMENTS: PARALLELISM WITH LABOUR LAWS

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948[11] which applies to every member of the human family in every part of the world. The declaration establishes basic rights for '*human being*'[12] and certain rights for migrant workers have also been established.[13] The Articles relating to migrant workers specifically addresses rights concerning work and employment of the sector or the job it pertains to such as the right to be free from slavery, equality before the law, equal protection of the law, protection against discrimination, freedom from arbitrary arrest, detention or exile, peaceful assembly and association and social security.[14]

The International Covenant on Economic, Social and Cultural Rights was adopted in 1966 and legally binding on those states that have accepted it by ratification or accession.[15] Article 2.2 provides that rights are to be exercised "without discrimination of

any kind as to race, colour, sex, language, religion, national or social origin, birth or another status". Moreover, it provides a set of economic rights that is right to work, fair wages, equal remuneration, safe working conditions etc.[16]

The International Covenant on Civil and Political Rights was adopted in 1996 and applies to all human beings of 'all members of the human family' and 'all individuals' within the territory without any distinction of any kind.[17] It also provides that no one shall be held in slavery or servitude[18] to perform forced or compulsory labour. Article 8 and Article 22 provides the liberty for forming and joining trade unions as well.

2.2 INTERNATIONAL LABOUR STANDARDS & OTHER INSTRUMENTS & RECOMMENDATIONS

The International Labour Standards are a comprehensive set of legal instruments that establish basic principles along with rights pertaining to the workplace. The conventions and recommendations form the ILS.[19] Conventions are legally binding international treaties. However, recommendations are the non-binding guidelines and could be autonomous as well.[20] Complaints alleging non-compliance with a ratified convention may be filed against the member state as well. ILO instruments applicable to migrant workers can be categorized as follow[21]:

- Fundamental Conventions which apply to all persons, including migrant workers;
- Labour standards which apply to all workers in the workplace, including migrant workers; and

Instruments specifically dealing with migrant workers as a whole.

- Moreover, in 1998, the ILO turned its focus on eight conventions in four key areas in its *Declaration on fundamental Principles on Right to Work*. [22] It comprised of eight fundamental conventions contain considering human rights at work. ILO gives special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers. Further, the *freedom of association and Protection of the right to organise the*

convention, 1948 (no. 87)[23] and the *right to organise and collective bargaining convention*, 1949 (no. 98)[24] are the two main rudimentary conventions providing liberty of association. Moreover, the 87th convention is vital as it covenants the rights and duties of workers and employers to establish and join organizations of their own choosing without previous authorization.[25] The *Forced Labour Convention*, 1930 (no. 29),[26] and the *Abolition of Forced Labour Convention*, 1957 (no. 105),[27] prohibit forced and compulsory labour for all persons, irrespective of the type or location of their economic activity including 29th convention which prohibits work exacted under the peril of penalty where the individual has not offered voluntarily. It prohibits forced labour for private entities and severely restricts its use by public authorities to imminent necessity, when it demands that wages be paid to workers.[28]

Moreover, it is pertinent to mention the way these migrant workers are squared up with peculiar difficulties in the sphere of social security because they are usually related to time of employment, contributions, residency or supplies. They run the risk of losing entitlements to social security benefits in their country/region of origin due to absence, and may at the same time encounter restrictive conditions in the destination country/area in respect to their overall coverage by its national social security system.[29] However, for regular and longer-term migrant workers, equality of treatment between native and migrant workers in the country of employment is with regard to existing social security benefits seems to be the rule.[30] Therefore, the international labour standard puts forward a base for the labour system in every country to abide by and follow. It is a unique set of actions considering the fact that it is the oldest standard of conduct for labourers and migrant workers which has acted as a redressal cell and last resort in many instances overt both in past and present times.

2.3 PROTECTION OF MIGRANT WORKERS: CERTAIN FUNDAMENTAL NOTIONS

The concept of safeguarding the migrant workers is an important consideration for policy-makers in both origin and destination area or region. Such protection of migrant workers' should initially begin in the place of origin. Moreover, the ratifications of international conventions on migrant workers by countries of origin provide a strong signal that they are

concerned about the protection of their citizens, both in the domestic arena and internationally, and constitutes an important step towards such protection and therefore, the countries are preferred to ratify the advanced treaties on the same.[31]

At times, when there is a contractor or an intermediary in between the parties and the labour worker, the most promising way to better regulate this regime is to enact joint liability laws, under which the beneficiary of migrant's labour is held liable together with the contractor (the intermediary) for paying wages and abiding by labour laws. In most cases, the beneficiary of the work done by workers hired through contractors is the most stable entity in the business relationship. [32] Moreover, the labourers shall not be subject to baseless litigation on frivolous grounds whatsoever, considering their low incomes and averagely lower status.

