

SOCIAL SECURITY OF LABOUR IN THE NEW INDIAN ECONOMY

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By

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Certificate

This is to certify that the thesis entitled “**Social Security of Labour in the New Indian Economy**” submitted by Smt. Mini S., for the degree of Doctor of Philosophy under the Faculty of Law is the record of bona fide research carried out under my guidance and supervision in the School of Legal Studies, Cochin University of Science and Technology, Cochin – 22. This thesis or any part there of, has not been submitted elsewhere for any other degree.

Dr. D. Rajeev
(Supervising Guide)

Declaration

I declare that the thesis entitled “**Social Security of Labour in the New Indian Economy**” is the record of bonafide research carried out by me in the School of Legal Studies, Cochin University of Science and Technology, Cochin - 22. I further declare that this has not previously formed the basis of the award of any degree, diploma, associateship or other similar title of recognition.

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Certificate

Certified that the important research findings included in this thesis have been presented and discussed in a Research Seminar at the School of Legal Studies, Cochin University of Science and Technology on 3rd July, 2009.

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PREFACE

Globalisation has many facets and its impact on labour is one of the most significant aspects. Though its influence is worldwide, it is much more significant in a transforming economy like India. The right of workers to social security is seen recognised under the Constitution of India and other welfare legislations. But, after adoption of the new economic policy of liberalisation and privatisation by the Government of India, the labour is exposed to new set of challenges. They are posed mainly due to economic restructuring affected in employment relationship, coupled with the increase in unprotected informal labour force. This study is an attempt to analyse the new challenges stemming up in employment relation, efficacy of the existing measures for social security of labour in the present economic condition and the suggestions for securing workers' right to social security in the trade regime.

The thesis consists of 9 chapters. The first chapter poses the challenges of globalisation on trade and labour standards with special reference to Indian labour and describes the relevance of the present study. The second chapter defines social security, its nature, meaning and content. The next chapter examines the influence of ILO in shaping social security as a right and its impact in India. The development of Indian labour jurisprudence with special reference to social security is examined in chapter 4. Chapter 5 concentrates on analysing the legislative framework of social security in India. The examination of new measures taken by other developed countries in tackling the problems created by globalisation is included as a comparative study in the next chapter. The position of labour in trade negotiations is very

important in this context and this is done in chapter 7. Chapter 8 analyses the impact of globalisation on Indian labour with special reference to social security of labour. Conclusions and suggestions are summarised in the last chapter.

For the successful completion of this study I had immense help from different persons. I am indebted to Dr. D. Rajeev, Former Director, School of Legal Studies, Cochin University of Science and Technology for giving proper guidance and constant inspiration to me in completing this work. Amidst his various academic and other works, Dr. V.S. Sebastian, Senior Lecturer, School of Legal Studies, Cochin University of Science and Technology had always been enthusiastic in properly channelizing the problematic areas of this study. I am indebted to Prof. P. Leelakrishnan, Prof. K.N. Chandrasekharan Pillai and Prof. N.S. Gopalakrishnan for giving valuable suggestions and encouragement. Prof. Mohan Gopal, Director, National Judicial Academy, Bhopal has been a constant encouragement during the completion of work. The active discussions I had with Dr. N.S. Soman, Dr. A.M. Varky and Dr. T.G. Agitha were of great benefit to me. I express my thanks to all of them.

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I express my sincere thanks for the cooperation extended to me by the library and office staff of School of Legal Studies, Cochin University of Science and Technology. Visits made to Indian Law Institute, Delhi, Centre for Development Studies, Trivandrum, Indian Society for International Law, Delhi, Jawaharlal Nehru University, Delhi, Parliament Legislative Library, Delhi, V.V. Giri Institute of Labour, Noida, High Court Library, Cochin and

Library of School of Applied Economics, Cochin University of Science and Technology proved to be very helpful in locating the materials. I express my thanks to all librarians and other persons who helped me in these institutions. I gratefully acknowledge Mr. Binoop, for his help which resulted in getting this work neatly printed.

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Present day world is witnessing sweeping changes in almost all facets of life, particularly in the social and economic life of the community. Labour class constitutes a major portion of the society and their contributions are directed towards the development of the society. Considering the fact that labour is a significant component in all economic activities, the changes that take place in the economic field will also have an impact on labour.

India had in the past a well protected economy with high rate of regulations and controls. The workers were also placed in a protected environment under the roof of many social security legislations and other effective industrial laws. Still in that period there was another fraction of working class who were out of these protective measures. The

unorganized sector was thus largely left out of controls. After the adoption of the new economic policy in 1991, Indian society is almost out of these ‘protectionism’ and now exposed to the challenges of globalization, privatization and liberalization. In this changed economic scenario, a major part of the labour force in the organized as well as unorganized sectors are exposed to many unforeseen casualties. Some of these problems are direct and some others, indirect. These policy changes that have taken place pose some basic questions. Whether Indian labour is mature enough to face the challenges? Whether the current legal framework of social security is adequate enough to protect the workers? What are the drawbacks of the current structure? What are the legal measures which can be adopted in handling the new challenges?

In a mixed economy as in India, state is assigned the role of regulator and controller of all economic activities within its jurisdiction with a view to assure the welfare of the community. Economic developments being the basic indicator of social development, economic activities are given priority in the governance of the country. Hence, in the course of development, India has been adopting and implementing an economic model based on nationalism, industrialization and modernization for the protection of domestic industry. This model is found wide enough to connect the domestic market to the working class and producers¹. This system experienced a decline by the end of 1960s due to stagnant

1. This is same with developed and developing nations. Institutional framework and economic structure of this world order and through the agency of nation state, a large part of the developing world are incorporated into the developing process. It is termed as “Golden Age of South” characterised by high rate of economic growth and major advancement in social development. See James Petras and Henry Veltmeyer, *Globalisation Unmasked: Imperialism in the 21st Century*, Madhyam Books, New Delhi, (2001), p.24.

production and class conflict for higher wages, greater social benefits and better working conditions. These conditions happened to create a profit crunch on invested capital². This led to two schools of political economy – one disrupting all areas of capitalist life³ and the other laying stress on various forms of response to systematic crisis⁴, and both led to globalizing money market⁵. As a result, in the late 1980s the capital flows in the money market used to finance governmental operations and its development projects paved the way for foreign direct investment and cross border operations. But in fact all these are social activities undertaken to meet needs of the society⁶.

Industrial operations are treated as a social activity for fulfilling the needs of the society. Globalization has taken all these activities to the arena of competition. But there has been a tension between the goals of free trade,

2. *Ibid.*

3. This emphasizes the inherent tendency of capitalism towards crisis and social contradictions.

4. Some examples cited are (1) diverse efforts of U.S. administration including unilateral obligation of the Bretton Woods Agreement on the value and exchange rate of U.S. Dollar (2) Relocation by transnational corporations of their labour intensive industrial operations in the search of cheaper labour (3) Internationalisation of capital on the basis of policy of liberalization and deregulation. See United Nations Conference on Trade and Development. (UNCTAD,1994)See also f. n.1

5. This boom was mainly sponsored by International Financial Institutions, UNCTAD,1994 reports that this is mainly because of the thought called commercial liberalization which advocate for trade and a market or capitalist economy as the way towards peace and prosperity. Today this view is promoted by global financial institutions, major trading states and multi national corporations. Steven L. Lamy “contemporary Mainstream Approaches Neo-realism and Neo-liberalism”, in John Baylis and Steve Smith (Eds.), *The Globalization of the World Politics: an Introduction to International Relations*, Oxford University Press, New Delhi, (3rd edn.,2005),204 at p. 212.

6. According to National Commission of Labour (II) “ all economic activity is the result of independent interests and co operation among various factors that together constitute the cycle of economic activity” Report, National Commission on Labour, 2002,Chapter V para 5.2.

global market efficiency and competition on the one hand and the workers rights and the social welfare on the other⁷. When the transnational capital comes into play, it controls the global market from anywhere with the aid of information technology. This increases competition and tension and thus poses serious challenge to the social welfare and labour. In such situation, two major aspects that attract attention are:

- (i) capitalist⁸ development process that separated large number of direct producers from their means of production and
- (ii) the demand of labour has grown more slowly than supply⁹.

Moreover, the process of technological change and economic reconversion has generated surplus labour¹⁰. Two other notable phenomena, both depend on technological innovations, have also emerged. The processing of information led to the growth of small

7. The new economic rule are tough advocating as they do productivity over social protection, the logic of profit over the needs of the workers and peasants and the strict financial target over that often worked to the disadvantage of the industry. There is little room for social concern in this brave world of privatization, deregulation and cut throat competition. See Michael Cox, "Free the Cold War to the War on Terror", John Baylis and Steve Smith (Eds.), *The Globalization of the World Politics: an Introduction to international Relations*, Oxford University Press, New Delhi, (3rd edn.,2005),131 at p.139.

8. According to Marx , there are three main characteristics of capitalism: (1) everything involved in production including labour, has exchange value and all can be exchanged one for the other.(2) everything that is needed to undertake production is owned by one class-capitalists. (3) workers are 'free' but in order to survive, they must sell their labour to the capitalist class because the capitalist class own the means of production, and control the production.They also control the profit that results from the labour of workers See Stephen Hobden and Richard Wyn Jones, "Marxist Theories of International Relations", in John Baylis and Steve Smith (Eds.), *The Globalization of the World Politics: an Introduction to international Relations*, Oxford University Press, New Delhi(3rd edn.,2005) p.225 at p. 227.

9. James Petras and Henry Veltmeyer, *Globalisation Unmasked: Imperialism in the 21st Century*, Madhyam Books, New Delhi (2001) p.24. See also I.L.O Reports (1996).

10. It is estimated as one third of total labour force, I.L.O. Reports (1996) available in www.ilo.org/english, accessed on 12th May 2008

executive class mainly of software engineers. The other is the outsourcing labour to low wage areas. All these led to widening the gap between traders and workers and even among workers. To mitigate the tension, the first thing to do is to decrease the inequality between traders and workers. This responsibility will have to be taken up by the government which can regulate the employment relationship. But the special regulation of employment relations are criticized and not admitted by many countries¹¹. However, there are arguments which justify the special regulations. One argument is economic i.e., cost of protection of rights of workers should be kept proportionate to the benefits that the employer earns from business¹². At the same time, the workers should be able to carry out their duties in a dignified manner¹³. In the new economy, the freedom of the workers as human beings has been exposed to new dimensions of invasions and controls¹⁴.

To dispense with the unsatisfactory economic situation in the labour field, controls through State regulations have become necessary. This may be done by reviewing and revising the existing labour laws and by introducing new laws in tune with the globalized requirements of labour¹⁵.

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11. This is the main reason for absence of labour clauses in most of the world trade agreements.
 12. Here human beings are reduced in to the level of capital equipment.
 13. This includes privacy, autonomy and without fear of constant monitoring.
 14. Termination of employment, challenges of new technologies, withdrawal of state from many important areas of its action, closing down of industry itself are some of the problems.
 15. "Globalisation is said to imply the labour lawyers like lizards and generate a new one, by tacking fresh views at the subject" Lord Wedderburn,' Common Law, Labour Law and Global Law'in Bob Hepple (Ed.), *Social and Labour Rights in Global Context: International and Comparative Perspective*, Cambridge University Press, U.K.,(2002), p.19

1.1 Labour Welfare Laws: The Constitutional Framework and Philosophy

The Constitution of India, guarantees fundamental rights to every citizen. The most significant among them is Article 21 which guarantees right to life. The Supreme Court has elaborately considered this Article many times and categorically held that right to livelihood is inherent in right to life.¹⁶ The ultimate aim of social security is to ensure means of livelihood to everyone. In other words, right to social security is inherent in right to life.

The specific provision relating to social security can be seen in the Directive Principles of State Policy included in Part IV, which are divine proclamations for the governance of the country. Labour policy in India must be fundamentally governed by it. Matters relating to social security are also found enumerated in the Concurrent List¹⁷. Art. 38 enjoins the State to strive to promote the welfare of the people by securing and protecting a social order ensuring social, economic and political justice. Article 39 (a) provides that the State shall direct its policies towards securing the citizens, men and women equally, the right to an adequate means of livelihood; clause (d) provides for equal pay for equal work for both men and women; clause (e) provides to secure the health and strength

16. *Olga Tellis v. BombayMunicipal Corporation* A.I.R. 1986 S.C. 180. The court held that the term ‘ life’ in Art. 21 is not restricted to the near animal existence of a person. It means something more and “ the inhibitions against the deprivation of life extends to all those limits and faculties by which life is enjoyed” *Id.* at p.185

17. Constitution of India, Seventh Schedule, List III, Item No.23 reads: “Social Security and Insurance, employment and unemployment.

Id. Item No. 24 reads: “Welfare of Labour including conditions of work, provident funds, employer’s liability, workmen’s compensation, invalidity and old age pension and maternity benefits.”

of workers. Article 41 provides that within the limits of its economic capacity and development the state, the state shall make effective provision to secure the right to work as fundamental with just and humane conditions of work by suitable legislation or economic organization or in any other way in which the worker shall be assured of living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workmen. The Constitution has expressed a deep concern for the welfare of workers and has provided in Article 42 that the State shall make provision for securing just and humane conditions of work and in Article 43 that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers work, a living wage, conditions of work ensuring a decent standard of life¹⁸. These constitutional provisions express the social philosophy in labour issues. This is a socialist approach ensuring social justice, equality and dignity of a person as corner stones of social democracy. The concept of social justice in the Constitution of India consists of diverse principles essential for the orderly growth and development of personality of every citizen.

The directives contained in Part IV are the common man's pathway towards the attainment of socio-economic justice. As rightly pointed out by Justice Ramaswamy¹⁹:

18. Sharat Babu and Reshmi Shetty, *Social Justice and Labour Jurisprudence: Justice V.R. Krishna Iyer's Contributions*, Sage Publications, New Delhi, (2007), p.55

19. *Air India Statutory Corporation v. United Labour Union*, A.I.R. 1997 S.C. 645 at p. 648. Ramaswamy, J., rightly said: "To make these rights meaningful to workmen and meaningful right to life a reality to workmen a shift of judicial orientation from private law principles to public law interpretation harmoniously fusing fundamental rights and directive principle..."

“The poor, the workman and common man can secure and realize the economic and social freedom only through the right to work and right to adequate means of livelihood, to just and humane conditions of work, to a living wage, a decent standard of life, education and leisure. To them these are fundamental facets of life....”

Though not justifiable, these principles are fundamental in the governance of the country and State is duty bound to apply these principles in making laws. In a series of decisions on the subject, the Supreme Court has categorically held that the State has responsibility to protect the interests of workmen for establishing social and economic democracy in which every workmen realize socio- economic justice assured in the Preamble, Article 14, 15, 21 and Directive Principles of the Constitution²⁰. Adopting the

20. Eg:-*P.U.D.R. v. Union of India* A.I.R. 1982 S.C.1473, the Supreme Court held “...it is the constitutional obligation of the state to take necessary steps for the the pupose of interdicting such violation and ensuring observance of fundamental rights” . In *National Textile Workers Union v. Ramkrishnan* A.I.R. 1983 S.C. 75, The Supreme Court observed: “The workers therefore have a special place ina socialist pattern of society...They are producers of wealth...they produce labour without which capital would be impotent...Our Constitution has shown profound concern of the workers and given them a pride of place in the new socio-economic order envisaged in the Preamble and Directive Principles of State Policy. The Preamble contains the profound declaration pregnant with meaning and hope of millions of peasants and workers that India shall be socialist democratic republic where social and economic justice will inform all institutions of national life and every endure shall be made to promote fraternity ensuring the dignity of the individual”. So also in *A.B.S.K. Sangh (Rly) v. UOI* A.I.R. 1981 SC 298, it was held that, “ Article 37 of the Constitution emphatically state that Directive Principles are never the less fundamental in the governance of the country. And it shall be the duty of the state to apply these principles in making laws. ...So we have to say that the constitutional goal is the establishment of a Socialist Democracy in which justice, economic, social and political is secured and all men are equal and have equal opportunity.The underprivileged, the deprived and exploited are to be protected and nourished so as to take their place in an egalitarian society. State’s action is to be towards these ends”. The decision in *Chandra Bhavan Boarding v. State of Mysore* A.I.R. 1970 S.C. 2042 also sounds the same. The Court held that:“The mandate of the Constitution is to build a welfare society in which justice, social, economic and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met the basic needs”

philosophy of the constitution, Government of India has enacted many labour legislations for protecting the rights of the labour class.

1.2 Labour Welfare and Social Security: Indian Scenario

In India there are several labour legislations relating to the welfare of labour force, some of which are enacted during the British regime²¹. Few such legislation envisage giving compensation when the earning capacity of workers is interrupted as in the case of injury, or accident²² or lay off, lock out, retrenchment or closure²³. Some other legislations are declaratory, declaring the rights like freedom to form association²⁴, freedom from exploitation²⁵, equal pay²⁶, minimum wages²⁷ and maternity benefits²⁸.

21. The Workmen's Compensation Act, 1923. It provides for payment of compensation to workmen and their dependents in case of injury or accident or occupational diseases arising out of and in the course of employment and resulting in disablement or death.

Payment of Wages Act 1936: It applies to persons employed in any factory including establishments declared as factories under Factories Act 1948 and in any railway and industrial establishment drawing less than Rs.1,600/- per month as wages. Employers cannot withhold wages earned by workers nor can they make any unauthorized deductions, in connection of which the workers or their unions can file a claim.

22. The Workmen's Compensation Act, 1923. It provides for payment of compensation to workmen and their dependents in case of injury or accident or occupational diseases arising out of and in the course of employment and resulting in disablement or death.

23. Industrial Disputes Act, 1947. Lay-off, retrenchment, lock out, transfer and closure of industries are regulated under the provisions of this Act. The provision for compensation to workmen with regard to lay off, retrenchment and closure is provided by this Act.

24. Trade Unions Act, 1926. The Act provides for registration of trade unions. It gives protection to registered trade unions and its office bearers from civil and criminal liability in certain trade union activities.

25. (1)Contract Labour (Regulation and Abolition) Act, 1970: The Act provides for abolition of contract labour in certain establishment where abolition is not possible. It also provides for setting up of advisory boards to advice governments and registration of establishments and contractors. (2) Bonded Labour System (Abolition) Act, 1976. This Act abolishes the bonded labour system in India with a view to prevent the economic and physical exploitation of the weaker sections of the people.

Funds are created under many statutes to provide housing, medical, recreational, educational, family welfare and other welfare facilities on a planned basis²⁹. Moreover, in order to spread literacy and awareness to worker about their rights, schemes and agencies have been established by the government³⁰.

In India, there are a few legislations enacted for providing social security to workers, which are by and large in tune with the Conventions and Recommendations of International Labour Organization irrespective of the fact that the Conventions have been ratified by India or not.

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26. Equal Remuneration Act, 1976. This Act provides for payment of equal remuneration to men and women workers, where all relevant considerations of employment are the same.
 27. Minimum Wages Act, 1948. This Act empowers the government to fix minimum wages for employees working in specified employments and thus to ensure at least payment of a minimum earning for the employees covered by the Act.
 28. Maternity Benefit Act, 1961. The Act protects the right of women workers in certain establishments leave with wages for a period before and after child birth.
 29. Some of these funds are established under: (1)Mica Mines Labour Welfare Fund Act, 1946;(2)Limestone and Dolomite Mines Labour Welfare Fund Act, 1972; (3)Iron Ore Mines, Manganese Ore Mines and Chromic Ore Mines Labour Welfare Fund Act, 1976; (4)The Beedi Workers Welfare Fund Act, 1976; and (5)Cine Workers Welfare Fund Act, 1981.
 30. Some of these agencies are:
 - (i)Central Board for Workers Education: This Board was established in 1958 with certain objectives such as strengthening among all sections of workers a sense of patriotism, national integrity, secularism and pride in being an Indian, equipping them for their intelligent participation in social and economic development, developing among them a nation-first approach, and instilling in them greater understanding of the problems of their social and economic environment, their rights and obligations as citizens and as workers in industry and their responsibilities towards family members.
 - (ii) National Safety Council: This council was set up in 1966, and it promotes safety consciousness among workers to prevent accidents, minimize dangers and mitigate human suffering. It arranges lectures and conferences on safety measures to arouse awareness among employers and workers.
 - (iii) National Labour Institute: This is an autonomous body under the Ministry of Labour, Government of India. It is conducting research activities and training of labour administrators, trade unions, public sector managers and other government functionaries concerned with labour

(a) Employees State Insurance

This is the first legislation relating to social security which was adopted by the country, after independence. The ESI Scheme aims to provide health care and cash benefit in case of sickness, maternity and employment injury but applicable to employees drawing wages not exceeding Rs.6500/- per month employed in factories and other establishments employing a minimum of 10 workers working by using power and minimum of 20 workers not using power.

The ESI Scheme is a contributory scheme and the contributions³¹ are made by employers³², employees³³ and the government as per the rates prescribed by Central Government³⁴. The cash benefits under the schemes are 70% of the wages as monthly pension for death or permanent total disability³⁵ and the same amount is paid for temporary disability for the disability period³⁶. The ESI scheme is administered by Employees State Insurance Corporation³⁷ which consists of nominees of Central Government, State Government and representatives of employers and employees³⁸. The Corporation is administered in a three-tier set up with headquarters, regional offices and local offices. The administration of medical benefit is vested with each State government.

31. Employees' State Insurance Act, 1948, Section 39

32. Presently eight and one third percentage of the basic wages, dearness allowance and retaining allowance payable to each employee

33. minimum contribution is the same as that of the employer

34. Employees' State Insurance Act, 1948 Section 2 (1)

35. *Id.* Section 46

36. *Id.* Section 51

37. *Id.* Section 3(1)

38. *Id.* Section 4

(b) Maternity Benefit

India is one of the first countries to enact laws for maternity protection. Under Art.42 of the Constitution of India, the state has a responsibility to make provisions for maternity relief. The Maternity Benefit Act enacted in 1981 is applicable to all factories, establishments, plantations, mines and shops where 10 or more persons are employed. Apart from this Act maternity benefits are also provided under ESI Act where an insured woman is entitled to maternity benefit in the form of periodical payments in case of confinement, miscarriage or sickness arising out of pregnancy. They are also entitled to medical care during maternity under ESI Scheme. In order to avoid overlapping, the factories or establishments and persons covered under ESI Scheme are excluded from the purview of Maternity Benefit Act. There is no wage limit for coverage under Maternity Benefit Act applicable to women above wage ceiling under the ESI Act. National Maternity Benefit Scheme has been introduced in the year 1995.

(c) Old Age Benefits

The benefit at old age and during other period of invalidity is covered under Employees' Provident Funds and Miscellaneous Provisions Act, 1952. This Act covers factories and establishments employing 20 or more employees in industries and establishments as notified in the schedule by Central Government. Under this Act also the wage ceiling is Rs.6500/- per month but there is provision for voluntary coverage and also for continuance of coverage of a person even after he crosses the ceiling.

Family Pension Scheme of 1971 was substituted by the Old Age Invalidation and Survivorship Pension Scheme 1995. The Employees Deposit Linked Insurance Plan was also introduced in 1976 where the employees have to contribute to this fund.

(d) Retiral Benefits

Gratuity is a terminal benefit, paid lumpsum, complementary to periodical pension payments, paid under Payment of Gratuity Act, 1972 for those who have completed 5 years of continuous service. The gratuity is paid at the rate of 15 days wages for every completed year of service or part thereof in excess of 6 months subject to a maximum of Rs.3,50,000/-. The wage ceiling for application of the Act was renewed in 1994. In 1997, the Act was amended and now it is required that the employer should get insured for his liability for payment of gratuity under the Act.

(e) Redundancy and Termination Benefits

The Industrial Dispute Act, 1947 contains provisions for compensation for lay off and retrenchment. Retrenchment covers all cessation of employment except voluntary retirement, superannuation and termination of service of workmen on the basis of continued ill-health or by way of disciplinary proceedings³⁹. In case of retrenchment, workers are entitled to 15 days wages for every completed year of continuous service⁴⁰, or any part thereof in excess of 6 months. Where the company is

39. Industrial Disputes Act, 1947, S.25F

40. *Id.* S.25 B

laid off workers are entitled to a compensation⁴¹ for the laid off period if they have completed one year of continuous service subject to certain conditions⁴².

(f) Accident/ Injury Benefits

Workmen's Compensation Act, 1923 is another enactment for providing social security measures to workers and their dependants on injury or death caused during the course of employment. The object of the Act is to make provisions for payment of compensation by certain class of employers to their workmen for injury due to accident. The compelling reasons behind the Act were growing complexity of industry with the increasing use of machinery and consequent danger to workmen along with the comparative poverty of workmen themselves. It is a guarantee against hazards of employment to which a workman is exposed because of his employment. This Act, casts a duty on the employer⁴³ to pay compensation in the case of death of workmen or on his total or partial disablement due to an accident happened in the course of or arising out of employment or occupational disease. But this liability is limited and subject to the provisions under the Act⁴⁴. The judicial pronouncements extended the scope and applicability of the provisions by notional extension of time and space⁴⁵ of employment. But, later, courts restricted

41. *Id.* S.25 C

42. *Id.* S.25 E

43. Workmen's Compensation Act, 1923 S. 3

44. *Id.* Section 4

45. *Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ibrahim Mohammed Issak* 1970 Lab.I.C. 1413; *S.S.Manufacturing Co. Ltd.v. Bai Valu Raja* A.I.R. 1958 S.C 881; *Carriage & Wagon Shop v. Mahabir* A.I.R. 1954 All. 132

its application⁴⁶ and in a nutshell many of the accident claims are taken out of the provisions of the Act.

All these schemes aim at economic security to workers in India. Economic security includes continuous employment with assured source of income adequate for meeting basic needs. The existing legislations, in one way or other impose restrictions on their extensive application and implementation of social security schemes under them. Moreover, there is no uniformity in the coverage of various schemes. In the changed economy, the labour policy also has to undergo thorough scrutiny so as to ensure protection to workers in this challenging world. How these challenges can be tackled with maximum benefit to the labour community and with limited burden to the management and society is the major issue that should invite closer scrutiny.

1.3 Labour and Social Security: Some Basic Principles

Social Security is a term having no definite meaning. There are two main schools which analyse social security in different angles. One school is represented by International Labour Organisation that limits scope of social security to maintenance of one's income against loss or diminution⁴⁷. This is described as protective form of social security. The other school view social security in a broader perspective. It is a basket of policies and institutions fashioned to enable a person to attain

46. Notional Extension theory is reversed in *Regional Director E.S.I. Corpn. V. Francis De Costa* A.I. R. 1997 S.C. 432; *Shakunthala Chandrakant Shreshti v. Prabhakar Maruti Garvati* A.I.R. 2007 S.C. 248. See also Crostopher Fonseca, Workmen's Compensation: Retrograde Judgments Vol.7 Combat Law, November- December, 2008 www.combatlaw.org/v7i6, accessed on 2nd February, 2009

47. International Labour Organisation, *Approaches to Social Security: An international Survey*, (Geneva), 1942 p.83.

and maintain a decent standard of life. This is described as preventive or promotional form of social security⁴⁸.

Many view social security as a system of proper distribution of income and also as a right mechanism of wage fixation. The poverty reduction is not a separate welfare issue but it goes along with the issue of industrial relations and social relations.

Recently, the concept of social security (safety) nets has emerged⁴⁹. Social safety nets are measures adopted to mitigate the negative effects of structural adjustments mostly in the form of cash payments. World Bank has introduced social funds⁵⁰ for building up local level capacity and social protection to provide basic social support to citizens based on their needs. Social security is distinct from this social safety net because the former is the universal need of all workers and the latter is for those who are permanently or temporarily thrown out of the system. Some opines that social security needs to be viewed as a basic right rather than a charity.

As far as India is concerned, it cannot adopt solely one view of social security excluding all others. It has to take a collective approach which include preventive, promotional and protective as the case may be. In India, social security encompasses social insurance, social assistance, social protection and social safety net. But the exponents of

48. Report, 'Social Protection Strategy: from Safety Net To Spring board', World Bank Group, Human Development Network www.worldbank.org accessed on 23rd November, 2008

49. See, World Bank Report, *Social Risk Management: A New Conceptual Framework for Social Protection and Beyond* (2000) www.worldbank.org accessed on 23rd November, 2008

50. *Ibid.*

a new theory argue that social security is not one of the primary functions of the government. Social security, according to them should not charge public exchequer and it should be left open to the citizens to buy whatever services or provisions he can to equip himself with security⁵¹. The question is that what is the protection that common people can legitimately expect from the State or the government if State shows a tendency to withdraw from all other than its essential functions. Criticisms are many against this view⁵².

- (i) The first and foremost argument is that no country can withdraw from providing the basic services which constitute the elements of social security to its subjects. On the other hand State should take up and run schemes for providing ingredients of social security like supply of water, medical services, sanitation, elementary education and so on.
- (ii) Second argument is that if State withdraws totally and leaves social security to be bought, majority of the people of the country will not get access to even elementary social security. Those who are not having adequate means of livelihood cannot get access and this will lead to an explosive situation that will affect the security, law and order which are essential for economic activities including investment and production.

51. The followers of this view believe that state should confine to its essential functions only and withdrawing state from all other activities

52. Sonia E Rolland, "Developing Country Coalitions at WTO: In Search of Legal Support", 48 Harv. Int'l L.J. 2 (2007). See also Parashar Kulkarni, "Emergency, Safeguard Measures in GATS: Policy Options for South Asia" *South Asian Year Book of Trade and Development*, 2006, Centad & Wiley, 2007, Catherine L. Lynch, *The Forces of Economic Globalization*, Kluwer Law International (2003) p. 58.

- (iii) Another argument is that if elementary medical benefits are not provided by State, it will lead to insecure health conditions for all. This in turn may lead to the deterioration of the quality of human resources available in the society.
- (iv) Lastly, when private agencies are vested with power to arrange and offer social security services, they will run it as a business enterprise. If the profit is only marginal, they may not be attracted.

The main allegation put forward is that social security situation in India is characterized by ambiguity in policy as well as in responsibility⁵³ and lack of effective implementation of legislations. There are many schemes but these have been framed at various points of time and, therefore, do not conform to any overall design reflecting a comprehensive and consistent policy or direction. The working group on Labour Policy⁵⁴ set up by the Planning Commission also pointed out that ‘the schemes of social security, types of benefits or protection provided there under do not conform to any overall plan or design. As a matter of fact, there is no policy on social security, no plan for social security and the Five Year Plans are practically silent about this important aspect, though the Indian Constitution visualizes a regime of social security. The public expenditure on social security in India is 1.8% of the GDP against 4.7% in Sri Lanka

53. Michael V Hauff, “Geramn Welfare State Some Aspects” M M Sankhdhar and Sharda Jain (Eds.), *Social Security, Welfare and Polity*, Deep and Deep Publications Pvt Ltd, New Delhi(2004), 282 at p.285.

54. Report of Working Group for 11th Five year Plan(2007-2012) under the Chairmanship of Prof. B.L.Mungekar

and 3.6% in China⁵⁵. This itself shows the disparity of human development that these countries have achieved and that we are yet to achieve. In the light of the inadequate expenditure on social security in India, it is necessary that plans and programmes be devised to address the needs of diverse vulnerable sections of the people, comprising the total population of India.

Needs of social security vary in accordance with the definition of the term. Lord Beveridge⁵⁶ listed eight kinds of primary conditions which demand social security. These are listed below:

(1) Unemployment; (2) Disability; (3) Loss of livelihood; (4) Retirement from occupation; (5) Marriage of women; (6) Funeral expenses of self or family members; (7) Childhood; (8) Physical disease or incapacity.

According to ILO⁵⁷ social security requires to meet the contingencies like (1) unemployment; (2) sickness; (3) employment injury; (4) maternity; (5) invalidity; (6) old age; (7) death; and (8) emergency expenses. World Bank⁵⁸ requires social security to cover (1) natural diseases; (2) health; (3) social risks; (4) gender; (5) economic and political environment.

55. World Labour Report, 2000. www.ilo.org/public/english/protection/socsec/wlrblurb.htm

56. These conditions are mentioned in his Report filed in 1942

57. Derived from ILO Conventions mainly (a) Social Security (Minimum standards) Convention, 1952, (b) Equality of Treatment (Social Security) Convention, 1962 and (c) Convention on Maintenance of Social Security Rights, 1982

58. See, *World Bank Report*, 2002 available www.worldbank.org/annualreport/2002 accessed on 25th April, 2008

In order to identify the needs of diverse sections of the population for social security, it is necessary to classify the total population into different groups. Population of India broadly may be classified into a working population and non-working population. The working population can again be classified into wage earners, self employed and unemployed.

The government has to bear the responsibility of assuring a basic minimum of social security to all citizens. This may be supplemented by other institutions through contributory insurance schemes, welfare funds etc.

When analyzing the Indian position it is highly necessary to deal with the policy reforms made by India in different sectors to match with the new trends and to examine how far they affect the Indian labour.

1.4 Economic Background and Policy Reforms in India

The founding fathers of India adopted the course of a mixed economy⁵⁹, and the economic development of India since independence is unique in several ways. India's development pattern during 1959-1980 was characterized by strong centralized planning, excessive regulation and control of private enterprises, state ownership of basic industries, trade protectionism and a cautious and selective approach towards foreign capital⁶⁰. It was nothing but a permit and license regime.

59. Capitalism and Marxism were the other two options. Mixed economy means economy where private and public enterprises co-exist. "An economy in which a substantial number, though by no means all, of the activities of production, distribution and exchange are undertaken by the government, and there is more interference by the STATE than there would be in a MARKET ECONOMY. A mixed economy thus combines the characteristics of both CAPITALISM and SOCIALISM." Alan and Trombley, *The Norton Dictionary of Modern Thought*, W. W. Norton & Company (1999), p. 535.

60. All these are regulated by specific laws and rules. The most important enactment was Foreign Exchange Regulation Act, 1973.

Since 1985, successive governments realized the lower rate of growth and carried forward reforms in industrial, financial, fiscal and external affairs. It reached a stage of liberalization, privatisation and globalization⁶¹ all the way. In the new liberalized industrial and trade environment, the government is allowing competition and market forces to guide investment decisions. Government started progressively assuming the role of promoter, facilitator and catalytic agent instead of a controller and licensor of private economic activities.

Economic reforms were set in motion, at least in industrial sector, from 1985 when government introduced a series of measures to reduce controls in industrial sector, particularly concerning large industries. The process speeded up with the new industrial policy introduced in 1991⁶². The new policy introduced radical changes “to unshackle the Indian industrial economy from the cobwebs of unnecessary bureaucratic controls”⁶³. It abolished industrial licenses for all projects except for 18 specified items relating to security and strategic areas, hazardous chemicals, items of elastic consumptions, environmental concerns and

61. These are the main components of new economic policies. See, Economic Reforms since 1991, Chapter 7 p.98 “...the replacement of ‘license, quota and permit (LQP) Raj by liberalization, privatization and globalization (LPG) Regime. http://www.ncert.nic.in/textbooks/XI/Economics_XI/Ch-7.pdf accessed on 3rd November, 2007

62. The reform process in India was initiated with the aim of accelerating the pace of economic growth and eradication of poverty. The process of economic liberalization in India can be traced back to the late 1970s. However, the reform process began in earnest only in July 1991. It was only in 1991 that the Government signaled a systemic shift to a more open economy with greater reliance upon market forces, a larger role for the private sector including foreign investment, and a restructuring of the role of Government. ITP Division, Ministry of External Affairs, Government of India, http://www.indiainbusiness.nic.in/economy/economic_reforms.htm accessed on 23rd November, 2008

63. Announcement of Industrial Policy in Parliament of India on July 24, 1991.

social reasons.⁶⁴ Apart from the central government many state governments have also initiated significant procedural and policy reforms to promote foreign investment and encourage domestic private participation in the developmental process. They also took steps for development of industrial estates, removing artificial barriers within states, decentralization of decision making, time bound clearance of projects, investment subsidies and tax and tariff concessions⁶⁵.

In the financial and banking sector also, reforms are inevitable as they have the strategic importance. The Reserve Bank of India comments on the future scenario as follows:

“The competition of banking sector has so evolved in the recent years that the market structure of the banking has tended to be oligopolistic. Existing banks must take a gradual upgradation of skills and technologies and the restructuring and re-engineering processes being attempted by both foreign and private sector banks”⁶⁶.

It means that the highly regulated and directed banking system is now transforming itself into one characterized by openness, competition and prudence. This development conforms to the liberalization and globalization needs of the Indian economy.

In par with this, tax reforms were also recommended and Government of India appointed Tax Reforms Committee (ITRC) for

64. *Ibid.*

65. *Ibid.*

66. *Report on Currency and Finance (1999-2000)* Reserve Bank of India, page IV-2.

making recommendations in this area. The 1994-95 budgets abolished the distinction between widely held domestic companies and closely held domestic companies. The tax reforms since 1991 have helped in correcting structural imbalances in the tax system. They are soft on industry with a view to create new investment climate and make India internationally competitive. The wave is extended to capital reforms also as it was closely related to the economy.

Prior to the onset of 1991 reforms, capital market structure in India was subject to several controls and opaque procedures. The trading and settlement system got outdated and was not in tune with international practices. Raising of capital from securities market was regulated by Capital Issues Control Act, 1947. Under this Act companies were required to obtain approval from Controller of Capital Issues for raising funds from the market. In 1992, the Capital Issues (Control) Act, 1947 was repealed and thus ended all controls relating to raising of funds from the market. Issuers of Capital are now required to meet the guidelines of Securities and Exchange Board of India on disclosures and protection of investors⁶⁷.

Likewise, before 1991, the foreign trade of India suffered from strict bureaucratic and discretionary controls. From 1991, Government of India has introduced a series of reforms to liberalise and globalize the Indian economy. Reforms in the external sector of Indian economy are

67. "Thus, financial sector and capital market reforms are critical to strengthening the financial system and, in turn, Indian economy and society. A double-digit economic growth rate on the back of freedom for investment, trade, capital flow coupled with competition and productivity are the cornerstones for a new India" Prime Ministers Council on Trade and Industry, on Reforms in the Financial Sector and Capital Markets. See, <http://indiaimage.nic.in/pm councils/reports/fin/ intro.htm>, accessed on 5th December, 2008

intended to integrate the Indian economy with the world economy. In this context the 9th Five Year Plan⁶⁸ statement observed:

“The process of globalization is a reality which cannot be denied and also should not be avoided. However, it needs to be managed so that we can derive the maximum advantage from world markets”.⁶⁹

1.5 Governmental Measures on Foreign Trade

The Indian economy became liberalized to a great extent on account of foreign trade policies introduced by the Government from time to time. Some of such important governmental attempts are discussed below.

(a) Medium Term Export Strategy (MTES) 2002-2007

In 2002, the Government of India announced a Medium Term Export Strategy (MTES) for 2002-2007 providing a vision for creating a stable policy environment with indicative sectorwise targets for achieving 1% share for India in the world trade by 2007. The new EXIM Policy 2002-07 also assumes an environment free of restrictions and controls.

(b) From FERA to FEMA

In 1973 Government of India introduced Foreign Exchange Regulation Act (FERA) which treated the violators of the Act as criminals. Realising that FERA as not in tune with the economic

68. 1997-2002.

69. Government of India, *Nineth Five Year Plan*, (1997-2002), p.5. Planning Commission Reports.

reforms initiated since 1991, the Government replaced it with a new legislation viz. the Foreign Exchange Management Act (FEMA) 1999.⁷⁰ FEMA retained a nightmare for 27 years for the Indian Corporate World. FEMA sets out its objective as ‘facilitating external trade and payment’ and “promoting the orderly development and maintenance of foreign exchange market in India”⁷¹. Under FEMA the violators are treated as civil offenders, unlike FEMA which treats them as criminals.

Appreciating the encouraging results of the reforms, the 9th Five Year Plan Document observed that the Indian economy has responded well to the change in policy direction and the growth rate increased from 5.8% in Seventh Plan (1985-90) to 6.8% in the Eighth Plan.⁷² This process of reforms should be continued and must be strengthened. The reforms involve a major re-orientation of the role of the State⁷³. Instead of being a controller of private sector activity and also a direct producer in many areas through majority owned public sector enterprises, the state must play a different role in future. Thus government is withdrawing, though gradually, as a controller and licensor of private activity and is presently allowing competition and market forces to guide investment decisions. In this situation it is highly necessary to analyse whether Indian labour management scenario is matured enough to go hand in hand with these reforms.

70. Which came into effect from 1st June 2000.

71. B.N.Gururaj, *et.al*, *Commentaries on FEMA, Money Laundering Act, and COFEPOSA*, Lexus Nexis, Wadhwa, Nagpur(2005) at p. 11

72. *Ninth Five Year Plan (1997-2000) op.cit*, p.3.

73. The conventional role of the State was as described by Friedman W. in his book *The State and Rule of Law in a Mixed Economy*, Stevens & Sons, London, (1971) at p. 3 State has four major role to play- as a controller, regulator, provider and entrepreneur.

1.6 Economic Reforms and Its Impact on Labour and Employment Security

The net result of the economic reforms in India is the creation of competitive markets⁷⁴. Fiscal stabilisation has resulted in drastic reduction in budgetary support to the public sector commercial enterprises while exposing these enterprises to increased competition from private sector. A shift from long protected non-competitive to increasingly competitive output market since 1991 by reducing wasteful utilization of both capital and labour is expected to take the Indian economy on a higher growth path.

However, increasing competitive pressures also involve a shift from high margin-low volume environment of the earlier period to the high volume-low margin situation with margins coming continuously under pressure. This is expected to induce cost reduction, quality improvement and productivity growth. Though this is good news for consumers, it is a bad news for producers with a call to shed old-style complacency and also for workers. The removal of custom trade barriers to entry will result in trans-border competition. These competitive forces will lead to rapid growth. Thus it requires exit route both for capital and labour from the existing inefficient uses towards more efficient, more productive, lower cost and better quality producing units⁷⁵.