One clause which is always left unheard and unanalysed is that the responsibility to protect migrant workers during pre-departure stage should lie within the origin country. It is that stage where the individuals decide whether or not to migrate for work is crucial. It is most important that reliable and accurate information is provided before they take vital steps towards migrating such as reimbursing fees to recruiters. origin countries should provide concrete assistance in finding employment, if possible, as well as information concerning, among other things, the cost of obtaining jobs, the migration process, and actual terms and conditions of work in the destination country. Further, fair recruitment practices should be followed and that could be done by providing model contracts that can minimize disputes and problems, especially if the contracts are realistic and advertised by the authorities in the final place.[33] The measures to protect the rights of labours must constitute an effective role parallel to the authorities making sure that the labours are not exploited, abused and treated unequally.

2.3.1 OBLIGATION OF STATE TO BESTOW SECURITY & PROTECTION

It is pertinent to mention that under certain national sovereignty principles, states retain the power to regulate immigration, namely to determine who (other than citizens) may enter, visit, reside or work in their territory. This engages two sovereign prerogatives:

contradicting or limiting access to the state territory; and

(2) separating non-nationals not authorized to enter or remain in the territory.

1. However, as with other areas of law and state practice, the regulation of migration is subject to the principles and norms of international law, in particular human rights obligations.

2.3.2 WHY MIGRANT WORKERS ARE NOT PROVIDED WITH ANY SECURITY BENEFITS BY THEIR HOST OWNER?

It is for this reason that the Article 16 protects the right of migrant workers and community of their families to liberty including the security of person. Article 16 supplemented with Article 9 of the International Covenant on Civil and Political Rights[34] provides a principle of law that that migrant workers and members of their families shall not be incorporated as “*individually or collectively*”[35] to arbitrary arrest or detention. Moreover, for them not to be arbitrary, arrest and detention of migrant workers and members of their families, including those in an irregular situation, must be prescribed by law, pursue a legitimate aim under the Convention, be necessary for the specific circumstances and proportionate to the legitimate scope pursued.

CASE STUDY: DETAILED ANALYSIS OF LABOUR LAWS IN INDIA

3.1 OVERVIEW

The preamble of our constitution declares India to be ‘*a Sovereign, Socialist, Secular and the Democratic Republic*’. The term ‘*democratic*’ denotes that the Government gets its authority from the will of the people. It gives a feeling that they all are equal “*irrespective of the race, religion, language, sex and culture*”.[36] It pledges justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of the individual and the unity and integrity of the nation to all its citizens thereby including migrant workers in its wide ambit. India is a signatory to Universal Declaration of Human Rights and a number of Fundamental Rights are similar to the provisions of the UDHR. Moreover, it is pertinent to mention that in the country India, certain law relating to labour and employment are also known as Industrial law. One act was ultimately enacted as the Industrial Disputes Act, 1947 after repealing the age-old Trade Disputes Act, 1929.

3.2 LABOUR LAWS IN INDIA

3.2.1 PRAGMATIC APPROACH: EVOLUTION & PRACTICALITY OF LABOUR RIGHTS

The Labour Laws in India are influenced by important human rights instruments and the conventions and standards that have emerged from the United Nations.[37] The concept 'labour' means productive work especially physical work done for wages. In India, labour law which is also called as employment law is the body of laws, administrative rulings, and precedents which address the legal rights and restrictions of working people and their organizations. There is two main classification of labour law, *firstly*, cumulative labour law relates to the tripartite relationship between employee, employer and union and *secondly*, the individual labour law concerns employees' rights at work and via the contract for work.[38] Under the Constitution of India, Labour is a subject in the concurrent list where both the Central and State Governments are competent to enact legislation.[39]

In the landmark judgment of *Kesavananda Bharati v. State of Kerala*[40], the Supreme Court observed, "Even though Universal Declaration of Human Rights was not be a legally binding instrument but the nature of human rights at the time the Constitution was adopted as an essential element." Moreover, a right incorporated in the Covenant on Civil and Political Rights is not recognized in the Indian Constitution but shall be available to the individuals in India.[41] It clearly shows the principle of dualism our country follows while dealing with the question of human rights and its violation leading to development in the legislative intent.

Further, labour laws can be categorized into six broad categories constituting of laws relating to industrial relations, wages, working hours and condition, equality and empowerment of women, social security and disadvantaged section of the society. The various important enactments relating to the concerned law are Industrial Disputes Act (1947), Minimum Wages Act (1948), Factories Act (1948), Industrial Employment (Standing Orders) Act (1946), Child Labour (Prohibition & Regulation) Act (1986), Workmen's Compensation Act (1923), Unorganised Workers' Social Security Act (2008).

Also, the Ministry of Labour and Employment, a bifurcation of the Government of India, is the supreme body for articulation and administration of the rules and pronouncements relating to labour and employment law in India. The main scope of the Ministry of Labour and Employment comprise of labour Policy and legislation, Safety, health and welfare of labour, Social security of labour, Policy relating to special target groups such as women and child labour, Industrial relations and enforcement of labour laws in the Central sphere, Adjudication of industrial disputes through Central Government Industrial Tribunals cum Labour Courts and National Industrial Tribunals. Therefore, the different bodies, laws and ministries governing the labour laws provide a set of conduct for labour law violation and its practicalities are being taken care thereof.