74. The reforms have unlocked India's enormous growth potential and unleashed powerful entrepreneurial forces. See, ITP Division, Ministry of External Affairs, Government of India, http://www.indiainbusiness.nic.in/economy/economic_reforms.htm, accessed on 20th March 2009.

75. In the absence of this shift in the utilization of labour and capital, there would clearly be a dogging of the economic system with adverse consequences for sustained rapid growth. This requires painful adjustments involving dislocation, unemployment, occupational and industrial shifts, obsolescence and increasing disparities in earnings between fast-growing and slow-growing industries.

During the pre-reform period, employment in the high productivity factory manufacturing segment increased at the rate of 53 % per annum against a manufacturing output growth of 8.7%⁷⁶. The stagnation in employment in the pre-reform period despite a rise in growth rate of industrial output has been found to be attributable to a significant rise in the growth of unit labour costs measured by nominal wages deflated by output price. The situation was reversed during the post-reform period. Product wage growth slowed down from 4.8% per annum during pre-reform period to 2.5% during the post-reform period⁷⁷. While government interventions have had decisive influences on wages in the organized sector, they have had virtually no effect on wages in unorganized sector. The government sought to influence wages in unorganized sector through the instrument of statutory minimum wages. But the statutory minimum wages have been largely ineffective in influencing actual wages.

The central focus on the employment security system, which has come to be established, has been on preventing retrenchment in large industrial establishments through legal and administrative restrictions. In practice, it has not been possible to limit the coverage of the system to industrial enterprises alone. The system has been at least effective in protecting industrial workers. A large majority of the protected employees are in fact, in services, mostly controlled by the government.

76. *Report of the Ninth Five year Plan*, 1997—2002.

77. According to ILO, wage growth is alleged to have slowed sharply after the introduction of economic reforms in 1991, ILO Report. See also World Bank Report, 2008: *Income Inequalities in the Age of Financial Globalisation* (1990-2007), International Institute of Labour Studies, available in [www.economicstimes .indiatimes.com/news/economy /indicators](http://www.economicstimes.indiatimes.com/news/economy/indicators), accessed on 23rd February, 2009

The proportion of protected industrial workers has been declining over the past decade. Industrial sickness has been growing and many workers inside industries have employment security only in theory⁷⁸. Employers search for escape routes has led to greater use of casual and contract workers. Thus the growth of industrial employment has declined quite sharply because of growing emphasis on capital intensive technologies⁷⁹.

However employment security system is only partly responsible for the slow growth of industrial employment. By making labour adjustments difficult and costly, the system effectively made labour costs higher than wage costs. Higher labour costs also made capital relatively cheap and encouraged growth of capital intensity⁸⁰.

Generally, the public sector regarded employment generation as a social responsibility. Government was ready to subsidise non-viable enterprises in order to prevent job losses. Both these resulted in surplus of labour in the organized sector. The economic reforms have reduced the capacity of the public sector enterprises and the government to carry the surplus labour. Growth of competitive pressures in the economy on

78. P.D. Shenoy, "Globalisation; n Its Impact on Industrial Relations In India", Paper presented in Seminar on India and Globalization, organized by RIS (Research and Information System for Developing Countries) on 1st February, 2007 at India Habitat Centre, New Delhi.

79. Aleck Ostry, "Impact of Globalization on labour Markets: Broad Implications for Research on Job Strain" available at [www. Workhealth.org](http://www.Workhealth.org). accessed on 14th December, 2008

80. Mita Agarwal, "International Trade, Labour Standards and Labour Market Conditions: An Evaluation of the Linkages", Sir Hans Singer, et al. (Eds.) *TRIPS, The Uruguay Round and Third World Interests*, B.R.Publishing Corporation, Delhi (1999), 751 at p 758

the part of the government threatens to reveal the hidden unemployment into open unemployment. The government thus established National Renewal Fund which aims at financing voluntary retirement schemes, programmes for counseling, retraining and redeployment of the workers accepting voluntary retirement.⁸¹ But the progress of implementation of these programmes has been very poor so far⁸².

When analyzing the weaknesses of reforms, it is evident that some central objectives must be set for a reform programme concerning labour. At the same time labour policy reforms must minimize social costs of structural adjustment.

The reforms must address mainly three objectives:

Firstly, the industrial establishment's right to retrench must be restored irrespective of its size. This flexibility is necessary to adjust to changing market conditions. But current proposals of government aim at firms with 1000 or more employees and this will have to be changed.

Secondly, appropriately uniform rights conforming to the international practice, should be established for all workers irrespective of whether they are employed in small medium or large firms. This must include the establishment of appropriate retirement benefits based on their number of years of service.

81. NDF also aim at are a regeneration schemes for areas affected by high job losses which has been not yet carried out.

82. B. B. Bhattacharya and Saktivel, "Economic Reforms and Jobless Growth in India in the 1990s" <http://ieg.nic.in/worksakthi245.pdf>. See also, N.K.Jetli, *India Economic Reforms and Labour Policy*, New Century Publications, N.Delhi, (2004) at p. 19

Finally, the establishment of proper mechanisms to implement these provisions.

As per Group of Ministers⁸³ discussions, establishments employing less than 1000 workers need not get governments permission for laying off, retrenching workers or closure of the unit itself. According to data available, 95% of Indian enterprises will be covered by the proposed legislative change. The government has sought to balance this measure with additional benefits to labour. The separation package will be increased from 15 to 45 days of wages for every year of completed years of services. A hike in workers' upper wage ceiling from Rs.1600 to Rs.6500 per month has been proposed for the purpose of calculating the compensation⁸⁴. It has been decided that there will be no distinction between core and non-core activities for outsourcing purposes. As for the provisions of contract labour, it appears that there are still some differences. The Supreme Court released contract labour laws for public sector units by quashing a 1976 central notification prohibiting the use of contract labour in certain types of jobs⁸⁵.

The GOM mentioned that the government had created the National Renewal Fund⁸⁶ to provide a safety net to the workers affected by the restructuring of public sector undertakings. The fund⁸⁷ is intended to finance compensation payments to employees opting for Voluntary

83. First set up in February, 2000 and reconstituted in 2001.

84. This is adopted in 2007, <http://planningcommission.nic.in>, accessed on 1st November, 2008

85. *Air India Statutory Corporation v. United Labour Union and Ors.*, A.I.R. 1997 S.C. 645

86. See *supra* n.62.

87. The financing of the fund is provided from Central Budget and World Bank Assistance.

Retirement Schemes and those made redundant due to the closure of unviable units. It was also intended to finance training programmes to help re-deployment of such labour. The fund also is to be utilized for retraining and re-employment of displaced labour. But in fact, now nobody knows about the status of this fund and what role is assigned to it. The GOM recommends that there is an urgent need to revamp the NRF and expand its scope covering all displaced employees.

Another important question discussed by GOM is of providing social security to the workers employed in unorganized sector which consists of 90% of total workforce. Hence, it recommends that the labour market flexibility must be accompanied by social security to the unorganized labour force in India. This should be borne in mind while taking the policy decision relating to labour.

According to GOM, it is true that every one prefers a faster growing economy than a slow growing economy. For employers it means growing market and increased profit from high volumes of sale. For the workers, it mean expanding gainful employment opportunities to growing labour force with progressively rising per worker productivity which would enable continuing rise in real wages and hence their living standards. The reforms place the governments to minimize counterproductive, unsuccessful, costly and time consuming involvements in the labour disputes in order to focus its attention on its core functions.⁸⁸

88. The core functions include law and order, defense public health primary education etc.

In a nutshell, the nature of demands of workers including that of trade unions is also changing. They are seeking job security and even ready to accept wage cuts for job protection. The nature of disputes is seen changing and the dispute resolution mechanisms are also to be changed. Above all, the protective attitude of government towards workers is seen changed when closure and retrenchments are allowed liberally. The conciliation machinery is more concerned about problems of employers like cost reduction, financial difficulties of employees competition, market fluctuations etc. The labour adjudication machinery gives more attention to the concerns of the industry. More over, the structural changes adopted effect change in the status of workers and that result in change in applicability of laws to these workers.

In these contexts, labour reforms in India in the era of globalization is really an important issue that may be very difficult to tackle. This issue becomes more sensitive as it is interrelated to poverty, illiteracy, deprivation, exploitation, lower per capita income etc. An institutional framework may be more appropriate for a new regulatory regime in the labour market for their welfare.

But today, the trade negotiations cast a duty on ILO and presently primary role of ILO is to promote opportunities for women and men to obtain decent and productive work with freedom, equity, security and human dignity. The ILO Declaration in Fundamental Principles and Rights at work⁸⁹, declares that the fundamental rights of workers are:

89. Declaration of Fundamental Principles And Right at Work, ILO,1998. See also,Bob Hepple, *Labour Laws and Global Trade*, Oxford and Portland, Oregon (2005), p.58-59.

- (i) freedom of association and effective recognition of right to collective bargaining;
- (ii) the elimination of all forms of forced compulsory labour;
- (iii) the effective abolition of child labour; and
- (iv) the elimination of discrimination in respect of employment and occupation.

The primary responsibility of ILO programmes and activities in a country is assigned to an officer of ILO office responsible for that country. These officers are responsible to maintain relations with its tripartite constituents and promote its principles and objectives. The ILO has launched an Active Partnership Policy with an aim to bring ILO closer to its constituents. This help to identify the needs and priorities in the countries they are dealing with and to establish country objectives. The officers are also responsible for development, implementation and evaluation of ILO activities in the country or countries they cover. There is a multi-disciplinary team to help in identifying special areas of concern and providing technical advice to member states to translate ILO's core mandate into action.

ILO country objective⁹⁰ for India was prepared in December 1996, which provided a framework for ILOs operational activities in India. The major objectives were:

- (i) Promoting sustainable productive employment and social protection in the organized sector;

90. See www.labour.nic.in/ilas/indiaandilo.htm. accessed on 15th April 2009

- (ii) Promoting sustainable productive employment and social protection in the unorganized sector;
- (iii) Elimination of child labour;
- (iv) Improving working conditions and occupational safety and health in certain selected sections;
- (v) Strengthening the capacity of workers to respond to topical issues; and
- (vi) Strengthening the capacity of employers to respond to topical issues.

The efforts of ILO is in tune with the transformation of labour market into a world labour market and the realization that unity among the working classes of the world has become an objective need. The political, social and economic changes that occurred during recent years have brought new challenges to the working class as well as to the entire human race. The policies of economic liberalization have severely altered the relationship between the state labour and business. Economic outcomes are now influenced more by market forces than legal norms, state intervention and social actions. Rapid technological progress alters normal employment relations by new relations involving multi-skilling. A growing number of workers will be excluded from the labour market on account of the mismatch occurring between the requirements of the market and the skills they possess. A brief analysis of the trade negotiations will reveal this fact.

1.7 International Trade and Labour Standards

The trade documents, GATT protocol and later WTO do not contain much provisions relating to labour. One among the WTO documents, the GATS (General Agreement on Trade in Services) contain the matters relating service sector, mainly commitments on market access in various service sectors including human resources. The issue of labour standards in trade relations was first raised at the Uruguay Round WTO negotiation at Marrakesh in 1994⁹¹. India and other developing nations had taken a stand that ILO and not WTO was the appropriate body to address labour standards at international level. The issue again came up at the first ministerial conference of the WTO in Singapore in 1996. Here also India along with other developing nations once again rejected the proposal of the US to include labour standards as an agenda in the WTO. The final Ministerial Declaration at Singapore⁹² explained the stand of the developing countries and reiterated that—

- (i) ILO is the competent body to set and deal with core labour standards and WTO affirms its support in promoting such standards
- (ii) It rejected the use of labour standards for protectionist purposes and agreed that the comparative advantage of countries particularly low wage developing countries, must not be put into question.

91. *Uruguay Round of Multilateral Trade Negotiations*, published by GATT Secretariat, Geneva, (1994)

92. www.wto.org/english/thewto_e/minist_e/.../wtodoc_e.htm accessed on 23rd November, 2008

- (iii) It noted that the WTO and ILO Secretariats would continue their existing collaboration. The Ministerial Declaration at Singapore was seen by the developing countries as successful against the more linking of trade and labour standards.

In the 3rd Ministerial Conference held at Seattle in 1999⁹³, the US has proposed establishment of a Working Group on trade and labour, which would deal with issues such as trade and employment, trade and social protection, core labour standards, forced labour, child labour and a report for consideration at the 4th Ministerial Conference. The European Union proposed the establishment of the joint ILO-WTO Working Forum on trade, globalization and labour issues to promote better understanding of the issues involved through interaction between all interested parties such as governments, employers, trade unions and other international organizations.

The 4th Ministerial Conference of the WTO which was held in Doha in 2001 reaffirmed the declaration made at Singapore Ministerial Conference of the WTO that ILO is the appropriate forum to deal with the issues of Core Labour Standards and thus withdrew from the issues of labour.

1.8 Globalization and Problems of Indian Worker

It is said that globalization would give a big boost to world trade and accelerate economic growth world-wide and in turn would greatly expand employment opportunities. In India, higher growth rates are achieved, but

93. www.wto.org/english/thewto_e/minist_e/.../min99_ehtm, accessed on 15th April 2009

such growth is capital intensive, and market is dominated by Multi-National Corporations which are profit driven and labour saving. Experience in the past decade shows that no growth in employment opportunities have taken place. Commodification of labour is an inevitable result of the thirst for high profit. The market demands that labour also to be subjected to demand and supply theory. Demand of labour can be minimized by adopting more advanced, labour saving technologies and thus making its price reduced. The result will be cutting of benefits and social security costs of labour. Under globalization regime, state intervention by subsidies in the market is totally out of place and market can have free hand in adopting any strategies to minimize labour costs.

In the new market conditions highest and fastest profits are not from goods producing industries or service sectors giving benefits to people at large but from sectors like communication and information technology. These sectors never expect to provide gainful employment on a mass scale.

In a situation where State is withdrawing from many of its essential functions, can the 'laissez faire' economy be said to be stepping in? In the regime of industrial relations, has hire and fire policy come back? These questions pose detailed enquiry.

There is no doubt that the working class is practically the victims of globalization⁹⁴. Some sectors compromised with this change by entering into alliances with more powerful global players and the other

94. Manfred Weiss, "Convergence and/ or Divergence in Labour Law Systems? A European Perspective" 28 *Comp. Lab. & Pol'y J.* 469 (2007) According to the author the process of globalization necessarily leads to "race to the bottom" change i.e., "a general decrease in workers' rights. The author describes it as "convergence or homogenization of labour standards"

sectors form a class who do not fit in to the new scheme. Labour comes under the second class and it is inevitable to find a solution to save them from the attack of the new challenges⁹⁵.

This work mainly concentrates on impact of globalization on social security of Indian labour, *viz*, how it affects the rights of labour as envisaged in the Constitution of India and under other laws enacted for ensuring protection and welfare. This analysis includes the efficacy of present legislative frame work and the way forward for securing right of workmen to social security in the changed economic scenario.

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95. Bruno Caruso, “Changes in the Workplace and the Dialogue of Global Law in the

SOCIAL SECURITY: ORIGIN AND ITS CONCEPTUAL EVOLUTION

C o n t e n t s	2.1	Social Security: Meaning and Content
	2.2	Essential Characteristics
	2.3	Genesis and Factors led to the Development:: A Brief History
	2.4	Modern Social Security Schemes
	2.5	Emergence of Social Security as a Human Right
	2.6	Conclusion

“History, in illuminating the past, it illuminates the present and in illuminating the present, it illuminates the future”

Benjamin N. Cardozo¹

This chapter is an attempt to analyse the origin of the term social security, its meaning and conceptual evolution as it would provide a clear insight for evaluating the present system and sound footing for framing future social security measures.

2.1 Social Security: Meaning and Content

Social security is essentially a term of Atlantic origin introduced by Abraham Epstein with a view to differentiating it from economic

1. Benjamin N. Cardozo, *Nature of Judicial Process*, Universal Law Publishing, New Delhi (2008), p.53

security². It is both a concept and a system³. The concept of social security is very old, though the term, the laws and institutions built around it in order to institutionalize the concept may be of recent origin. Social security conveys a meaning that necessitates a security in the society in case of contingencies⁴. But it also extends to security by state in case of contingencies⁵.

The term social security, its meaning, its denotation and connotation are vague. It speaks of a condition of the masses as a symbol of an end greatly desired and has been duly sensed by statesman⁶. It is the principle or practice of public provision for the economic security and social welfare of individual and his family as such, through social assistance or insurance⁷.

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2. Mr. Abraham Epstein is the person generally recognized as introducing the word to the world. He was the national leader in the social welfare movement in the first half of this Century in U. S. In U. S. at the beginning of 1930s the term “economic security was used and the Bill introduced in the Congress was Economic Security Bill. Epstein said “ I insisted on the term ‘social security’ because by that time I had a clear conception of the differences which lay between the concept of social insurance as worked out by Bismarck in Germany and the conception of social protection as elaborated in England. I definitely did not want social insurance because this would give it the German twist of the actuarial insurance conception terms of compulsory savings which do not justify governmental contributions. I did not want ‘economic security’ because what I hoped for was not only a form of security which would, at the same time, promote the welfare of the society as a whole as I was convinced that no improvement in the conditions of labour can come except as the security of the people as a whole is advanced.” See Notes, “Origin of the Term Social Security”, 55 Soc. Sec. Bull. 63(1992) at p. 64 . See also *infra* n.6 at p. 114
 3. Report of the Working Group on Social Security for the Tenth Five Year Plan(India) (2002-2007)
 4. Contingencies include the following: (a)unemployment, (b)sickness, (c)maternity, (d) invalidity, (e)old age, (f)death, (g)emergency expenses etc. See *Report of National Commission on Labour II*, Chapter 8, para 54
 5. In most of the studies the term is used in this sense.
 6. Maurice Stack, ESQ., Technical Advisor, Social Insurance Section, International Labour Organization. “The Meaning of Social Security”, 23 J. Comp. Legis. & Int’l. L. 113 (1941), 113
 7. See *Webster’s New International Dictionary*

International Labour Organization⁸ defines social security as “security that society furnishes through appropriate organizations against certain risks to which its members are exposed”⁹, i.e., the security is furnished by society, to the members of the society¹⁰. The origin of society itself is an outcome of the fact that man is a social animal and he can survive only in the collective humane circumstances. Being a part of the society he expects help from society when he faces a risk¹¹, which is the most common factor in human life. ILO casts a duty on society to furnish that protection to its members when one is exposed to a risk in life¹². It is social as it represents a culmination of collective effort¹³. This definition envisages existence of appropriate organization

8. The ILO was founded in 1919, in the wake of a destructive war, to pursue a vision based on the premise that universal, lasting peace can be established only if it is based upon decent treatment of working people. The ILO became the first specialized agency of the UN in 1946. http://www.ilo.org/global/About_the_ILO/lang--en/index.htm accessed on 16th March, 2007

9. International Labour Organisation, *Approaches to Social Security: An international Survey*, Geneva, (1942), p.83.

10. In other words it is freedom of society itself from worry. Maurice Stack has rightly observed: “Society might worry about injustice, ignorance, poverty and disease in its midst, about the less fortunate members. It might do so for two reasons: out of sympathy and idealism and out of fear of the disorder that extensive misery might produce. Our analysis suggests that “social security” means that security from injustice etc., which society provides for its members, with an eye to its own preservation.” See *supra*, n.6

11. World Bank narrates the risks as natural disasters, health, social, gender, economic, political and environmental. See *Social Protection Strategy: from Safety Net To Spring Board*, World Bank Group, Human Development Network

12. The Preamble of The Constitution of the ILO refers to the need and protection of workers against sickness, disease and injury arising out of their employment, pension for old age protection of the interests of workers .this is the first time social security is recognized as a right officially. Subsequently Universal Declaration of Human Rights also recognized right to social security by stating that every member of society has a right to social security. See also *supra* n. 2.

13. Deepak Bhatnagar, *Labour Welfare and Social Security Designation in India*, Deep and Deep Publications, New Delhi (1984), p.46.

through which the security is to be furnished. But what are the areas covered by the definition? Whether are they social only? Or political, economic, moral, religious, or natural to which members of society are continuously exposed to? These areas comprise essentially contingencies against which the individual of small means and meager resources cannot be effectively addressed to and the working man will not be in a position to support himself and his dependents in “health and decay”¹⁴. Hence the term social security foresees a condition wherein the wage earner is at peril when he is exposed to some risks in life so that he is unable to maintain himself and his dependents. The risk may come as anything-as a disease or as an accident and so on. Such a situation will overturn his and his dependant’s existence miserable. To save him from such a situation a duty is cast on the society to protect him. Hence social security is a protection rendered by society through collective action against social risks causing hardship to individuals whose resources are seldom adequate to meet them. According to this definition the social security is ensured by way of different schemes which provide the citizens with benefits designed to support when unable to earn and to restore him to gainful activity. It is an opportunity to earn one’s living and freedom from fear especially of economic ruin which involves physical or moral ruin¹⁵.

14. *Id* at p.80.

15. K.D.Srivastava, *Law Relating to Trade Union & Unfair Practices in India*, Eastern Book Co., Lucknow (2002) p.30. The author says: “Security of job and standard of living are at the core of labour demands...t is the urge for security and striving for a minimum and then increased standard of living which impels various activities in labour...social security, an opportunity to earn one’s living and freedom from fear- fear especially from economic ruin which involves physical and moral ruin – is the fundamental needs of the day”.

Sir Williams Beveridge aptly observed:

“The term social security “is used to denote the security of an income to take the place of earnings, when they are interrupted by unemployment, sickness or accident, or to provide for retirement through age or to provide loss of support by the death of another person, and to meet exceptional expenditure such as those connected with birth, death and marriage”¹⁶.

By this definition, social security is the security of an income when the earning is interrupted. The cause of such interruption may be unemployment, sickness, accident, old age, death of earning member or meeting exceptional expenditure (such as birth, death or marriage in the family). This definition reiterates the social nature of an independent human being. When an individual is exposed to such type of interruption of his income, the society has to provide him some assurance or guarantee that the society will take care of him in these situations and the same is called social security. This is a comprehensive definition and it details the areas on which the security can be provided with.

According to National Commission on Labour (I), the concept of social security is based on the ideas of human dignity and social justice.¹⁷ According to the Commission the underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare, should be given protection against certain

16. William Beveridge, *Social Insurance and Allied Services*, Report presented to Parliament in December, 1942 at p.120. See also Julian Fulbrook, *Law at Work; Social Security*, Sweet and Maxwell, London (1980) at p. 16

17. Report of National Commission on Labour, 1968 (India) para.13.1, p.162.

hazards.¹⁸ As a part of society, every individual has some contribution to it. The collective contribution indicates the welfare and progress of the society. When the positive contribution increases, society is said to be a developing society. The development of the society indicates the welfare of the country. National Council on Labour explains that the individuals in the society contribute or likely to contribute are having a right against the society to be protected when he/she is in peril. National Council on Labour explains social security as an incentive for development¹⁹. This is more or less a right based approach.

According to Beveridge Committee Report²⁰ this can be provided by social security plan and these plans should contain an adequate level of employment, a comprehensive health service and a scheme of children's allowances as three fundamentals. According to National Council on Labour also, social security envisages that the members of the community shall be protected by collective action against social risks causing undue hardships and privation to individuals whose private resources can seldom be adequate to meet them²¹. Individuals working in various fields and in different capacities contribute towards the enrichment of society and in turn "deserve to be taken care of, in times, when calamity befalls them"²²

18. *Ibid.*

19. See *supra* n.15

20. Almost all other definitions casts a duty on society to provide social security. Without a shift from that duty based approach to a right based approach, social security can not be read as a right of the workers

21. See *supra* n.16 at p.162.

22. See *supra* n 15. The author explains that 'the philosophy of welfare has stolen the philosophy of laissez-faire in the social scene and with social objectives, collective social responsibility looms large'.

Hence social security law involves those legal mechanisms primarily concerned to ensure the provision for their individual of a cash income adequate, when taken along with the benefits in kind provided by other social services to ensure for him a culturally acceptable minimum standard of living where the normal means of doing so fail²³.

2.2 Essential Characteristics

A comprehensive service of social security is designed to compact the five giants in the path of social progress—want, disease, ignorance, squalor and idleness. Thus it is a programme of protection provided by security against those contingencies of modern life, sickness, unemployment, old age, dependency, industrial accidents and invalidity against which the individual cannot be expected to protect himself and his family by his own ability or foresight. According to the overview prepared by Ministry of Labour of India, social security protects not just the workman but his entire family by giving benefit packages in financial security and health care²⁴.

As stated earlier, social security is provided through schemes. On the basis of meaning of social security the schemes should contain certain essential characteristics. Generally there are four main requirements. They are

- (i) The scheme for social security should guarantee income in case of involuntary loss of all or a large part of income from work;

23. Harry Calvert, *Social Security Law*, Sweet & Maxwell, London (1978), p.1.

24. Available at <http://labour.nic.in/nic/ss/overview.html> accessed on 18th March, 2009

- (ii) The system must be initiated by legislations so as to define obligations upon public or other organizations to ensure the same;
- (iii) The system must be administered by public or private organizations;
- (iv) The system must assure that the benefits will be available when required and the protection will be adequate both in quantity and quality²⁵.

2.3 Genesis and Factors led to the Development: A Brief History

The quest for social security and freedom from want and distress has been the consistent urge of man through out the ages.²⁶ The very basis of social security originates from the concept of poverty. As Victor George has rightly pointed out, the problem of poverty is seen in four different ways:

“Poverty as an ascribed status in the immediate aftermath of the collapse of feudalism, as an individual problem of physical subsistence attributable to the individuals, personal failing from the mid 17th Century to the beginning of the present century and finally as a social problem of physical subsistence and social inequality during this century²⁷.”

25. Amoriand Doshi, *Labour Problems and Social Welfare in India*, Kitab Mahal Pvt. Ltd. (1966), p.333.

26. *Supra* n.16

27. Victor George, “Social Security and Society”, Routledge and Kegan Paul Ltd., London (1973), p.1.

In all the four ways poverty is a social problem and it involves conflict of economic interest between the various social classes in the society.²⁸ But in strict sense, in the rigid feudal society, poverty was considered as a status and the same could not be altered²⁹. But the term underwent a drastic change during 1350-1601³⁰ which was a transition period. The government considered large number of poor people in the town who were unemployed and in search of relief or alms as a threat to the existing social order. But during this period, government never aimed at to provide them with employment or a means of acquiring income. The legislations of 15th Century³¹ and first half of 16th Century³² were designed in such a way as to punish begging. The notion persisted that poverty was consequence of moral fault³³ and it is equated with laziness and crime. In 16th Century during the period of Henry VIII, the wealthy people of parish were asked to help the poor who lived in the locality. But this was purely voluntary. The various

28. *Ibid* at p.1.

29. See, www.ise.ac.uk/library/pamphlets, accessed on 26th November, 2007

30. *Id.* at p.4.

31. The *Vagabonds and Beggars Act*, 1494 provided that: "Vagabonds, idle and suspected persons shall be set in the stocks for three days and three nights and have none other sustenance but bread and water and then shall be put out of Town. Every beggar suitable to work shall resort to the Hundred where he last dwelled, is best known, or was born and there remain upon the pain aforesaid." Ref. <http://www.workhouses.org.uk/> accessed on 2nd March, 2009

32. The 1547 *Statute of Legal Settlement* (1 Edw. VI. c.3) enacted that a sturdy beggar could be branded or made a slave for two years (or for life if he absconded). The Act condemned "...foolish pity and mercy" for vagrants. Ref. <http://www.workhouses.org.uk/> accessed on 2nd March, 2009

33. *Id.* at p.5.

Acts of last quarter of the 16th Century³⁴ were incorporated and enlarged in the Elizabethan Act of 1601³⁵ which cause to guide poor relief for over two centuries³⁶ i.e.,1600-1834.³⁷ The Elizabethan Act required parishes to provide relief to the poor, put off taxes compulsorily levied on their wealthier members. This indicates that some machinery was established to help the poor during that period. A new religious view of nature of work, i.e., to work hard, to lead a good life and to save one's own money, because it was a part of the Christian way of life according to God's will. Thus the views of poverty and work meant that the poor were not only idle but sinners as well. Poverty then was not a social problem to the society but a personal problem of the individual concerned. The solution to the problem such as social policies to provide employment opportunities to safeguard wages etc., did not lie in the government, but in the individuals themselves.

34. An Act of 1564 aimed to suppress the 'roaming beggar' by empowering parish officers to 'appoint meet and convenient places for the habitations and abidings' of such classes — one of the first references to what was subsequently to evolve into the workhouse. This was followed in 1576 by an Act For Setting the Poor on Work which provided that stocks of materials such as wool, hemp, and flax should be provided and premises hired in which to employ the able-bodied poor. Ref. <http://www.workhouses.org.uk/>In 1597, an Act *For the Relief of the Poor* (39 Eliz. c.3) required every parish to appoint 'Overseers of the Poor' whose responsibility it was to find work for the unemployed and to set up parish-houses for those incapable of supporting themselves. Ref. <http://www.workhouses.org.uk/> accessed on 2nd March, 2009

35. The Act for the Relief of the Poor,1601. Under the 1601 Act, each parish was obliged to relieve the aged and the helpless, to bring up unprotected children in habits of industry, and to provide work for those capable of it but who were lacking their usual trade. Ref. <http://www.workhouses.org.uk/>. See also Sidney Webb and Beatrice English *Poor Law History*, Longmans, Green & Co., London, (1927).

36. *See supra* n. 27 at p.5

37. *Id.* at p.6.

The change in the nature of relationship between government and the citizen emerged after the collapse of feudalism. During feudal period, ruling class themselves formed the government and government was not of people. After the collapse of feudalism, a new relationship between ruling class and working class became a necessity for the economic development of the society. The answer or way out was provided by the British liberalism,³⁸ i.e., the principles of individualism and laissez-faire.³⁹ According to this philosophy, if the people worked long hours in unsuitable conditions—the theoretical independence became utterly meaningless, as it meant to starvation, hardship and exploitation to many of them. But the reports from parishes showed that if the poor were supported well, then their willingness and ability to work would also be increased. Thus the views on poor relief developed well in the 17th and 18th Centuries and passed to 19th Century. The main methods developed to deal with poverty are work house, Roundsman system and Speenham land system.⁴⁰ Roundman System is a sort of billeting of the unemployed labour upon the parishioners in rotation, each in turn having to provide maintenance and being free to exact

38. Democratization in Britain, the transition from aristocracy to democracy, took place in the nineteenth and early twentieth centuries. Some people say that democracy in Britain started with the Glorious Revolution in the seventeenth century. However, after the Revolution there still existed deep-rooted discrimination in political rights caused by religious and economic factors. It was in the nineteenth century (in particular from 1830 to 1880) that a series of unprecedented reforms, that is, liberal reforms, were instituted in order to do away with these discriminations

39. Malthuse, Adam Smith and the then economics argued that individuals must be free to pursue his own welfare as we please. Several individual must be master of his own fate, responsible for his action, free to pursue policies that suit to him best. See Steven G. Medena and Wren J. Samuels (Eds.) *A history of Economic Thought, The LSI Lectures by Lionel Robbins*, Oxford University Press, New Delhi (2004) at p. 149

40. *Supra* n.15 at p.8.

services. In Speenhamland System, labourer's wages were supplemented out of parish funds up to a certain level depending on the number of children he had to support. Thus a starvation wage was assured by both these systems. But it was given irrespective of the worker's efforts or trade.

The Act of 1722⁴¹ provided provision for workhouses in Britain, which were concentrated mainly in towns. The Parish overseers were authorized to refuse relief to anyone unless he and his family were willing to enter the work house. Though earlier the life in these was miserable, at the end of 17th Century, these aimed at to provide employment, to train and to rehabilitate the poor and unemployed.⁴²

These systems led to the rise in public expenditure on poor relief. The ruling class rejected the idea of minimum wage, which would result in rise in public expenditure on poor relief and demanded the use of deterrent workhouse on mere systematic lines both in urban and rural areas. The workhouse principle of 1722 was applied with greater uniformity and on a large scale after the Poor Law Act, 1834. The Act introduced no new legal principles⁴³. It appointed a board called 'Poor Law Board' and its inspectors for the functioning of the Board. The

41. The Workhouse Test Act, 1722. Otherwise known as Sir Edward Knatchbull's Act of 1722-3 — it was mainly for amending the laws relating to the Settlement, Employment and Relief of the Poor. It enabled workhouses to be set up by parishes either singly, or in combination with neighboring parishes.

42. French Revolution provided another earner i.e., wage earner—State should serve interest of people. See, Alfred Cobban and Lewis, *The Social Interpretation of French Revolution*, Cambridge University Press, (1999) p. 23.

43. <http://www.victorianweb.org/history/poorlaw>. accessed on 2nd March, 2009

major drawback of this system was rightly pointed out by Gilbert in the following words:

“The poor law ... treated an applicant for relief as a quasi-criminal and sought to force him by the pressure of humiliation and discipline back into the labour market. So long as the men who made the laws were not elected by the people who were likely to become clients of the poor law, such a system could work”⁴⁴.

The formation of labour party at the end of 19th Century and the election of working class candidates as Members of Parliament were a clear warning to the Conservative and Liberal parties to what could happen if the working class acted in solidarity. The spread of socialistic ideas particularly marxism provided the working class with the unifying class-consciousness. By the end of 19th Century, the industrial expansion of the country became increasingly dependant on a labour force that was skilled, efficient and cooperative with management.

A few industrialists came to realize that the payment of a living wage or of adequate poor relief or the provision of education and health services were not a threat but an asset to the economic prosperity of an industry. The development of personnel and welfare departments in industry were the outcome of this realization. Protection of worker from want and worry thus became an economically profit-oriented activity.⁴⁵

44. As quoted in *supra* n. 27 at p. 9

45. *Id.* at p.15.

Social surveys and its statistical results and the social climate compelled to recognize poverty as a social problem, which had its root in the economic structure of society. It could be solved only through government action. The same caused for a protracted conflict between the working class and the upper classes. In 1905, Royal Commission on the Poor Law was appointed.⁴⁶ In their report, there was less emphasis on deterrence through no complete abandonment of the people; there was more emphasis on treatment and help to those in need but always qualified so as not to undermine the virtues of self help and independence, but there was less emphasis on forcing people with the workhouse, though not complete abolition of the workhouses.

The social policy measures introduced before the First World War raised a threat to the economic position of the ruling class. They did not aim at replacing a capitalist system but was concerned with making it more humane and efficient. Old Age Pension Act, 1908 and National Insurance Act, 1911 were passed in England in the field of social security but they represented slightly different philosophies of social policy. The Old Age Pension Act is more socialistic in nature⁴⁷ than the National Insurance Act, 1911. The National Insurance Act, 1911 was considered as the most important piece of legislation during this period. It determined the nature of future social security legislation in U.K.

46. Royal Commission on the Poor Laws and Relief of Distress 1905-09 They filed report in 1909. It contained majority and minority views

47. It provided pension of 5 shillings a week to old people who were 70 years old or more and whose income was not more than a stipulated maximum. Those who serve not morally correct were excerpted from recovery the pension.

This Act required people at work⁴⁸ to pay contributions, which entitled them to a benefit when they were out of work because of illness or unemployment. Employers and state contributed to the fund, which financed the benefit. Those who had not paid any contributions or not paid minimum number of contributions were not entitled to any benefits. Health insurance was administered by approved non-profit societies that were part of friendly insurance societies or of commercial insurance companies or of trade unions. The insurance principle had very much in line with middle and upper class values of individualism and self help. It proclaimed that employers and workers were alike in self-dependence and that regardless of class, each man's success was a proof of himself and a contribution to common wealth. In this way workers were more likely to accept the position of the upper classes as legitimate and to try to simulate them.⁴⁹ This was based on the following principle:

“What is good for the individual is good for society as a whole, for society nothing more than a collectivity of free individuals. The government can best help each individual and society in general by providing an administrative framework that encouraged free competition among individuals, even if the comparison was between unequal persons and groups”.⁵⁰

48. Only employed workers required to contribute to a fund from which the money was distributed to those who were in need.

49. *Supra* n.27 at p.8.

50. *Ibid.*

Self-help was instrumental in the growth of industrialization as well as to the economic interests of the upper classes in another way. It required people to make savings which could be used to expand industries and also prevent a person relying on state for help. The harshness of the poor law forced many workers to take out insurance policies against sickness, unemployment and such other risks with friendly societies or trade unions.⁵¹ Insurance however came to be seen as respectable, the sensible way to make provision for one's financial problems. Thus from a middle class practice, based on middle class values, it spread to the stable working class section and the Insurance Act, 1911 extended it into a national practice based on a national social value. Insurance was proclaimed to be in the interest of individual and of the nation as a whole. It was, in a sense, a compromise solution among those who felt that the state should be fully responsible for one's welfare. Britain was copying Bismarck Germany which was the first European country to introduce insurance schemes 'out of fear that the prevailing social order might be overthrown by revolutionary agitation of the working class'⁵².

Social security schemes originated in Germany, in 1881, when Emperor William I urged upon the Rich to adopt social insurance

51. These workers were mainly skilled workers with stable jobs and regular wages. The industrialists also came forward and supported skilled and efficient labour force. See *Id.* at p. 15.

52. The "friendly Society" or more generally, voluntary mutual aid paved the way for compulsory social insurance. *Supra n. 5* see also, William Harbutt Dawson, "Social Insurance in Germany, 1883-1911; Its History, Operation, Results: And a Comparison with The National Insurance Act, 1911".⁷⁵ *Journal of the Royal Statistical Society*, (1912), pp. 848-850

schemes.⁵³ Bismarck was also a great supporter of social insurance in Germany. The law providing sickness insurance in Germany was passed in 1883⁵⁴, for workmen's compensation on a compulsory insurance basis in 1884 and for old age and invalidity insurance in 1889.⁵⁵ The state intervention in matters of social welfare also greatly increased with the beginning of present century as the evils of laissez-faire policy were realized to a greater extent and as a result, many schemes had been evolved in various countries by the state for providing a minimum standard of well being for the industrial workers who had suffered most at the hands of the capitalists, due to non-intervention of the state for a long time.

Hence, with the development of political consciousness and growth of democratic institutions, people become increasingly conscious of their rights and privileges. There was growing realization that the state was the ultimate moral and economic guardian of the community⁵⁶. Its activities for the prevention of exploitation of unorganized labour, stabilization of economic system and protection of helpless, poor and underprivileged persons were no longer regarded as interference but was regarded as its legitimate function. The state is no longer a negative institution with only policy and judicial attributes. It is no longer a mere arbitrator among conflicting private interests in the

53. R.C.Saxena, *Labour Problems and Social Welfare*, K.Nath & Co., Meerut, (13th edn, 1974.) at p.33 .

54. In 1883 Germany extended through out the empire the principle of compulsory insurance which, having its origins in the incidents of mediaeval guild organization, had long been applied. *Ibid.*

55. Unemployment Insurance came only in 1925.

56. See, *supra* n.23 at p.335.

community. It is, in every country, it is becoming an active participant in an over widening sector of economics and social life. It is in fact, a creator of enterprises. The creator must not miss out and be partial in affairs of human welfare and national progress. The demand for provision of social security by the state emerges from lack of economic security and stability but it is a primary duty of the state to guarantee a certain amount of social well being and economic security to every individual member in the community. The concept has developed into a new dimension as social services are no longer a humiliating charity but necessary and proper duty of the modern state.⁵⁷

So far as means of providing social security are concerned there are several alternatives available to state. State can organize it single headed without counting on the sources or co-operation of any party or organization or it can work in conjunction with some private bodies or voluntary organizations for the benefit of employees, which is not associated with the organization either through contributions or by participating in its administration. The state can also enlist the resources and co-operation of the party for whom such schemes are primarily meant along with other parties in organizing social security. Different governments have extensively adopted the first two methods.⁵⁸ The last method, i.e., social insurance is comparatively of recent origin. However the present trend shows that the first two methods are being progressively replaced by the third one in organizing

57. See, ILO, *Approaches to Social Security*. <http://www.ilo.org/publications>, accessed on 16th May, 2009.

58. Generally called as methods of poor relief and social assistance.

social security in every advanced country of the world. Each country has evolved a scheme suited to its own particular requirement with due regard to world forces.⁵⁹

2.4 Modern Social Security Schemes

In the development of social insurance, different stages of growth can be traced. At first in pioneering of experimental stage the new idea is applied only to cover a few risks and strictly defused and limited groups of persons in the society. Then gradually social insurance is extended from these selected groups and risks to cover new risks and persons. Outstanding feature of modern social security scheme is the integration of its two important basic elements - social assistance and social insurance - and the unification of all social risks. Universality of coverage and adequacy of protection are two important factors in the way of social security. Before going into its details it is noteworthy to discuss social assistance and social insurance in detail.

(a) Social Assistance

Social assistance is customarily defined as a benefit in cash or in kind financed by the state and usually provided on the basis of a means or income test. Social assistance scheme is a device according to which benefits are given as a legal right to workers fulfilling prescribed conditions, by the state out of its own resources. Such schemes comprises of programmes designed to assist the most vulnerable

59. The Social Insurance Scheme adopted by Denmark, Bulgaria, New Zealand, Austria, France, Greece, Hungary, Japan, Yugoslavia and Lithuania have moved for equal contribution by employers and employees. On these countries states do not contribute. In German and Norwegian scheme, employees contribute larger sum than employers. In USSR the total cost was beard by employers.

individuals to meet their subsistence and for improving living standards. These programmes are aimed to transfer resources to eligible vulnerable and deprived persons. It is given as grants on fulfilling certain prescribed conditions such as means test etc. It provides benefit for persons of small means granted as of right and the amount is sufficient to meet a minimum standard of need and financed from taxation or general revenues. This is a kind of human development through public investment in social services to the poorest and most vulnerable and providing them employment opportunities and encourage self-reliance⁶⁰.

(b) Social Insurance

Social insurance can be defined as a device to provide benefit for persons of small earnings granted as of right in amount, which combine the contributive effort of the insured with subsidies from the employer and the state. Sir Beveridge defines social insurance “as a plan of giving in return for contributions, benefits up on the subsistence level, as of right and without the means test so that individual may build upon it freely.”⁶¹ Hence it is a device to prevent an individual from falling to the depths of poverty and misery and to help him in times of

60. Currently the social assistance is applied rather than traditional passive receipt of transfers. According to Asian Development Bank Report Social Assistance programmes should be designed to provide an expansion of opportunities to enable vulnerable groups to get out of poverty. It is envisioned that Social assistance can promote equity by ensuring access to human development opportunities that skilled and productive work force and contribute to the levels of social cohesion that assist in long term economic development. The labour Market Programmes may offer employment support in the form of public works programmes to the unemployed or poorest families. See www.adb.org/books/social_protection. NREGA Scheme in India is one example

61. *Supra* n.16

emergencies. Insurance involves the setting apart sums of money in order to provide compensation against loss, resulting from particular emergencies. The elimination of risks of the individual is the basic idea of insurance. It is primarily the effort of social group, in place of individual effort, to lessen the incidence of loss on individual. Thus it is a co-operative device, which aims at granting adequate benefits to the insured on the compulsory basis, in times of unemployment, sickness and other contingencies with a view to ensuring a minimum standard of living, out of fund created on the tripartite contributions of workers, employers and the state, and without any means test and as a matter of right of the insured. As rightly opined by William Beveridge:

“...social insurance implies both that it is compulsory and that men stand together with their fellows”.⁶²

Social Insurance encompass a contributory scheme wherein contributions are paid in to a common fund from which the costs of benefit and administrations are met⁶³.

There is a progressive development towards a “unified scheme of social insurance and social assistance”. According to ILO, a scheme which is unitary, must afford protection against all the ordinary risks of life and the special risks of employment and should bring under its

62. *Ibid.*

63. Hestor Inductivo, Director, Regional Office for Asia and Pacific, International Social Security Association, Presentation of paper in a Seminar on “Social Protection for the Poor in Asia and Latin America”, 20-25, October, 2002 available at www.adb.org/document/events/2002 accessed on 10th March, 2009

protection all workers by hand who live in society by their earnings, i.e., the entire population of small means and without private incomes.⁶⁴

A social security scheme, therefore, covers both social insurance and social assistance. All the social risks—incapacity for work, inability to find work, need for medical case etc. can be covered either by social insurance or by social assistance or by a combined scheme. For this purpose the benefits can be demarcated as (1) cash benefits and (2) kind benefits. The cash benefits such as wage loss, medical expenses can be covered by social insurance and kind benefits are covered by social assistance. Hence social security system of a country consists of its social insurance and social assistance schemes and in many cases there is a co-ordination between the two and in practice it is difficult to lay down any definite demarcation lines between various forms of social security.

It may also be noted that securities against contingencies may be provided in ways other than by state system. Many trade unions have their own sickness, unemployment and old age schemes in many countries. Large number of firms have established saving funds, sickness benefits and old age pensions for their working people.

Whatever may be the schemes or by whom these are worked out, certain conditions must be looked into. They are:

- (i) The schemes should never be allowed to deteriorate into a mere hand out of giving something in return for nothing.

64. ILO, "A New Structure of Social Security", p.18. See also, Social Security A New Consensus, ILO, (2001), available in [ilo.org/public/ English](http://ilo.org/public/English) accessed on 16th May, 2009.

Social security cannot continue for any length of time if it were to degenerate into as substitute for work and personal earnings.

- (ii) Any assistance rendered by society should be dignified and also must be dependable.
- (iii) It should be the objective of the scheme completely to weave a mesh of its protection.
- (iv) It rests on the national income which should be transferred from the pockets of the rich, the healthy and employed into the hands of poor, the sick, the aged and the unemployed.⁶⁵

Thus, social security is a result achieved by a comprehensive and successful series of public measures for protecting the public or large sector of it from economic distress that, in the absence of such measures, it would cause stoppage of earnings in sickness, unemployment, invalidity or old age and after death for making available to that same public medical care as needed and for subsidizing families bringing up young children.⁶⁶ The important goal of the system should be to 'ensure that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus is able to feel a sense of participation in and belonging to the society'.⁶⁷

As far as labour law is concerned, it originated as a part of private law. Philosophy of welfare state has resulted in a host of legislative

65. *Supra* n.25 at p.333.

66. ILO, Social Security (Minimum Standards) Convention, 1952.

67. Ogus & Barendt, *The Law of Social Security*, Butterworth's, London, (1978), p.1.

schemes designed to channel this economic activity for the collective welfare. Thus the developments in labour law have been largely consumed by public law and form an important part of economic law. In many cases state provide actual service itself. Along with these actual services form the concern of law of public services and the schemes designed to provide the individual and his dependants means. These schemes are concerns of social security law⁶⁸. Hence it can be concluded that all social security measures planned by government should give a confidence in the mind of its subjects that they are protected in the society by the society against the unforeseen risks which may be happened during their life. But then the question arises what exactly is the nature of this right. Is it a part of human rights?

2.5 Emergence of Social Security as a Human Right

Rights is a 20th Century name for what has been traditionally known as natural rights or rights of man⁶⁹. The Declaration of Independence issued by the Thirteen American States in July 1776 stated “ that all men are created equal; that they are endowed with certain inalienable rights; and among these are life, liberty and pursuit of happiness”⁷⁰.

The Declaration of Rights of Man and Citizen issued by Constituent Assembly in France asserts that “men are born and remain free and equal in rights.”⁷¹

68. *Supra* n.15.

69. Maurice Cranston, *Human Rights Today*, Manaktalan Bombay (1966),p.1

70. *Id* at p.2

71. *Id.* at p. 32

The natural rights to life liberty etc., have been understood as categorical rights, i.e., nobody could find any excuse for not respecting those rights. Such political right can be secured by legislation. But social and economic rights can rarely be secured by legislations alone. The rights like right to work, right to social security come under the second category. The first category of rights actually declares that those rights are secured through legislation. But for the second category rights, it depends on many other factors and hence mere declaration will not give meaning to those rights.

For example, a government needs to have wealth to provide social security than will to make laws. Most of the governments in the world today are poor and can not raise money. Though a state has earnest socialist ambitions, it cannot command anything approaching the sources which would be needed to guarantee any one in the state “a standard of living adequate for the health and well being of himself and of his family”⁷².

When right to life, liberty and pursuit of happiness become inalienable rights, it casts a duty on the state as it acquires the status of human right. Human right requires a conception of what rights one possesses by virtue of being human. By human rights we refer to those elements, which constitute the minimal conditions for human life or essential elements of human rights. Optimum realization of human rights can be achieved through the enactment of protective law and the establishment of mechanism to implement that law.⁷³

72. *Ibid*

73. Arun Ray, *National Human Rights Commission of India*, Vol.III, Khama Publishers, New Delhi (2nd edn.,2004) p.507.

India enacted the Protection of Human Rights Act, 1993 which defines human right as the right relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international covenants. International covenants are defined⁷⁴ as International Covenant on Economic, Social and Cultural Rights adopted by General Assembly of UN. An examination of whether social security is a human right or not means an examination whether it is included in any of the basic documents as human right.

International human rights norms provide an excellent opportunity to explore the right of workers to social security, to be included within the spectrum of human rights. The declaration through various international organizations, conventions, protocols and such other legal materials substantiate that it is an inseparable social obligation to keep the human dignity of work.

International Labour Organization is one of the 12 specialized agencies of UN. It has the most effective and well-developed mechanisms for human rights protection in the international system. The preamble of ILO states the objective of regulating the hours of work including the establishment of maximum working days and weeks, the regulation of labour supply, the prevention of unemployment, the provision of adequate living wage, the protection of workers against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provisions for old age and injury, recognition of the principle of equal remuneration for work of equal value, recognition of the principle

74. Section 2(d) of Protection of Human Rights Act, 1993.

of freedom of association, the organization of vocational and technical education and such other measures.

The declaration of ILO categorically states that ILO frames the international industrial jurisprudence. It envisages measures for entering agreements on basic labour standards and provides guiding principles of policy and administration throughout the world. First World War caused a set back to industries. Failure of some of the nations to adopt human conditions of labour was seen as an obstacle in the way of other nations, which desired to improve the labour security conditions in their own countries. In these circumstances it was realized that permanent world peace could not be achieved by achievement of political and economic justice alone, but that it required securement of social justice also. Workers' well being, regulation of labour supply, the prevention of unemployment provision for adequate living wage, protection of weaker sections sickness, disease, injury, old age and of young persons and women led to the creation of ILO in 1919 as a part of League of Nations by Part XIII of the Treaty of Versailles. The Treaty is "the first known to history for containing a provision dealing with labour"⁷⁵ and provide for establishing a standard setting mechanism called ILO.

ILO is distinct from other international institutions as its major concern is social justice. The aims and purposes of this institution were reaffirmed in 1944 through Philadelphia Charter.⁷⁶ In 1946, ILO and United Nations made agreement and ILO was recognized as a

75. Encyclopedia Britannica, Vol.12, p.517.

76. Declaration of Philadelphia.1944

specialized agency of UN. In the era of UN, there was more attainment of social justice as an aim of International co-operation and co-operative actions.

The Philadelphia Charter sets the fundamental principles upon which the ILO is based. They are: (a) Labour is not a commodity; (b) Freedom of expression and the association are essential to sustained progress; (c) Poverty anywhere constitutes a danger to prosperity everywhere; and (d) The war against want requires to be carried on with unrelenting vigor within each nation and by continuous and corrected international effort in which the representatives of workers and employers enjoy equal status with those of government joining in them in free discussion and democratic decision making with a view to the promotion of common welfare.

The Charter affirms that ‘lasting peace can be established only if it is based on social justice’ and the conference affirms that all human beings have right to pursue their material well being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. The conference recognizes the solemn obligation of ILO to further among the nations of the world programmes which will achieve—

- (i) a full employment and raising of standard of living;
- (ii) the employment of workers in which they can have the satisfaction of giving the fullest measure of their skills and attainments and make their greatest contribution to the common well-being;

- (iii) facilities for training and transfer of labour for employment and settlement;
- (iv) policies with regard to wages and earning hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and minimum living wage to all employed and all in need of such protection;
- (v) official recognition of collective bargaining, co-operation of management and labour;
- (vi) provision for child welfare and maternity protection;
- (vii) assurance of equality of educational and vocational opportunity;
- (viii) provision for adequate nutrition, housing and facilities for recreation and culture;
- (ix) adequate protection of life and health of all workers in all occupations; and
- (x) extension of social security measures to provide basic income to all in need of such protection and comprehensive medical care.

In this declaration, ILO emphasizes states' social commitment to the upliftment of working class and affirms the right of workers for decent living. While recognizing these rights, ILO actually assures a living with human dignity which is one of the basic human rights.

Universal Declaration of Human Rights

The preliminary steps towards an elaborate formulation of standards in relation to human rights in instrument which would have undoubted legal force as treaties is Universal Declaration of Human Rights. It contains 30 articles delighting diverse rights from right to life, to the right to work and right to rest and leisure. It has both been construed as law and as a common standard of human rights which everyone, every state, should endeavor to achieve.⁷⁷ Among the 30 articles all relates to civil, political, economic, social and cultural rights including right to work,⁷⁸ right to leisure and rest, right to social security, right to just and favorable conditions of work, right to equal pay for equal work, right to fair remuneration, right to form and join trade unions, right to maximum working hours and periodic holidays with pay, right to adequate standard of living, including food, clothing and shelter, right to medical care and education, right to special protection and assistance to motherhood and childhood, right to equal access to all for higher education on the basis of merit, right to participate in the cultural life of the community and right to enjoyment of art and cultural activities and right to share scientific advancement and its benefit.

All the above recognized rights aim at general welfare of a democratic society. Articles 25(1) explicitly deals with right of workers. It reads,

77. Paras Diwan & Piyush Diwan, *Human Rights and the Law*, Deep and Deep Publications, (1996) p.26

78. Article 6 to 13.

“every one has the right to standard of living adequate for the health of and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, in widowhood, old age or other lack of livelihood in circumstances beyond his control”.

Hence, this Article categorically establishes the security measures which are basic rights not only of the wage earner but also of his family. All the aspects or ingredients of social security are dealt within this Article.

International Covenant on Economic, Social and Cultural Rights, 1966

International Covenant on Economic, Social and Cultural Rights is one of the important covenants on Human Rights. The preamble to this covenant recognizes that in accordance with Universal Declaration of Human Rights, the ideal of free human beings, enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his political rights⁷⁹.

The Covenant recognizes the right to work, which includes the right of everyone to the opportunity to make his living by work which he freely chooses, or accepts⁸⁰. The text also recommends the home

79. Preamble of ICESCR.

80. Article 6(1).

state to take measures for full realisation to achieve steady economic, social and cultural development and full and productive employment.⁸¹

Article 7 of the Covenant identifies the right of everyone to the enjoyment of just and favourable conditions of work, which ensures: (1) minimum remuneration; (2) fair wages and equal pay for equal work; (3) a decent living for him and his family; (4) safe and healthy working conditions; (5) equal opportunity for promotion in employment; and (6) rest, leisure and paid holidays with reasonable limitation.

The rights to form and join trade unions and right to strike⁸² are recognized under Article VIII. Protection and assistance to family, women, children and young person are extended in Article.

Article IX stands important in the present context. It recognizes the right of every one to social security. On analysis it is evident that social security including protection from economic and social exploitation, employment in work harmful to their morals or health or dangerous life and occupational diseases is recognized as a human right under the Covenant. Altogether the Covenant recognizes the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health.

International Convention on the Elimination of all forms of Racial Discrimination, 1966

Though this convention specifically aims at some other purpose, it incidentally touches social security also. This convention undertakes

81. Article 6(2).

82. Subjected to limitation in conformity with the laws of particular country.

prohibition and determination of racial discrimination in all forms while cultural rights, the right to public health, medical care, social security and social services particularly against discrimination as to race, colour or national or ethnic origin.⁸³ Hence while dealing with a particular type of human right, it aptly recognizes the dimension against discrimination in providing social security and allied basic rights.

Convention Relating to the Status of Refugees, 1951

This Convention also recognizes right of association, gainful employment of refugees and their social security.⁸⁴ The contracting states shall accord the same treatment as is accorded to nationals in respect of such matters which governs by laws or regulations or are subject to control of administrative authorities; remuneration including family allowances (ie., part of remuneration) hours of work, overtime agreements, holiday with pay, restrictions on human work and work of young persons and the enjoyment of benefits of collective bargaining.

According to this convention, social security--legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death unemployment, family responsibilities and any other contingency under laws or regulations in social security schemes—is subject to limitations as these limitations are subject to national laws and regulations. For example, the right to compensation for the death of refugee resulting from employment injury or from occupational disease is subject to the condition that it

83. Article 5 of Conventions on Racial Discrimination.

84. Article 24 Convention relating to Refugees.

shall not be afforded by the state as the residence of the beneficiary is outside the territory of the contracting state.

Convention Relating to Status of Stateless Persons, 1954

Another convention similar to the abovesaid convention is Convention Relating to the Status of Stateless Persons, 1954 also recognizing same provisions to stateless persons as of refugees as said above lawful stay in the territory. These two conventions imposes duty on states to make provisions assuring social security and dignity of working class even though they are refugees or stateless persons.

Convention on the Elimination of All Forms of Discrimination Against Women, 1979

This convention relates to special category of persons, women. Article 1 of the convention aims at ‘equality of men and women of human rights and fundamental freedoms in the economic, political, social, cultural, civil or any other field’.

With regard to employment, Article 11 of the Convention asks the states to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure the abovesaid rights particularly—

- (i) right to work as inevitable right of all human beings;
- (ii) same employment opportunities;
- (iii) free choice of profession and employment, the right to properties, job security and all benefits and conditions of service and the right to receive vocational training;

- (iv) equal remuneration including benefits; and
- (v) child care facilities and social protection to women during pregnancy in types of work proved to be harmful to them.

Article 11(e) and (f) envisages for total upliftment of women employees as it is their basic human right i.e., right to social security particularly in case of retirement, unemployment, sickness, invalidity and old age and other incapacity to work as well as right to paid leave and right to protection of health and to safety in working conditions.

Special provisions are made for rural women because of their significant role in economic survival of their families. Their right to have access to adequate health care facilities and to benefit directly from social security programmes are given more emphasis.

The Convention on the Right of the Child, 1989,⁸⁵ Convention Protecting Rights of Migrant Workers,⁸⁶ families of forced labour⁸⁷ and of abolition of forced labour⁸⁸ reaffirm the right enumerated by Universal Declaration of Human Rights and Dignity.

Equality before law is a well-known principle and every one has an inherent right to be treated equally. Convention concern equal

85. Article 32: Assures right of the child for protection from economic exploitation and from performing any work that is likely to hazarded or to interfere with child's education of health the convention casts a duty on states to make legislation to employment here promises. See also the clarification by the Summit in Economic, Social, Cultural Rights. Magda Spe Veda, *The Nature of the Obligation Under the International Covenant on Economic, Social, Cultural Rights*, *School of Human Right Research* (2003) p.37.

86. International Convention on the Protection of Right of Migrant Workers and their Families, 1990.

87. Convention Concerning Forced or Compulsory Labour, 1930.

88. Convention or Abolition of Forced Labour, 1957.

remuneration, equality in employment opportunity, equality treatment in social security recognize the equality and equal treatment of workers. The Equal Remuneration Convention, 1951 recognizes the right to equal remuneration for men and women workers for work of equal value without any discrimination based on sex, colour, religion, political opinion etc. The policy adopted by the convention is based on the following principles: (1) equality in opportunity and treatment in employment and occupation; (2) equality in access to guidance and placement services; (3) security of tenure of employment; and (4) conditions of work including hours of work, pay, safety, social security measures and welfare measures.

Employment Policy Convention, 1964 is concerned with economic security and right to work which is guaranteed in Article 23 of Universal Declaration of Human Rights. This Convention obligates of ILO to further among nations of the world programmes which will reshape economic and financial policies to achieve economic and financial raising of standard of living in order to ensure the right to pleasure and natural well-being and spiritual development in conditions of freedom and dignity of economic security and equal opportunity.

The main convention relating to social security⁸⁹ are:

- (i) Equality of Treatment (Social Security) Convention 1962: The Convention comprises the main provision of present ILO instruments in the field of social security and establishes minimum standard for the social security; and

89. Dealt in detail in the chapter III, ILO and Social Security.

- (ii) Equality of Treatment for Non-nationals in the Matter of Social Security: This convention encompasses about particularly the securities aspect of principles of equality, namely equality of treatment for non-rationales. This convention compels ILO and states to take measures providing economic and social advancement of living of the working class.

All these conventions aim at social advancement as well as economic advancement. Certain conventions, though they are very few stress accelerated growth of economic development than social development. Freedom proclaimed in Preamble of ILO, Universal Declaration of Human Rights and International Covenant of Human Right aims at safeguarding freedom of association, abolition of forced labour, eliminations of discrimination in employment, protection of equality of opportunity and right to work, minimum income, social security and adequate condition of work and life.

In a nutshell, in all the above conventions the right of workers especially for right to social security is recognized and treated as one among the indispensable human rights.

2.6 Conclusion

The analysis of development of social security as a term and concept reveals the fact that it is evolved as a protective measure to the poor and the acceptance of poverty as a social problem placed the burden on the government to protect the citizens from the economic distress. Considering the fact that the working class contribute towards the development of society, as the guardian of the community state is

duty bound to protect the workers in disruption of their income arising out of disablement, accident, death or old age. The present system of social security is developed from a series of public measures reshaped from time to time by expanding coverage and risks. In the Indian context, social security should be in essence a measure for ensuring social justice and human dignity as envisaged in the Constitution of India. The international community accepts social security as a human right and I.L.O. has come forward to guide the member states to ensure social security to workers in their countries.

The next chapter is an analysis of I.L.O.'s role in promoting social security in the member countries.

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SOCIAL SECURITY: INTERNATIONAL LABOUR ORGANIZATION AND INDIA

C o n t e n t s	3.1 ILO Conventions and Recommendations
	3.2 Normative Framework of Social Security Evolved from ILO Documents
	3.3 Protected Class of Persons
	3.4 Minimum Content of Right to Social Security
	3.5 ILO and India: An Appraisal
	3.6 Conclusion

International Labour Organization's work in the field of social security has been pioneering. From the date of its inception¹, ILO² has been constantly engaged in formulating standards with a view to extending social security benefit to larger section of people in greater number of contingencies. The Philadelphia Declaration recognizes

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1. In 1919 ILO was formed by Treaty of Versailles under League of Nations with a unique membership. It was an intergovernmental institution with a tripartite structure including Government representatives, labour organizations and employer organizations. Its main agenda was maintenance of social peace and improvement of the situation of the world's workers. See Lee Swepston, "The Future of ILO Standards", 117 Monthly Lab. Rev. 16
 2. ILO assists its 171 members by setting Code of International Labour Standards consisting of conventions and recommendations. It also provides for a range of technical assistance aimed at rapid economic and employment growth. Michel Hansenne, "Promoting Social Justice in the New Global Economy" 117 Monthly Lab. Rev. 3.

the solemn obligation of the ILO to further among nations of the world programmes which will have to achieve “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care³”. Co-ordination⁴ of social security legislations among countries has been a major concern of ILO along with international and intergovernmental organizations in the social security field. International Labour Office serves as the secretariat of the International Social Security Association⁵ which groups together government services as well as central institutions and national unions for social security of different countries. ILO sets ideal standards⁶ for their universal application to ameliorate the working conditions of the workers and to ensure social justice to them⁷. These universal standards are known as Conventions and

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3. Philadelphia Declaration of 1944, ‘ILO Declaration Concerning Aims and Purposes of ILO’ International Labour Office, 26 Official Bulletin 1 (1944)
 4. This is done by providing creative solutions to the social security problems. See *supra n.2* at p. 3
 5. It was founded in 1927. It is “a privileged forum for social security institutions throughout the world and an acknowledged partner with everyone interested in the appropriate development of social protection adapted to the genuine needs of populations, the ISSA has become a universal institution whose essential role is inherent in the network which it embodies” <http://www.issa.int/engl/homef.htm>, 3rd September, 2008
 6. ILO Standards have formed the basis for much social and labour legislations enacted in this century. See *supra n.1* at p. 17
 7. ILO is given a broad mandate to establish International Labour Standards under the Treaty of Versailles, 1919. Although the League of Nations perished during interwar years the ILO continued its existence, surviving the second world war and on creation of United Nations Organization of which it became a part. See also, H. Bartolomei, dela Cruz et al., *The International Labour Organisation: The International Standard System and Basic Human Rights* Westview Press, Boulder CO(1996) p.45

Recommendations⁸. In all, 22 conventions and 16 recommendations have been adopted on social security and are classified under: A. General Instruments, B. Medical Care and Sickness Benefit, C. Maternity Benefit, D. Invalidity, Old Age and Survivor's Benefit E. Employment Injury Benefit, and F. Unemployment Benefits.

3.1 ILO Conventions and Recommendations

A. General Instruments

(a) Social Security (Minimum standards) Convention, 1952

The Convention⁹ consolidates the main provisions of the provisions ILO instruments relating social security and establishes minimum standards for 9 fundamental branches of social security namely medical care,¹⁰ sickness,¹¹ unemployment,¹² old age,¹³

8. The principal means of action of ILO is the setting up the international labour standards. Conventions are international treaties and creates obligation on countries which ratify them. Recommendations are non-binding in nature and set out policies for actions for states. The ILO has so far adopted 182 conventions and 190 recommendations encompassing subjects such as worker's fundamental rights, worker's protection, social security, labour welfare, occupational safety and health, women and child labour, migrant labour, indigenous and tribal population, etc. <http://www.ccc-india.org/leftlinks/05/national/document.visited> on 15-10-07. **Core Conventions of the ILO:** - The eight Core Conventions of the ILO (also called fundamental/human rights conventions) are: Forced Labour Convention (No. 29) Abolition of Forced Labour Convention (No.105) Equal Remuneration Convention (No.100) Discrimination (Employment Occupation) Convention (No.111)(The above four have been ratified by India). Freedom of Association and Protection of Right to Organised Convention (No.87) Right to Organise and Collective Bargaining Convention (No.98) Minimum Age Convention (No.138) Worst forms of Child Labour Convention (No.182) (These four are yet to be ratified by India) See, <http://labour.nic.in/ilas/indiaandilo.htm> visited on 15-10-07

9. Convention No.102.

10. Part II of the Convention

11. Part III.

12. Part IV.

13. Part V.

employment injury,¹⁴ family,¹⁵ maternity,¹⁶ invalidity,¹⁷ and survivor's benefit¹⁸. The principles anchored in Convention No. 102 are: guarantee of defined benefits; participation of employers and workers in the administration of the schemes; general responsibility of the state for the due provision of the benefits and the proper administration of the institutions; collective financing of the benefits by way of insurance contributions or taxation.

The Member States are allowed to ratify the Convention partially. But the partial ratification is subjected to certain conditions *viz.*, ratifying states must secure at least three benefits out of 9 benefits covered by the convention and at least one from Part IV, V, VI, IX and X. The persons covered are prescribed classes of employees, active population of residents and families of beneficiaries. The instrument indicates the manner of calculation and applicable limits. Equality in treatment of non-nationals and nationals is also ensured by this Convention, if money is paid from public fund.

(b) Equality of Treatment (Social Security) Convention, 1962

The Convention¹⁹ has been ratified by 38 member countries. This Convention is designed to secure equal treatment of nationals and non-nationals including refugees and stateless persons in case of social

14. Part VI.

15. Part VII.

16. Part VIII.

17. Part IX.

18. Part X.

19. Convention No.118.

security except in special schemes for public servants, war victims and public assistance by ratifying states. But the equality is assured to the non-nationals of another ratifying state in case of medical care, sickness, maternity, invalidity, old age, and survivor's employment or family benefits. Equal treatment is guaranteed regardless of residence, on condition of reciprocity. States accepting obligation are bound to make payment on the basis of invalidity, old age, survivor's employment and family benefits. But the states can prescribe minimum period of residence for granting benefits of maternity, unemployment survivors and old age benefits.

(c) Convention on Maintenance of Social Security Rights, 1982

In effect this convention²⁰ is considered as supplementary to the Social Security (Minimum Standards) Convention 1952, Equality of Treatment (Social Security) Convention, 1962.

Under this convention various branches of social security are offered. It lays down that each member shall endeavour to participate with every other member concerned in schemes for the maintenance of rights in the course of acquisition, as regards each branch of social security and for which everyone of these members has legislation in force, for the benefit of the persons who have been subject to their legislation. Such schemes for maintenance of rights in case of acquisition shall provide for periods of insurance, employment, occupational activity or residence to be completed under the legislation of the concerned members and it should provide for the participation

20. Ratified by 3 countries.

involuntary insurance scheme acquisition, maintenance or recovery of rights, periods completed currently under the legislation of two or more members shall be reckoned only once.

The convention requires the members to provide schemes of maintenance and to determine formula for awarding, invalidity, old age and survivor's benefits and pensioners benefit in respect of occupational diseases, and cost involved.

The convention requires that each member shall guarantee the provision of invalidity, old age and survivors cash benefits, pension in respect of employment injuries and death grant and the conditions under which benefit can be given in case of contributory benefits, by agreement between parties.

Each member is also required to promote the development of social services to assist persons covered by this convention, particularly migrant workers, in their dealings with the authorities and institutions as well as promote the welfare of the person and his family.

Apart from these conventions, there are two recommendations also coming under the general category:

i) Income Security Recommendation, 1944

This recommendation aims at formulating general principles to be followed by states in making income security schemes for employed persons and their dependants. It recommends that such schemes should be founded on compulsory social insurance supplemented by assistance measures. The risks covered under this recommendation are sickness,

maternity, invalidity, old age, death of the wage earner, unemployment, emergency expenses and employment injuries. Suggestions for application of guiding principles²¹ detailed in other provision are also given in the annexure to the recommendation.

ii) Social Security (Armed Forces) Recommendation 1944

The recommendation requires the member states to ensure that persons discharged from the armed forces and assimilated services receive a special grant proportionate to length of service on their discharge and treated under employment insurance schemes. It is a recommendation that has been adopted in the context of Second World War, but relevant for all cases of armed conflict.

iii) Maintenance of Social Security Rights Recommendation, 1983

It aimed at providing minimum guidelines to be followed by the members who ratified the convention. The recommendation and its annexure contains model provision for all those instruments scheme for various benefits, trilateral or multilateral agreements that are required to be implemented or concluded between the parties.

B. Medical Care and Sickness Benefit

(a) Sickness Insurance (Industry) Convention 1927²²

This convention adopted in its 19th session on 25th May 1927. This convention is concerning sickness insurance for workers in industry and commerce and domestic servants. It consists of 18 Articles and ratified by 28 member countries.

21. Guiding principles scope, administration, planning and types of benefits to be provided.

22. Ratified by 28 member nations.

The convention requires the member countries to set up compulsory Sickness Insurance System²³ which shall apply to manual and non-manual workers including apprentices employed by industrial undertakings, commercial undertakings, out workers and even domestic servants. However the convention allows exemption to special schemes with more benefits and employees of special categories specified as in national laws or regulations.

The sickness benefit shall be payable in cash to an insured person who is rendered incapable of work by reason of his abnormal bodily or mental health. The convention prescribes time periods and conditions under which the cash benefits can be withheld.²⁴ The convention also provided the service of doctor or medicine even after period of sickness benefit and extending the benefits to the dependants. Other articles of the convention make provision for the administration and financial supervision of the administration machinery by a competent public authority. It is again clarified that sickness benefit granted under this convention shall not affect the obligations arising out of the convention relating to women and the maternity benefits. The convention was revised by 1969 convention.

(b) Sickness Insurance (Agricultural) Convention, 1927

This Convention²⁵ is simultaneously adopted along with convention No.24 relating to the same benefit in respect of workers working in

23. The insured and their employers shall share financial resources of Sickness Insurance Scheme.

24. If the person receives compulsion from another source, social assistance if he refuses to doctor's orders, or sickness caused by willful conduct of the insured etc. are grounds for referring cash benefits.

25. Convention No.25.

industries, commercial undertakings and domestic servants. This convention has been revised in 1928. The provisions of this convention are similar to that of Sickness Insurance (Industrial) Convention, 1927 but mainly aim at manual and non-manual workers, employed by agricultural undertakings.

(c) Medical Care and Sickness Benefits Convention, 1969

This Convention²⁶ is concerning medical care and sickness benefit. It revised two earlier 1927 convention relating to sickness insurance industry and agricultural conventions. This document contains 45 articles. This convention regulates the protection of worker in respect of entitlement to medical care of a curative and preventive nature and compensation for loss of earning through sickness.

Ratifying states are responsible to secure the provision of medical care and sickness benefit to employees or prescribed classes of persons. Medical care can also be extended to wives and children of persons covered and must include in particular hospitalization, pharmaceutical and surgical supplies and dental treatment. Sickness benefit must be periodical payment and be reckoned, as regards the wage of male member of beneficiary's previous earnings or at a sufficient rate to maintain the beneficiary's family in health and decency. Benefits must be available equally to nationals and non-nationals. The rate of cash benefits payable to the standard beneficiary²⁷ should not be less than 60% of the earnings of the class of employees to which the beneficiary belongs. Part IV deals

26. Ratified by 14 countries.

27. The standard is taken on 'mean bar' with wife and two children.

with common provision and specific conditions under which a protected person is not entitled to benefits.

(d) Recommendations

Social Insurance (Agricultural) Recommendation, 1921 and Sickness Insurance Recommendation, 1927 are superseded by 1969 convention. The persisting recommendation is:

Medical Care Recommendation, 1944

This Convention details the concept of medical care as a guarantee for all members of the community whether gainfully occupied or not i.e., deriving from every person's right to health. It lays down general principles to be followed by states in developing medical care services and organization and administration of such services. It contains provision on a number of important aspects not dealt within the 1969 convention on Medical Care and Sickness Benefit.

C. Maternity Benefit

(a) Convention on Women, 1919

ILO as early as 1919 itself in its first session adopted this convention.²⁸ It contains 12 articles to provide protection to the women workers who are in their family-way, to stay at home with appropriate health care, away from work place. They are also conferred with right to certain maternity benefits before and after child birth.

According to Article 2 of the convention, women signify any female person, irrespective of age or nationality, whether married or

28. 33 countries ratified this Convention.

unmarried and the child means legitimate or illegitimate. Article 3 lays down that in any private or public, industrial or commercial undertakings or in any branch thereof a woman shall not be permitted during 6 weeks following her confinement. She should be made entitle to leave up to 6 weeks before confinement. During the period of absence from work she shall be paid benefits sufficient for the full and healthy maintenance of her and her child from an insurance system or from public funds as determined by a competent authority.

There are provisions in the convention dealing with illness arising out of her pregnancy or confinement. This article prevents a notice of dismissal and makes such a notice unlawful if her absence is due to illness during pregnancy or resulted out of pregnancy or confinement.

This convention was revised in 1952 and adopted convention No.103 concerning maternity protection. However, the revision of this convention did not affect the applicability and still it is open for ratification.

(b) Maternity Protection Convention, 1952

It covers industrial undertakings and non-industrial and agricultural occupations, including home workers and domestic servants. It aim to secure to women workers a substantial period of leave with subsistence and medical benefits before and after confinement and safeguard their continued employment i.e., more than what is provided for in the earlier convention.

(c) Maternity Protection (Agricultural) Recommendation, 1921

It was superseded by 1952 revised Maternity Protection Convention. Maternity Protection Recommendation 1952 is supplementary to 1952 Maternity Protection Convention. It suggests possible improvements on the protection provided under the Convention like extension of maternity leave to a total of 14 weeks, higher rate of cash benefits, more exclusive medical care. It also recommends prohibition of the employment of pregnant women and young mothers on specified type of work prejudicial to their health.

D. Invalidity Old Age and Survivor's Benefit

Old Age Insurance (Industry etc.) Convention, 1933, Old Age (Insurance) Agricultural Convention, 1933, Invalidity Insurance (Industry etc) Convention, 1933, Invalidity Insurance (Agricultural) Convention, 1933 and Survivors Insurance (Industry etc.) Convention, 1933²⁹ have been revised by Invalidity Old Age and Survivors Benefit Convention 1967 and the previously stated Conventions are not now open for ratification.

(a) Invalidity Old Age and Survivor's Benefit Convention, 1967

ILO adopted this convention³⁰ in its 51st session. It is a comprehensive document which has revised the earlier 6 conventions which were adopted by ILO in 1933. Any member country which has ratified the earlier Convention but does not ratify this revised convention, shall continue to be bound by earlier convention till it denounces any of them.

29. Convention No.35, 36, 37, 38, 39 and 40.

30. Ratified by 16 states.

This Convention specifically deals with invalidity benefits,³¹ old age benefits,³² survivor's benefit³³ and general standards³⁴ to be complied with periodic payments etc. The member countries which ratify the convention can comply with provisions of Part I and at least one of Part II, III or IV dealing with Invalidity Benefits, Old Age Benefits and Survivor's Benefit. It should also comply with relevant parts of other provision. According to this Convention invalidity benefit shall be periodical payments to the protected employees in accordance with the requirements of the Convention. Old age benefit and survivor's benefit also shall be periodical payments calculated as prescribed in the Convention. The rate of periodical payment shall be determined by competent public authority in conformity with the prescribed rules. In the schedule to the Part V of the Convention dealing with the periodical payments to standard beneficiaries is tabulated.

The period during which the invalidity benefit is payable is specified in the convention and it shall be granted throughout the contingency or until old age benefit becomes payable. However the benefits, i.e., invalidity, old age and survivors may be suspended under prescribed conditions where the beneficiary is engaged in gainful activity.

(b) Recommendation Concerning Invalidity, Old Age and Survivor's Benefit, 1967

It is supplementary to the Convention relating to Invalidity Old Age and Survivor's Benefit. It calls for the extension of protection to persons

31. Convention No.128.

32. Part II, Article 7 to 13.

33. Part III, Article 14 to 19.

34. Part IV, Article 20 to 25.

whose employment is of casual nature and to all economically active persons. It also covers invalid and dependant widower for survivor's benefit.

E. Employment Injury Benefit

(a) Workmen's Compensation (Agriculture) Convention, 1921

This Convention³⁵ aims at providing compensation in occupational accidents to agricultural workers arising out of and in the course of employment.

(b) Workmen Compensation (Accidents) Convention, 1925

This Convention³⁶ aims at providing compensation to workers injured in industrial accidents. The injured worker is entitled to medical, surgical and pharmaceutical aid at the cost of employer or insurance institution including the supply and renewal of surgical appliances. If the worker is permanently incapacitated or dead, he or his dependants are entitled to compensation as periodical payments. The periodical payment may be converted with lump sum in exceptional cases and must be increased if the worker needs the constant help of another person. The states are under obligation to frame legislation for safeguarding in all circumstance the payment of compensation in the event of insolvency of the employer or insurer. National legislation must provide for supervisory measures to prevent abuses. This convention is revised by Employment Injury Benefit Convention, 1964 still open for ratification.

35. Part V, Article 26 to 29.

36. Convention No.12.

(c) Workmen's Compensation (Occupational Disease) Convention, 1925

This Convention³⁷ provided details of such diseases, their nature and cause which have to be considered as occupational diseases having arose out of the respective employments. The Conventions contemplates that compensation shall be payable to workman incapacitated by occupational diseases or in case of death from such diseases to their dependants. This Convention provides a schedule of occupational diseases and of substances which cause occupational diseases. It was revised in 1934 which added some more to the list.³⁸

(d) Convention on Equality of Treatment (Accident Compensation) 1925

This Convention³⁹ contemplates equality of treatment for national and foreign workers as regards workmen's compensation for accidents. The member country has to assure the foreign sufferer of personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment as to that of national in respect of compensation. The equality of treatment has to be guaranteed to foreign workers and their dependents without any condition as to residence, by the states ratified the Convention.

(e) Employment Injury Benefits Convention, 1964

This Convention⁴⁰ contains 39 articles, one schedule and one annexure. This regulates the compensation for injuries resulting from

37. Ratified by 66 countries.

38. Convention on Workmen's Compensation (Occupational Diseases) (Revised) 1934. Convention No.42.

39. Convention No.19. Ratified by 120 states.

40. Ratified by 23 members.

industrial accidents and occupational diseases. The Convention lays down the criteria of eligibility and dependence for availing the benefit of compensation. It lays down standards in respect of contingencies to be covered, contents duration, rates etc. of the benefits to be provided in case of employment injury caused by accidents and occupational diseases.

Each member country which ratifies this Convention is required to prescribe a definition of “industrial accident” including the conditions under which a commuting accident is considered to be an industrial accident. Each member country also has to describe the list of diseases which shall be regarded as occupational diseases which shall be regarded as occupational diseases under prescribed conditions.

The Convention prescribes the nature of medical care and allied benefits which should be available to the injured workman. Medical benefits include not only services of a medical practitioner and hospitals but also dental, pharmaceutical and other surgical supplies. It also prescribes that the employer should provide at the place of work facilities for emergency treatment of persons sustaining a serious accident. The Convention also prescribes for cash benefits in respect of loss of earning capacity, periodically or lump sum, for its proper utilization by the injured workman. The compensation in case of the death of the workman is prescribed in the nature of periodical payments to the widow or a disabled and dependent widower and it also provides for funeral expenses. Ratifying states also promote occupational safety and health, and provide rehabilitation and placement services for disabled persons.

The Convention is appended with a schedule which enumerated the list of occupational diseases and corresponding work involving exposure to risk.

(f) Recommendations

1. Workmen's Compensation (Minimum Scale) Recommendation, 1925.
2. Workmen's Compensation (Jurisdiction) Recommendation, 1925.
3. Workmen's Compensation (Occupation Diseases).

Recommendations 1 and 2 are supplementary to Workmen's Compensation (Accidents) Convention, 1925 and it provides for minimum rates of compensation and defines surviving dependents entitled to compensation. Recommendation 2 calls for the submission of disputes on workmen's compensation to special courts or boards of arbitration on which employers and workers are equally represented and for recourse to expert advice on question involving degree of incapacity for work.

Recommendation 3 is supplementary convention, relating to occupational diseases. It calls on member state to adopt a simple procedure for revising the list of occupational diseases in their national legislation. All the three are superceded by Employment Injury Benefits Convention, 1964 and Recommendation Supplementary to this Convention.

(g) Employment Injury Benefit Recommendation, 1964

This recommendation is supplementary to the Convention 1964 and it envisages the extension of coverage to members of co-operatives,

self-employed persons, those engaged in small scale business or firms or those undergoing training for future occupational employment or trade. It is also recommended to other member of voluntary bodies engaged in combating natural disasters, with saving lives and property or with maintaining law and order. It calls for periodical adjustment of rates of cash benefits payable under the Convention in case of total loss of earning capacity.

F. Unemployment Benefit

(a) Unemployment Provision Convention, 1934

This convention⁴¹ was adopted to ensure benefit or allowances to the involuntary unemployed persons. This Convention was ratified by 14 countries but later revised in 1988 and the former one is not open for ratification now.

The Convention consists of 23 articles dealing with various aspects of providing unemployment benefit, condition for eligibility and the period for which such employment benefit is payable and also the event on the happening of which such unemployment benefit ceases to continue.

The Convention contemplates that each member state of the ILO which ratifies this Convention shall undertake to maintain a scheme for the payment of benefit to the persons who are involuntary unemployed. Such schemes can be compulsory or voluntary or a combination of both. The national law of the ratifying member-state may provide for the payment of benefit on allowance and also the conditions under which a person passes from benefit to allowance.

41. Convention No.44.

This convention applies to all persons employed for wages or salary. It also provides for the age-limit to be prescribed by the national law for the unemployment benefit and also for qualifying period of eligibility for benefit or allowance.

The document is disqualified to receive unemployment benefit if it refuses to accept any suitable employment, to undergo training or if he has lost his employment as a direct result of a stoppage of work due to trade dispute or has left it voluntarily without just cause. If the claimant tried to receive any benefit fraudulently or fails to comply with the instruction of a public employment exchange, then also he is disqualified to receive any unemployment benefit.