3.2.2 THEORETICAL APPROACH: UNITARY, PLURALISTIC & RADICAL INTERPRETATION

It is pertinent to mention the term Unitarianism in which the institutions are observed as an integrated and harmonious structure with the idea of "*one happy family*", where management structure and other staff all share a common objective, emphasizing the importance of mutual cooperation in an organisation. It has a paternalistic approach where it asks for the loyalty of all the staff members, being predominantly managerial in its approach and application. Hence, such kinds of trade unions are deemed as unnecessary because of the loyalty point between employer and employee is considered mutually unique and exclusive. Therefore, any kind of conflict in the organisation is discerned as disruptive and troublesome. It might result in pathological behaviours of agitators, interpersonal friction and communication breakdown.[42]

In pluralistic approach, the institution is recognised as vested of powerful and varying sub-groups, each with its own admissible loyalties and own set of non-discriminatory approaches. Moreover, it is important to mention that there are two types of predominant sub-groups in this approach and they are, firstly, the management and secondly, the trade unions. Consequently, such management roles would lean less in connection with imposing and supervising and more toward persuasion and co-ordination.[43] Trade unions are deemed as legitimate representatives of employees and therefore, conflict is dealt with by collective bargaining which is not necessarily viewed as a bad thing.

It is pertinent to mention the view of industrial relations. These relations look at the nature of the capitalist society with the utmost importance and observe the fundamental division of interest between capital and labour, and perceives workplace relations against their history. Also, this kind of perspective discerns any type of inequalities of power and economic wealth and compares it with the roots in the nature of the capitalist economic anatomy. Therefore, any kind of conflict is preordained and trade unions are a natural rejoinder by workers to their exploitation in the capital. Hence, there are times when the Marxist view would be that institutions of joint regulation would improve the position of both relations rather than limiting the management's position. It is so because they forehandedly assume the continuation of capitalism rather than challenging it. There are two variants of this view - the pessimist view propounded by Lenin, Trotsky and Michel and the optimist view propounded by Marx and Engels.[44]

3.3 LABOUR MARKET FLEXIBILITY: INDIA vs. ABROAD

3.3.1 LABOUR MARKET STRUCTURE IN ECONOMICS

In terms of macro-economics, flexibility in the labour market refers to the elasticity of production suiting changing market condition. Generally, in such market flexibility is considered as an incentive to promote economic growth and more generate jobs. However, the trade unions consider such a flexibilization as a strategy for weakening the labour rights in order to produce more gains and profits.[45] The principle of flexibility is from the point of view of the employers since they possess the capacity to shift the elasticity through their own terms in the context concerning the employees and their rights. It is right to mention that macro data offers support to flexibilization tendencies in the labour market. Many times, the casual worker is considered as an outsider in this concept.

However, inflexibility in such a market is considered as a situation wherein the level of unemployment is too high and there are numerous restrictions with respect to freedom of employers to fire and hire, restrictions on compensation schemes and strict rules regarding the salary of the employees. It is too restrictive in nature and at times give too much power to trade unions to protect incumbent migrants. This concept is prevalent both in India as well as

abroad enshrined in various concepts of behaviour economics pertaining to the analysis of the labour market in terms of their psychology to function. It is for this purpose that there should be a middle path for such a principle which is silently prevalent in the labour market affecting both the employee and the employer. Moreover, it observed over the time that this conceptual shift behind is mainly related to the trade unions and retrenchment. There should not be unreasonable retrenchment due to introduction of advancements and modernization in the country. However, if unavoidable surplus labours exist, then they should be deployed by giving prior notice followed by a proper procedure. It is vital to highlight that in India there is no such right as “*right to work*” and no “*employment assistance*” and therefore, even the valuation of Second Labour Commission makes it hard to analyse.

Therefore, a social compromise must emerge between the two debates because both trade unions and employers do not serve their sectional interest or their social interest by sticking to their strict ideologies.

3.3.2 CONCEPT OF FLEXI-WORK: MIDDLE PATH BETWEEN THE TWO IDEOLOGIES

The concept of flexible-work offers a ground solution for the abovesaid mindset regarding the animosity between the workers and the employers. This ground solution need not to be considered and perceived as negative by both unions and workers. In fact, they can work a way out of unemployment by bridging a gap to long-term employment which may serve as a necessary complement to other working in the industry. Additionally, the un-skilled labours get deployed more than anybody else and this mechanism is considered as a necessary escape from such debates. Hence. The author propounds the concept of flexi-work through this detailed analysis.

CONCLUSION

The purpose of migration to move from one place to another, either permanently or on temporary basis plays a significant role in the population distribution of geographical area and influences the growth of work force in the region. Migrant labourers are restricted in the

strict sense and therefore, labour rights protection comes into place. It is for this reason that the member states should formalize and effectuate all the pertinent international instruments related to international migration which also include the most vital international human rights instruments i.e. the ILO conventions, protocols against human trafficking and migrant smuggling and the Convention with regard to the Status of Refugees. It is pertinent to mention that the different alternative approaches to administrative detention should also be discovered, while the detention of migrant children should be avoided in such matters. The countries should disregard all types of discrimination against migrants with respect to working conditions and wages. Any discrimination with regard to fundamental economic, social and cultural rights should also be prohibited. Labour rights are human rights and it is the need of an hour to accept it among ourselves.

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