(b) Convention on Employment Promotion and Protection against Unemployment, 1988

This Convention⁴² came into force in 1991. It is a comprehensive convention consisting of 39 articles which are divided into IX parts and provides a detailed scheme suitable for any enactment. Part I deals with general provision and calls upon every member to take appropriate steps to co-ordinate its system of protection against unemployment and its policies relating to employment. It contemplates that any system providing for protection against unemployment shall contribute to the promotion of full productive and freely chosen employment.

Part II deals with full productive and freely chosen employment. It envisages that each member shall endeavor to establish special programmes to promote additional job opportunities and employment

42. Convention No.168.Ratified by 6 members

assistance and encourage freely chosen and productive employment for identified categories of disadvantaged persons⁴³ having difficulties in finding lasting employment. Part IV details the contingencies to be covered by such schemes which include loss of earning due to partial unemployment, suspension or reduction of earning, etc. Under Part IV the persons covered are identified which include not less than 85% of all employees including public employees and apprentices. Part V explains the methods of protection and such methods may consist of contributory or non-contributory systems or a combination of both. Part VI specifies various benefits to be provided. It deals with the quantum of benefit, qualifying period, calculation of periodical payments and other conditions that may be prescribed for availing the benefit. It also provide for duration of any benefit including medical benefit and conditions under which such benefits can be varied or suspended.

Part VIII consists of special provisions for new applicants for employment such as young persons who have completed their vocational training or their studies, divorced or separated persons, released prisoners, adults including disabled persons or previously employed persons. Part VIII provides for legal administrative and financial guarantees including any procedure for settlement of any dispute or claim. Part IX, the last part, deals with final provisions dealing with ratification, its binding effects, duration, denunciation etc.

43. Means women, young workers, disabled persons, older workers, migrant workers etc.

(c) Recommendation**Employment Promotion and Protection against Unemployment Recommendation, 1988**

This recommendation is supplementary to the Convention 1988. It deals with general provision and promotion of productive employment, protection of unemployed persons and the development and improvement of systems of protection. It calls upon member states to work out their national policy for the promotion of full, productive and freely chosen employments.

The ILO offers its co-operation and technical advice for better implementation of the social security schemes for unemployment benefits and also to set up a national provident fund to provide periodical cash payments to the holders of the account in the fund.

3.2 Normative Framework of Social Security Evolved from ILO Documents

In 1944, ILO in its 26th Session convened Philadelphia Recommendation relating to social security⁴⁴ and evolved certain guidelines for the income security in the event of certain contingencies like sickness, maternity, invalidity, old age etc. This convention was actually adoption of Atlantic Charter⁴⁵ of UN which declares contemplates fullest collaboration between all nations in economic field for securing improved labour standards, economic advancement and social security to all.

44. Income Security Recommendation, 1944.

45. Atlantic Charter 1941, "The fullest collaboration between all nations in the economic field with the object of securing for all improved labour standards economic advancement and social security". Which later adopted by www.un.org/aboutun/charter/history/atlantic.html.

In this recommendation, ILO declares that income security is an essential element of social security and compensation has to be provide for accidents, occupational diseases, sickness, maternity benefits, old age, invalidity and widow's and orphans' pension and provision for unemployment.

The delegation of governing body adopted the declaration of Santiago de Chile and established a permanent agency for ensuring co-operation between social security administrations and institutions functioning in connection with ILO⁴⁶. Thus International Social Security Association⁴⁷ works effectively in framing and implementing solution⁴⁸ for contemporary problems in social security system.

Article 9 of the UN International Covenant on Economic Social & Cultural Rights provides for everyone's right to social security, including social insurance. ICESCR's preparatory works are silent about the history of this article. The basic issue of establishing a normative content of right to social security has not been addressed by human right literature. Since the adoption of ICESCR, the implementation and promotion of the right to social security has been seen as the unique task of ILO⁴⁹ and ILO

46. www.ilo.org/public/english. 25th General Assembly 1995.

47. International Social Security Association was established in the year 1927. This is world's leading organization bringing together governments departments, social security administrations and agencies. Its mandate is to promote dynamic social security as the social dimensions in a globalizing world through supporting excellence in social security administration

48. "Tracking workplace trends and problems through extensive research and publications help ton shape workable solutions to the problem" See *Supra N. 2*

49. Andrey Chapnam and Sage Russel (Eds.), "Cove Obligations: Building a Framework for Economic, Social and Cultural Rights", Intersentia, Oxford, (2002), p.89.

Conventions remain at the centre of process of defining the right to social security.

Hence it is highly necessary to examine what are the convention relating to social security, what is the role of ILO and what is its impact in India.

The ILO's work and the standards it has developed remain the most important source of interpretation in defining social security as a right. As stated earlier, ILO was born⁵⁰ out of the concern of states, unions and employers representatives that peace could not be achieved without devoting sufficient attention to creating the condition for social justice. The Legislative body of ILO International Conference on Labour which is represented by state, employee and employer⁵¹ is very much concerned about assuring the conditions of social justice. Initially the conventions of ILO conference concerned about labour conditions. This Conference adopted a group of conventions which aimed at committing states to engage themselves in the creation and improvement of national mechanisms protecting workers from industrial and social risks. These are Convention on Workmen's Compensation adopted in 1925,⁵² Convention on Sickness Insurance adopted in 1927,⁵³ Convention on Old Age, Invalidity and Survivors Insurance adopted in 1933,⁵⁴ Convention

50. Part III of the Treaty of Versailles Constituted the foundation of the ILO.

51. ICL consists of 4 representatives from each member state, two of them are state delegates, the other two represent employers and workers.

52. Convention No.17 and 18. <http://ilotex.ilo.cch:156/public>, 24th September, 2007

53. *Id.*, Convention No.24 and 25.

54. *Id.*, Convention No.35 and 40.

on Unemployment Provision adopted in 1934.⁵⁵ The notion of social risk involves sickness and medical care, unemployment, old age benefits, worker compensation, family and maternity benefits disability and survivors benefit.

Social Security (Minimum Standards) Convention 1952 though does not provide a single definition of social security; the definition can be construed from various parts of the convention. To ratify this convention, ILO member state is obliged to comply (at the time of ratification) with at least three of the following parts of the convention; medical care, sickness benefits, unemployment benefits, old age benefits, worker's compensation, family disability, maternity and survivor's benefits and at least one among three must be a provision concerning unemployment, old age, worker's compensation, disability or survivors benefits. Each part of the Convention provides specific standards aimed at guaranteeing the benefit of social protection and in all cases, states must comply with certain general parts of the Convention including provision for periodic payments of social security.⁵⁶ Social Security assured by this Convention through ratifying it by states though it provides flexibility according to financial status of states. This convention paved the way for adoption of several specific conventions subsequently. Invalidity, Old Age and Survivors Benefits Convention, 1967 and Medical Care and Sickness Benefits Convention, 1969 aimed at raising the requirements for the categories of protected persons and the level of protection provided by national social security schemes covering these risks.

55. *Id.*, Convention No.44.

56. Part XI of the Social Security (Minimum Standard) Convention, 1952.

3.3 Protected Class of Persons

All social security conventions adopted by the ILO have a difficulty in defining the protected class of people or persons. ILO has always tried to expand the categories of persons covered while member states have tried to limit the prescribed categories to a percentage of waged workers or residents. The Social Security (Minimum Standard) Convention aims at providing social security benefits.⁵⁷ Ensuring a person's right to live in a healthy and decent conditions and hence the implementation requires the right to access to all. The level of benefits depends on this category of persons covered depending on the wages and needs of them.

Social exclusion i.e., member state may declare that its national scheme protects an acceptable percentage of protected classes of workers, but this leaves out many categories of the population, such as non-industrial workers, self employed and workers in informal sector who often exercise several economic activities. This poses as a drawback to the present system.

In 1995, International Society Security Association effectively summarized contemporary problems confronting the model of social security.⁵⁸ Cut back in benefits, privatization systems, the need for efficient protection in transnational countries and the impact of structural adjustments programmes in developing countries were among them. In 1998, the study conducted by the Council of Europe on Human Dignity and Social Exclusion in European countries emphasized that social

57. In case of 9 identified social risks as stated in the Convention. See *supra* n. 3

58. *Supra* n.49 at p.96.

exclusion is not the only result of exposure to a set of social and economic risks. As against this, social protection has been the historical goal of social security regime which is seen as specific mean of promoting social protection. The increasing poverty over the world governs the quest for comprehensive approach to both social protection and social security. Such an approach would facilitate social cohesion and inclusion, and protect individuals from social risks.

Since beginning of 1990s, the ILO social security division has been given a mandate by the International Labour Conference to search for solutions that can include “other workers” in a social protection scheme. Naturally the ILO used the principles of social security as a human right to govern its work.⁵⁹The Conference finds the essentials of social security to be provided to all are:

1. the provision of benefits to households and individuals.
2. through public or collective arrangements
3. aimed at protecting against low or declining living standard and
4. that arises from basic risks and needs.

Informal Workers and Social Security Needs

The social security needs of informal workers include (1) Health care costs; (2) Survivors benefits; (3) Disability benefits; (4) Maternity and child care benefits (all four addressed by 102 conventions).

59. See Wouter Van Ginnekan, “Social Security for the Informal Sector: Issues and Tasks Ahead”, ILO, Geneva 1996. Available on ilo.org/public/english/110secsoc/techmeet/wouter2.htm, 24th September, 2007

The proposals⁶⁰ by ILO for evaluating existing previously established schemes are:

- (i) improving the access to basic health services by means of government financial supply of services in terms of types of service in an equitable manner;
- (ii) promoting self financial social insurance after having identified the limits and the viability of public and private insurance schemes;
- (iii) evaluating existing programmes in terms of administrative costs per beneficiary;
- (iv) analyzing the cost-effectiveness of social security programmes compared with other anti-poverty programmes such as employment guarantee schemes and food subsidies to consumers;
- (v) analyzing the role of social assistance programmes and their relationship to other anti-poverty means; and
- (vi) extending formal sector social security schemes.

3.4 Minimum Content of Right to Social Security

The right to social security, as guaranteed in the ICESCR,⁶¹ makes no reference to the ILO Conventions on social security. Although it is important not to depart from its historic roots to understand this right, it is nevertheless possible to offer a minimal definition that is more flexible than the one proposed in ILO

60. See also <http://www.ilo.org/publicenglish/110secso/step/frame.htm>. 24th September, 2007

61. Article IX.

conventions. (This flexibility would respect the urgency of action as well as the limited means of states with obligations to implement the right to social security). The minimum and immediate content of right to social security with a useful framework is made available to financial institutions, donors, human right agencies and NGO (working in the field) as a guiding principle are:

- (i) The model: Social security as a human right not as a commodity, relies on collective funding. This can be of different types: public, professional or community. In all these cases, it is a basic and minimal requirement of the right that it be supervised by an independent, participatory and regulated body.
- (ii) Contribution and Benefits: The benefits must be defined in advance, along with contributions that do not exceed a reasonable percentage of available income (whatever its source) how small or minimal the benefit it is.
- (iii) Risks: According to the principle of inter-dependence of all human rights, and in order to implement the right to social security as well as the right to an adequate standard of living in Article II of ICESCR risks related to health care, sickness benefits, survivor's benefits and maternity benefits must be given priority.
- (iv) Coverage: States are to undertake negotiations with civil society aimed at guaranteeing social security for all, including the self-employed, rural workers and workers in the informal sector. Provision must be made for periods of time when the

insured person, family or group is not able to contribute to the system. In all cases social security programmes should be subject by law to such requirement.

(v) Discrimination: In accordance with the comment⁶² adopted by the ICESCR and in view of the fundamental nature of the right to be protected from discrimination states will:

- Create an advisory body whose mandate is to identify direct and indirect discriminatory effect of the social security system and to suggest ways of implementing more inclusive patterns.
- Guarantee them that human rights codes will apply to all dimensions of social security system. The right to benefit equally from social security will include protection from discrimination based on source of income.

3.5 ILO and India: An Appraisal

Among all these Conventions, India ratified only four Conventions:⁶³

They are:

- (i) Workmen's Compensation (Occupational Diseases) Convention, 1925;
- (ii) Equality Treatment (Accident Compensation), 1925;

62. See CESCR, General Comment No.9, the domestic application of the Covenant (9th Session) 1988 UN Doc E/C.12/1998/24.

63. Johnwood, "International Labour Organization Convention: Labour Code or Treaties?" 40 I.C.L.Q. pp.649-657(1991)

- (iii) Workmen's Compensation (Occupational Diseases) Revised Convention, 1934; and
- (iv) Equality of Treatment (Social Security) Convention, 1962.

ILO, an organization committed to the cause of social justice, India a welfare state committed to the same goal. The approach of India with regard to international labour standards always has been positive. The ILO instruments have provided "guidelines and useful framework for the evolution of legislative and administrative measures for the protection and advancement of interest of workers"⁶⁴. But, India's response to ratification of ILO Conventions relating to social security has been poor⁶⁵. But effective implementation of the ILO Convention can be noticed through legislations and administrative actions⁶⁶.

3.6 Conclusion

From the colonial era till independence and even after that almost all the labour welfare legislations in India are preceded or supported by ILO documents or publications. During the period 1942- 1951 many committees were appointed for advancing social security of labour force and these decisions were influenced by ILO publications⁶⁷. The Commission on Social Security appointed in 1943 which was headed by

64. See, <http://labour.nic.in/ilas/indiaandilo.htm>, accessed on 21st May, 2009

65. India has not even ratified The Social Security Minimum Standard Convention (no.102), 1952

66. Ministry of Labour explains that ratification imposes legally binding obligations and hence India is careful in ratifying Conventions. India ratifies a Convention only if all laws and practices are in conformity with the relevant convention. India adopted a strategy to proceed with progressive implementation of standards and ratification at a later stage. See, <http://labour.nic.in/ilas/indiaandilo.htm>, 24th September, 2007

67. ILO Documents, Approaches to Social Security –An International Survey, published in 1942 and Social Security Principles and Problems Arising Out of War, published in 1944.

Professor Adarkar filed a Report and ILO appointed experts to review that report. This report formed the basis of Employees' State Insurance Act, 1948 which is providing basic social security benefits such as sickness benefit, disablement benefit, maternity benefit, dependant's benefit and funeral expenses. Though India has not ratified even the flagship ILO Convention on Social Security⁶⁸ all the nine areas identified in the convention and other related conventions are made part of social security schemes in India. It is reasonable to conclude that India has incorporated the obligation contemplated in the ratified and unratified Conventions through the Constitution and legislations. However, the OECD Report says that nine out of ten employees in India are out of social security coverage⁶⁹. The next chapter deals with India's role in providing social security of labour in detail.

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68. Convention No.102

69. OECD, Policy Brief, *Is informal Normal? Towards More and Better Jobs in Developing Countries*, (2009)

SOCIAL SECURITY IN INDIA: HISTORICAL DEVELOPMENT AND LABOUR POLICY

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The underlying idea behind social security measures is that there is a duty on the society to protect the working class that contributes to the welfare of the society against hazards¹. It protects not just the workman, but also his entire family in financial security and health care. The social security can be provided by institutional and non-institutional agencies. The non-institutional agencies existed from time immemorial and they are the back bones of the present social security programmes. India is a good example of having non-institutional form of social security measures in the world. The needy and unfortunate are seen protected in joint family set up and the caste system. The hardship due to unemployment, economic difficulties, old age, widowhood etc.,

1. Prof. Harry Calvert, *Social Security Law*, Sweet & Maxwell, London (1978), p.38.

was taken care of by joint family system. It had a religious backing also. An additional help from individual and institutions was provided to them through the guilds, community and Panchayats, orphanages, widow homes and charity centers available during that time. This indicates that India had its own social security system² of (1) self-sufficient village economy; (2) caste system; (3) joint family system; (4) organizations of charity. Following the development of liberalism and individualism fostered by the western influence, these roots of Indian society were shaken and ultimately lost its significance. The society, its culture and custom were affected a great deal by the foreign impact and a new society based on class gradually emerged. Industrialisation created a new class and this rising up class with its rural background and without social and material resources urgently necessitated systematic help from various social security agencies other than the traditional ones. The ideals of social security ultimately became a social responsibility largely depending on the resources and needs of the country. India is a country where economic resources are less and needs are more. The social security enactments that we find today in India are an amalgam of the ideals and principles emerged over the years.

4.1 Pre-constitutional Era and the Roots of Social Security

In the early historical times, people were living in a more secured or protected environment. As stated above, the system of the joint family, the guilds, the caste, and community panchayats and religious

2. Mamuria and Doshi, *Labour Problems and Social Welfare in India*, Kitab Mahal Pvt. Ltd., Allahabad (1966), p.339.

institutions have been providing protection to individuals from the evil consequences of various contingencies. The development of modern state totally changed the social set up in India and the state assumed the role of protector of people from evils. The philosophy of welfarism has resulted in legislative schemes designed to channel all economic activity for collective good.³ Originally, labour law was almost a part of private law but now it has become part of public law.

From the middle of 19th Century to the end of First world war, the Indian industrial legislation was in the period of origin. It was through a slow and steady process that the industrial law took root in India. The Apprentices Act figures the first law introduced in India relating to labour.⁴ It was enacted for better enabling children to learn trades, crafts and to seek employment by which when they come to full age, they may gain a livelihood.⁵

Cotton mills and jute mills that have been established during 1850s marked the beginning of factory system in India.⁶ The condition of workers in those mills were pathetic due to long working hours without any safety and security. Based on the principles of torts, Fatal Accidents Act, 1855 was enacted for providing compensation to legal

3. See. *Supra n.* 1.

4. S.R.Samanth, *Industrial Jurisprudence*, M/s.N.M.Tripathi P.Ltd., Bombay, at p.54.

5. Preamble, The Apprentices Act.

6. *Factory system (India)* Report of the Commission, question by Mr Anderson and replied by Lord George Hamilton, HC Deb. 10 April 1877 Vol. 233. See, <http://hansard.millbanksystems.com/commons/1877>

heirs of these employees where death occurred by an actionable wrong.⁷ Minimum rate of compensation, to some selected legal heirs and a restricted application were the main drawback of the said Act.

In 1859, Indian Merchant Shipping Act was passed. This Act was envisaged for regulating employment of seamen and to provide for their better health. In the same year Workmen's Breach of Contract Act was passed which provided for criminal penalties for workers for breach of contract of service. In 1860, Employers and Workmen (Disputes) Act was passed and it provided for speedy and summary settlement of disputes between employers and workmen.⁸

By 1881, factory system clearly emerged in India, but workers did not organize themselves simultaneously with the industrialization. The safety and working conditions of these workers were prime concerns for many members of the House of Lords and they argued for a legislation⁹. Thus in 1881, Indian Factories Act¹⁰ was passed. In order to improve the conditions of plantations labours, Island Emigration Act 1892 and to secure safe and healthy conditions of work in mines, Indian Mines Act, 1901 were passed.

It is evident that, all these early legislations were enacted in connection with specified classes of industries and did not extend to the

7. Compensation was given only if it is proved in the Court of law that the accident was not due to obvious neglect of workers.

8. This Act was the forerunner of Industrial Disputes Act, 1947 which played an important role in modern industrial life.

9. See *supra* n. 6

10. It was re-enacted in 1911.

entire working class. The majority of the measures adopted were related to railways, shipping, factories, and mines. The progress of both industries and industrial laws was haphazard and inadequate. The attitude of government towards the workers legitimate rights was that of opposition and non-interference.¹¹ It was sincerely believed that any interference in employer employee relationship would prove detrimental to both parties. This might be the reason for industrial enactments passed during this period happened to be limited. These were also scattered, limited in scope with respect to their coverage, and of minor importance and conservative in nature.

During and after the first world war period, there had been tremendous change in the attitude of state and society towards labour. ILO was established in 1919 which aimed at welfare of workers globally. India is a member since its inception. ILO has adopted many conventions and recommendations casting different types of liability on industry, Government and labour.¹² Under the Montague-Chelmsford Reforms in 1919, the central legislature was given definite legislative authority to enact industrial laws. Using that power, in 1923, India passed a major enactment called Workmen's Compensation Act, 1923, with an object to eliminate hardship caused to workmen injured, through providing prompt payment of benefits regardless of fault from their side and with minimum legal formalities. It imposed obligation upon employers to pay compensation to workers for accidents arising out of and in the course of

11. Laissezfaire was the ruling doctrine of the day.

12. Among them India ratified only 3 conventions relating to workmen's compensation, on occupational diseases and equality of treatment in accident compensation.

employment and for death and disablement¹³. In 1925, Government of India enacted another Act, Provident Fund Act, 1925.¹⁴ Royal Commission on Labour was appointed in 1929 which recommended a scheme for health insurance to industrial workers on a contributory basis (financed by employers along with small deductions from the wages of workers) and provisions against old age and payment of gratuity.

The Government of India Act, 1935 laid down the subjects on which Federal Legislature could pass industrial laws. During this period, industrial legislation grew in speed, volume, scope and underwent a great change in its nature. These enactments gave coverage to major field of industrial workers and their rights. These laws are found to be liberal as regards their contents and coverage and having far reaching importance and consequences. This pointed a change in governmental attitude from toleration to encouragement of worker's aspirations.

During the period of 1919-1942, there was a great progress in modifying old laws¹⁵ and in enacting of new ones¹⁶. Some new enactments were passed for specifically addressing certain industrial

13. The Act was amended 7 times during this period.

14. This Act is enacted with a view to set up a fund which is to be maintained by Governemnt and Semi-government organizations.

15. Indian Merchant Shipping Act, 1923; Assam Labour and Emigration Act, 1893; Indian Mines Act, 1901; Factories Act, 1911 improved up in their scope and object. Employers and Workmen (Disputes Act, 1860 and Indian Fatal Accidents Act, 1855 were re-enacted as Workmen's compensation Act and Indian Trade Disputes Act.

16. Tea Districts Emigrant Labour Act, 1932; Indian Mines Act, 1923 and Indian Factories Act, 1934.

establishments¹⁷. These were not merely intended for regulating employment in the industries but attempted to give better conditions of employment like shorter hours of work, weekly holidays, safety of premises, payment for overtime, rest period and paid holidays.

All these changes¹⁸ were made mainly due to the emergence of ILO. Apart from that, after first world war, India witnessed a rapid rise in nationalism. The British Government also tried to accommodate and adjust some of Indian demands. Indians were also given chance to administration on local subjects called transferred subjects. Thus the introduction of diarchy and rapid growth in industrialization gave more interest in labour matters.

Another phase when many significant development in the field of social security occurred on a firm and sound footing was the second world war. The war created an acute shortage of man and materials. This necessitated increased production and that required greater co-operation of labour. To ensure this a number of concessions were made to the working class under Defence of India Rules.¹⁹ The appointment of Dr.B.R.Ambedkar as labour member to the Viceroy's Council infused keenness in government's labour policy. In 1943, a committee called the 'Standing Labour Committee' was appointed by Government of India.

17. Mines Maternity Benefit Act, 1941; Indian Motor Vehicles Act, 1939; Indian Dock Labourer's Act, 1934

18. Children (Pledging of Labour) Act, 1933; Payment of Wages Act, 1936; Employees Liability Act, 1938; Employment of Children Act, 1938; Weekly Holidays Act, 1942 are some of the new enactments passed during this period relating to labour. These new legislations extend to the entire working class as distinguished from workers in specific industry

19. Rule 81-A.

Constitution of this Committee and Indian Labour Conference effected remarkable changes in the attitude of Government towards labour. The committee was constituted for the purpose of formulating a scheme for health insurance for individual workers. Another committee was also appointed to make survey on the position of health conditions and health organizations in existence. All these provided for a forum for the discussion of labour matters. The two ILO publications viz; '*Approaches to social security—an International Survey*' and '*Social security—Principles and Problems Arising Out of War*'²⁰ highlighted the tendency in planning social security to bring under a single scheme for assuring maintenance in case of inability to work and to extend this to all the employees, employed or self employed, rural or urban.

The publication of Beveridge Report in England also had a remarkable impact on Indian scene. The Government of India made attempts to introduce sickness benefits in India. The provincial governments were entrusted with this task. But they doubted its success because of migratory nature of Indian workers and difficulty in locating them in villages. Shortage of medical staff for certification and treatment was yet another reason. About this, the E.S.I. Review Committee observed:

“Sickness is an important contributory cause of indebtedness with all that debt entails. Under existing conditions at the time of greatest need the worker may find himself destitute of resources, unable to take proper measures to restore his

20. Published in the year 1942 and 1947 respectively.

health and in difficulties regarding even in the means of subsistence.”²¹

Recommendations of the ESI Review Committee were considered by Government of India and again referred to provincial governments. But no evidence was available to show that these efforts would become fruitful.

But in Bombay, the Textile Labour Enquiry Committee formulated sickness insurance scheme and recommended in its report that a compulsory and contributory insurance scheme in which the employer, the workers and the state to contribute has to be put in motion at Bombay and Allahabad initially and extended to other cotton textile centers in the province. Though the centre forwarded such schemes to states, none was implemented due to lack of interest of the provinces.

Government placed the matter in the First Labour Minister’s Conference held in New Delhi in 1940. In the same year Employees Conference held at Bombay under the joint auspices of All India Organization of Industrial Employers and the Employees examined the question of sickness insurance and favoured the tripartite contribution. The decision in Second Labour Minister’s Conference held in 1941, Third Labour Minister’s Conference held in 1942 and the ILO Conventions and recommendations forced Government of India to appoint a commission in 1943 under the Chairmanship of Professor B.R.Adarkar²². The scheme formulated by him envisaged to cover only

21. ESI Review Committee appointed by Government of India in 1966.

22. The Commission filed its report in 1944.

perennial factories belonging to textile engineering, mineral and metal groups of industries. Government of India requested ILO to depute experts to examine Adarkar Report. ILO deputed M/s.M.Stack and Rao for evaluating Adarkar Report and they suggested certain modifications relating to classification of workers, contribution benefits, and the organization of medical services and financial structure of the scheme²³.

In 1947, India became independent and an interim government was formed which caused greater encouragement to worker's legitimate ambitions and accelerated harmony in the industrial relations. The interim government formulated a five year programme for the welfare of the labour class. The significant features of the programme were:

- (i) organization of the health insurance scheme;
- (ii) revision of the Workmen's Compensation Act;
- (iii) central law for maternity benefit; and
- (iv) extension to other classes of workers the right within specific limits to leave with allowances during sickness²⁴.

Industrial Disputes Act enacted in 1947 introduced an adjudicating system where an industrial worker can raise an industrial dispute. Gratuity was also considered as a cause of industrial dispute and thus gratuity was recognized as a legal right.

23. The modified Adarkar Plan is now the ESI Act, 1948.

24. Report of the *National Commission on Labour I*, at p.163.

Employee's State Insurance Act was passed in 1948. It introduced a scheme of compulsory health insurance and benefits in the event of sickness, maternity and employment injury to workmen.

Mica Mines Labour Welfare Fund Act, 1946 and Coal Mines Provident Fund and Bonus Scheme Act, 1948 were enacted and these provided for levy of a cess on the output of the industry to finance housing and such other projects like nutrition, provision for water supply, educational and recreational facilities etc. of workmen employed in that sector.

Hence, in a nutshell, the government made many efforts to implement welfare provisions for the labour force in India, but due to lack of interest of provincial governments in its implementation and supervision did not yield the intended result.

4.2 Analysis of Social Security in Independent India

The socio-economic conditions of the poor and working class in India were highly depressing. Various committees and reports stressed those facts in different fora whenever they could. The submission before Constitutional Reforms Committee explained the pathetic condition and the necessity to ensure the right of workers. It said that certain fundamental rights of the working classes should be specifically declared so that Indian Parliament should make suitable laws to ensure fair rent and fixity of tenure to agricultural tenants from whom industrial workers are recreated, for the maintenance of health and fitness of workers, securing a minimum wage for them, the protection of motherhood, welfare of their children and the economic

consequences of old age, infirmity and unemployment²⁵. This is a part of the memorandum submitted to the sub-committee of Joint Committee on Indian Constitutional Reforms in 1933 and gave evidence that the priority to the right of labour included social security of labour also.

Another memorandum submitted by Mr. Shiv Rao on behalf of National Trade Union Federation to the same Committee contained demands such as the Constitution should contain a declaration of fundamental rights guaranteeing to all citizens of the federation *inter alia*, freedom of speech, freedom of press, freedom of association, and in case of workers the right to strike, the right to work and provisions against old age invalidity etc., in view of the experience that the Indian workers have had with regard to the treatment meted out to them and their organizations during industrial disputes. The federation was convinced of necessity of insisting upon such fundamental rights being guaranteed in the interests particularly of the working classes²⁶.

These two memorandums are reiteration of the resolution adopted in April 1933 by special session of National Trade Union Federation at its Calcutta Session. They strongly recommended that the Constitution Act should contain a declaration of fundamental rights guaranteed to the workers. But in almost all discussions generally, there was a strong opposition to declaration of fundamental rights especially when there would be no effective machinery for enforcing them.

25. Report on Indian Constitutional Committee 1917-1918.

26. National Trade Union Federation Memorandum, pp.2213-2214 and Appendix A, Evidence, Indian Constitutional Reforms, Vol.12, pp.1932-33.

Apart from the discussion and memorandum submitted on the subject of fundamental right at the London Round Table Conference Sessions and at the meeting of Joint Committee on Constitutional Reforms, the Indian National Congress also passed a resolution on declaration of fundamental rights at its 45th Session held in Karachi in March²⁷ and it was modified in its 47th Session in Calcutta in 1933²⁸ and adopted under the heading “Fundamental Rights and Duties and Economic Programme”. It was based on the ideology that in order to end exploitation of the masses, political freedom must include real economic freedom of the starving millions. The resolution was divided under different heads and one among them related to labour. The rights of labour expressed in the resolution included securing decent standard of living, suitable legislation for securing living wage, healthy conditions of work, limited hours of labour, suitable dispute settlement machineries and maternity leave to women workers, protection against the economic consequence of old age, sickness and unemployment including protection of right to form unions²⁹.

This resolution expressed the main rights required or demanded by labour. It was comprehensive in character and reflected rights, economic, political and social in conformity with principle of justice.

A decade after, for the incorporation of fundamental right in Government of India Act, 1935, it was again discussed by special

27. See <http://education.nic.in/cd50years/12/8I/6E/8I6E0H01.htm>

28. <http://education.nic.in/cd50years/12/8I/6E/8I6E0H01.htm>

29. www.indianyouthcongress.in/history045.htm

committee in 1945 for the purpose of collecting information regarding the future constitutional set up for India. A questionnaire was issued by the Committee. The first questionnaire was—“What are the fundamental rights which should be incorporated in future Constitution of India? What machinery would you suggest for the enforcement of such of those rights as are not justiciable or enforceable by court of law?”³⁰

Answers were submitted by several associations and individuals. It is worth to note the memorandum submitted by Prof.M.Venkatarangaiah among those submitted by individuals. It mentioned the distinction that was to be made between civil rights on the one hand and social and economic rights on the other. He wanted the incorporation of the two sets of rights in the Constitution, the former being enforceable in the courts of law and the latter not. He gave reasons for the distinction between the two sets of rights, the difficulties involved in respect of non-justifiable rights and the utility of social and economic rights in the constitutional set up.

According to Mr.Venkatarangaiah, the rights in non-justifiable character ought to be enforced because it involves positive action by state-legislature and administration and required large financial resources. He again explained that the rights not justiciable, were not ineffective as rights but “while enforcing some rights we have to look to courts and for enforcing others, we have to look into other political institutions”.³¹

30. Constituent Assembly Debates, Volume II, <http://parliamentofindia.nic.in/ls/debates/vol7p1d.htm>

31. *Ibid.*

Sapru Committee finally in its “Constitutional Proposals” recommended that the declaration of fundamental rights was absolutely necessary for India not only for prescribing a standard of concept for legislatures, government and the courts but the rights must be divided into two (i) justiciable and (ii) non-justiciable and to provide suitable machinery for enforcement of both.³² The importance of this recommendation lies where both types of rights were recommended to be included in the body of the Constitution.

Sri B.N.Rao, Member of Constituent Assembly made an elaborate study of the fundamental rights to be embodied in the Constitution and of making criteria for incorporation of the same in the Constitution. He came to the conclusion that the chapter on Fundamental Rights be divided into Part A & B for the draft scheme placed before the members of Constitutional Assembly. According to him, Part A must be the fundamental principle of state policy and those were non-justiciable. The scheme he placed before members of Constitutional Assembly included—

“6. The state shall as far as possible, secure to each citizen;

(1) the right to work; (2) right to education; (3) right to maintain in old age and during sickness or loss of capacity to work; (4) right to rest and leisure.

7. The state shall ensure that the strength and health of workers, men and women and tender age of children shall not

32. *Ibid.*

be abused and that they shall not be forced by economic necessity to take up occupations related to their sex, age or strength”³³ and observed, “... none of the above provisions is stable for enforcement by the courts”³⁴ and has given the status only as ‘moral precepts having education value’.³⁵

The Fundamental Rights Sub-Committee recorded that a difference should be drawn in the list of fundamental right between rights which were enforceable by appropriate legal process and provision which were in the nature of fundamental principles of social policy that was to regulate the governments concerned.³⁶ During the constituent assembly debates the word “fundamental’ was replaced by ‘directive’ and Part II of Sir B.N.Rao’s draft was placed as “Fundamental Rights including Directive Principles of State Policy”.³⁷

The above stated brief history showed that the right of workers including social security was demanded to be included in Constitution as fundamental right but the nature of the right and the difficulty in its enforceability made its position in the subordinate category of non-justiciable right. Matters relating to Social Security are listed in the Directive Principles of State Policy and the subjects in the Concurrent

33. Reading the nature of the rights Sir B.N.Rao, *Constitutional Precedents*, (3rd series) 1947, p.21.

34. *Id.* at p.22.

35. *Ibid.*

36. Markandan K.C., *Directive Principles in the Indian Constitution*, Allied Publishers Pvt. Ltd., Bombay, (1966), p.62.

37. *Id.* at p.79.

List³⁸. The provisions contained in Fundamental Rights and Directive Principles³⁹ of Constitution helped a lot for providing facilities to workmen and making effective provisions of public assistance.

Soon after the commencement of the Constitution, Five Year Plans were introduced in India in order to ensure social justice and better standard of life to the people.⁴⁰ In 1954⁴¹, India declared as it adopted a socialistic pattern of society and this reshaped the labour policy.

In 1952, the Employees Provident Fund Act was passed on the basis of experience of provident fund schemes of coal mine workers and constant demand from employees. The Act provided for old age, invalidity and survivorship benefits to the workforce in the organized sector.⁴² The Act now covers factories and establishments employing 20 or more employees in scheduled industries and other establishments notified by Central Government. The employees drawing salary up to

38. The social security issues mentioned in the Concurrent List *viz.*, List III in the Seventh Schedule of the Constitution of India are Item No. 23: Social Security and insurance, employment and unemployment. Item No. 24: Welfare of Labour including conditions of work, Provident funds, employers' liability, workmen's compensation, invalidity and old age pension and maternity benefits.

39. Article 41 Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42 Provision for just and humane conditions of work and maternity relief The State shall make provision for securing just and humane conditions of work and for maternity relief

40. Government of India, Planning Commission, First Five Year Plan.

41. Constitution was amended and added the word 'socialist' to the preamble

42. The Amendment in 1976 extended the benefits and in 1982 extended to establishments employing 1000 or more workers.

Rs.6500/- per month are covered under the Act. There is a provision for voluntary coverage of a person even after he crosses the ceiling.⁴³

Another social security measure in the form of benefit against unemployment was adopted in 1953 when an ordinance⁴⁴ provided for lay-off and retrenchment compensation to industrial workers. The scope of unemployment benefit was extended after amendment in 1956 and 1957 to provide for compensation to workmen on transfer or closure of undertakings.⁴⁵ Retrenchment covers all termination of workmen other than through voluntary retirement, superannuation, termination of the service of the workmen, after an expiry of an employment contract and termination on the basis of continued illness of workmen.⁴⁶

The Maternity Benefit Act was passed in 1961 replacing all state laws on this subject.⁴⁷ It applies to all establishments, factories, plantations and shops where 10 or more persons are employed. Maternity benefits are also provided under ESI Act and an insured woman is entitled to maternity benefit in the form of periodical

43. During 1952, this Act covered 1.2 million workers employed in about 1400 establishments in 6 major industries, and in 1991 the Act covered 21.2 million workers in 2,99,000 establishments covering 177 industries.

44. 1971 Amendment in the Act provided for family pension and 1976 Amendment for Employees Deposit Linked Pension Scheme.

45. Labour Industrial Dispute Amendment Act, 1953 that amended the industrial Disputes Act, 1947.

46. 25-C of Industrial Disputes Act laid off workmen are entitled to a compensation equal to 50% of the total basic wages and dearness allowance for the laid-off period and in case of retrenchment workers have to be paid 15 days wages for every completed year of continuous service or any part there of in excess of six months.

47. It was again amended in 1973 & 1976 to enlarge its scope.

payments in case of confinement, miscarriage or sickness arising out of pregnancy. They are also entitled to medical care under the ESI scheme for maternity. The factories or establishment to which the provisions of ESI scheme apply are excluded from the purview of Maternity Benefit Act. But high salaried women above the wage ceiling under ESI Act are entitled to be benefited under this Act. There is no wage limit for coverage under the Maternity Benefit Act. The provisions under ESI Act for medical benefit are more comprehensive as they include medical care and maternity benefit than provision under Maternity Benefit Act.

Though in 1957 a study group on social security to work out a comprehensive social security scheme was appointed, their recommendations⁴⁸ could not make any impact. Hence in 1966, a Committee on Labour Welfare and National Commission on Labour was appointed. The Committee on Labour Welfare was set up for examining the functioning of various welfare schemes in operation in industrial establishments and to suggest improvements. Both the Committee and the Commission submitted detailed reports in 1969. Apart from these legislative efforts, Committees and Commissions, a key role is seen played by Planning Commission.

4.3 Labour Policy; Social Security and Five Year Plans

The First Five Year Plan⁴⁹ dealt with labour and industrial relations with a humanistic approach. It recognized the importance of

48. *Recommendation of Study Group on Social Security*, Government of India, 1957.

49. Government of India, Planning Commission, First Five Year Plan (1951-1956).

labour in the fulfillment of the targets of the plan and creating an economic order in the country. With this view, the first plan associated certain rights and obligations with the role which labour had to play.⁵⁰ The rights included factors like adequate provision for the basic need of the workers in respect of food, clothing and shelter so as to enable them to remain healthy and efficient, provision for improved health conditions, wider provision for social security, better educational opportunities and increased recreational and cultural facilities; conditions of work that would safeguard the worker's health and protection against occupational hazards, right to organize and to take lawful action in furtherance of their rights and interests. The plan called upon labour to realize the fact that in an undeveloped economy, it cannot build for itself but they have to make a substantial contribution⁵¹. This will ultimately lead to peaceful industrial relations.

In the Plan, right to strike and lock out was recognized. Just settlement of claims was also given emphasis. The Commission also accepted the importance of conciliation and arbitration in dispute resolution and duty of state to provide machinery for settlement of disputes. The plan envisaged for establishing a tripartite body for determining norms and standards, standardization of wages with principles of social policy, profit sharing, permanent wage boards etc. Above all, a full and effective implementation of minimum wage legislations was the main recommendations in First Five Year Plan. The

50. *Supra* n. 2 at p.22.

51. The report said that, the working class performance functions vital to the maintenance of the community's economic life.

plan also stressed on improving working conditions of labour and for that purpose implementing legislation i.e., Factories Act, Mines Act, Plantation Act, Shops and Establishment Act etc. The plan assured:

“having placed his assets labour and skill at the disposal of the community, he should be assured for a reasonable measure of security against various natural and other risks to which he is exposed.”⁵²

Second Five Year Plan dealt with employment aspects in its Chapter 5. This plan gave importance to the employment opportunities with an objective of maximizing rate of growth output through the utilization of available resources as a means for economic development. The task is divided into three, firstly about providing employment opportunities for the existing urban and rural growth, secondly, providing natural increase in the labour force and lastly about those underemployed in agriculture and household activities to be provided with increased work opportunities.⁵³

With the adoption of the policy of socialistic pattern of society, the labour policy in the Second Plan was accordingly influenced. The Second Plan recognized that the goal of progressively speeding up production would mean that indiscipline, stoppage of production and indifferent quality of work would have to be guarded against. The Plan placed greater emphasize on mutual negotiations and voluntary arbitration in improving employer-employee relations. Important

52. *Ibid.*

53. Government of India, Planning Commission, Second Five Year Plan (1956-1961).

development took place in the acceptance of Code of Discipline (1958) laying down specific obligation for the management and workers i.e., instituting programmes for worker's education (1958), establishment of wage boards (1960), for fixation of wages etc.⁵⁴ The main emphasis of the Second Five Year Plan was on the problem of unemployment and under employment. The plan gave high priority to the development of large scale joint stock enterprises on the one hand and village and small scale industries on the other for solving the unemployment problem.⁵⁵

During the Third Plan, apart from the fuller implementation of the schemes drawn up in the first two plans, social security measures were taken into consideration. The Third Five Year Plan declares the labour policy by emphasizing states' responsibility in providing facilities and co-operative arrangements for settling disputes. It visualized that "the object is to secure not peace alone but higher levels of industrial efficiency and rising standard of life of working class"⁵⁶. Payment of Bonus Act, 1965; Shops and Commercial Establishments Acts in different states⁵⁷, Labour Welfare Funds Acts⁵⁸ in many states were some remarkable improvements during this plan period. National Safety Council was set up in 1966. Under Minimum Wages Act, 1948, minimum wages were fixed and periodically revised by state governments in respect of various agricultural and other trades. The

54. *Supra* n.2 at p.22.

55. *Id.* at p.50.

56. Government of India, Planning Commission, Third Five Year Plan(1961-1966)

57. In Kerala in 1960, in Uttar Pradesh 1962, Punjab 1958, Himachal Pradesh 1969 etc.

58. In Karnataka 1965, in Bombay 1965 etc.

First National Commission on Labour was also set up under this Plan. This was the first step in independent India that envisaged a comprehensive study for finding out the labour problems, its causes and remedies.

The Fourth Plan⁵⁹ analysed the ESI Scheme, industrial training to craftsmen, employees provident fund scheme and found that these expanded steadily. This plan recommended for adoption of the ideology of ILO that includes “development involving comprehensive programs of rural development, labour intensive public work programmes and fuller utilization of industrial capacity, promotion of labour intensive products in domestic and foreign markets and application of economically sound labour intensive techniques in industrial production.”⁶⁰ Such investment plan will need more investment in human as compared to physical capital.⁶¹ More stress was given to rural development and small scale industries and the strategy of development envisaged in Fourth Plan was broadly in conformity with this. The plan also envisaged the creation of new employment opportunities and improvement in wages of those who were already employed in different sectors.

The Sixth Five Year Plan recognized that the time had come when labour policy should be much more concerned with the interests of vast masses of workers who are outside the organized sector and are unable

59. Government of India, Planning Commission, Fourth Five Year Plan (1969-1974).

60. In the report of UNEP, the ILO has forcefully agreed for the integration of employment creation to economic development through the maximum possible productive resources available labour to accelerate economic growth and more particularly, to substitute labour for scarce capital where there is economically feasible.

61. *Id* at chapter 22, p.429.

to protect their interests. The plan spoke about industrial policy i.e., ‘industrial development policy’ in a developing country like India has to meet two conflicting requirements. It must protect the right of the working class to organize and to struggle for its economic and social betterment by all democratic and legal means.⁶² At the same time, it must ensure the steady growth of investment and production at a satisfactory rate. Acceptance of priority of collective bargaining as the main mode of dispute settlement and protection of right to strike of workers were the proposals under this plan for concretizing the good industrial relationship.⁶³ At the same time means to avoid strike i.e., notice, consultation and arbitration were also given importance. The plan also envisaged for extension of benefit of minimum wages to more beneficiaries, revising wage policy assuring similar wages for similar work, worker’s share in profit and income, expansion of working of National Safety Councils and National Council for Safety in Mines.

The Plan discussed social security of workers under Employees State Insurance Act, 1948; Employees Provident Fund and Miscellaneous Provisions Act, 1948; Payment of Gratuity Act, 1947 and Family Pension Scheme.⁶⁴ The Plan envisaged for expansion of coverage of these Acts not only to factories employing 10 to 19 persons using power but also to shops, hotels, restaurants, cinemas, theatres, motor transport and news paper establishments employing 20 workers

62. *Ibid.*

63. The plan says the right to workers is to be protected otherwise bilateral collective bargaining is deprived of its ultimate sanction from worker’s point of view.

64. Government of India Planning Commission, Fourth Five Year Plan (1978-1983), Chapter 2, p.172.

or more. With regard to women labourers, the plan recommended for application of Equal Remuneration Act to all branches of employment to eliminate discrimination against women and to set up Advisory Committees in all states to implement the Act. The plan emphasized the proper enforcement of existing provisions requiring crèches or child care units within establishments in order to cover children of working mothers.

The plan realized that there was no shortcut to the elimination of child labour in an economy where poverty and unemployment forced families to divert their children from education to the supplement their family income. The only way is to raise the income of the families through employment and anti-poverty programmes. The plan also recommended for National Committee on child labour to examine the adequacy and implementation of the present legislation relating to child labour and to suggest welfare measures for the benefit of employed children and also for a Child Labour Cell in Ministry of Labour to formulate, co-ordinate and implement policies and programmes for the welfare of employed children and to indicate follow up action on the sections of the Child Labour Committee.

The Seventh Five Year Plan⁶⁵ dealt with in detail employment, manpower planning and labour policy in chapter 5. In the Seventh Five Year Plan there is a shift in ideology of employment and manpower policy from basic approach to the concept of productive employment. The task is found with adopting a suitable structure of investment and production,

65. Seventh Five Year Plan, (1974-75).

appropriate types of technology and mix of production technique and organizational support which would help the promotion of growth in productive employment. There must be suitable arrangements and adjustment of policies in terms of education, training and retraining and reorientation of workers in order to avoid dislocation effects and make the process of technology adoption smooth. The Plan analysed the employment generation achievements in Sixth Plan period and found that there was expansion.⁶⁶

The Seventh Plan recognized that the labour entered the production process from the supply side as well as from the demand side and the thrust of Seventh Plan was an improvement in capacity utilization, efficiency and productivity.⁶⁷ This plan has given emphasis to industrial safety and required constant attention due to its significant impact on the working conditions and welfare of workers and also on the production mechanism. This plan also discussed wage policy and found that wage factor depended on related elements like allowances, bonus, social security and fringe benefits. With regard to the unorganized sector, efforts are suggested to be made not only to train to upgrade skills of the workers but also to educate them and make them aware of the pragmatic and legislative provisions available to them. With regard to women workers, the plan gave special recognition and made provisions for requisite facilities for bringing them into the mainstream of economic growth.

66. Apart from sectoral investments, the oriented programmes like NREP, IRDP, RLEGP, and TRYSEM resulted in expansion of employment opportunities.

67. Government of India, Planning Commission, Seventh Five Year Plan, Chapter 'Employment-Power, Plans and Labour Policy', pp.1-9.

The objective in the Eighth Plan was treating employment generation and economic growth as complementary rather than conflicting processes. The plan took the aspect of need of important scrutiny in the impact of macro-economic, sectoral and labour policies on employment.

The plan also discussed elaborately the existing labour policies, in the context of economic reforms. It was pointed out that capital and labour policies are not always employment friendly. The plan found that the labour policy as manifest in certain labour laws and labour market rigidities rendering wage mechanism ineffective, has introduced a degree of inflexibility in labour use thus “discouraging employment expansion particularly in the large scale industries”.⁶⁸ The plan also discussed the unorganized sector where majority of workers belong and found employment in that sector, not only completely insecure but also devoid of any social security provisions i.e., “high degree protection for minimum scale proportion of the work force and complete lack of protection for the majority of workers”.⁶⁹

The shift from long protected non-competitive economy to increasingly competitive market occurred during Ninth Plan period.⁷⁰ Appreciating the encouraging results of these reforms, the plan document observed that Indian economy has responded well to the change in policy direction.⁷¹

68. Government of India, Planning Commission, Eighth Five Year Plan (1992-97), Chapter 6, p.116.

69. *Id* at p.117.

70. 1997-2002.

71. N.Jetli, *India: Economic Reforms and Labour Policy*, New Century Publications, New Delhi, (2004), p.16.

The Tenth Plan⁷² as approved by National Development Council (NDC) envisaged an annual growth of 8% which is higher than 5.5% achieved during the Ninth Five Year Plan period. The plan targeted 10 million employment opportunities per year over Tenth Plan period. The plan especially emphasised on social security and framed a working group. The report⁷³ elaborately discussed the present system of social security in India. The objective of this plan was to support attainment of economic and social objective in labour sector through a set of strategies. It is believed that a reasonable return to labour is facilitated by labour laws including provisions for social security to workers. According to the plan, job is the best guarantee for those who are not covered by social security laws⁷⁴. In the plan it has been stated that the labour market is found moving in a direction that change over of jobs by an individual will become more frequent. Public sector which provides comprehensive social security cover to its employees has been shrinking in size, the pension system of government employees be kept under review. The Plan envisaged that to reach out to the entire labour force employed, many of the existing institutions, laws and programmes including those on social security have to be restructured.

4.4 Conclusion

The historical over view of labour jurisprudence in India reveals the fact that social security is not an alien concept in India. It was in

72. (2002-2007) period.

73. Report of the Working Group on Social Security for the Tenth Five Year Plan (2002-2007), Government of India, Planning Commission, October, 2001.

74. As stated in the Plan, out of about 400 million workers in the country only around 50 to 60 million are covered by some form of social security.

existence as a part of family or religious institution. The development of industrial jurisprudence influenced India also and thus the modern approach to social security moved slowly to India. The growth was stage by stage i.e as a preliminary period and then, a period of conscious planning. Before independence the enactments relating to social security were made for certain category of workers only. The framers of the Constitution of India had given significance to the provisions relating to social security of labour while framing the Constitution. Later in all policies in the governance of the country, social security to worker was a concern of the government.

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SOCIAL SECURITY IN INDIA: CONSTITUTIONAL AND LEGAL FRAMEWORK

C o n t e n t s	5.1. Right to Social Security: The Constitutional Framework
	5.2. Directive Principle, Welfarism and Social Security vis-à-vis-Fundamental Rights: Judicial Approaches
	5.3. Legislative Measures for Social Security in India: Current Position
	5.4. Social Security in Unorganized Sector
	5.5. Conclusion

At the dawn of Indian independence political thinking of the world over was mainly centered around three political systems *viz.*, capitalism, Marxism and socialism. When the Constitution was in the process of making, the framers were much influenced by socialistic thought and visualized an egalitarian social order¹ by incorporating several provisions for eliminating inequalities and prevention of concentration of wealth.

5.1 Right to Social Security: The Constitutional Framework

The preamble expresses the essential features of political and economic philosophy underlying the provisions of the Constitution. It

1. P.B.Gajendragadkar, *The Indian Parliament and Fundamental Rights*, Tagore Law Lectures, Eastern Law House, Calcutta (1972), p.36.

declares that India would be a sovereign, socialist, secular democratic republic and to secure to all its people justice, liberty, equality and fraternity.² It assures a democratic way of life and embraces the ideal of establishing social, political and economic justice in the country. Naturally, the dignity of individual occupied a central place of honor in its scheme. Though the individual rights are protected through Fundamental Rights under Part III, the claims of social good and egalitarianism are enshrined in Part IV. These two parts are rightly observed by Granvillie Austin as the core commitment to social revolution and the conscience of the Constitution³. Fundamental Rights in the Constitution recognizes the importance of the individual in the affairs of the state and seek to assure every citizen full freedom to enjoy life, liberty and happiness as he likes and the state will interfere with it only if consideration of public good justifies such interference. On the other hand, Directive Principles make precaution to provide inbuilt provisions on the strength of which reconciliation has to be attempted between the rights of individual and the claims of social good⁴. The framers of the Constitution were clear in their mind that Directive Principles are fundamental in the governance of the country. The significance of Directive Principles in relation to that of Fundamental Rights can be determined only by making a reference to the intention of

2. The words “socialist, secular” were added to the preamble only in the year 1976 by the Constitution (Forty-second Amendment) Act, 1976, S.2

3. Glanville Austin, *The Indian Constitution: Cornerstone of Nation*, Oxford University Press, New Delhi, (1966), p.50. According to Glanville Austin, Indian Constitution is the first and foremost social document and says, “the core of commitment to the social revolution is in Part III & IV in the Fundamental Right and Directive Principles of State Policy. These are consciences of the Constitution”

4. *Ibid.*

the framers in making these principles as an integral part of the Constitution.

The framers of the Constitution visualised that the socio-economic policy envisioned in the Directive Principles along with guarantee of freedom and liberty by the state can assure a welfare state. The framers did not make the fundamental rights absolute. The objectives of Directive Principles can be achieved by making appropriate law by the state. Articles 36 to Article 51 of this Part reflect the socio-economic principles in the governance of the country. The provisions relating to social security of labour lie in Part IV though the right to life and protection from discrimination and exploitation are laid down in Part III, the Fundamental Rights.

Dr.B. R. Ambedkar, the Chairman of the Drafting Committee, has categorically stated that Directive Principles “are really instruments to the executive and the legislature as to how they should exercise their power”⁵. Provisions of several constitutions were instrumental in formulating the Directive Principles. German Constitution⁶, Spanish Constitution⁷ and Constitution of Bolivia⁸ are some of them. Charter of

5. Constituent Assembly Debates, Vol.II, pp.41-42.

6. Article 14(2) “Maternity shall have the right to the protection and public assistance of the state.

7. Article 14(2) “Maternity shall have the right to the protection and public assistance of the state.

8. “The Law shall provide regulations for contemporary instance to cover sickness, accidents, involuntary unemployment, disability, old age, employees and workers, women and minors, the maximum working days, maximum salary, weekly day off, rest and holidays maternity leave with pay, medical and ... attention and other protective benefits for workers”.

League of Nations and Universal Declaration of Human Rights were also influenced the drafting of Directive Principles.

Article 38 (1) directs the State to promote the welfare of the people by securing and protecting as efficiently as it may a social order in which justice –social, economic and political shall inform all institutions of national life. This is a re-affirmation of the preambular objective of securing socio-economic and political justice. The 44th Amendment added clause (2) to Article 38 which directs the state to minimize the irregularities in income, and to endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also groups of people residing in different areas or engaged in different vocations⁹. This clause represents the group equality.

Article 39 lays down certain specific objectives. Clauses (a) (b) and (c) particularly lay down the norms for an egalitarian operation of economic and social system of the country. Securing of adequate means of livelihood for citizens, preventing the concentration of economic power in few hands and ensuring the operation of the economic system for the general good are stated as the guiding principles. Ensuring of equal pay for equal work and protection of health and strength of workers from abuse are some other objectives of the Article¹⁰. To make effective provision for securing the right to work, education and public assistance in case of unemployment, old age, sickness and disablement and in other cases of

9. Constitution (44th Amendment) Act, 1978, S.9

10. According to Prof. M.V.Pylee “the concepts of socialism and secularism was explicit in the Constitution as it was originally passed” M.V.Pylee, *Indian Constitution*, Asia Publishing House (P) Ltd., (1974), Bombay, at p.55.

undeserved want are significant measures of social security under Article 41. But this provision is subject to the limits of economic capacity of the State. Provisions for securing just and humane conditions of work and for maternity relief, a living wage to all workers, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities are yet another measures of social security enshrined in Articles 42 and 43. Many of these provisions in Part IV of the Constitution (Article 38, 39, 40 and 41 are examples) are intended to bring about a socialistic order in the Indian society. These objectives have been later summed up in the phrase “socialistic pattern of society” and have been explained in length in the Fifth Five Year Plan Documents¹¹. At this juncture, it is noteworthy to recall what Jawaharlal Nehru had said while introducing the Constitution (First Amendment) Bill. He said:

“The Constitution lays down certain Directive Principles of State Policy and after long discussions we agreed to them and they point out the way we have got to travel. The Constitution also lays down certain fundamental rights. Both are important. The Directive Principles of State Policy represent a dynamic move towards a certain objective. The fundamental rights represent some static, to preserve certain rights which exist. Both again are rights”

The difference between the two according to Chinnappa Reddy, J., is that fundamental rights are aimed at assuring political freedom to citizens by protecting them against excessive state action while the directive

11. See *supra* Chapter 4.

principles are aimed at securing social and economic freedoms for citizens by state action¹². Thus the Directive Principles are intended to be systematically put into application with a view to transforming Indian Society and bring out a social order in conformity with these principles.

Directive Principles of State Policy, though they are fundamental in governance of the state, i.e., there is a duty of the state to apply these principles in making laws, are not enforceable by any court¹³, according to Article 37. In other words, no organs including the courts have power to enforce them. However, the judicial pronouncement by the Supreme Court, on whom ultimately the power to interpret these provisions is vested, reveals drastic changes in judicial approach towards this part¹⁴.

5.2 Directive Principles, Welfarism and Social Security vis-à-vis Fundamental Rights: Judicial Approaches

The main preambular objective of Indian Constitution is to secure to all its citizens justice- social, economic and political. The basis and origin of this concept was the ‘objective resolution’¹⁵ moved by Nehru in the Constituent Assembly. The founding father’s vision was to build up the nation on the strong foundation of socio-economic justice which was denied to the millions of people in India.

12. O. Chinnappa Reddy, *The Court and the Constitution of India : Summits and Shallows*, Oxford University Press, New Delhi (2008) at p. 76

13. *Supra* n.3.

14. *Kesavananda Bharati v. State of Kerala*, 1973 4 S.C.C. 225.

15. The object resolution states: “It shall be guaranteed and secured to all the people of India justice—social, economic and political, equality of status of opportunity before the law, freedom of thought, expression, belief, faith, worship, vocations, associations—but all are subject to law and public morality” Nagabhooshanam, P., *Social Justice and Weaker Sections: Role of Judiciary*, Sitaram Co. (2000), p.4.

The concept of social justice therefore become a *sine qua non* for a true and purposive democratic state, particularly in India wherein the social stratification perpetrated for a long time. It was the philosophy of restoring the dignity of poor, the weak and the oppressed¹⁶.

Hence a modern state is expected to engage in all activities necessary for the promotion of the social and economic welfare of the community¹⁷. Thus the aim of Directive Principles is to attain a democratic socialistic society where an individual has a right to the most basic necessities of life including food, clothing, housing, medical care and the right to social security in the event of unemployment, sickness, old age, disability, widowhood etc. The welfare state accepts the responsibility of meeting these legitimate demands.

The social responsibility of modern welfare state extends to the field of human rights and imposes an obligation upon the government to promote liberty, equality and dignity. This welfare idealism covering wide range of socio-economic demands as well as aspirations of the people is seen permeated into the Constitution as Part III and part IV. The debates in the Constituent Assembly categorically shows that the utility of the state would be first judged from its effect on common mans' welfare and that the Constitution must establish state's obligation beyond doubt¹⁸. The Fundamental Rights and Directive Principles are aimed at ensuring

16. *Ibid.*

17. See *Ram Jawaya Kapoor v. State of Punjab*, A.I.R. 1955 S.C. 549 at p.554.

18. 1.C.A.D. 117, 99, 513-514, 277.

distributive justice to common man in India. In a nutshell, both these parts constitute the philosophy of the social service state¹⁹.

But the true nature, significance, role and objective underlying the Directive Principles have not been rightly appreciated by courts initially. There has been conflict of opinions about the status and position of Directive Principles vis-à-vis Fundamental Rights in the Constitution. Soon after the commencement of the Constitution, the approach of the judiciary was to give an undue emphasis on the unenforceability of Directive Principles without taking them as fundamental in the governance and ignoring the constitutional duty imposed on the state to implement them. The ‘non-justiciable’ and ‘non-enforceable’ character of these principles as discussed and concluded by the Constituent Assembly might be the reason behind this approach of judiciary. Thus it strengthened the belief that Directive Principles carry mere pious aspirations of little legal force and had to conform to and run subsidiary to Fundamental Rights.

It was in *State of Madras v. Chempakam Dorairajan*²⁰, the Supreme Court held that Directive Principles had to conform to and run as subsidiary to the chapter on Fundamental Rights on the reason that the latter are enforceable in the courts, while the former are not. Later the Supreme Court placed reliance on the Directive Principles for validating a number of legislations by propounding a theory of harmonious

19. Gajendragadkar J., “The Constitution of India: Its Philosophy and Basic Postulates”, 14 (1970), Gandhi Memorial Lectures. He said: “both Preamble and Directive Principle of State Policy give evidence of unmistakable anxiety of the framers of the Constitution to shape the Constitution as a mighty instrument for the economic improvement of the people and for the betterment of their conditions”. 19 A.I.R. 1980 S.C. 1789 at 1847.

20. A.I.R. 1951 S.C. 226.

construction of both directive principles and fundamental rights. For instance, the very same judge²¹ who held the view in *Chempakam Dorairajan* adopted a significant approach in *Mohd.Hanif Qureshi v. State of Bihar*²², when he observed:

“A harmonious interpretation must be placed up on the Constitution, and so interpreted it means that the state should certainly implement the directive principles, but it must do so in such a way as not to take away or abridge fundamental rights”²³.

Again in *Re Kerala Education Bill*²⁴, S.R. Das, C.J., observed that the Directive Principles had to conform to and run as subsidiary to the chapter on fundamental rights. Nevertheless, in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body of persons, the court might not entirely ignore these Directive Principles of State Policy but should adopt harmonious construction and should attempt to give effect to both as much as possible²⁵. It reveals the fact that though the Supreme Court initially tried to give predominance to Fundamental Rights over Directive Principle in case of conflict between the two.

Later, the Court adopted an approach of harmonious construction to give effect to both Directive Principles as well as Fundamental Rights. In

21. S.R.Das, J.

22. A.I.R. 1958S.C. 731.

23. *Ibid*

24. A.I.R. 1958 S.C. 956.

25. *Id* at p.967

*Sajjan Singh v. State of Rajasthan*²⁶, it was observed that even if Fundamental Rights could be taken as unchangeable, the needs of the viable dynamism would still be satisfied by properly interpreting the Fundamental Rights in the light of values and ideologies contained in Directive Principles of State Policy. But in the same year in *Golaknath v. State of Punjab*²⁷, it was held that the Directive Principle and Fundamental Rights enshrined in the Constitution formed an ‘integrated scheme and was elastic enough to respond to the changing needs of the society’²⁸ and ‘the scheme was made so elastic that all Directive Principles could reasonably be enforced without taking away or abridging the fundamental rights’²⁹. Thus the Supreme Court reached a stage of realizing “an integrated scheme” of the two parts of the Constitution. Again in another following case the court held that it did not see any conflict on the whole between the two provisions and found that ‘they are complementary to each other’³⁰. It was held in this case that the provisions of Constitution were not erected as the barriers to progress. They provided a plan for orderly progress towards the social order contemplated in the Preamble of the Constitution³¹.

The Constitution was amended in 1972 to establish pre-eminence of some of the directive principles over some of the fundamental rights i.e., Article 31-C was inserted by the 25th

26. A.I.R. 1967 S.C. 845.

27. A.I.R. 1967 S.C. 1643.

28. *Id.* at p.1656

29. *Ibid*

30. *C.B. Boarding & Lodging v. State of Mysore*, A.I.R. 1970 S.C. 2042

31. *Id.*, as per Hegde J.

Amendment Act³². The validity of this amendment was challenged in *Kesavananda Bharati v. State of Kerala*³³. While recognizing the significance of directive principles in the Constitution, the Supreme Court by majority upheld the validity of the 25th Amendment. Mathew, J., went to the extent of observing that in building a just social order, the fundamental rights could be subordinated to Directive Principles because only if men existed then there could be fundamental rights³⁴. It was also held that the two parts constitute the conscience of the Constitution and there is no antithesis between fundamental rights and directive principles as one supplements the other³⁵. More over both parts have to be balanced and harmonized³⁶. Similarly in *Mumbai Karigar Sabha v. Abdulbhai*³⁷ it was held that, where two statutory choices are available, the construction in conformity with the social philosophy of the Directive Principles has to be preferred. The Judicial role was further explained by the Supreme Court in *Uttar Pradesh Electricity Board v. Hari Shanker*³⁸ where the Court expressed the view that even though the courts could not direct making of legislations implementing the directives,

32. The 25th Amendment was to make Articles 14, 19 and 31 inapplicable to the laws made by the Parliament or State legislature for implementing the directive principles enshrined in Article 39 (b) and (c). Consequently, those legislations could not be questioned in a court of law.

33. A.I.R. 1973 S.C.1461.

34. Markandan K.C., *Directive Principles in the Indian Constitution*, Allied Publishers Pvt. Ltd., Bombay, (1966), p.62.

35. See *Supra* n.31 *Per* Hegde and Mukherjee, JJ. , *Id* at p. 1641

36. *Id.*, *Per* Shalet and Grover, JJ., *id* at p. 1658

37. A.I.R. 1976 S.C. 1455.

38. A.I.R. 1979 S.C. 65

judiciary was bound to evolve and adopt principles of interpretation which would further the goals set out in Directive Principle in the state policy³⁹.

In *Kasturilal v. State of Jammu & Kashmir*,⁴⁰ the Supreme Court found that the yardstick for determining reasonableness and public purpose is to be found in the law for implementing directive principles. The Court emphasized that an executive action or a law enacted for giving effect to directive principles in furtherance of constitutional goal of social and economic justice, would be *prima facie* reasonable and in public interest.

The 42nd Amendment in 1976 further changed the content of Article 31 C for giving predominance to all directive principles over any of the fundamental rights conferred by Articles 14 (equality) 19 (freedom) and 31 (property rights). The majority of the Court in *Minerva Mills Ltd. v. Union of India*⁴¹ held the amendment unconstitutional on the reason that Indian Constitution is founded on the bedrock of the balance between Part III and IV. To give absolute priority to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Right and Directive Principles is an essential feature of the basic structure of the Constitution⁴² and ‘anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic

39. *Id.* at p.69.

40. A.I.R. 1980 S.C. 1992.

41. *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789.

42. *Id.* at p.1806.

structure of our Constitution'⁴³. In *Minerva Mills*⁴⁴, Bhagwati J., took a different approach. According to him, the directive principles enjoyed a very high place in the constitutional scheme and it was only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights were intended to operate, for it was only then they could become meaningful and significant for the millions of poor and deprived people who did not have even the bare necessities of life and who were living below poverty line. Therefore, the goals set out in Part IV had to be achieved without the abrogation of the means provided for by Part III. Justice Bhagwati⁴⁵ while upholding the amendment emphasized the State should take positive action for creating socio-economic conditions in which 'there will be an egalitarian social order with social and economic justice to all', and 'this is the philosophy of distributive justice embodied in the directive principles'.

The duty of the court to apply directive principles in interpreting the Constitution and other laws was emphasized by justice Krishna Iyer later in *A.B.S.K.Sangh (Rly) v. Union of India*⁴⁶ in the following words:

“The Directive Principles should serve the courts as a Code of interpretation. Every law attacked on the ground of infringement of fundamental rights should be examined to

43. *Id.* at p.1807.

44. *Supra* n.39.

45. *Ibid*

46. A.I.R. 1981 S.C. 298.

see if the impugned law does not advance one or other of the Directive Principles or if it is not in discharge of some of the undoubted obligations of the State towards its citizens flowing out of the preamble, the Directive Principles and other provisions of the Constitution”⁴⁷

Later in *Unnikrishnan v. State of A.P.*⁴⁸, it was observed that ‘it is thus well established by decisions of this court that the provisions of Part III and Part IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve that goal indicated in Part IV’.

The above analysis shows that the goals set out in directive principles are to be achieved without abrogating the fundamental rights. The courts have used the directive principles not so much to restrict fundamental rights but to expand their scope and content⁴⁹.

In case of labour issues also judiciary has followed the same approach. The Supreme Court’s decision in *Chandra Bhavan Boarding v. State of Mysore*⁵⁰ is a befitting example. The question in this case was whether fixing the minimum wages of different classes of employees in residential hotels and eating houses in State of Mysore would be arbitrary and violative of Article 14 of the Constitution. Section 5 (1) of the Minimum Wages Act, 1948 was challenged as unconstitutional on the ground that it conferred

47. *Id* at p. 315

48. A.I.R. 1993 S.C. 2178

49. M.P. Jain, *Indian Constitutional Law*, Wadhwa and Co., Nagpur (2003), p. 1372

50. A.I.R. 1970 S.C. 2042.

arbitrary power i.e., without any guidance to fix minimum rates of wages. It was also challenged that the Act interfered with the fundamental right to carry on any trade or business. While upholding the validity of the Act, the Court explained the objectives of the Act and the significance of the directives contained in Article 43 of the Constitution in the following words:

“Its (the Acts’s) object is to prevent sweated labour as well as exploitation of unorganized labour. It proceeds on the basis that it is the duty of the State to see that at least minimum wages are paid to the employees irrespective of the capacity of the industry or unit to pay the same. The mandate of Article 43 of the Constitution is that the State should endeavor to secure by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The fixing of minimum wages is just the first step in that direction”⁵¹.

The Court further observed that while rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country and there is no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other and the

51. *Id.* at p. 2048

mandate of the Constitution is to build a welfare society in which justice—social, economic and political shall inform all institutions of our national life⁵². The Court further held:

“The workers therefore have a special place in a socialist pattern of society. They are not mere vendors of toil, they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much capital –nay very much more. They supply labour without which capital would be impotent and they are, at least, equal partners with capital in the enterprise’⁵³.

In *National Textile Worker’s Union v. P.R.Ramakrishnan*⁵⁴, the Supreme Court pointed out the significant position of workers in Indian society and reiterated the profound concern to the workers by the socio-economic order envisaged in the Preamble and the Directive Principles of the Constitution. Though the Companies Act does not provide any right to the workers to intervene in the winding up proceedings it was decided that such a right of the workers had to be spelt out from the Preamble and Articles 38, 39, 42, 43 and 43A of the Constitution. The directive in Article 43A, i.e., the provision for securing the worker’s participation in management, were accordingly read into fundamental right of the shareholders to carry on or not to carry on their trade or business guaranteed

52. *Id* at p. 2050

53. *Ibid*

54. A.I.R. 1983 S.C. 75.

under Article 19(1) (g)⁵⁵. The Court speaking through Bhagwati, J., concluded:

“The constitutional mandate is therefore clear and undoubted that the management of the enterprise should not be left entirely in the hands of the suppliers of capital but the workers should also be entitled to participate in it, because in a socialist pattern of society, the enterprise which is a centre of economic power should be controlled not only by economic power but also by capital and labour”.

In *Air India Statutory Corporation v. United Labour Union*⁵⁶ it was observed by Supreme Court that the Directive Principles are substantially human rights. Most of the rights of workers are included in Part IV, but the judicial interpretations gave them a better footing.

All these decisions are pointing towards the necessity of a healthy work force in a welfare state. But after the adoption of the globalization and liberalization strategy, it is seen that the Indian Judiciary also is shifting its approach towards the new economic policies of the government. This is evident from the decisions on labour issues especially issues relating to labour rights. The labour jurisprudence in India evolved by the judiciary after 1950s has been a shield of protection to workers from all sorts of exploitation. The contributions of Krishna Iyer, Bhagwati and Chinnappa Reddy, JJ., are significant in this regard. The court was always with the labour in

55. *Id.* at p.83

56. A.I.R. 1997 S..C 645.

all reasonable circumstances, for protecting the interests of labour⁵⁷. The conditions of labour in India remain the same as they are always exposed to exploitation, except the advantaged group (the organized sector) who enjoys legal protection. But the slogans of development in the era of globalization influenced the Indian judiciary also⁵⁸.

Changes in Judicial Approach

After adopting the globalization and liberalization strategy in India, there has been a considerable change in the judicial approach. A series of decisions of the Supreme Court prove testimony to the new approach of ‘non-interference’ towards economic and labour policy of the government.

57. In *Tata Engg. And Locomotive Co. Ltd. v. S.C. Prasad*⁵⁷, the Supreme Court held: “No doubt, in fact the order was couched in the language of a discharge...can...examine the substance of the matter and decide whether termination is in fact discharge simpliciter or dismissal though the language of the order is one of simple termination of service. If it is satisfied that the order is punitive or malafide or is made to victimize the workmen or amount’s to unfair labour practice it is competent to set aside.” Similar view was taken in *Chartered Bank* ((1960) 3 S.C.R. 441), *Tata Oil Mills* (1964) 2S.C.R. 125. The law on this point has been best summarized in *L. Michael Ltd v. M/s Johnson Pumps Ltd*⁵⁷ as “The tribunals has power and indeed , the duty to X-Ray the order and to discover its true nature. The object and effect in the present circumstances and the ulterior purpose, are to dismiss the employee, because he is an evil who to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent looking order of termination simplicitor, such an action is bad and is liable to set aside”

58. Prof. Upendra Baxi has rightly observed: “I will suggest that the World Bank/IMF/UNDP and related programs of good governance understandably, if not justifiably, promote structured adjustment of judicial activism. These covertly address, as well as, overall seek to entrench market friendly, trade related forms of judicial interpretation and governance. Judicial self restraint covering macro-economic policy as on the basis of adjudicatory policy stands proselytized by the already hyper globalised Indian Appellate Bar” Upendra Baxi, *Access to Justice in a Globalised Economy: Some Reflections*, ILI Lecture, 5th August, 2006.

While considering the validity of the industrial policy of the State of Madhya Pradesh relating to the agreements entered into for supply of sal seeds for extracting oil in *M.P. Oil Extraction and Another v. State of M.P. and Others*⁵⁹, the Court held that the Industrial Policy of 1979 which was subsequently revised from time to time could not be held to be arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. and the executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. The Court held:

“Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State.”

This Court, further held that the power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there might not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism. According to the Court, the democratic set-up to which the polity was so deeply committed could

59. (1997) 7 SCC 592, at page 610

not function properly unless each of the three organs appreciated the need for mutual respect and supremacy in their respective fields.⁶⁰

In *State of Punjab and Others v. Ram Lubhaya Bagga and Others*⁶¹ the change of Government policy in regard to the reimbursement of medical expenses to its serving and retired employees came up for consideration before the Supreme Court. Earlier, the reimbursement for treatment in a private hospital had been endorsed by Supreme Court. The State of Punjab changed this policy whereby reimbursement of medical expenses incurred in a private hospital was only possible if such treatment was not available in any government hospital. Dealing with the validity of the new policy, the Court expressed its hands off approach. The question in this case was whether the new policy which is restricted by the financial constraints of the State to the rates in AIIMS would be in violation of Article 21 of the Constitution of India. The Court held that it was not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it was arbitrary or violative of any constitutional, statutory or any other provision of law. The Court further held:

“When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be

60. *Id.* at p. 611

61. (1998) 4 SCC 117

dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints."⁶²

The reluctance of the Court to judicially examine the matters of economic policy was again visible in *Bhavesh D. Parish and Others v. Union of India and Another*⁶³. In this case validity of Section 45-S of the Reserve Bank of India Act 1934 which restricts acceptance of deposits by individuals, firms and unincorporated associations was upheld by Supreme Court and held that the services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They were best left to the wisdom of the legislature and in policy matters the accepted principle was that the courts should not interfere. The Court's approach towards the new economic policy was emphasized in the following words:

62. *Id.* at p.129

63. (2000) 5 SCC 471

“Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalization of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all”⁶⁴.

In *Narmada Bachao Andolan v. Union of India and Others*⁶⁵, there was a challenge to the validity of the establishment of a large dam. It was held by the majority as follows:

"It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's

64. *Id.* at p. 485

65. (2000) 10 SSC 664 at page 762

fundamental rights are not transgressed upon except to the extent permissible under the Constitution"⁶⁶

The Supreme Court made a clear declaration that “the protectionism has gone” in *Haridas Exports v. All India Float Glass Manufacturers Association*⁶⁷ as “it is to be born in mind that public interest does not necessarily mean interest only of the industry....Nevertheless, the era of protectionism is now coming to an end. The Indian industry has to gear up so as to meet the challenges from abroad.”⁶⁸

In *BALCO Employees Union (Regd.) v. Union of India & Ors*⁶⁹, the Supreme Court elaborately considered the scope of review of economic policy affecting rights of labour. The Public Sector Disinvestment Commission in its second report suggested the Government of India to privatize BALCO and there by the Government immediately transferred its shares to its strategic partner. The Court held in this case that the process of disinvestment was a policy decision involving complex economic factors. It was also observed that the economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, was demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. According to the Court in matters relating to economic issues, the Government had, while taking a decision,

66. *Id.* at.p.762

67. (2002) 6 SCC 600

68. *Id.* at p.633

69. 2002(2)SCC 333

right to "trial and error" and as long as both trial and error were bona fide and within limits of authority the courts would not interfere. The Court opined that even though the workers might have interest in the manner in which the Company was conducting its business, in as much as its policy decision might have an impact on the workers' rights, nevertheless it was an incidence of service for an employee "to accept a decision of the employer which has been honestly taken and which was not contrary to law..."⁷⁰ The Court was emphatic in saying that the principles of natural justice had no role to play in taking of a policy decision in economic matters. The Court explained:

"While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision."⁷¹

Thus the Court not only withdrew from its function of protection of rights of the marginalized employees but also endorsed that the employer would take the welfare of the labour in to consideration while taking policy decisions.

The Court examined as to how the rights of labour is protected in this case and observed that in the shareholders agreement between the Union of India and the strategic partner, it was provided that there would be no retrenchment of any worker in the first year after the

70. *Id.* at p. 342

71. *Ibid.*

closing date and thereafter restructuring of the labour force, if any, would be implemented in a manner recommended by the Board of Directors of the company. The shareholders agreement further mandated that in the event of reduction in the strength of its employees was required, then it was to be ensured that the company offered its employees an option to voluntarily retire on terms that were not in any manner less favourable than the Voluntary Retirement Scheme (VRS) offered by the company on the date of the arrangement. Apart from the conditions stipulated in the shareholders agreement, the company has stated in the Court that it would not retrench any worker(s) who were in the employment of BALCO on the date of takeover of the management by the strategic partner, other than any dismissal or termination of the worker(s) of the company from their employment in accordance with the applicable staff regulations and standing orders of the company or other applicable laws. The Court recorded this.

Thus the Court gave sanction to the employers decisions on interest of labour and also favoured VRS- the most celebrated and infamous term for “throwing away a workman from his job”. The Court went to the extent of saying that ‘the consent of the management to better service conditions etc., would certainly depend on the achievement of the productivity and production’. The Court further held that guaranteeing the social security of the BALCO employees at par with the employees of the Government establishments might not be possible any time before or after the disinvestment. The Court trusted the Government by saying that normally the decisions would be taken with care and consideration.

Hence, BALCO is a missed opportunity for the judiciary to protect the worker's right in the context of globalization, liberalization and privatization. Unfortunately the subsequent decisions also followed the same without considering the impact of the decisions on the position of Indian workers. For instance in *District Red Cross Society v. Babita Arora and Ors*⁷², the higher judiciary squandered a chance to help the workmen while deciding the question related to protection of a worker against retrenchment. The respondent contended that the employer did not follow the procedure under Industrial Disputes Act i.e., 'last come first go'. She contended that her juniors were working under other units. The Court held that though other units were receiving grants from government and were functioning as separate entities and the mere fact that they had not been closed down, could not lead to the inference that the termination of services of the respondent was by way of retrenchment which was illegal on account of non compliance of the provisions of Sec. 25 (F) of the Act⁷³.

In *Indian Airline Officer's Association v. Indian Airlines Ltd. and Ors*,⁷⁴ the Supreme Court examined the rights of worker's union in decisions as to merger of two industrial units. The Employees' Association of Indian Airlines, Indian Airline Cabin Crew Association and Vayudoot Karmachari Sangh who were having conflicting interest approached the Supreme Court against the order of Division Bench of Delhi High Court on absorption of employees on merger of Vayudoot

72. A.I.R. 2007 S.C. 2879

73. *Id.* at p. 2881

74. A.I.R. 2007 S.C. 2747

with Indian Airline. The supreme court elaborately discussed the law on absorption of employees and their promotional perspectives. Quoting Justice V.R.Krishna Iyer, the Court held:

“In Service Jurisprudence integration is a complicated administrative problem where, in doing broad justice to many, some bruise to a few cannot be ruled out. Some play in the joints, even some wobbling, must be left to government without fussy forensic monitoring, since the administration has been entrusted by the Constitution to the executive, not to the court. All life, including administrative life, involves experiment, trial and error, but within the leading strings of fundamental rights, and, absent unconstitutional 'excesses', judicial correction is not right. Under Article 32, this Court is the constitutional sentinel, not the national ombudsman. We need an obudsman but the court cannot make-do”⁷⁵.

But the Court took the position that that there was nothing wrong done in adopting two different methodologies in case of Air India and Indian Airlines⁷⁶. The above two decisions are in accordance with the decision of Supreme Court in BALCO Employees Union Case⁷⁷, where the Court opined that ‘in case of policy, the employees may suffer to certain extent, but such suffering should be taken to be incidence of service’. The Court in this case categorically held that Government had not to give the workers prior

75. *Id.* at para 28

76. *Ibid*

77. See *supra* n. 65

notice of hearing before deciding to disinvest. According to the Court, there was no principle of natural justice which requires prior notice and hearing to persons who are generally affected as a class by an economic policy decision of the Government⁷⁸. While denying the Union's right to become part of decision making of their establishment, the Supreme Court adopted a retrograde step that actually denied the rights of the workers.

Another important area of labour issues is with regard to security of tenure. In *Secretary, State of Karnataka and Ors. v. Umadevi and Ors*⁷⁹, the issue was with regard to regularization of employees. The Court viewed that a sovereign government, considering the economic situation in the country and the work to be got done, was not precluded from making temporary appointments or engaging workers on daily wages.⁸⁰ After referring to many conflicting decisions⁸¹, the Court continued that the right of the Union or of the State Government could not but be recognized and there was nothing in the Constitution which prohibited such engaging of persons temporarily or on daily wages, to meet the needs of the situation.

78. *Id.* at para 48 See also, *Union of India and Another v. International Trading Co. and Anr.* AIR 2003 SC 3983 Where it is held that the policy decision should not be lightly interfered with

79. A.I.R.2006 S.C.1806

80. *Id.* at para 2

81. *Ashwani Kumar and Ors. v. State of Bihar and Ors* AIR 1997 SC 1628, *State of Haryana and Ors. v. Piara Singh and Ors.* AIR 1992 SC 2130, *Dharwad Dist. P.W.D. Literate Daily Wage Employees Association and Ors. v. State of Karnataka and Ors* AIR 1990 SC 883, *State of Himachal Pradesh v. Suresh Kumar Verma and Anr* AIR 1996 SC 1565, *State of Himachal Pradesh v. Suresh Kumar Verma and Anr*(1992) 1 SCC 489, *State of Punjab v. Surinder Kumar and Ors* AIR 1979 SC 1676, *State of Karnataka v. H. Ganesh Rao* 2001 (4) Karnataka Law Journal 466

The Court said that the “state must be model employer,⁸² at the same time, the Court endorsed the ‘hire and fire’ policy of the Government in the new Indian economy. The Supreme Court thus concluded in the following words:

“If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued.”⁸³

Though the court referred to equality principle and preamble of the Constitution, it forgot the socialist and economic justice concepts envisioned in the preamble.

So, in conclusion, in cases of dismissal⁸⁴, termination of service⁸⁵, rights of workers in case of merger of industrial units⁸⁶ and regularization of employees⁸⁷, the hands-off approach of the judiciary is visible. Without seeing the constitutional objective of socio-economic justice, the Court simply endorsed the governmental policy of economic liberalization and privatization.

82. *Supra* n.74 at para20

83. *Id.* at para 34

84. *United Bank of India v. Sidhartha Chakraborty* Civil Appeal No. 2001 of 2006 decided on 27.08.2007

85. *District Red Cross Society v. Babita Arora and Ors.* A.I.R 2007 S.C. 2879

86. *Indian Airline Officer’s Association v. Indian Airlines Ltd. And Ors.* AIR 2007 S. C. 2747 and *BALCO Employees Union Case*, A.I.R.2002S.C.350

87. *Secretary, State of Karnataka and Ors. V.s. Umadevi and Ors* AIR2006SC1806,

But there is a silver lining in the cloud. In *BCPP Mazdoor Sangh v. N.T.P.C. & Ors*⁸⁸, the Supreme Court has taken a realistic view and distinguished the decision from *BALCO's case and All ITDC Worker's Union & Ors*⁸⁹. It reads

“There is no quarrel as to the proposition laid down in *BALCO's* and *ITDC's* case. However, considering our discussion relating to various aspects starting from calling for applications and subsequent actions taken by NTPC, we are satisfied that the employees have made out a case for continuing their service in NTPC⁹⁰.”

In many other countries, the judiciary protects⁹¹ the labour force from the adverse consequences of globalization. For example Spanish courts interpreted domestic Spanish law in the light of internationally recognised labour standards particularly the Conventions of ILO.⁹²

The above analysis shows that though the Indian judiciary has contributed a lot in service jurisprudence, even by interpreting labour rights in the light of international conventions, in the globalised era it gives a clean chit to the legislature in the name of ‘policy matters’

88. Decided On 11.10.2007

89. A.I.R. 2002 S.C. 350 & A.I.R. 2007 S.C. 301

90. *Supra* n.69 para 32

91. For example- “Spanish law does not provide social security, health care, or pension benefits for undocumented workers. Spanish judges have nonetheless interpreted the ILO Conventions on equality and immigrations implying these rights for undocumented workers because they are guaranteed to other segments of the Spanish Work force.” Benjamin Aaron and Katherine V.W. Stone, “Comparative Labour Law- Bridging the Past and the Future”, 28 *Comp. Lab.L& Pol'y* . 377 at 387 (2006-07)

92. Julia Lopez, “Beyaond the National Case: The Role of Transnational Labour Law in Shaping Domestic Regulations” 28 *Comp.Lab.L.&Pol'y J.* 547 (2007)

without foreseeing the adverse consequence of the legislative measures on the right of the workmen. In this context, the only way out is to strengthen the legislative measures to give enough social security to the workers.

5.3 Legislative Measures for Social Security in India: Current Position

In the Indian context, social security is a comprehensive approach designed to protect deprivation i.e., to protect the individual from any uncertainties in income. The State bears the primary responsibility for developing appropriate system for providing protection and assistance to its workforce. The workforce in India is increasing though the workforce in organized sector is not increasing proportionately⁹³. The organized workers constitute 7% of the total workforce of about 400 million in the country. They are covered by various legislations providing to social security to workers. The principal social security laws enacted in India are:⁹⁴ (1)The Employees State Insurance Act, 1948 ,(2)The Employees' Provident Funds & Miscellaneous Provisions Act, 1952, (3)The Workmen's Compensation Act, 1923, (4)The Maternity Benefit Act, 1961 and (5)The Payment of Gratuity Act, 1972. These legislations protect those workers who are specifically mentioned in the enactments. A close scrutiny of these enactments would tell about the vires and virtues in brief.

93. Workforce Estimates in National Accounts, Chapter 7 Study conducted by National Samples Survey Organisation available in <http://www.mospi.nic.in>. The survey shows that in 1991, the total workforce was 314 million and out of which 27 million were in organized sector, in 2000, the total workforce has increased to 397 million and out of which 28 million were in organized sector.

94. These are the enactments mentioned by Social Security Division, Ministry of Labour, Government of India See, Synopsis of Social Security Laws, <http://labour.nic.in/ss>, accessed on 24th September, 2007

(i) The Employees State Insurance Act, 1948

The question of introducing a Health Insurance Scheme in India has been initiated in 1929 by the Royal Commission of Labour. But it was materialized in the year 1944 after submission of Professor Adarkar's Report⁹⁵. This scheme of health insurance was for workers below a certain wage ceiling in textile, engineering and minerals and metals which comprised major group of industries. The scheme was intended to provide medical care and the sickness benefit for the insured person. Professor Adarkar's Scheme and suggestions made by ILO experts were incorporated in to the Workmen's State Insurance Bill, 1946 which was passed by legislative assembly in April, 1948 as Employees' State Insurance Act. This was the first social security legislation adopted by the country after independence⁹⁶.

Scope and Application of E.S.I. Act

The E.S.I. Act, 1948 presently applies to the factories using power in the manufacturing process and employing 10 or persons and non power using factories, shops, hotels, and restaurants, cinema, pre-view theatres, road motor transport undertakings and news paper establishments employing 20 or more persons⁹⁷. The employees of

95. ESI Review Committee appointed in 1966 by Government of India.

96. See, Report of the Working Group on Social Security , Planning Commission, Govt. of India appointed on 3-3-06

97. Initially the scheme applied only to factories using power and employing 10 or more persons. Based on the recommendations of committee on Perspective Planning in 1972 the corporation extended the coverage to non power using factories employing 20 or more persons. Along with this several non factory establishments such as shops, cenemas, hotels, restaurants, road motor transport undertakings and news paper establishments employing 20 or more persons were brought within its purview.

factories and establishments drawing wages up to Rs. 7,500/- per month⁹⁸ are covered under the scheme. The scheme is administered by a separate body called the Employees' State Insurance Corporation⁹⁹ which includes representatives of employer, employees, Central and State Governments, medical profession and the Parliament. A Standing Committee constituted from among the members of the corporation acts as the Executive body for administering the scheme. There is a Medical Benefit Council¹⁰⁰ to advise the corporation in matters connected with provisions of medical care.

The Scheme is financed mainly by contributions from employers and employees¹⁰¹. The employer's share is 4.75 % of the wages payable to employees and the employees' share of contribution is 1.75% of their wages¹⁰².

Employees who are earning less than Rs. 50 per day are exempted to contribute but their employers are required to pay their share of contribution. The state governments share of expenditure on provision of medical care is to the extent of 12.5% of the total expenditure on medical care on their respective states subject to a per capita ceiling prescribed by the corporation from time to time¹⁰³.

98. Initially the scheme was introduced to employees who are drawing wages up to Rs.400/- It is increased to Rs.500/- in 1966, Rs.1000/- in 1975, Rs.1600/- in 1985, Rs. 3000/- in 1992, Rs. 6500/- in 1997 and Rs. 7,500/- from 1.2004. On 15.06.06 the meeting of the corporation approved enhancement in the wage ceiling from Rs. 7,500 to 10,000/- per month

99. E.S.I Act, S. 3.

100. *Id.* at S.10.

101. *Id.* at S.39.

102. See, <http://esic.nic.in> accessed on 16th April, 2007

103. E.S.I. Act, S.26

The benefits under the Act include both cash benefits and benefits in kind like medical benefits. The cash benefits are: (1) Sickness benefit¹⁰⁴- payable in cash at the rate of about 50% of wages for a maximum of 91 days in a year extendable up to 2 years in cases of specified long term diseases¹⁰⁵ at a higher rate of about 70% of wages; (2) Maternity benefit¹⁰⁶- payable for 12 weeks for confinement, six weeks for miscarriage and additional one month for sickness arising out of pregnancy at the rate of about full wage;(3) Temporary disablement benefit¹⁰⁷ –payable at the rate about 70% of wages till the disability is there; (4) Permanent disablement benefit¹⁰⁸- payable in the form of periodical payment for life depending upon the extent of loss of earning capacity determined by a duly constituted Medical Board. Full rate of benefit is about 70% of the wages; (5) Dependant's benefit¹⁰⁹- which is payable to the dependants in the contingency of death of insured person due to employment injury at the rate of about 70% of wages; (6) Funeral Expenses¹¹⁰- actual expenditure on the funeral of a deceased insured person up to Rs. 2,500/- which is reimbursable to any person incurring the same;(7) Rehabilitation allowance/ vocational rehabilitation allowance – payable at full wage during the period of an insured person remains admitted for fixation or replacement of artificial limbs. Further cash benefit@ Rs.123/- per day or the amount charged by Vocational

104. *Id.* at S.49

105. So far 34 diseases are specified.

106. E.S.I. Act, S.50

107. *Id.* at S. 51 (a)

108. *Id.* at S. 51 (b)

109. *Id.* at S. 52

110. *Id.* at S. 46 (f)

Rehabilitation Centre is also payable¹¹¹; (8) Unemployment allowance-payable for a maximum of six months to insured persons losing employment due to closure of factory or retrenchment or permanent invalidity at the rate of 50% of the wages.

The medical care services under ESI Scheme are provided by respective state governments¹¹². The Medical care services to the beneficiaries¹¹³ are provided in two ways: (1) direct provision through ESI schemes own network dispensaries and hospitals; (2) indirect provision by contracting with private clinics and hospitals. The ESI scheme is providing full medical care to its beneficiaries which include preventive, promotive, curative and rehabilitative services. The expenditure on medical care is shared between ESI Corporation and the State Government in the ratio 7:1 within the prescribed ceiling which is revised from time to time. There is no limit on the per capita expenditure on individual medical care.

A scheme for model hospitals has been implemented in 2001 as per the decision of the ESI Corporation¹¹⁴. As per the scheme one hospital of the state is to be taken over from the state government and run by ESI Corporation directly. Till now 12 hospitals have been taken over from State Governments by Corporation. Recent and Proposed initiatives of the Corporation include Rajiv Gandhi Shramik Kalyan Yojna which is an

111. <http://esic.nic.in/benefits.htm>, accessed on 16th April 2009

112. Except in Delhi and Noida where these are provided directly by ESI Corporation

113. When the scheme was initially introduced medical care under the scheme was provided only to the insured worker, but in 1977, the medical care was extended to families of insured persons also.

114. E.S.I. Act, S.59.

unemployment allowance scheme aiming at those insured who are losing their employment due to closure of factory, retrenchment and permanent invalidity. The unemployment allowance is paid at the rate of 50% of the wages for a maximum period of 6 months, setting up of Super specialty hospitals in four zones¹¹⁵ and extension of ESI Scheme to educational and private medical institutions¹¹⁶.

(ii) The Employees' Provident Funds & Miscellaneous Provisions Act, 1952

This is yet another welfare legislation enacted for the purpose of constituting a Provident Fund for employees working in factories and other establishments. The Act aims at providing monetary assistance to industrial employees and their families when they are in distress or unable to meet family and social obligations and to protect them in old age, disablement, early death of bread winner and such other contingencies. This Act provided coverage to workers of factories and other classes of establishments engaged in specific industries and classes of establishments employing 20 or more persons¹¹⁷. The Act does not apply to employees of co-operative societies employing less than 50 persons and working without power and those belonging to Central, State governments and local authorities. An establishment which is not otherwise coverable under the Act, can be covered voluntarily with mutual consent of the employers and

115. 133rd Meeting of ESI Corporation held on 7.7.05 decided to set up super speciality hospitals in Delhi, Kolkata, Hyderabad and Mumbai at cost of Rs. 50 Crores each.

116. Decision in 125th Meeting of ESI Corporation held on 21.2.2003 (to educational institutions) and 27.2.2005 (to private medical institutions)

117. The Central government is empowered to notify coverage of this Act to any establishment employing less than 20 employees and once it is included the coverage will be there though the number of employees falls below 20.

majority of the employees¹¹⁸. The Act currently applicable to factories and other establishments engaged in about 180 specified industries¹¹⁹. The Schemes under The Employees' Provident Funds & Miscellaneous Provisions Act are

Employees Provident Fund Scheme, 1952

The Fund is constituted on the basis of the contribution from employers and employees. The normal rate of contribution is 12% of the pay¹²⁰ of the employees. Under the scheme the contributor can withdraw the amount standing in his account at the time of retirement from service after attaining the age of superannuation or due to permanent or total incapacity, migration from India, retrenchment or at the time of voluntary retirement.

Employees Deposit Linked Insurance Scheme, 1976

Under this scheme, the employees are not contributing but the employers are required to contribute and the contribution can be not to exceed more than 1% of the aggregate of the basic wages dearness allowance and retaining allowance plus the administrative charge at the rate of .05% of the wages. Under this scheme, if the employee dies while in service, the nominees or members of the family of the employees of the establishment get an additional amount equal to the average balance in the provident fund account of the deceased during the preceding 12 months if the balance is less than 35000/- and if the balance is above Rs.35000/- the

118. Section 1(4) of the Act.

119. Industries covered by the Act are specified in Schedule I of the Act.

120. The 'wages' includes basic wage, dearness allowance, including cash value of food concession and retaining allowance.

amount payable shall be Rs.35000/- plus 25% of the amount in excess subject to a ceiling of Rs. 60000/-. Revamping the whole EPF Scheme has started in the year 2001 by initiating “Re-inventing EPF, India” Project¹²¹. Social Security Number is a new initiative as the part of the project. SSN¹²² aims at uniquely identifying a subscriber i.e., every working person in India.

Employees Pension Scheme, 1995

The Act is amended in 1995 and replaced the Employees Family Pension Scheme, 1971. The benefits under the new scheme include:

(1) Superannuation Pension (2) Early Pension (3) Permanent Total Disablement Pension (4) Widow / Widower’s Pension (5) Children or Orphan Pension (6) Nominee Pension/Dependant Parent Pension.

From and out of the contributions payable by the employer to the provident fund, a contribution equivalent to 8.33% and 1.16% of the of the employees pay by the Central Government is remitted to Employee’s Pension Fund. If the pay of the employee exceeds Rs. 6500/- per month, the contribution payable by the employer and the central contribution is limited to Rs. 6500/- .The superannuation pension will be payable on attaining the age of 58 years or on completion of 20 years of service or more and early pension can be taken at a reduced rate between 50-58 years of age, on completion of 10

121. Report of a Multi Disciplinary Expert Committee(a project for IT Reforms) was accepted by executive committee on 14.03.2000. M/s. Siemens Information Systems Ltd. is appointed as consultant

122. It is argued that SSN will address the needs of mobile and seasonal workforce, minimize the possibility of multiple accounts for the same member and pension claims for the same person and other fraudulent practices.

years pensionable service or more. If the service is less than 10 years a lump sum withdrawal benefit is given.

(iii) The Workmen's Compensation Act, 1923

The main objective of the Act is to impose an obligation upon the employers to pay compensation to workers for accidents arising out of and in the course of employment.

The Act applies to any person who is employed otherwise than in clerical capacity, in railways factories, mines, plantations, mechanically propelled vehicles, loading and unloading work on a ship, construction, maintenance, repairs of roads and bridges, electricity generation, cinemas, circus and other hazardous occupations and other employments specified in Schedule II of the Act. The Act exempts the employees covered under Employees State Insurance Act, as disablement and dependant's benefits are available under that Act and also members serving in Armed Forces. The "workman¹²³" under the Act is a person employed but, not a casual employee, for the purpose of employer's trade and business and according to Schedule II of the Act.

The compensation has to be paid by the employer to a workman for any personal injury caused by an accident arising out of and in the course of his employment¹²⁴ if the disablement continues more than 3 days. The amount of compensation in case of death is an amount equal to 50% of the monthly wages of the deceased workman multiplied by the relevant factor

123. Section 2(1) (n)

124. Section 3

or Rs. 50000/- whichever is more. In case of permanent total disablement results from injury, 60% of the monthly wages multiplied by relevant factor or 60000/- whichever is higher. If the monthly wages of the workman exceeds Rs. 2000/-, then his monthly wages for the above purpose will be deemed to be Rs. 2000/- only.

(iv) The Maternity Benefit Act, 1961

This Act is a social legislation enacted for the welfare of the working women. The Act prohibits working of the pregnant women for a specified period before and after delivery. It also provides for maternity leave and payment of monetary benefits for women workers during the period when they are out of employment due to pregnancy. The services of women worker cannot be terminated during this period in her absence except in case of gross misconduct. The maximum period for maternity benefit is fixed as 12 weeks, six weeks before delivery and 6 weeks immediately after delivery.

(v) The Payment of Gratuity Act, 1972

This Act provides for a scheme of compulsory payment of gratuity to employees engaged in: (1) every factory, mines oil fields, plantations, port and railway company, (2) every shop or establishment in which 10 or more persons are employed or were employed on any day of the preceding 12 months, (3) every motor transport undertaking in which 10 or more persons are employed or were employed on any day of the preceding 12 months and (4) such other establishments or class of establishments in which 10 or more employees are employed or were employed on any day of the

preceding 12 months as the central government notifies from time to time.

Every employee other than an apprentice irrespective of his wages is entitled to receive gratuity after he has rendered continuous service for five years or more. Gratuity is payable at the time of termination¹²⁵ of his services on superannuation or on retirement or resignation or death or disablement due to accident or disease¹²⁶. The benefits are calculated as 15 days wages for every completed year of service or part there of in excess of six months based on the rate of wages last drawn by the employee subjected to a maximum of Rs. 3,50,000/-.

(vi) The Factories Act, 1948

This Act regulates the working conditions in the factories and ensures that basic minimum requirements for safety, health and welfare of the factory workers. The Act also regulates the working hours, leave, holidays, overtime, employment of children, women and young persons. The Act covers all workers employed in the factory¹²⁷ premises, directly or through agency including contractor, with or without knowledge of principal employer, whether for

125. termination of service includes retrenchment.

126. the condition of five years is not necessary if service is terminated due to death or disablement.

127. Section 2 (m) Factory means any premises including the precincts there of (i) wherein 10 or more workers are employed on any day preceding 12 months and a manufacturing process is carried on with the aid of power or (ii) wherein 20 or more workers are employed on any day preceding 12 months and a manufacturing process is carried on without the aid of power.

remuneration or not, in any manufacturing process or any kind of work incidental or connected there to.

(vii) Industrial Dispute Act, 1947(Chapter V A and V B)

These provisions are dealing with lay off, retrenchment and closure of any industrial unit. Lay off, retrenchment and closures are termination of employment either temporarily or permanently. These provisions provide for adequate notice to employees as well as compensation in such situations. Chapter V A deals with those industrial establishments which are not seasonal in character and in which at least 50 workmen on an average is employed for a continuous period of at least one year. In case an employee is laid-off, the employer shall pay compensation for the days laid off at the rate of 50% of the basic salary plus D.A subject to the maximum of 45 days. If the lay off continues beyond 45 days the employer can retrench such employees after paying retrenchment compensation.

The employer cannot retrench the employee unless (a) one month's notice is served or payment in lieu of notice (b) compensation at the rate of 15 days salary multiplied by number of years of continuous service and (c) notice to appropriate government stating reasons for retrenchment. In case of closure, the employees are entitled to notice of 60 days before closure and compensation as in the case of retrenchment subject to a maximum of 3 month's salary if the closure is due to unavoidable circumstances. Chapter V B deals with industrial undertakings where number of employees are more than 100. The compensation is the same as that in

Chapter V A, but these establishments have to take written approval from state government before lay off, retrenchment and closure.

5.4 Social Security in Unorganized Sector

The unorganized sector workers are those who have not been able to pursue their common interests due to constraints like casual nature of employment, invariably absence of definite employer employee relationship, ignorance, illiteracy, etc. They are generally low paid and outside the purview of any type of social security. The government has enacted certain legislations for the protection of these workers.

Minimum Wages Act, 1948

This Act primarily aims at safeguarding the interests of the workers engaged in unorganized sector who are vulnerable to the exploitation due to illiteracy and lack of bargaining power. The Act binds employers to pay the minimum wages to the workers as fixed under the statute by the state¹²⁸ and central¹²⁹ governments from time to time under their respective jurisdictions. This Act does not discriminate between male and female workers. No standard is laid down by the Act for fixing the minimum wage and hence, norms recommended by Indian Labour Congress, 1957 are taken into account for fixing minimum wages. The decision in *The Workmen v. Reptakose Brett and Co. Ltd Reptakos and Co.*¹³⁰ by Supreme Court is another guideline. It is

128. So far 1530 employments are covered under this Act, See, <http://www.indialabourstat.com/India>, accessed on 19th April 2009

129. See, <http://www.indialabourstat.com/india> There are 46 scheduled employments in the central sphere, accessed on 19th April 2009

130. A.I.R. 1992 S.C. 504

decided by apex court that the children's education, medical requirement, minimum recreation, provision for old age, marriage etc., should further constitute 25% of the minimum wage and used as a guide in fixation of minimum wages. Section 12 of the Act prevents employers from paying less than minimum wages and Section 13 protects workers from exploitation by fixing the number of hours in a working day.

In order to have a uniform structure all across the country in wage structure, concept of National Floor Level Minimum Wage was mooted on the basis of recommendations of National Commission on Rural Labour in 1991. The Central government revised the national minimum according to the recommendations of different working groups from time to time.

Apart from this Act, the social security coverage to the unorganized sector workers are through some Central legislations including Welfare Funds¹³¹. These funds are financed out of cess levied on manufactured products. The welfare funds are utilized for implementing welfare schemes for these workers coming under specific legislations. According to survey conducted by NSSO in 1999-2000 about 1.76 crores of workers are employed in construction activities. The Building and Other Construction Workers (regulation of Employment and Conditions of Service Act, 1996 and The Building and

131. The main central legislations are (1) The Mica Mines Labour Welfare Fund Act, 1946 (2) The Lime Stone and Dolomite Mines Labour Welfare Fund Act, 1972 (3) The Iron Ore, Manganese Ore and Chrome Ore Mines Labour Welfare Fund Act, 1976 (4) The Beedi Workers Welfare Fund Act, 1976 and (5) The Cine Workers Welfare Fund Act, 1981.

Other Construction Worker's Welfare Cess Act, 1996 are the legislations covering the welfare of the workers in the construction activities¹³².

Apart from these welfare schemes, there are other social insurance schemes like Janshree Bima Yojna- a group insurance scheme implemented by LIC- is available to persons between age of 18 and 60 years and are living below or marginally above poverty line. This scheme Provides death insurance of Rs. 30000/ and accidental benefits for partial and total disability¹³³. Universal Health Insurance Scheme is another heavily subsidized scheme for BPL families covering reimbursement of hospitalization and personal accident insurance cover. Apart from these there are insurance scheme for handloom weavers, fishermen, etc.

132. The Social Assistance Scheme include (1) National Old Age Pension Scheme-for destitute persons or more than 65 years of age. (2) Swarnajayanti Gram Swarozgar Yojana¹³² for bringing self employed persons above poverty line by providing them income generating assets through bank credit and government subsidy. (3) Sampoorna Grameen Rozgar Yojana¹³² which started in 2001 for providing additional wage employment in the rural areas and also food security. (4) Indira Awas Yojna¹³² which provides for dwelling units, free of costs, to the scheduled castes and scheduled tribes and other BPL families in rural areas. (5) National Rural Health Mission which seeks to provide effective health care to rural population including unorganized sector labourers through out the country. (6) National Rural Employment Guarantee Act (NREGA) is aiming to provide for 100 days of guaranteed wage employment in every financial year to every house hold whose adult members volunteer to do unskilled manual work¹³². This Act also provides insurance coverage. (7) Pradhanmantri Gram Sadak Yojna¹³² launched in 2000 in order to provide all weather connectivity to all eligible unconnected rural habitations. It provides employment to rural poor in addition to systemic upgradation of the existing rural road network. (8) Swarna Jayanti Shahari Yojna¹³² is covering two programmes viz, the Urban Self –Employment Programme and Urban Wage Employment Programme.

133. http://rajlabour.nic.in/janshree_hous. 24th September, 2008

The Unorganized Sector Worker's Social Security Scheme, 2004 envisages 3 benefits: old age pension at the rate Rs.500 /- per month on attaining the age of 60 years; personal accidents insurance cover of Rs. one lakh; and the coverage will be under Universal Health Insurance Scheme.

The common characteristic of all these new programmes is to provide jobs to large masses in unorganized sector and thus to assist to acquire security by themselves. This is a good trend but only acceptable for a short duration. The state is constitutionally bound to provide social security and it has the responsibility to accept social security as a right of citizen rather than managing things in an ad hoc manner as they do now.

Another reality is that most of the employees working in the above mentioned establishments are informal workers as under 'contract system'. Hence the benefits are out of reach to them¹³⁴.

The Unorganised Sector Workers' Social Security Act, 2008

The study will be incomplete, if the analysis of the Act is omitted. The Act¹³⁵ primarily aims at providing social security and welfare of unorganised sector workers¹³⁶. The words "unorganised sector" in the Act hold an exhaustive definition which can be made applicable to all sections apart from organised sectors where social

134. M. Gopinath and Harikrishna," Employee State Insurance: For a Handful Contribution, a Bagful of Benefits", available at unpan1.un.org/intradoc/groups/public/documents, accessed on 12th November 2009.

135. The Cabinet approved the Bill on 21.8.08. It will be introduced in the parliament in the September Session.

136. "It will build a social security for unorganised workers. The issue of income security, employment security and working conditions will have to be addressed through other legislation. <http://pmindia.nic.in/nac/communocation>, accessed on 12th November 2009.

security measures already exist. Unorganised sector is defined in the Act as, “home based worker, self employed worker, or a wage worker in the unorganised sector.” It really includes almost every category other than organised sector. Chief Justice K.G. Balakrishnan aptly highlighted the objectives of the Act in the following words:

“Needless to say, the millions of unorganised workers are in dire need of a stable and reliable social security regime. The Unorganised Workers’ Social Security Act contemplates the delivery of benefits to unorganised workers in instances of sickness, disability, maternity, unemployment, old age and the death of a family’s bread winner. The Act has defined ‘Unorganised workers’ in a wide and liberal manner so as to include those who are casually employed and receive daily or monthly wages as well as ‘home-based workers’ and even farmers who work on small land-holdings. Hence, the legislative intent is to expand the social safety net as widely as possible¹³⁷.”

The benefits proposed are (1) life and disability cover (2) health and maternity benefits (3) old age protection generally and any other benefit as determined by Central Government. The Act envisages that the state government may formulate suitable welfare schemes including provident fund, employment injury benefit, housing,

137. http://www.supremecourtfindia.nic.in/speeches/speeches_2009/Unorganised_workers_social_security_Act_2008_-_NALSA_seminar.pdf, accessed on 20th December, 2009.

educational schemes for children, skill upgradation of workers, funeral assistance and old age homes which may be wholly funded either by Central Government or shared by Central and State Government or along with contribution from employees also. The machinery for implementing these schemes will consist of a National Social Security Board and State-level Social Security Boards. These Boards will perform the tasks of supervising the collection of contributions, maintenance of Social Security Funds and ensuring the proper dispersal of benefits. The nodal role will be played by the District-level authorities who will be responsible for the registration of workers for the scheme and unique identification cards will be issued to the intended beneficiaries. In keeping with the philosophy of decentralisation, the actual registration of workers will be performed by Worker Facilitation Centres (WFC) which could be run by Panchayati Raj institutions, trade unions or recognised NGOs. The main drawback of the Act is that social security has not been defined within the Act and “social security” and “welfare” are used interchangeably¹³⁸.

Another criticism against the Act is that, it lacks of fund allocation. The fund allocation is now according to the discretion of Central or State Governments. Another flaw in the Bill is that the social security provided by the Act is not at all right based ie., the Act does not recognise social security as a right. It merely provide for

138. T.S. Sankaran, “The Unorganised Sector Workers’ Social Security Act, 2008-2008- A Critique”, available in www.lawyerscollective.org/magazine/dec2008-jan2009/feature5, accessed on 17th May, 2009

the social security schemes without any permanent funding. More over the Board envisaged in the Act is only an advisory body and not an empowered body. This Act does not provide any security as expected to unorganised sector. Hence the Act is to be strengthened by adequate amendments in this sphere to rectify the above defects.

5.5 Conclusion

There are many laws covering different set of benefits available in India. But these are available to a small portion of the labour force only i.e., the organized sector. These laws generally provide minimum number of employees for their application to an industrial establishment¹³⁹. The provision for wage ceiling is another impediment in widening the application of these Acts¹⁴⁰. Clauses for barring benefits if the worker is entitled to more than one benefits is another drawback of the present legal framework¹⁴¹. For instance, medical benefits are provided under E.S.I. Act and Plantation Act. Similarly maternity benefit is provided under E.S.I. Act and various Central and State maternity Acts. Further, employment injury benefits are available under E.S.I. Act and Workmen's Compensation Act. Another problem is the machineries for implementing these laws. For example with respect to workmen's compensation, it is noted that "however wonderful legal provisions for the payment of compensation to workmen for industrial injuries may be, they are of little use to an injured workmen, in the absence of a proper machinery for their

139. For example E.S.I. Act, 1944 is applicable establishment using power if the minimum number of employees employed are 10 and without power the number is 20

140. For example E.S.I. Act is applicable to workmen with wages up to 7,500/- per month.

141. Deepak Bhatnagar, *Labour Welfare and Social Security Legislations In India*, Deep and Dep Publications, New Delhi, (1984), p. 116

enforcement”¹⁴² In a nut shell, the present social security system in India is suffered mainly by multiplicity of laws, shortage of coverage, lack of policy and scarcity of implementation mechanism¹⁴³.

It is worthy to analyze how other countries are trying to cope up with the wind of globalisation. Understanding about how the legal system works in other countries will definitely help to reconcile the principle of unlimited market freedoms sought by employers with the demands of workers for the guaranteed basic rights and social protections.

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142. Valsamma Paul, *Enforcement Machinery for Providing Compensation for Industrial Injuries* [1998] C.U.L.R. 409.

143. See P.G. Krishnan, *“Law of Social Security: Perspectives”*, [1989] C.U.L.R., 1

SOCIAL SECURITY OF LABOUR: A COMPARATIVE STUDY

C o n t e n t s	6.1. Social Security in United States
	6.2. Social Security in UK
	6.3. Social Security in Sweden
	6.4. Social Security in India
	6.5. Conclusion

Social security programmes are often described as the most successful programme of the modern welfare states. But its long term future is now in doubt¹. International Social Security Association² finds that, while globalization is likely to erode the pension income of the older persons, it will enhance their wealth and income from capital, leaving their overall spending power slightly improved. The working age population, which earns lower wages as a result of having less capital to work, is an unambiguous loser from the globalization process. The situation is different from country to country. As a result of these dire predictions, there are proposals to reshape the social security system around. An

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1. Katherine L. Moore, "Privatisation of Social Security: Misguided Reform" 71 Tem. L. Rev. 131. (1998).
 2. ISSA Programme held in Sept. 25-27, 2000 at Helsinki, Introduction to the Research Paper on "Social Security in the Global Village" www.issa.org visited on 25th may, 2008.

examination of the different kinds of social security systems function in three countries, viz., U.S.A. U.K. and Sweden and how far they made changes to cope up with the changes in the new economic order is essential to this part of the study. Indian position is also briefly explained for the sake of a comparative study.

6.1 Social security in United States

Historical Background and Development

Social security program in US began in limited sphere as a measure to implement “social insurance” during great depression of 1930s. The idea behind the programme was to offer economic security to Americans. The industrial revolution has changed the family structure and multiple generations of one family were no longer living together³. After stock market crash in 1929 and the ensuing depression, Americans needed protection from financial worries. In the beginning the Social Security Act⁴ when passed by FDR⁵, the retired workers and the unemployed workers were the two groups covered by the programme. Within a few years Congress added benefits for surviving

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3. For important demographic changes happened in America ie, the industrial revolution The urbanization of America The disappearance of the “extended” family, and a marked increase in life expectancy-rendered the traditional systems of economic security increasingly unworkable.www.ssa.gov/policy/docs, accessed on 7th October, 2008
 4. In1932, the Federal Government first made loans, then grants, to states to pay for direct relief and work relief. After that Special Federal emergency relief and public works programmes were started. In 1935, President Roosevelt proposed to congress economic security legislation and thus Social Security Act is passed and signed into law on August 14,1935.See, Historical Information, available in <http://www.ssa.gov/history/brief.html>, accessed on 7th October, 2008
 5. ‘Federal Intervention seemed to be the only option as private charities and state also had budget woes’, Kathleen Santoro, “Social Security Privatization”,2006 (10)Holy Cross J. L.& Pub. Pol’y 47

dependants of deceased workers. Later it has become the largest government programme in the world.

The basic nature of social security in US is social insurance programme funded through payroll tax. i.e., a ‘pay as you go’ system (PAYGO System)⁶. It is formally known as Old Age Survivors and Disability Insurance Program⁷ (OASDI program). The OASDI Programme is administered by the Social Security Administration (SSA). The SSA is in the process of re-engineering the disability process in order to restore public confidence in its programme and ensure a nurturing environment for its employees⁸. Originally, in US the social security system included unemployment insurance. However the term is now used to mean only three benefits⁹, i.e., benefits for retirement, disability and death.

Eligibility Status

To become eligible for the benefits for family members or survivors, a worker must earn a minimum number of credits based on work in covered employment or self-employment. These credits are

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6. I.e., to days retiree’s benefits are financed by social security taxes that today’s workers are paying on a monthly basis. See, Elizabeth D. Tedrow Social Security Privatization in Other Countries-What Lessons Can Be Learned For The United States? 2006 (14) Elder L.J. 35 at p.36
 7. OA for retirement, S for Widows and Survivor’s Income, D for Disability Income. It provides monthly benefits to qualified retired and disabled workers and their dependants and to survivors and of insured workers, The OASDI Programme is administered by the Social security Administration (SSA) which became an independent agency in 1995. employees, employers and the self-employed pay taxes on earnings in covered employment and self-employment up to an annual maximum taxable amount for OASDI. See, Annual Statistical Supplement, 2005 Supp. Soc. Sec. Bull. 11(2005)
 8. Larry M. Gropman, “Social Security”, 1997 Det. C. L. Rev. 755
 9. These three benefits are provided by traditional private sector pension plans that still exist.

described as Quarters of Coverage (QC). Eligibility for most types of benefits requires that the worker is fully insured. A fully insured worker usually has a number of QCs at least equal to the number of calendar years elapsing between the age of 21 and the year in which he/she reaches the age of 62, becomes disabled or dies, whichever occurs first. For workers who become disabled or die before the age of 62, the number of QCs needed for fully insured status depends on their age at the time when worker becomes disabled or dies. A minimum of 6 QCs is required regardless of age for entitlement of benefits.

Retirement Benefits

The largest component of OASDI is the payment of retirement benefits. In US throughout a worker's career, the social security administration keeps track of his or her earnings. The amount of the monthly benefit to which the worker is entitled depend on that earning record and upon the age at which the retiree chooses to begin receiving benefits. The earlier stage at which the benefits are payable is 62 years and full retirement benefits are dependent on a retiree's year of birth.

Spouse Benefits

In US any current spouse is eligible and divorced or former spouses are eligible generally if the marriage lasts for at least 10 years. The spousal benefit is half the Primary Insurance Amount¹⁰ (PIA) of the worker. Only after the worker applies for retirement benefits the non-working spouse can apply for the spousal retirement benefits.

10. This is the basic social security benefit available to a worker. There is a formula for calculating PIA based on average indexed monthly earning. See, <http://www.ssa.gov/history/brief.html>, accessed on 7th October, 2008

Disability

A worker who has worked long enough and recently enough to be covered can receive benefits upon becoming totally disabled, regardless of his or her age. The eligibility formula requires a certain number of credits based on earnings to have been earned overall, and a certain number within the ten years preceding the disability, but with more lenient provisions for younger workers who become disabled before having had a chance to compile a long earnings history.

The worker must be unable to continue in his or her previous job and unable to adjust to other work, taking into account the worker's age, education and work experience. The disability must be long term lasting 12 months resulting in death, or expected to result in death. As with the retirement benefit, the amount of disability benefit payable depends on the worker's age and record of covered earnings.

Supplemental Security Income (SSI) uses the same disability criteria as the insured social security disability program, but SSI is not based up an insurance coverage. But a system of means-testing is used to determine if the claimants' income and net worth fall below certain income and asset thresholds after the claimants establish disability.

Severely disabled children may qualify for SSI. In addition, disabled minor children of disabled or deceased workers may receive survivor's benefits. A programme called Disabled Adult Child Insurance Benefits (DACIB) provides benefits for the disabled adult children of disabled or deceased workers.

For disability determination at the Social Security Administration has created administrative courts in the US depending on the state of residence. A claimant whose initial application for benefits is denied can request reconsideration or having before Administrative Law Judge. It involves a re-examination of evidence and an opportunity for hearing before disability hearing officer. The hearing officer then issues a decision in writing, with reasons for his findings. If claimant is again denied at the reconsideration stage, he can request hearing before Administrative Law Judge. In some states SSA is implemented as a pilot program that eliminates the reconsideration steps and allows claimants to appeal an initial denial directly to an Administrative Law Judge. Since the number of applications for social security is very high¹¹ the time for hearing is limited to 90 days of the request of the claimant.

After hearing, the Administrative Law Judge issues decision in writing. The decision can be fully favourable (the claimant is disabled); partially favourable (the claimant is disabled in source point and not in certain others as claimed) or unfavourable (not disabled at all). In case of the last two decisions, the claimant can appeal to Social Security's Appeals Council and it accepts no hearings but written briefs. If the claimant disagrees with the Appeal Council's decision he can appeal the case in the federal district court. As in most federal court cases an unfavourable district court decision can be appealed to the appropriate appellate circuit courts and an unfavourable appellate court decision can be appealed to the United States Supreme Court.

11. Approximately 650,000 per year

Survivor's Benefit

If a worker covered by social security dies, a surviving spouse or children can receive, survivor's benefits. In several instances, survivors benefit are available even to a divorced spouse. Survivor's benefits to non-disabled children are upto 18 years of age or the child graduation from high school, whichever is later. The earliest age for a non-disabled widow(er) benefit is 60 years. The benefit is equal to the worker's full retirement benefit for spouses who are at or older than survivor's normal retirement age (if the worker dies when the survivor is younger, there is an actuarial reduction).

Reshaping the Social Security Law

The Social Security Act was passed in the year 1935 It is otherwise known as Old Age Pension Act. This Act provided benefits to the retirees and the unemployed and a lump sum benefit at death. Payments to current retirees are financed by a payroll tax on current worker's wages, half directly as payroll tax and half paid by the employer. Though the constitutionality of the Act was challenged in many cases, the courts affirmed its validity.¹²

The original 1935 Act paid retirement benefits only to the primary worker. Many types of people were excluded, like farm workers, the self employed and anyone employed by an employer of less than 10 people. These exclusions intended to exclude those, as it would be difficult to monitor compliance, and covered approximately half of the civilian labour force in the US.

12. *Steward Machine Co. v. Davis*, 301, US 548 (1937); *Helvering v. Davis*, 301 U.S. 619.

The 1935 Act also contained the first national unemployment compensation program aid to the states for various health and welfare programs and the Aid Dependent Children Program. The initial tax rate was 2.0% of the first \$3000 of the employees earning shared equally between the employee and the employer. The tax rates were increased by amending Federal Insurance Contribution Act generally in three important ways. They are

- (i) The widowed non-working spouse of someone entitled to an old age benefit also entitled to an old age benefit.
- (ii) Survivors (widows and orphans) became eligible for a benefit.
- (iii) Retirees who had never paid any FICA taxes became eligible for old age benefits. In 1956, the tax was raised to 4.0% (2% for employer and 2% for employee-equal contribution) and disability benefits were added. In 1961 also the tax rate was increased to 6%.

Medicare was added in 1965 by Social Security Act of 1965. Supplementary Security Income benefits, though not exactly social security benefit but welfare benefit prolonged to immigrants who had never paid into the system even when they reached 65 years of age.

In the early 1980s there was concern about the long-term prospects for social security because of demographic considerations. A commission chaired by Alan Green Space made several recommendations. Under the 1983 Amendments to social security, the payroll tax rate was increased, additional employees were added to the system, the full age retirement age

was slowly increased and up to half of the value of social security benefit was made potentially taxable income.

As a result of these changes, the social security system began to generate a large surplus of funds intended to cover added retirement cost. Congress invested these surpluses into special series, non-marketable US Government bonds which are held by social security trust fund. Under the law, the government bonds held by social security are backed by the full faith and credit of the US government. The special series non-marketable bonds currently held in social security trust fund are off-balance sheet and are excluded from the US National Debt Calculation.¹³ These bonds simply represent a promise to pay the trust fund later, whether by increasing taxes, cutting benefits or simply borrowing some money.

Social Security Tax on Wages and Self Employment Income

Benefits are funded by taxes imposed on wages of employees and self employed persons. In case of employment, the employer and employee are responsible for one half of the social security tax with the employees half being withheld from the employees' pay check. In the case of self employed persons too, independent contractors the person himself is responsible for the entire amount of social security tax.

A separate payroll tax of 1.4% of an employees' income paid directly by the employer and an additional 1.45% deducted from the employees' pay check, yielding an effective rate of 2.9%, funds the Medicare program. This program is primarily responsible for providing

13. "Status of Social Security & Medicare Programme: A Summary of 2005 Annual Reports", www.ssa.gov/OACT/TRSUM.html accessed on March 17, 2006.

health benefit to retirees. The combined tax rate of these two federal program is 15.3%.

Social Security taxes are paid into the Social Security Trust Fund maintained by US Treasury. Current year expenses are paid from current social security tax revenues. A Social Security Number (SSN) is issued in pursuant to section 205(c) (2) of the Social Security Act¹⁴ is provided with. A multitude of US entities use the social security number as a personal identifier.

Legislative Changes from 1996

Contract with America Advancement Act of 1995 made a change in the basic philosophy of the disability programme¹⁵. By this Act New applicants for the Social Security or SSI disability benefits could no longer eligible for benefits if drug addiction or alcoholism is a material factor to their disability¹⁶.

The Personal Responsibility and Work opportunity Reconciliation Act of 1996 is called as “welfare reform” legislation. Previously lawfully admitted aliens could receive SSI if they met other factors of eligibility. From the date of enactment no new non-citizens could be added to the benefit rolls and all existing non-citizens beneficiaries ,

14. <http://www.law.cornell.edu/usc-gi>. <http://www.ssa.gov/history/brief.html>, accessed on 7th October, 2007

15. Previous policy has been that if a person has a medical condition that prevents him from working ,he is eligible to Social Security regardless of the cause of the disability. See.Larry DeWitt, SSA Historians Office. See www.ssa.gov/history 7th October, 2007

16. Unless they can qualify on some other medical basis they cannot receive disability benefits. Individuals in this category already receiving benefits ,have been be deleted from the list .

even the children eligible under old law, would be removed from the rolls.

Ticket to work and Work Incentives Improvement Act of 1999 made a most significant change in the disability policy. This law creates a Ticket to Work and Self-Sufficiency Programme which will provide disability beneficiaries with a ticket they may use to obtain vocational rehabilitation services and other support services from an employment network of their choice. The new provisions provide a number of safeguards to the beneficiaries to protect their benefits and health. Law also provides for incentive payments to providers for successful rehabilitation in which the beneficiary returns to work. Altogether the Ticket to Work initiative seeks to shift the emphasis in the disability programme away from mere maintenance of benefits to more toward rehabilitating the disabled and assisting them in returning to productive work.

The Senior Citizen's Freedom to Work Act of 2000 eliminated the Retirement Earnings Test¹⁷ which is provided under Social Security Act, with effect from January, 2000¹⁸.

17. The retirement earnings test applies only to people below normal retirement age (NRA), which ranges from age 65 to 67 depending on year of birth. Social Security withholds benefits if your earnings exceed a certain level, called a retirement earnings test exempt amount, *and* if you are under your NRA. One of two different exempt amounts apply, depending on the year you attain your NRA <http://www.ssa.gov/OACT/COLA/rtea.html> accessed 7th October, 2007

18. Beneficiaries under full retirement age (FRA) with earnings in excess of certain exempt amounts may have all or part of their benefits withheld as a result of annual earning test. See, Curt Pauzenga, "Social Security (Old Age, Survivors and Disability Insurance)" 2005 Supp. Soc. Sec. Bull. 11

Three Models of U.S. Social Security Reform

Recently the Government offers three alternative plans (Model I,II &III) for reforms. They are as follows:

Model I allows workers to invest up to 2 % of their taxable income in to a personal account. Traditional benefits if received would then be setoff from the personal account contributions. In Model II the workers could contribute up to 4.5% of their taxable income. Social Security benefits would be set off from the contributions, but the additional interest of 2% of the workers contribution, compound over the worker's career. Model III involves a 2.5% contribution from payroll taxes, plus a 1% additional contribution by the employee , up to 1000 dollars maximum. Benefits then be setoff from the account of the contributions but the additional interest rate reduction under this model would be 2.5 %.

Under all these three models there are changes in the way that benefits are calculated. In the current system benefits are indexed to current wages but here the benefits would be indexed to prices.

Comparison with Private Pensions

Although social security is sometimes compared to private pensions, the payment of disability benefits distinguishes social security from most private pensions. A private pension fund accumulates the money paid into it, eventually using those reserves to pay pension to the workers who contributed to the fund. Social security on the other hand, is fundamentally a wealth transfer system. A private system can refund because it does not try to cover everybody, so they can be net savers and net borrowers; on the other hand, social security system operates as

a pipeline through which current tax receipts from worker, are used to pay current benefit to retirees, survivors and the disabled. Although there is a social security trust fund that holds the cumulative excess of taxes withheld over benefits paid, unlike a private pension plan, the social security trust fund does not hold any substantial marketable assets to secure worker's paid-in contributions. Two broad categories of private pension plans are: (1) defined benefit pension plans; (2) defined contribution pension plans. Out of these, social security is more similar to defined benefit pension plan in which benefits ultimately received are based on some sort of pre-determined formula. Defined pension plans generally do not include separate accounts for each participant. But in a defined contribution pension plan each participant has a specified account in the funds put into that account by employer in the participant or by both. Here the ultimate benefit is based on the amount in that account at the time of retirement. Private pension are governed by *Employee Retirement Income Security Act*, which requires minimum level of funding. The purpose is to protect workers from corporate mismanagement and outright bankruptcy. In terms of financial structure, social security would be analogous to an under funded pension, i.e., where savings are not enough to pay future benefits without collecting future tax revenues¹⁹.

19. In 1981 a National Commission on Social Security Reform was established by President Reagan and sent its recommendations in 1983 Unanimously the Commission recommended that The Congress in its deliberations on financing proposals, should not alter the fundamental structure of Social Security programme or undermine its fundamental principle. The National Commission rejected proposals to make the social security programme a voluntary one, or to transform it into a programme under which benefits are a product exclusively of the contributions paid or to convert into a fully funded programme or to change it into a programme under which benefits are conditioned on the showing of financial need. See, Report of National Commission on Social Security Reform 1983 46 Soc. Sec. Bull. 3

On February 2, 2005 President George Bush in his Statement of the Address described the social security system as “headed for bankruptcy”²⁰ and outlined in general terms, a proposal based on partial privatization²¹. Critics responded that privatization would worsen the program’s solvency outlook and would require huge new borrowing²².

International Social Security Agreements

In today’s global environment, people often relocate from one country to another, either permanently or limited time basis. This poses challenges to business, governments and individuals seeking to ensure future benefits or having to deal with taxation authorities in multiple countries. The President is authorized to enter into international Social Security Agreements to coordinate the U.S. Old Age, Survivors and Disability Insurance (OASDI) with comparable programmes of other countries. To that end the U.S. has signed treaties, often referred to as ‘totalization agreements’ with other social insurance programs of various foreign countries²³.

International Social Security agreements have two main purposes for U.S. First they eliminate dual social security coverage and the

20. It is reported that by 2040, Social Security will no longer be able to pay its obligations. www.socialsecurityonline.org visited on 12th June, 2008.

21. Private account would replace in part the defined benefits that that Social Security Recipients can expect today. See, also *supra* n. 1 at p.74

22. The system of private account would present a serious cash flow problem to the system, and undermine the social insurance function of social security. The second argument is that it would place women minorities and the disabled at a disadvantage. Third is the privatization will reduce many of the auxiliary benefits that available today. See also Kathleen Santoro, “Social Security Privatization” 10 Holy Cross J. L. & Pub. Pol’y 47 at p.55 ,(2006)

23. Currently has agreement with 21 countries. See www.ssa.gov/OACT, accessed on 8th October 2008

second is to help in filling gaps in benefit protection for workers who have divided their careers between the U.S. and the other country. They eliminate dual social security taxation when a worker from one country works in another country and is required to pay social security taxes to both countries on the same earnings. Those who divided their careers may fail to qualify their social security benefits from one or both countries because they have not worked long enough to meet the criteria. Under an agreement these workers and their family members may qualify for a partial U.S. benefit based on totalized credits from both countries.

6.2 Social Security in U.K.

The United Kingdom is a unitary state in which the central government substantially directs most government activity. British social policy was dominated by Poor Laws, first passed in 1598 and continuing till 1948²⁴ Britain's social security system dates back to the 19th century and was enacted based on the overriding principle that the individuals should be insured "against the contingency of their growing old and being unable to earn a living"²⁵ The first laws relating to social security was Old Age Pension Act, 1908, Disability Insurance Act, 1911 and Old Age and Survivors Insurance 1925. In 1942, the Beveridge Report proposed a system of national insurance based on three assumptions i.e., family allowances, a national health service and full

24. <http://www2.rgu.ac.uk/publicpolicy>.

25. Mathew Owen & Frank Field, "Pension Reform in Britain: Alternative Modes of Provision", in James Midgley & Michael Sherraden (Eds), *Alternatives to Social Security : An International Enquiry* Auburn House, London (1997) p.91 at p.94

employment. The labour government in 1945 introduced the following three Acts:

- (i) The National Insurance Act, 1946 which implemented Beveridge Scheme for social security;
- (ii) The National Health Services Act, 1948; and
- (iii) The National Assistance Act, 1948 which abolished the Poor Law while making provisions for welfare services.

In simple terms British pension system is based on two tiers. The first tier, introduced in 1908 is mandatory and provides a basic flat-rate weekly benefit, which is independent of earning. It is financed on a PAYGO basis²⁶. The level of benefit from this basic pension ensures very low benefits. The second tier introduced in 1961, provides earning related benefits from public or private pensions.

National Insurance

National Insurance is a system of taxes, and related social security benefits that has operated in the UK since its introduction in 1911 and extended in 1946. The name national insurance was adopted as an expression of the government aspiration that the system should be qualitatively different from conventional general taxation such as income tax. Initially, the most important contributory benefits were the State Retirement Pension and Unemployment Benefit. With the introduction of employer payroll tax deduction (Pay-As-You-Earn or PAYE) employee's national insurance contributions were collected

26. Lillian Liu, "Retirement Income Security in the United Kingdom", 62 Soc. Sec. Bull. 23 at p.25

along with income tax. This replaced the old system of purchasing a contribution certificate or stamp. In the contemporary United Kingdom budget national insurance contribution are a significant source of government revenue comparable with value added tax.

Contribution to National Insurance Contributions (NICs) falls into a number of classes. Class 1,2 & 3 NICs paid are credited to an individual's NIC account, which determines entitlements to certain benefits including the state pension. Class 1A, 1B and 4 NICs do not count towards benefit entitlements but must still be paid if due.

Class I contributions are paid by employees and their employers. They are deducted from their gross wages by the employer, with no action required by the employee. The employers also match their contributions. Lower Earning Limit (LEL), Earning Threshold (ET) and Upper Earning Limit (UEL) are the milestone figures which determine the rate of NIC. The rate is:

- (i) Below the LEL, no NIC is paid
- (ii) Between LEL and ET, NIC are not paid but are credited as if they were earning employees
- (iii) Between the ET and UEL, NICs are paid at the rate of 11% on earning by employees and 12.8% of earnings by employers.
- (iv) Above the UEL, NCCs are paid at the rate of 1% on earnings by employees and 12.8% of earning by employers.

Class I.A contributions are paid by employers on the value of company cars and other benefits in kind of their employees and directors at the rate of 12.8% of value of the benefits in kind. Class 1.B were introduced on 6th April 1999 and are payable whenever an employer enters in to PAYE Settlement Agreement for tax. Class 1.B NCCs are payable only by employers and payment does not provide any benefit entitlement for individuals.

Class 2 contributions are fixed weekly amounts paid by the self employed. They are due regardless of trading profits or losses, but people on small earnings can apply for exception from paying and those on high earnings with liability to either class 1 or 4 can apply for different from paying. While the amount is calculated to a weekly figure, they are typically paid monthly or quarterly. Class 3 contributions are voluntary NICs paid by people that wish to fill a gap in their contributions record which has arisen either by not working or by their earnings being too low. The main reason for paying class 3 NICs is to ensure the “10 years’ worth” of contributions required for entitlement to the state pension. “10 years’ worth” is the amount that would be accrued through 520 weeks of earnings at the LEL for people with higher salaries, this might be achieved in less than 10 years.

Class 4 contributions are paid by self-employed people as a portion of their profits, calculated with income tax at the end of the year. Below the earning threshold no class 4 NICs are due. Above the earnings threshold and below the upper earnings limit class 4 NICs are paid at a rate of 8% of trading profits. Above the upper earnings limit

class 4 NICs are paid at the rate of 1% of trading profits. They do not form part of a qualifying contribution record for any benefits, including the state retirement pension.

People who are unable to work for some reason may be able to claim NIC credits. These are equivalent to class 1 NICs, though they are not paid for. They are granted either to maintain a contribution record while not working, or to those applying for benefits whose contribution record is only slightly short of the requirements for those benefits. In the latter case, they are unavailable to fill 'gap' in contribution records for some benefits.

New Labour Welfare Reforms

Since 1997 British Government has transformed work and opportunity in Britain. The economic stability and labour market flexibility, with employee's rights and active welfare to work programmes, have combined to produce the highest employment after the reforms²⁷. With a goal of raising employment rate to 80% and reduce the number of working age people who are dependent on benefit and to continue to close the employment gaps between different groups U.K., made these changes²⁸. Hence the government has given more stress on innovative employment programmes and improved incentives to work²⁹. The work focused benefit regime provides help and advice on jobs

27. Green Paper issued by Department of Work and Pensions on "A New Deal for Welfare: Empowering People to Work" http://www.dwp.gov.uk/welfare_reform/legislation_green_paper.asp

28. Ibid.

29. by providing support through tax credit system, by substantially increasing childcare provision and by introducing the minimum wage. <http://www.dwp.gov.uk>.

and training for people who can work and financial help for those who cannot³⁰ through 'Job Centre Plus'³¹. This agency is responsible for the new changes in pensions and benefits generally.

Based on the Pension Committee Report, reforms were also proposed in pension for the ageing society taking it as the first priority³². In 2002 itself Britain introduced State Second Pension crediting the low earners and some careers who missed out the State Earnings Related Pension Scheme³³.

The Government has set five tests for the reform package. It says that any reformed pension system must³⁴:-

- (i) promote personal responsibility (to avoid under saving for retirement);
- (ii) be fair(in protecting the poorest women and children);
- (iii) be simple (in clarifying the roles of state, employer and the worker);
- (iv) be affordable(in maintaining a strong market economy); and
- (v) be sustainable (by being amenable to future trends)

30. See, www.jobcentreplus.gov.uk, accessed on 12th September 2009

31. An agency of Department of Work and Pension.

32. "Security in Retirement: Towards A New Pension System", White Paper published by Department of Work and Pension. See, www.dwp.gov.uk/pensionreform/whitepaper.asp Prime Minister's forward.

33. The predecessor of the State Second Pension Plan

34. [http://www.dwp.gov.uk/pension reform](http://www.dwp.gov.uk/pension_reform), accessed on 12th September 2009

There are many critics to these reforms. The main criticism is that there is nothing new. Some argue that ‘welfare to work’ is the same ideology behind Poor Law Act of,1601³⁵. Another criticism is against partnership between public and private sectors where there is chance of loosing charitable aspect³⁶ and welfare provision³⁷. The government’s aim is to provide claimants a single point contact in case of controversy, then the quality and training of the officers who carry out the function becomes vital³⁸.

According to British Pension’s Commission, the present level of pension right level accrual, both public and private, will be insufficient to fund an adequate retirement. The insurers have told the Britons that their private accounts are unlikely to match their second tier public benefit and to move back into public system. In 2004, nearly five lakh workers opted for state system³⁹.

6.3 Social Security in Sweden

Sweden had a long successful economic formula of a capitalist system interrelated with substantial welfare element. But it was

35. Julian Fulbrook, “New Labourer’s Welfare Reforms: Anything New?” 64 Mod. L. Rev.243 (2001) at p.249.

36. *Id.* at p. 253

37. Presently pensioners receive 63%of their income from state benefits, 25% from occupational pensions and 12% from personal pensions. Since occupational pensions is unevenly distributed. The British Govt. tries to reverse 60/40 State /private balance by expanding voluntary pension provision by pension funds and private companies. Trade unions argue that this will not lead to a substantial increase in in pension saving. See, Report of British –German Trade Union Forum Conference ,”Tomorrow’s Welfare State” <http://www. Agf.org.uk/pubs>

38. See *supra* n.35 at p. 254

39. Elizabeth D. Tedrow, “Social Securitization in Other Countries –What Lessons Can be Learned for theUnited States?”, 14 Elder L. J. 35 (2006)at p.501

challenged in 1990s by high unemployment and 2000-02 by the global economic downturn. But the fiscal discipline in the country helped to withstand.⁴⁰

The Swedish Social Insurance System consists of two tiers. A flat rate basic pension funded on a PAYGO basis and an income related supplementary pension (ATP)⁴¹. Workers are contributing 2.5% of eligible earning to their private accounts known as premium pensions, and the remaining 16% of payroll contributions continues to fund benefits on PAYGO Basis⁴². In Sweden, the expenditure has been classified into four categories: general/cash, general/in kind selective/cash and selective/in kind.⁴³

In Sweden, sickness disability and old age accounted for over 70% of the social security budget. Selective benefits only come up to 6%. Cash benefits dominate over in kind⁴⁴ but most cash benefits are taxed and hence net benefits are considerably smaller. Sweden found that the growth in public expenditure for social security is to a large extent burdensome. Rejection of the fact that existing welfare state provisions gradually become expensive due to exogenous forces such as ageing population and new technologies in healthcare. There was also a

40. <http://www.apl.se ,www.ppm.nu/tpp/infodocument/1>, accessed on 8th October 2009.

41. It was created through 1998 Legislation. See also, Elizabeth D. Tedrow, Social Security Privatization in Other Countries- What Lessons Can Be Learned for the United States? (2006) 14 Elder L. J. 35 at p.53

42. Susan Stanahan & Carol Simons, Sweedens Choice, available at [http://www.aarp.org/bulletin/social sec/ss_sweden.html](http://www.aarp.org/bulletin/social%20sec/ss_sweden.html) visited on 16th May, 2008

43. *Public Expenditure for Social Protection in Sweden Relative to GDP in 1998*, Ministry of Social Affairs, Sweden, (2001).

44. Lars Sodr Strom and Klas Rikner, *Privatisation of Social Insurance with Reference to Sweden*, Clarendon Press, Oxford (2004) at p.167.

growing awareness of risk that welfare state has become a 'black hole' in the public budget gradually absorbing resources for other perhaps, more urgent needs. Various measures to cut public expenditure for social security were implemented by Sweden also in the 1990s. These expenditures fell over 5% points in just 6 years, from 38.6% relative to the GDP in 1993 to 33.3% in 1998.

Social Insurance Schemes make up the major part of public expenditures for social security with respect to cash benefits. These schemes include old age pensions, disability pensions, sickness insurance, parental insurance, worker's compensation and unemployment insurance. In addition, there are benefits in kind such as healthcare.

Sickness Insurance

In Swedish Sickness Scheme, individuals are compensated for loss of income due to temporary illness. Compensation is given irrespective of cause of illness i.e., no distinction is made between illness caused by a common cold, a work or traffic accident, sport activities etc. The compensation is given into two parts: (1) sick pay from the employer during the first two weeks of sickness episode, the sick pay period and thereafter; (2) a sickness benefit from the social insurance. In Sweden, there is no formal limit for the period one can receive sickness benefit. However, in case an individual's working capacity is permanently reduced the sickness benefit will be replaced by a disability pension. In Sweden law carefully regulates both part of the compensation. Thus employers are not free to have a higher or lower sick pay than stipulated equity as well as efficiency arguments are used in favour of this

regulations. Its purpose is to make sure that the rate of co-insurance is kept reasonable high and the same for all workers.

The main two advantages of having insurance in the hands of competing private insurance companies which forced Sweden to shift are:

- (i) **Differentiation:** Competing insurance companies are likely to take all steps possible to promote prevention on the part of the insured.
- (ii) **Diversification:** Competing insurance companies are likely to offer policies adapted to the performance of various (major/minor) groups in the society.

There are two types of work injuries—accidents and diseases. For accidents, it is often possible to determine when and where the injury has arisen. It is therefore easy to change appropriate employer with the costs. Injuries caused by diseases are very difficult to handle. Private insurance for work injuries would imply large differences in premiums for employers in different branches.

Pensions

The Swedish Pension system has three parts. A social pension scheme, supplementary negotiated pension schemes and individual pension plans. The social scheme is public and two others are private—the difference between them being that the negotiated schemes are collective, similar or identical for all members of the respective group, while individual plans are adapted to each person's preferences. The

three parts are closely interrelated. The negotiated schemes and individual plans are to a large extent merely supplements to the social scheme. Social pension schemes are as a rule mandatory and thus protect the interest of tax payers to mandate a system that requires everyone to pay into a scheme that provides adequate coverage in old age. The adequate level should at least include subsistence needs.

This pension reform is recently implemented and it includes a system of individual accounts giving individuals substantial flexibility in their choice of investments. At the same time other Swedish Social Insurance system such as unemployment insurance⁴⁵ sickness benefits and parental leave has remained unchanged. The major reform is made in old age pension system i.e., the defined benefit scheme by national defined contribution system.⁴⁶ Between 1998 and 2001 the system was converted from a 100% PAYGO system to a system where some money is saved and invested.⁴⁷

Government pension payments are financed through an 18.5% pension tax on all taxed economies in the country, which comes partly from a tax category called public pension fee (7% on gross income) and 30% of a tax category called employer fees on salaries (which is 33% on a retted income). Since January 2001, the 18.5% is divided into two

45. Swedish Unemployment Insurance is under private management. It is not mandatory. There is a benefit society for each Federation of Labour Unions handling cash benefits according to rules stated by law.

46. Martin /Feldstein and Horst Siebert (Eds) *Coping with the Pension Crisis: Were does Europe Stand?* University of Chicago Press, Chicago (2001) p.324.

47. See *supra* n.1.

parts 16% goes to current payments and 2.5% to individual retirement accounts, which was introduced in 2001.

Analysis of Recent Developments

From 1998 onwards Sweden has started its reform measures to strengthen social security. In 1999 a new system of social insurance notional accounts plus mandatory individual “premium pension” accounts was established. It is a transition from the old system established in 1938 and continued in 1958. The earning related old-age pension system based on average income was replaced by a new system where notional account is calculated using an annual index based on development of an average wages, an annuity factor depending on average life expectancy at the time of retirement and a norm for the expected increase of average wages in future years. The premium pension is based on contributions plus net returns converted in to an individual, joint, fixed, or variable annuity. Annual pensions are made subject to taxation. A programme for unemployment benefits are also provided by 1997 legislation replacing the 1934 Act for the job seekers. This is a subscribed programme consisting of basic insurance and a voluntary income related insurance system and the source of payment is payment by insured as membership fee and the employer’s contribution calculated as a % of payroll.

6.4 Social Security in India⁴⁸

The general frame work of social security legislations in India includes Employees’ Provident Fund, Gratuity, Employee’s Insurance,

48. Chapter 5, 6 and 8 elaborately discuss social security in India. This part is narrating the present system in India for the purpose of comparative study only.

Employee's Pension Scheme and National Social Assistance Programme. Social Security to the workers in the organized sector is provided through five Central Acts, namely, the Employees State Insurance Act, the Employees Provident Fund & Miscellaneous Provisions Act, the Workmen's Compensation Act, the Maternity Benefit Act, and the Payment of Gratuity Act. In addition, there are a large number of welfare funds for certain specified segments of workers such as beedi workers, cine workers, construction workers etc.

The types of programmes in India include Provident Fund with Survivor (Deposit Linked) Insurance and pension fund, gratuity schemes for industrial workers and social assistance system. In 2004, a voluntary old age, disability and survivors benefits scheme introduced under unorganized sector social security scheme for employees and self employed persons between the age of 36 to 50 having a monthly income Rs. 6500/- or less. This means that India is having a lot of social security benefits under different heads. More over, a single benefit is provided under many heads also. For example old age benefits are provided by provident fund, pension scheme, gratuity scheme and old age pension under social assistance also. Like wise permanent disability benefit is provided by provident fund scheme, pension scheme and gratuity scheme. The survivor's benefits are provided through provident fund, survivor (deposit-linked) insurance scheme, pension scheme (widow(er)'s pension, orphan's pension, other eligible survivor's pension), gratuity scheme, funeral grant and survivor grant under social assistance. Generally the coverage comes under social assistance and social insurance.

Relevant amendments are proposed in the EPF and MP Act as also in the ESI Act. The consultation process is on with reference to the amendment suggestions received in case of the Maternity Benefit Act and the Workmen's Compensation Act.

Innovative measures are proposed in the running of the Social Security Schemes of Employees' Provident Fund Organisation and Employees' State Insurance Corporation. This includes flexible benefit schemes tailored to the specific requirements of different segments of the population.

Most social security systems in developed countries are linked to wage employment. In India, the situation is entirely different from that existing in developed countries. The key differences are⁴⁹:

- (i) India does not have an existing universal social security system;
- (ii) India does not face the problem of exit rate from the workplace being higher than the replacement rate. Rather on the contrary lack of employment opportunities is the key concern;
- (iii) 92% of the workforce is in the informal sector which is largely unrecorded and the system of pay roll deduction is difficult to apply.

6.5 Conclusion

The new trend in all countries is that the State is trying to withdraw from its responsibility to provide security benefits to their workers. They do it either by privatizing or through converting

49. <http://labour.nic.in/ss/overview.html>, accessed on 20th September, 2009

assistance to contributory insurance. In United States, the government is trying to increase pay roll tax rates and promote rehabilitation programmes which enable workers to return to work. International social security agreements with other countries by U.S. to enable the workers who divide their career between U.S. and other countries is a good initiative to be taken into consideration. U.K. introduced innovative employment programmes and improved incentives to work. They modify the social security system by increasing personal responsibility and creating an affordable and sustainable reform package. Sweden has taken a balanced approach in providing social security in cash and in kind benefits. They changed to 100% PAYGO system based on membership fee and employers' contribution. As the social, economic and political situation in India is highly different from other nation states, India has to find out solutions for maximum social security coverage in tune with its own resources and needs. The position in India with regard to social security can be differentiated mainly on three grounds.

- (i) *Lack of effective grievance redressal mechanism*:- In India the social security benefits are under different legislations and under different schemes. Some legislations provide for redressal fora and some do not. Many of the benefits under schemes are not a matter of legal rights to get adjudicated under a court of law.
- (ii) *Lack of comprehensive coverage*:- The system prevailed under other countries are providing coverage irrespective of any classification for coverage. All are legally entitled to one

benefit scheme or other benefit scheme. But in India majority are outside the legally covered social security programmes⁵⁰.

- (iii) *Constitutional Mandate*:- Unlike any counterpart Indian Government is constitutionally bound to provide social security to its citizens⁵¹

Apart from this, in the contemporary world, the domestic legal scenario is highly influenced by international agreements and sovereignty of nation is said to be re-defined. This influence is made a sweeping change in India too. Hence it is highly necessary to understand the labour and trade law relationship and how it affects the states' welfare measures for labour force. In this context a deliberation up on the question whether there is any conflict between trade liberalization and labour rights becomes indispensable.

The next chapter is an attempt to examine the relationship between international trade law and labour rights.

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50. In India 66% of workforce are under unorganized sector and outside the coverage area of legally declared social security benefits. Some of them are covered under different schemes declared by Government from time to time.

51. This aspect will be discussed in detail in Chapter 4

WORKER'S RIGHTS AND WORLD TRADE LAW: AN APPRAISAL

Contents	7.1	The Trade- Labour Nexus
	7.2	WTO and Labour
	7.3	Provisions in GATS Relating to Labour
	7.4	ILO, Trade and Labour: An Outline
	7.5	The Impact of CLS on the Existing Labour Rights Regime
	7.6	ILO's Decent Work Agenda
	7.7	Conclusion

In the era of trade liberalization, concerns about the exploitation of workers' rights are inevitable where labour is considered as part of trade¹. In developing countries there is a need to enact and enforce a particular set of workers' rights and to avoid unwarranted intrusion into the internal affairs of these countries². What are the appropriate rights in this context? It is argued that there is no universal set of workers' rights, rather those are rights guaranteed in a context-specific manner. But free trade in goods and services surely will undermine repressive political regimes that make exploitation possible³. Along with free trade, free

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1. Jose M. Salazar-Xirinachs, *The Trade and Labor Nexus: Developing Countries' Perspectives* 3 J. Int'l Econ.L. 377 (2000). The author observes: "It is common sense and a matter of fact that close links do exist in the real world between trade and labor issues..."
 2. Radha D'Souza, "Linking Labour Rights to World Trade: Trade or Worker's Rights?", *World History Archives*, www.tartford-hwp.com, accessed on 10th October 2009.
 3. Raj Bhala and Kevin Kennedy, *World Trade Law, The GATT-NGO System, Regional Arrangements & U.S. Law*, Lexis Law Publishing, Virginia (1999) at p. 167.

information as to labour condition and practices in other countries is made known to workers of developing countries.

7.1 The Trade-Labour Nexus

The International Trade Commission Study in 1995 while answering to the question whether developing countries are suppressing labour rights in order to reduce production costs and provoke exports mentioned that ‘their labour standards, foreign direct investment flows and wage trends indicated that the export success is not based on unfair advantages due to the lack of core labour standards.’⁴

The Havana Charter⁵ specified that ‘the members recognize that ... all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity and thus in the improvement of wages and working conditions as productivity may permit. The members also recognize that unfair labour conditions particular in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within the territory’⁶.

4. *Ibid.*

5. Havana Charter was the charter of the defunct International Trade Organization (ITO). It was signed by 53 countries on March 24, 1948. It allowed for international cooperation and rules against anti-competitive business practices. The charter ultimately failed because the Congress of the United States rejected it. Elements of it would later become part of the General Agreement on Tariffs and Trade (GATT). U.S International Trade Commission, “Trade Issues of the 1990s—Part II”, *International Economic Review*, December 1994 at p. 19.

6. ILO, Paper prepared for Int’l 1994 Meeting of its Governing body, Trade Issues of 1990s. *Id* at p. 19.

The United Nations World Summit for Social Development⁷ in 1995 at Copenhagen recognized the significance of social development and human well being for all and to give these goals the highest priority in 21st century.⁸ It is declared that economic development and mutually reinforcing components of sustainable development is the framework for the efforts to achieve higher quality of life for all people.⁹ The summit finds that globalization which is a consequence of increased human mobility, enhanced communications, greatly increased trade and capital flows, and technological developments open new opportunities for sustained economic growth and development of world economy, particularly in developing countries.¹⁰ At the same time it is feared that rapid process of change and adjustment have been accompanied by intensified poverty and social disintegration which often result in to isolation, marginalization and violence.¹¹ The centre of the declaration is the decision as to place people at the centre of development and direct the economies to meet human needs more effectively.

As far as the workers are concerned, the Declaration specifically deals with their rights in its goals stated in the commitment 3 in detail. The goals are set to attain and secure a sustainable livelihood with adequately remunerated employment. The summit pursues the goal of ensuring quality jobs and safeguard the basic rights and interests of workers and to this end, promotes respect for ILO Conventions including

7. *UN World Summit for Social Development 1995*, March 6-12, Copenhagen.

8. Copenhagen Declaration, 1995, para.1.

9. *Id.* at para 6.

10. *Id.* at para 14.

11. *Id.* at para 16.

those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively and the principle of non discrimination. These are later became the basis for Core Labour Standards of ILO which are discussed later in detail.

In review of existing trade and labour provisions, ILO found that virtually all trade liberalizing agreements lack a labour or social dimension particularly areas covered by the ILO Conventions¹². This can be revealed by analyzing the World Trade agreements.

7.2 WTO and Labour

With the establishment of World Trade Organization¹³ the world trade has been organized mainly on three pillars such as General Agreement on Trade and Tariff (GATT), General Agreement on Trade in Services (GATS) and Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS)¹⁴.

The GATT protocols and at present WTO contains very little language that has direct bearing on the issue of labour standards.¹⁵ There are only two provisions in GATT touching on the link between

12. *Supra* n. 1 at. 170

13. After the second World War there was an attempt to to construct a new global institutional architecture. Part of this new world financial and trade institutions were proposed an International Monetary Fund (IMF), Internal Trade Organisations and World Bank. ITO failed to come into existence instead GATT was set up and later replaced by WTO. See, John H. Jackson, *The World Trading System* (2nd edn, 1997) at p. 78.

14. Mita Agarwal, "International Trade, Labour Standards and Labour Market Conditions: An Evaluation of the Linkages", in Sir Hans Singer, *et al.* (Eds.), *TRIPS, The Uruguay Round and Third World Interests*, B.R. Publishing Corporation, Delhi (1999), 751 at p.793

15. John H. Jackson, "The Uruguay Round Results & National Sovereignty" in Jagadish Bhagavati & Mathias Hirseh (Eds.), *The Uruguay Round and Beyond*, Springer-Verlag Berlin (1998), p. 293.

international trade and workers' rights. The preamble says that countries joining GATT do so recognizing that their relations in the field of trade should be conducted with a view to raising standards of living. The other one is Article XX (e) which provides authority to bar imports of prison labour products. On analysis, it is revealed that these provisions are not carefully drafted for articulation of the importance of workers' rights.

The Director General of GATT, Arthur Dunkel's efforts were central to the Development and successful conclusion of the most massive international trade negotiation called the Uruguay Round¹⁶ but not obtained an agreement to place workers' rights on the WTO work agenda¹⁷. They failed to place the agenda at the 18th WTO Ministerial Conference in Singapore in December, 1996. WTO Ministerial Declaration sets forth 5 points about trade and labour issues but passes the responsibility to ILO¹⁸. It declares that:

- (i) We renew our commitment to the observance of internationally recognized labour standards;
- (ii) ILO is the competent body to set and deal with these standards and we affirm our support for the work in promoting them;
- (iii) We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards;

16. WTO Singapore Ministerial Declaration 36 International Legal Materials 220 (1997).

17. Martin Khor, WTO: "The Battle over Labour Standards", Third World Network, www.hartford-hwp.com/archives accessed on 30th January, 2009.

18. Ibid.

- (iv) We reject the use of labour standards for protection purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question; and
- (v) In this regard we note that the WTO and ILO secretariats will continue their existing collaboration¹⁹. The developing countries fear that the trade-labour link at WTO level will raise the cost of production (as the developed countries are having high-minded labour principle as it seems).

Thus, in net result, labour issues are ousted from GATT-WTO regime. ILO is made the responsible body to take care of workers' rights. The Director General proposed two strategies to increase the effective enforcement of labour standards. First proposal was that ILO should identify a set of core labour rights to which members of ILO should be regarded as being committed by virtue of their membership in the organisation. Second strategy involved is a scheme for increasing the effectiveness for consumer choice by labelling goods as having been produced in conditions that conformed to these core labour standards.²⁰ ILO has declared a lot of rights of workers, some of them are the most fundamental. Formally four worker rights are identified, recognized and endorsed by a large number of countries. These core worker rights²¹ are

19. *Ibid.*

20. ILO, The ILO Standard Setting and Globalisation: Report of the Director General (1997) International Labour Conference 85th Session available at www.ilo.org/public/english

21. The four core worker's rights are: 1. The freedom of association, including the right to organize and bargain collectively; 2. The freedom from forced or compulsory labour; 3. A minimum age for the employment of children and 4. Minimum standards for working condition.

drawn from ILO Conventions²², (2) OECD study²³ and (3) The EU Social charter²⁴.

Another Agreement which is connected to labour rights is GATS. General Agreement on Trade in Services is an agreement which requires WTO members to give specific commitments on market-access in various service sectors. Among trade, services are the fastest growing sector. Nearly one fourth of the world trade is accounted for by services²⁵ and as it is always a key sector in the world economy, they were brought within the ambit of multilateral trading system by GATS in 1994.

The GATS is a comprehensive legal frame work of rules and disciplines covering 161 services activities across 12 classified sectors except those services which are supplied in the exercise of governmental authority²⁶. The main objectives of GATS are the expansion of trade in services, progressive liberalization of such trade through negotiations, transparency of rules and regulations and

22. Mainly from 6 conventions on freedom of Association and Protection of the Right to organize (No. 87), Right to organize and Bargain Collectively (No. 98) Forced or Compulsory Labour (No. 29) Abolition of forced Labour (No. 105) Discrimination in Respect of Employment and Occupation (No. 111) Minimum Age for Employment (No. 138).

23. Organization for Economic Co-operation and Development, Trade and Labour Standards (1995) at 9-15, 19-27. OECD study on Trade, Employment and Labour Standards: A Study of Workers Rights and International Trade (1996).

24. European Union Social Charter, Charter of Fundamental Rights of the European Union, Official Journal of European Union, www.europarl.europa.eu/charter/pdf/text_en.pdf

25. V.K.Gupta, "WTO-GATT: An Analytical Appraisal with Special Reference to India", 11 National Capital Journal, p. 55(1997).

26. Art. 1 GATS, see also Rupa Chanda, GATS and its Implication for Developing Countries: Key Issues & Concerns Dept of Economics and Social Affairs. Discussion Paper No. 25 United Nations. <http://www.un.org/esa/papers.htm> p.4

increasing participation of developing countries. GATS²⁷ contains three basic elements. They are: a basic element applicable to all members, specific commitments undertaken by various countries and recognition of special needs of the specific sectors of the member countries. GATS present a set of voluntary commitments by member countries with their undertaking for further opening of the services which have been left for future negotiations and commitments.

Recognizing that human capital continues to play a pivotal role in development and economic growth, economic planners have been paying considerable attention to human resource planning and the movement of people is vital in determining the forces of demand and supply of labour service²⁸ including demand and supply of labour. GATS defines service trade²⁹ as occurring through four possible modes of supply, both skilled and unskilled. The possible modes are:

Mode-1: Cross border supply in which services trade takes place across borders (cross-border supply);

Mode-2: Consumption abroad in which services trade is affected by movement of consumers to the home country of the service supplier (consumption abroad);

27. The scope of service transactions induced under the GATS through introduction of additional concepts like nationality, territorial location and ownership or control than international transactions in services defined in the IMF's Balance of Payment Manual (BPMS) 1993. See Rajesh Chandra, "Services Issues and Liberalisation in the Doha Development Agenda Negotiations: A Case Study of India" in Aditya Mattoo and Robert M. Stern (Eds.) World Bank, Oxford University Press, Oxford (2003), p.67 at p.68.

28. Sieh Lee Mei Ling and Org Fon Sim, *The Economies and Politics of People Movement in East Asia and Pacific Region*, www.pecc.org/labor/ accessed on 10th September 2009.

29. *Id.* at p.68.

Mode-3: Commercial presence in which services trade occurs when the service exporting firm establishes itself in the importing country after with capital investment and commercial presence and

Mode-4 Movement of personnel which involves a natural person who supplies services moving temporarily to another WTO member country for the purpose of supplying a service. (Movement of natural persons);

The important aspect to be noted in this context is in essence mode 4 of GATS in relation to:

- (i) “Persons providing services where a foreign service supplying firm or juridical person obtains a contract to supply services to a host or importing country, company and sends its employees to provide the services;
- (ii) Non-independent service providers abroad where an individual markets and promote services to a host country company or to an individual; and
- (iii) Persons employed abroad by foreign companies in the host country³⁰”

This provision relates to the migration of employees but does not match with the conventional migration. But the other provisions of GATS are to be examined as those are covering the workers in trade services.

The main restrictions on movement of natural persons originate in immigration and labour market policies of individual countries.

30. Julia Nielson, “Current Regimes for Temporary Movement of Service Providers- Labour Mobility in Regional Trade Agreements”, paper presented at Joint WTO-World Bank symposium on movement of natural persons (mode 4) under the GATS(2002, OECD)

Temporary movement of persons is not distinguished from permanent movement of labour and falls under the purview of immigration legislation and labour market conditions in nearly every country³¹.

Another restriction emerges from the issue of eligibility which includes the problem of wages. Wages paid to foreign workers must be at par with that of locals thus negating the purpose of cross country labour movement based on the principle of cost differentials³².

Yet another set of obstacles for services trade through people movement originate from barriers to recognition of qualifications, certification and licensing. Issues of qualification and certifications are the most fundamental requirements, without which no service can be provided.³³

But now the increasing number of workers who moved across national borders has given rise to the emergence of a service industry that serves as intermediaries in both the sending and receiving countries. In parallel, the increase in the flow of labour has resulted in the emergence of agents facilitating the flow illegally, circumventing the rigid immigration rules and regulations³⁴. The employers in specified industrial establishments must obtain prior sanction or approval of the appropriate government for lay off retrenchment and closure. They also have to follow prescribed procedures under the Act. These provisions must be changed as these are hurdles to the growth of

31. *Id* at para 1.4

32. *Ibid*.

33. Because visa can be rejected on the basis of non recognition of qualifications.

34. *Supra* n. 16 at 2.1

economy. For example, an employer is not allowed to close down his industry even though it is running at a loss. This will lead to prevent restructuring of several nonviable sick industries and thus cause slow growth of industrial investment and employment.

Before examining the impact of laws and regulations applicable to the labour force, it is inevitable to examine the provisions in GATS which affect the labour.

7.3 Provisions in GATS Relating to Labour

The preamble to the General Agreements on Trade in Services states that the general goal of participants is to establish a multilateral frame work of principles and rules for trade in services with a view to expanding such trade under conditions of transparency and progressive liberalization. This would promote the economic growth and development of all trading partners. The agreement expresses the desire to facilitate the increasing participation of developing countries in trade in services and the developed countries.

The central theme of the GATS is the Most Favoured Nation (MFN) treatment³⁵. Other main provisions are transparency³⁶, domestic regulation³⁷, monopolies and exclusive service suppliers³⁸ emergency safeguard measures³⁹ balance of payment safeguards⁴⁰, government procurement⁴¹, exception⁴² and subsidies⁴³.

35. Art. II

36. Art. III

37. Art VI

38. Art VIII

39. Art. X

Under the MFN treatment countries are required to accord equal treatment i.e., not to discriminate among member countries of the WTO in terms of their treatment of foreign suppliers and service suppliers. If it is so, the member countries have to provide all beneficial provisions to migrant workers also without any discrimination. Moreover there is a provision to take exemption for a period of 10 years (subject to conditions). Under the transparency provision the countries are required to provide information on all relevant rules and measures with bearing on the agreement and on their commitments under the GATS.

Several of other GATS provisions are not really general, as their applicability is conditional up on the commitments filed by member countries. For example the article on domestic regulation is applicable only to sectors where specific commitments have been taken. These types of exemptions are in order to protect public order, human, animal or plant life or natural security or to secure compliance with laws or regulation consistent with the agreement etc.

Another ambiguity is found with regard to interpretation of foreign natural persons, “employed by a service supplier of a member”, also include foreigners employed by host country companies. Article 1:2 (d) of the Agreement seems to cover foreigners appointed by foreign

40. Art XII

41. Art XIII

42. Art XIV

43. Art. XV

owned companies. If they are employed by locally owned firm they will not be covered by the Agreement. Most of other GATS provisions are also loosely defined and broad in terminology so that the nature and extent of their applicability is subject to discretionary interpretation. In the provisions on domestic regulation, there are many ambiguities concerning what constitutes a “reasonable, objective and impartial” manner of administering domestic regulations.

Another element of GATS is the process by which countries commit themselves to liberalising services. The countries are free to decide which service sectors they wish to open, subject to market access and national treatment disciplines. If the countries are unwilling or unprepared to open up a particular service sector, they have the discretion to do so. Countries have made use of this flexibility provision by limiting their commitments in sensitive and heavily government regulated and monopoly type service sectors.

If this is the status of GATS provision there is nothing wrong to say that appropriate policies are needed in order that workers, especially the unskilled are to be protected in the host country. The policies should be in accordance with or complying with the core labour standards. As far as developing countries are concerned it may be highly burdensome and expensive.

But the regulatory mechanism is still in the hands of independent countries and provisions in GATS remain flexible, the member countries are free to take policy decision in this matter. While making the policy certain factors are to be looked into *viz.*, (1) temporary nature

of movement (limited duration of stay), (2) specificity of tasks to be performed and (3) the discreteness of the transaction involved i.e., specific employment for a definite period of time⁴⁴. It includes all types of workers viz., highly skilled, semi skilled and low skilled⁴⁵.

Such a pressure on developing countries in the area of employment has often been seen as an attempt to reduce their competitiveness by imposition of regulation which would in turn result in increase of production costs. Economic efficiency is not the only measure of the labour market. Social policy is also at the centre of the regulatory function. But in reality, developing countries fail to protect the interests of workers in order to facilitate the development of industry including foreign investments⁴⁶. They are adopting a de-regulatory policy. Positive legislative standards are not widely adopted partly because they were not extensive and partly because left to themselves without updating they will become ineffective.

In this context, it is highly necessary to examine the efforts of ILO in the protection of workers' rights. In the context of ILO, the voluntarism has formalized in 1998 as Declaration on Fundamental Principles and Right at Work.

44. United Nations Convention on Protection of all Migrant Workers and Members of their Families, 1990-Though it does not specifically deals with trade related labour mobility but it defines a worker on temporary and specific employment.

45. This view is taken by developing countries. But developed country view that the provision excludes low skilled workers from the GATS category of service providers.

46. R.W.Rideout, "The Changing Face of Employment Protection" 24 JMCL 1 at p. 1(1997)

7.4 ILO, Trade and Labour: An Outline

After the First World War, fair competition was one of the main slogans which found its place in international trade.⁴⁷ Some of the international regulatory endeavors contained trade as well as labour standards⁴⁸ and there itself began some form of nexus between trade and labour. But the international trade regulations remained in embryonic stage for quite a long period. Later the Philadelphia Declaration recognized the broader outlook to a working peace system along with social and economic policy. In 1960s and 1970s, the social and economic policies and discussions were on its peak and the developments in the area of labour rights are commonly called as international labour code. But during 1980s the whole international scenario started to change. Fall of Berlin wall, communism and Russia were some of the instances which made a threat on international labour rights. The emphasize on freedom of association and on non-discrimination which are characterized as main features of ILO became less important due to the neo liberal reforms of labour market. At the starting of the era of globalization, the employer groups and the countries in transition began to identify that they have little time to protect labour rights. They feared that such type of protection may raise risks and may work against the general current to diminish state protection and state regulations and to encourage individual initiative. The same trend reflected in national arena also by de-regulation, outsourcing and offshore jobs. The process of de-constitutionalising rights were occurring at national level. But at the

47. Charnowitz, "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview", 126 *International Labour Review* 565(1987).

48. *Ibid.*

same time a renaissance of interest in soft law or promotional approaches to labour rights at international level began to occur. In 1990s, rather than in 1970s and in 1980s the labour rights issues are learning more frequently on international agendas of multilateral and regional institutions, governments and NGOs. Though they are having divergent interest, they include the accelerating liberalization of trade and financial markets the anti globalization movements, the sustained exposure of the role of transnational involvements in exploitative labour practices and the resulting growth of consumer demands of fair labour and the concerns and demands for fair labour. More over, employers are turning into international community through multinational trade and they have to promote even at national level a sort of voluntary code enabling to consider them reputable and legitimate rather than rogue exploitaters.

ILO Declaration, 1998

The ILO Declaration⁴⁹ on Fundamental Principle and Right and Work aims to ensure that social progress should go hand in hand with economic progress and development. According ILO, the declaration is a promotional instrument. The declaration commits member state to respect and promote principles and rights in five categories i.e.,

- (i) freedom of association and the recognition of the right to collective bargaining;
- (ii) elimination of forced or compulsory labour;
- (iii) abolition of child labour; and

49. Published in the official web page of ILO, <http://www.ilo.org/dya/declaris> accessed on 18th September 2009

- (iv) the elimination in respect of discrimination in respect of employment and occupation.

ILO clarifies that the member state can adopt these principles irrespective of the fact that they have ratified the relevant conventions. The declaration makes it clear that these rights are universal and they apply to all people in all states. ILO is confirming the need for strong social policies, justice and democratic institutions. ILO again ascertains its role in standard settings especially in areas of employment in the context of global strategy for economic and social development so as to create broad base sustainable development. As ILO is the constitutionally mandated international organization and competent body to deal with international labour standards and to promote fundamental rights at work it declares the above mentioned principles as fundamental and universal. By this declaration, it recognizes that economic growth alone is not enough to ensure equity, social progress and eradication poverty. The commitment is supported by follow up procedure so as to technical assistance and reviewing reports.

The declaration and follow up provides three ways⁵⁰ to help countries, employers and workers to achieve full realization of its objective. Firstly, there is an Annual Review composed of reports from countries that have not yet ratified one or more of the ILO conventions that directly relate to the specific principles and rights stated in the declaration. The reporting process provides governments with an opportunity to state what measures they have taken towards achieving in respect of the

50. Programme for Promotion of Declaration, available in <http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines> accessed on 18th September 2009.

declaration. It also provides organizations of employers and workers choice to express their views on progress made and actions taken.

Secondly the global report each year provides a dynamic global picture of the current situation of the principles and rights expressed in the declaration. The global report is an objective view of the global and regional trends on the issues relevant to the Declaration and serves to highlight those areas that require greater attention. It serves as a basis for determining priorities for technical co-operation. Technical co-operation projects, the third way to give effect to Declaration, are designed to address identifiable needs in relation to the Declaration and to strengthen local capacities theory translating principles into practice.

The Declaration principles and rights are gaining wider recognition among organizations, communities and enterprises. These fundamental principles and rights provide benchmarks for responsible business conduct, and are incorporate into ILO's own Tripartite Declaration of Principles concerning Multilateral enterprises and social policy. The OECD's guidelines for multinational enterprises emphasise the principles and rights found in the ILO Declaration and the UN global compact promotes them as universal values to be achieved in business dealings around the world. A growing number of private sector codes of conduct and similar initiatives also refer to the fundamental principles and rights at work.

Actually the process of transformation began in 1995 at Copenhagen World Summit for Social Development. Then the International Labour Organization responded to the pressures exerted on labour rights by

international trade liberalisation by adopting the Declaration on Fundamental Principles and Rights at Work.⁵¹ The Declaration provided for universally recognized labour standards. These rights consist of a standardized hierarchy instead of heterogeneous and wide ranging set of labour rights. According to Philip Altson⁵² the ‘previously unknown concept of Core Labour Standards is now ubiquitous’ and he explains five reasons for this. The first reason⁵³ is that the core standards constituted a departure from the insistence within the international human rights regime on the equal importance of all human rights. This mainly focuses on a small and manageable set of standards which are well accepted with priority attention. Secondly⁵⁴ the Declaration laid down the ground for a decentralized system of labour standards implementation. In other words the sole governmental responsibility is divided among different agencies ranging from MNCs to consumers.⁵⁵ These responsibilities extend to defining, promoting and even enforcing core labour standards.

The third⁵⁶ reason is that the CLS approach is more flexible so as to cope up with particular situations and liberated from ‘legalism of ILO Conventions. Thus these standards have become applicable in wide range of contexts.

51. www.ilo.org/public/english/standards/decl/declaration/index.htm., accessed on 18th September 2009.

52. Philip Altson, “Core Labour Standards and the Transformations of the International Labour Rights Regime”, 15 E.J.I.L., 457(2004).

53. *Ibid.*

54. *Id.* at p.460.

55. *Ibid.*

56. *Ibid.*

Fourthly,⁵⁷ Core Labour Standards provide an effective via media for resolving highly controversial debate even trade and labour standards. It places ILO at centre and thus helps ILO to overcome the criticism on its incapability in responding effectively to the growing demands in the context of the rapidly evolving international trading regime.

Finally,⁵⁸ Core Labour Standards put forward a vision of labour standards emphasizing the role of promotional techniques and thus breaks the sanctions under 'social clause' proposals. It is more palatable to many governments and most employers in a world of ever increasing capital mobility.

Right at Work: Rights or Principles?

The Declaration on Fundamental Principles⁵⁹ and Right at Work raises some immediate questions like what they actually mean, rights or principles? If there is difference, conceptually how does it make an impact on declaration. In common parlance, rights are in a higher footing than principle. In the international sphere the term 'principles' is used in the context of 'general principle of law' This is a neutral term with no real legal significance. It also conveys a meaning as a description of normative proposition rather than a signified right. 'Principles' are also like principles in UN charter where the purposes are listed as principles. Though these

57. *Ibid.*

58. *Ibid.*

59. The term principles rights have used in the Declaration because it had been adopted from the North American Agreement on Labour Corporation (NAALC) <http://www.org/eng/agreement.html>.

are referred as principles, the provisions are actually dealing with rights per se. Just like that the principles in the Declarations are having the status of rights than mere leading proposition covering certain rights.

During the debate at International Labour Conference, 1998 leading to adoption of the Declaration, the ILO Legal Adviser was asked to explain difference between values, principles and rights. He answered that values referred to widely shared conceptions of moral order, principles translated those values into concrete context and rights constituted an acknowledgement in law of the principles.⁶⁰ Hence it can be presumed that the term 'principle' used in the Declaration, 1998 is relatively close to the category of usage in international legal instruments like UN Charter.

In a nutshell, the Declaration emphasizes on the notions of principles in par with ILO constitutional principles.⁶¹ In other words the Declaration proclaims as principles a range of values which has already been recognized as rights.

Origin of Core and Criteria for Choosing Core

From the very beginning ILO began to make use of classification according to which there were three different categories of labour standards.⁶² These are: (1) that protect certain basic human rights; (2) those establishing certain basic labour standards; and (3) those requiring the maintenance of certain instrumentalities of social policy. It was after

60. Report of the Committee on the 'Declaration of Principles', 86th Session of the International Labour Conference', 1998 para.73.

61. See *supra* n.2 at p.483.

62. C.W.Jenks, *Human Rights and International Labour Standards*, Stevens, London (1960), p.127.

the fall of Berlin Wall that the idea of seeking to identify small set of core standards began life within ILO as part of an attempt to refine and sharpen the original system of classifying international labour standards.⁶³ The initial efforts started in 1990s by ILO officials and moved to 194 proposals of the Director General and to the events in Copenhagen.⁶⁴ The ILO Director Generals' Report in 1994 clearly says that rights would be designated as fundamental or core as decided in Copenhagen with a principal focus on social development. These values were selected in tune with the context of ILO's minimum core.⁶⁵

The Relationship between ILO Convention Standards and the Core Labour Standards

Core Labour Standards are linked to the standards contained in eight ILO conventions and the human rights law generally. The further understanding of the meaning of the four rights comes from the underlying ILO conventions. The Conventions constitute reference points for examining the content of core labour standards. For example the content of Rights to Freedom of Association has been even derived from jurisprudential clarifications by the relevant ILO supervisory bodies, body of law and core laws relating to the same.

But the ILO Conventions are declared as a recognition to the human rights. The core labour standards are something related to economic law where an effort is put to recognize the workers right all

63. Bartolomei de la Cruz, "International Labour Law: Renewal or Decline?" 10 *International Journal of Comp. Labour Law and Industrial Relations* 201 (1994)

64. See *supra* n.2

65. Ballace, "The ILO Declaration of Fundamental Principles and Rights at Work", 17 *International Journal of Comp. Labour Law and Ind. Rels.*, 269 at p.271 (2001).

over the world. This may arise a conflict between established conventional jurisprudence and the magnitude of revolution led to the Declaration. The ILO's Legal Adviser clarifies the point as the Declaration should be based on the principles of Constitution of ILO, reflected in Convention but not on specific provisions of Conventions.⁶⁶ Hence it can be said that the detailed legal requirements of the conventions are not invoked by the Declaration and States do not need to be in compliance with the specific provisions of the conventions in order to satisfy the requirements of the Declaration.

7.5 The Impact of CLS on the Existing Labour Rights Regime

The reason for devoting so much space to an analysis of developments relating to bilateral and regional free trade agreements⁶⁷ is to demonstrate that while the WTO remains largely impervious to labour right claims the broader emerging trade law regime contains very consistent references to labour rights. The old assumptions that once applied to the ILO, its standards, procedures and monitoring mechanisms are no longer viable in a globalised world and new decentralized systems are become better options. In many ways 1998 Declaration has given an initiative to the trend towards decentralisation. The Declaration standards are considered as complementary to the standards of ILO where it is unworkable mainly in developing countries.

66. See *supra* n.6

67. Eg., NAFTA, NAALC.

On the basis of developments in the six years since the adoption of the 1998 Declaration, it can be concluded that CLS system is not clear on the following aspects:

- (i) to the extent to which the content of the core standards is defined by reference to the specific normative profile which the relevant rights have been given in the appropriate ILO conventions
- (ii) to the promotion of this limited range of core standards does not serve to undermine the status of other labour rights which have long been recognized as human rights.
- (iii) to the arrangements of implementation which attach to the core standards are meaningful and just not promotional in a soft or tokenistic sense and
- (iv) those arrangements neither undermine ILO's existing supervisory arrangements nor discourage the serious reforms which the supervisory system requires.⁶⁸

However, this result can be avoided if a determined effort is made in the years ahead to remedy the specific defects of both the CLS system and the much broader international labour standards supervisory system.

The Policy Integration Department of ILO has published a Report on ILO Activities in the Social Dimension of Globalisation.⁶⁹ The

68. *Supra* n. 51

69. Published in July, 2002.

paper expresses ILO's concern about the difficulties of many people and countries experiencing the difficulties created by globalization.

The Report finds four areas of consensus concerning the social dimension of globalization in the context of international labour over the last decade. They are firstly the adoption of Declaration of Fundamental Principle and Right at Work in 1998, secondly the consensus of international community reaffirmed the role of ILO in settling and dealing with standards of labour concerned. World Summit for Social Development in 1995 and WTO Singapore Ministerial Declaration 1996 are best examples which declares ILO as the competent body to set and deal with labour standards.

Thirdly, in respect of social clause debate both WTO Singapore Ministerial Declaration and Declaration on Fundamental Principles and Right at Work affirm that labour standards should not be used for protectionist trade purposes and that the comparative advantage of any country should not be called in question. Lastly, the work of the working party on social elimination of the liberalization of the international trade was reappraised in March 2000. The governing body decided to broaden the scope of the working party and change its title to the 'Working Party on the Social Dimension on Globalisation'. The social dimension concerns all aspects of globalisation including investment, technology and migration, as well as trade.

7.6 ILO's Decent Work Agenda

The ILO's Decent Work Agenda provides the basis for an integrated approach to the economic, social and political dimensions of

public policy.⁷⁰ The concept of Decent Work was launched in the terms in 1999, in the Report of the Director General, to the International Labour Conference in the 87th Session. The idea conveys the broad and varied dimensions associated with work today and encapsulates them in an expression that every one can appreciate. It has four strategic objective i.e., rights at work, employment, social protection and social dialogue.⁷¹ Employment here covers work of all kindss and has both quantitative and qualitative dimensions.⁷² It also refers to adequate opportunities of work remuneration, safety at work, healthy working conditions and social security. The ILO is providing support to member states to ensure that the objectives of decent work are addressed as an integral part of the development process, so that growth and development ultimately leads to reduction of poverty. Though integration into the global economy is today a major source of economic growth, it is not sufficient in achieving poverty reduction. The pattern and source of growth as well as the manner in which its benefits are distributed are extremely important from the point of view of poverty reduction. The report finds that furthering the ILO's Decent

70. *Id.* at p.4. See also Amartya Sen, "Work and Rights", 139 *International Labour Review*, (2000) www.ilo.org/public/english/support/pub/rew/articles/index.htm accessed on 18th September 2009. He explains "the first important feature in the new ILO vision is the articulation of its goal: the promotion of opportunities for women and men to obtain a decent and productive work, in conditions of freedom, equity, security and human dignity. The reach of this objective is in indeed momentarily large: it include all workers, wherever and in whatever sector they work; not just workers in the organized sector, nor only wage workers, but also unregulated wage workers, the self employed, and the home workers. The ILO aims to respond to the terrible fact that the world is full of overworked and unemployed people".

71. See ILO, "Decent Work, Report of the Director General, International Labour Conference", 87th Session, 1999 <http://ilo.org/public/english/standards/reim/ile/ile87>, accessed on 20th October 2009.

72. Dharam Ghai, "Decent Work Concept and Indicators" 142 *Int'l Lab. Rev.* 113

Work Agenda as an integrated development strategy in a global context also requires an enabling international policy environment and the ILO is conducting research analysis to develop policy approaches for the same.

The approach adopted by ILO is something beyond national policies but slightly different from so called “globalised”⁷³ approach and “international”⁷⁴ approach. The approach adopted by ILO provides a more promising understanding of the needs of the institutions and policies in pursuit of the rights and interests of the working people.

7.7 Conclusion

It is a fact that globalization with free trade, made free information available to workers of the developing countries. Thus they come to know about the labour conditions and practices in developed countries than ever before. They are well aware of the exploitation in the name of reduction of production cost and promotion of exports. But they are ousted from the GATT, GATS and WTO regime. They are marginalized by saying they are not “part of trade”. ILO’s Fundamental Principles and Right to Work agenda aim to provide social protection to workers. But many of the aspects of these agenda are not clear. But they give a globalised perspective which can influence the national policies

73. Global approach need not see human beings only as citizens of particular countries, nor accepts that the interactions between citizens of different countries must be inevitably intermediated through the relations between distinct nations. International approach works through the intermediary of distinct countries and nations. Amartya Sen, “Global Justice: Beyond International Equity” in Inge Kaul, Isabelle Grunberg and Marc A. Stern (Eds.), *Global Public Goods: International Corporation in the 21st Century*, Oxford University Press, New York (1999) p.321, at p.325

74. *Ibid.*

of developing countries. The national policy should reflect that the need of a worker in developing countries like India is to attain and secure a sustainable livelihood with adequately remunerated employment.

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SOCIAL SECURITY OF INDIAN LABOUR AND CHALLENGES OF GLOBALIZATION

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	8.9	Impact of Globalization on Social Security of Indian Labour
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	8.11	The Recommendations of National Commission on Labour, 2002
	8.12	Conclusion

Globalization has become a new term for signifying dramatic changes in the nature of international relations in the latter part of 20th century and dawning of 21st century¹. Globalization conveys many meanings and things emphasizing a global rather than a national context. It is something like a process by which it redefines the world affairs especially in relations

1. Gillian Youngs, "International Relations as We Enter in the 20th Century", in Eleonore Kofman and William Youngs (Eds.), *Globalization: Theory and Practice*, Continuum, London (2nd edn., 2003), p.3

between states. In other words it is the process of increasing interconnectedness between societies such that events in one part of the world have effects on peoples and societies far away².

8.1 Dynamics of Change and their Economic Dimensions

Globalization denotes expanding scale, growing magnitude, speeding up and deepening impact of transcontinental flows and patterns of social interaction.³ It refers a shift or transformation in the scale of human organization that keeps links among distant communities and expands the reach of power relations across the world's regions and continents. But it does not pose as a universal process of global integration, in which there is growing convergence of cultures and civilization⁴.

As an economic term⁵, it denotes the acceleration of the international connections in the global economy in the last few decades and the emergence of global corporations and relatively open international financial markets⁶. The word also invokes themes of cultural union as a result of media and electronic interconnections from satellite broad cast, television, fax machines, cyber space etc.

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2. Steve Smith and John Baylis, *The Globalization of World Politics: An Introduction to International Relations*, Oxford University Press (3rd edn., 2005), p.8 .
 3. Speech by Dr. Bimal Jalan, Governor of the Reserve Bank of India, at the 36th Convocation of the Indian Statistical Institute, Kolkata on 15th January, 2002 as cited in Vol.3 BIS Review, 2002
 4. David Held and Anthony Mc Grew, *Globalization and Anti-globalisation*, Blackwell Publishers Inc. Malden USA (2002), p.24
 5. Thomas L. Friedman, *The Lexus and the Olive Tree (Understanding Globalisation)* Farrar, Straus & Girouse, U.S.(1999), p.9. The author observes: “[T]he driving idea behind globalization is free market capitalism -the more you let market forces rule the more you open your economy to free trade and competition...”
 6. Bernet and Cavanagh, *Global Dreams: Imperial Corporations and the New World Order*, Simon and Scheister New York (1994), p.36.

Sociologists use this term to denote cultural changes in discussion of economics and business⁷. According to Ronald Robertson, it includes some sense of comprehension of global politics and the emergence of a subjective identity of living in a single, relatively small planet⁸. There are powerful reasons for seeing globalization as a new stage in the world politics, with a view that it is progressive and it improves lives of people. In the era of globalization, states are not remained as closed units and world economy has become more and more interdependent with expanding trade and finances. The main arguments in favour of globalization include⁹ that the world is becoming more homogenous¹⁰, time and space seem to be collapsing¹¹ and a cosmopolitan culture is developing¹². There are arguments that suggest the opposite also¹³. The main argument is that this ends up paralysing governmental attempts to subject global economic forces to control regulation. Another argument is that globalization is very uneven in its effects¹⁴. Some argue that the globalization is nothing but old modernization theory because the forces

7. *Supra* n. 1 at p. 36. See also, Anthony Smith, "Towards a Global Culture", in Michael Featherstone (Ed.) *Global Culture: Nationalism, Global Culture and Modernity*, Sage Publishers Ltd.U.K.(1990), p.171

8. Robertson R., *Globalization: Social Theory and Global Culture*, Sage Publications, London(1992), p.31

9. *Supra* n. 2 at pp.10-11.

10. Differences between people are diminishing.

11. This is due to spread of modern communications. Old ideas of geographical space and chronological time are undermined.

12. People are beginning to think globally and locally.

13. Richard Falk, *Predatory Globalisation: A Critique*, Polity Press, Cambridge (2000), p.13 (explaining negative globalisation)

14. It is reachable to a few class of people and majority of world population are ousted from its benefits though they bear the impacts. Since substantial proportion of the world population is largely excluded from benefits of globalization, it is a divisive process.

that are being globalised are conveniently those found in the western world. The most discussed question is that to whom the transnational social movements are responsible and democratically accountable¹⁵.

8.2 Political Dimensions of Globalization: A Question of Governance

Globalization is frequently portrayed as a technological and economic process with limited attention to its political dimension. The state system remains the central organizing device in the international system but the conceptual change has resulted in diminishing autonomy for all states¹⁶. States have become more constrained by the market forces and through the delegation of some functions of State to global organizations¹⁷. The process of economic globalization¹⁸ has resulted in a shift from a world of singular or separate national economies, exercising a large control of their economies to one in which open market forces and economic interdependence are increased. These changes are mainly because of the result of technological changes, developments in capitalistic accumulation and political decisions.

15. *Supra* n. 2 at p.12.

16. Larry Cata' Backer, "Economic Globalisation Ascendant and the Crisis of State: Four Perspectives on the Emerging Ideology of the State in the New Global Order", 17 *Barkeley La Raza L.J.* 141 (2006) at p. 142. The author says: "...a global system in which the state play the subordinate role",

17. The global institutions include WTO, TRIPS Council, World Bank..etc. The functions delegated include governance functions also. Prabhat Patnaik calls them "Bretton Woods Institutions" See Prabhat Patnaik, "Ten Years of Economic Liberalisation" *THE MARXIST*, Vol.17, No.02, April-June,2001 available on www.cpim.org/marxist/200102, accessed on 22nd February, 2009

18. This term reflects the popular feeling that an unjust world order being imposed on the people of India, and more generally on the Third World, by powerful social forces and international institutions. B.S. Chimni, "Alternative Visions of Just World Order: Six Tales from India", 46 *Harv. L.J.* 389 (2005) at p. 401

The State is a leading player in these processes.¹⁹ The shift in policies by States is either voluntary or involuntary. The voluntary shift takes place through implementation of liberalization and de-regulation policies. It may happen involuntarily through structural adjustment programmes in the developing world²⁰.

This type of economic restructuring has fundamental impact on the interests of State. However, to achieve their economic goals and to enhance international competitiveness, the States are forced to adapt their domestic economies with the realities of the global economy by understanding that they exist within a changing global market. The opening up of national economies to world markets, deregulation and the removal of many protectionist policies throws the firms to an increasing global competition.²¹ It is believed that the removal of most capital controls have led to an unprecedented increase in the expansion and integration of financial markets around the world. Then the character and interests of a State has become changed²² and transformed

19. Role of the state in the context is limited. As it is rightly observed: "...globalization began to be represented as a finality, as the logical and inevitable culminations of the powerful tendencies of the market at work. The dominance of the economic forces was regarded as both necessary and beneficial. States and the interstate system would serve mainly to ensure the working of market logic." Robert W. Cox, "A Perspective on Globalisation" in James H. Mittleman (Ed.), *Globalisation: Critical Perspective*, Lynne Rienner Publishers (1996) p.21 at p. 22

20. B.S. Chimni, "Co-option and Resistance: The Two Faces of Global Administrative Law", I.I.L.J. Working Paper, 2005/16 Global Administrative Law Series,1, at p.10

21. *Supra* n. 5

22. The change of state in a globalised context is explained by Prof. Chimni in the following words: "Today in the era of globalisation, international law and institutions are increasingly playing a more significant and intrusive role than ever in the past, in particular *viz-a-viz* third world states. The latter are compelled to cede sovereign, economic, social and political space to international institutions .*Supra* n.20 available at www.iilj.org/publications/documents, accessed on 30th April 2009.

into a competition state to compete with other states for a large share of world output.

If it is so, it is necessary to analyse the position of the State in the era of globalisation. Is it a capitalist state under a WTO regime or a welfare state as it generally is in many countries or does it assume a role of both?

8.3 Welfare State and its Essential Characteristics

The idea of 'welfare state'²³ conveys not only the meaning of providing welfare services by the State but also by assuming primary responsibility for the welfare of its citizens²⁴. Here the responsibility of state is comprehensive. When all aspects of welfare are considered, a "safety net"²⁵ is not enough. Sometimes the welfare is not actually provided by the State, but what is provided is a combination of independent, voluntary, mutualist and government services. The provider

23. The term is believed to be coined by Arch Bishop William Temple during second World War.(William Temple (15 October 1881 – 26 October 1944), Archbishop of Canterbury (1942–1944) <http://justus.anglican.org/resources/bio/61.html>., accessed on 12th October, 2009.

An early version of the welfare state appeared in China during the Song Dynasty in the 11th century. Prime Minister Wang Anshi believed that the state was responsible for providing its citizens the essentials for a decent living standard. Accordingly, under his direction the state initiated agricultural loans to relieve the farming peasants. He appointed boards to regulate wages and plan pensions for the aged and unemployed. These reforms were known as the "new laws," http://www.bbc.co.uk/history/british/modern/field_01.shtml, accessed on 12th October, 2009.

24. M.M. Sankhdher, *The Welfare State*, Deep and Deep Publications, New Delhi (1985), p.10

25. It is a term coined in the era of globalization for identifying those who are in need of state protection. The 'social safety net' is a term used to describe a collection of services provided by the state, such as welfare, unemployment benefit, universal healthcare, homeless shelters, the minimum wage.

may be the State, government sponsored company or agency or even a private corporation.²⁶

Modern welfare states are evolved through a gradual process beginning in the late 19th century and continuing through the 20th century²⁷. Welfare state is an integral concept arising from the merger of various traditions of thought and practice. The idea of welfare state arose from different sources²⁸. Its actual ideas of liberty, equality and fraternity came from the French Revolution, the idea of greatest happiness of greatest number from Bentham, the concept of social insurance and social security from Bismark and Beveridge, the principles of public ownership of basic industries and essential services from Fabian socialists, and principles of political economy from John Stuart Mill and so on²⁹.

The welfare state uses public policies as the means for promoting and realizing its goals. These public policies include policies in general or sectoral policies like developmental, social, economic and cultural policies in particular.

It is also viewed the welfare state as a structure of thought and practice founded on market economy, the principles of individual liberty, rule of law and limited government. Jermy Bentham gives a conceptual formulation of welfare state¹² that the basic principle of determining human behaviour is the maximisation of utility as the

26. www.worldnetdaily.com/news/article, accessed on 12th October, 2009.

27. www.history.ox.ac.uk/ecohist/synopses/1b_social/history accessed on 12th October, 2009.

28. See, P. Baldwin, *The Politics of Social Solidarity*. Cambridge U.P., London(1990), p.35

29. www.lse.ac.uk/lsehistory/fabian.htm, accessed on 15th October, 2009.

greatest happiness principle. According to Bentham the business of government is to promote the happiness of the society, by punishing and rewarding.

According to Professor Marshall³⁰, the essential characteristics of the welfare state are its intense individualism and collectivism. The former confers on the individual an absolute right to receive welfare and the latter imposes a duty on the state to promote and safeguard the whole community which may transcend the aggregation of individual claims.³¹ It is considered that welfare state has not rejected the capitalist economy but gives it only qualified approval since there are some elements in civilised life of greater importance which can be attained only by restricting markets. In other words welfare state accepts a modified form of capitalism³² i.e., by retaining two basic elements--private property and the profit motive.

8.4 Social Protection and Development: Emerging Challenges and Doctrinal Contradictions

Welfare state and development are closely related as means and ends respectively. In other words, when the end of social organization is welfare of whole people of the state that state is a welfare state and the end is development. However, after the introduction of globalization the new development has become a challenge to welfare. In recent years, the relative insulation or the national embeddedness of welfare state has

30. T. H. Marshall, *Class Citizens and Social Development*, Cambridge University Press, London (1950), p.31.

31. *Id.* at p. 35

32. Stanford M. Jacoby, *Modern Manors: Welfare Capitalism Since the New Deal*, Princeton University Press, New Jersey (1997), p.35

been increasingly challenged by a set of developments under the globalization. The impacts of globalization on states are alarming. Globalization, is a process through which nation state is becoming more open to influences that are supra national. These may be economic, cultural, technological or political in nature. As far as the welfare state is concerned the focus has been economic globalization which has been seen as curtailing the policy making autonomy of nations and putting pressure on social protection and social standards. The system of social protection which enjoyed was a part of old orders of state socialism with its ideological commitment to economic security and collective consumption³³. The states use coercive instrumentalities of state power to provide for the welfare of the population within the territorial domain of nation state. The basic assumption underlying a welfare state has been that of substantial policy autonomy on the part of nation state in respect of economic management and determination of monetary fiscal and social policies.

Now, the globalization and development invite two crucial aspects of their relationship. They are : (1) the destabilizing effect of financial openness on national economies and its implication on national economies and of social protection, and (2) the influence of international financial institutions³⁴ on socialist policy of nations. During transformation of economy, the state role is that of organizing, financing and providing particular services or activities. The size of public sector cannot be a criterion for judging the extent of public involvement by a

33. *Id.* at p.41

34. Like IMF, World Bank.

state as it is done in national accounts. When markets are opened, states are more integrated, the debate has centered on the possibilities of financing welfare state activities collectively in the integrated economies.³⁵ One view is that the challenges faced by welfare state due to international integration do not arise from outside political pressure, but are caused by changes in the way in which economies work. But the development will not display abrupt changes calling for sudden and drastic changes in welfare policies. But the integration enhances the exposure to risk. The basic source of risk is its shocks to domestic market and to foreign markets. The enlarged exposure to risk can be mitigated by state contingencies in public consumption transfers and taxes. How far these affect the labour force when the markets are concentrating on product transfer is the relevant question in this context.

8.5 External Forces: Internal Integration in Domestic Markets

WTO, GATT and their off shot of technological advances promote international integration of countries through political decisions and technological changes reducing trade costs and exhausting dissemination among countries.³⁶ This process extends the market in size and scope and even changes the preferences. The instantaneous flow of information and less costly flow of knowledge also affect market interdependences. This type of interdependence leads to international integration of markets. Since

35. Parashar Kulkarni, "Emergency, Safeguard Measures in GATS: Policy Options for South Asia" South Asian Year Book of Trade and Development 2006, Centad & Wiley (2007), available at SSRN:<http://ssrn.com> accessed on 25th June 2008.

36. Sonia E. Rolland, "Developing Country Coalitions at WTO: In Search of Legal Support" 48 Harv. Int'l L.J. 2 (2007), available at www.harvardilj.org/print, accessed on 12th October, 2009.

labour market issues are essential to the welfare state, and mobility across countries is small, the labour market consequences are high. In many countries large part of welfare state activities is financed by taxes or social security contribution levied on labour in a higher labour taxation via wages. This leads to deterioration of the competitive position of the country. When integration of markets occurs that leads to more inequality in the labour markets³⁷. Foreign firms capture the domestic market i.e., threat of imports and possibility of entering foreign markets via exports are two immediate impacts of such integration. Entering into foreign markets will also give new opportunities, good wages and employment. But this will affect the high income group and low income group differently i.e., the distribution of wages for employed workers becomes more unequal.³⁸ Those facing the import threat will have to accept lower wages to maintain their jobs while those having an export possibility will face an improvement in their trade.

This raises the question of choosing of policy. The main need is for a wage floor to achieve social objectives. Apart from this, another point of consideration is the difference between the short run and long run strategy to achieve social objectives in the labour market. The short run is that it will be costly to maintain social standards and this has to be financed some how. The long run perspective is that it becomes increasingly costly to maintain a qualification structure which does not match social ambitions with respect to the wage structure.

37. <http://ilo.org/public/standards/relms/8b282,ESP1/1>, accessed on 12th October, 2009.

38. ILO finds that these changes are mainly in developing countries other than industrial countries. See <http://ilo.org/public/English/standards/relm/gb/docs/gh282>, accessed on 12th October, 2009.

8.6 Product Market versus Labour Market: Labour in World Economy

The way in which, labour market functions depends critically on product market structure. This is because of the simple reason that the latter shape labour demand. The trade in products can be a substitute for factor mobility between countries. The main effects on product market are firstly, the intensive competition where in foreign products can compete for market shares in domestic market and vice versa. Secondly, more integrated market enhances the mobility of firms. The mobility is in terms of Foreign Direct Investment and Outsourcing. Both these have effect on labour markets and they tend to make labour demand more sensitive to the wage rate.³⁹ This is potentially important since this elasticity is critical for distortions arising from taxation of labour income i.e., cost of financing welfare state arrangements can be critically affected even though labour is not having the mobility across countries.

The effect on the employment level is in general ambiguous since although more integrated markets offer opportunities for export which tend to improve labour market conditions, they also face a threat from imports with opposite. The opportunities are not necessarily equally distributed across countries and different groups in the labour market and this brings forth the need for welfare state activities.

The larger part of the welfare state activities is financed by taxes on social security contributions levied on labour (i.e., tax burden on labour). With integration it follows that the competition for jobs

39. Aleck Ostry, "Impact of Globalization on Labour Markets: Broad Implications for Research on Job Strain", available at www.workhealth.org, accessed on 4th July, 2009.

becomes more intensive due to the effects discussed above and therefore the effect of labour taxation changes.

Another main issue affecting economic development and welfare is what is known popularly as “brain drain”⁴⁰ in developing nations.⁴¹ Some developed nations have been pursuing the policy of encouraging the immigration of trained and experienced professionals from developing countries. Such skilled production of manpower trained at a heavy cost from public exchequer in developing countries are required to serve and provide welfare to the people and contribute to economic development in developed countries. If a person undertakes a period of work in another national labour market, he acquires new skills, resulting in a higher level of human capital on return to home country. This should be entered into a human capital account.

In such circumstances, non state employment related insurance schemes might reflect the interests of the state, unions, employers, employees and companies. It is important to point out that a public insurance scheme does not have to be put under formal private administration in order to be privatized. An alternative to keep a scheme public but change its character into a more private-like scheme, either by introducing flexibility and consumer choice or by replacing taxes with insurance premiums and thereby achieving an informal

40. It is otherwise known as ‘human capital flight’. Douglas S. Massey and Edward Taylor(Eds.), *International Migration: Prospects and Policies in Global Market*, Oxford University Press(2003), p.36. See also Binod Khadria, *The Migration of Knowledge Workers: Second Generation Effects of India’s Brain Drain*, Sage Publications (1999), at p.4

41. Peter stalker, *Workers Without Frontiers*, ILO, Geneva, p.104

privatisation. From an individual citizen's point of view informal and formal privatisation may in many cases serve some purposes. This gives individuals substantial flexibility in the pension and health care costs and choice of investments.

In short, several studies indicate that occupational and private welfare can be a substitute for or supplement to social welfare⁴². These welfare accounts promise a number of significant advantages over the traditional welfare systems. In particular by permitting the government to focus on interpersonal redistribution and social insurance against economic circumstances with significant life time income implications, the reform may allow substantial reductions in taxes and thereby improve people's incentives to work, save and invest. Further more by helping people internalise the social cost of the welfare expenditures, welfare accounts discourage people from making excessive welfare claims. In doing so, welfare accounts also improve people's incentive to work.

But technological developments tend to be skill-based shifting labour demands towards skilled groups. The international integration will reinforce the 'competition' across countries in human capital and skills and therefore add to the effects of the skill bias. It is important that this effect arises even in the absence of labour mobility through channels like trade, FDI etc.

The following question arises in this context: is it possible to reform the welfare state without jeopardizing key objectives? A number

42. James Petras & Henry Veltmeyer, *Globalisation Unmasked: Imperialism in the 21st Century*, Madhyam Books, Delhi, (2001), p. 25

of measures can be adopted aiming at reducing public expenditure based on increased private involvement in the public sector in financing, supply, or at consumption stage. The general aim is to attain a better balance between costs and benefits of activities that are organized by the public sector. When user fees are introduced, part of the financing role is shifted to the user. This will improve resource allocation and force producers to adapt to the preferences of the public⁴³. Another alternative is to substitute private provisions for public in order to reduce costs. This can be implemented either by contracting out or by letting private producers compete within a publically managed system, with or without public producers⁴⁴.

8.7 Social Protection and Security: Role of ILO in the Globalised Regime

As pointed out in earlier Chapters, International Labour Organisation also finds that insecurity has raised in recent years as people all over the world are affected by developments linked to globalization⁴⁵ and emphasize the need for new ways of promoting socio-economic security and thus it constitute a basis of social justice and economically dynamic societies.

The ILO has been seeking to raise awareness of the different forms and causes of socio-economic insecurity, so that policy makers are better able to formulate policies to combat the adverse effect of

43. *Id.* at p.23

44. *Ibid.*

45. Such as emergence of more flexible labour markets, increased informalisation, rapid technological change and social policy reform.

insecurity and promote decent work security, particularly so as to improve the position of the most insecure groups in society.⁴⁶

While discussing ILO's role in globalization regime, it is evident that ILO promotes participatory processes and within which those who work and those who are affected by policy decisions have voice in formulation and implementation of policies at any level⁴⁷. ILO again declares that social dialogue is also an integral part of Decent Work Agenda.⁴⁸ The ILO finds the issues of dialogue diverse and include industrial relations, wages and incomes, working conditions, social security, safety and health, employment, vocational training, poverty reduction and monetary and fiscal policies.

Analysing the new world trade law, it reveals the fact that the pre-Uruguay Round GATT framework applies only to trade in goods, reflecting traditional assumptions that services are not easily tradable⁴⁹. However because of technological developments, service transactions can be effected without physical proximity between service provider and consumer. Moreover the deregulation reforms affected the countries which maintain state monopoly during 1980s and renewed the limits of domestic competition. Apart from these, the traditional view of services,

46. According to ILO, the concept of socio-economic insecurity can be of seven kinds, which are linked to work and labour. They are income security, employment, job, labour market work skill development and representation security.

47. See Report of Policy Integration Department of ILO published in July 2002, para 2.2

48. *Id.* at para 2.3. Social Dialogue is defined by ILO as all types of negotiations, consultations, or simply exchange of information about reports of governments and workers on issues of common interest relating to economic and social policy.

49. Michael J. Trebilock and Robert Houge, *The Regulations of International Trade*, Roulledge, New York (2nd edn., 1999), p.270

as part of the production of goods, is shifted and includes international intrafirm trade in service inputs into production either of goods or of other services. In the light of these developments, 'the reduction or elimination of barriers to services trade became a major priority of a number of developed countries in the Uruguay Round of GATT Negotiations.

8.8 Trade and Services

It is highly necessary to differentiate between trade and services at least in principle in order to understand why trade negotiations exclude services from discussions.

Depending up on the nature of services, they include mainly two categories i.e., knowledge and technology-intensive services and labour intensive services. Generally the first category services are final products and where in services are inputs. But in latter category, goods are final products wherein services are also inputs along with other goods i.e., goods are medium of services⁵⁰. When goods are outputs, the goods inputs are also governed by trade laws with the situation where trade law exempts services from its purview. But world trade laws in the present tries to reduce barriers on trade. The other side of the coin is that the law relating to services remains the same domestic law which contains more restrictions when foreign markets are developed and countries allow foreign investments, the home country regulations must be in tune with the trade laws for reaching targets i.e., removal of trade barriers.

50. *Id.* at p.272.

It is necessary to analyse International Agreement on Trade in Services in this context. The schedules attached to the agreement contain wide range of services covered by the Agreement. The only services excluded altogether from coverage are services those associated with energy, basic petrochemical goods and air services.

The OECD members are bound to eliminate ‘restrictions on current invisible operations’⁵¹. The current invisible operation refers to a wide variety of trans-boundary service transactions including technical assistance to business and training, market research and provisions for markets and blue prints construction and maintenance services. The members are permitted for reservations to remove restrictions on current invisible operation on strong reasons.

In this regime of world trade law what exactly is its implication on labour force especially in developing countries?

8.9 Impact of Globalization on Social Security of Indian Labour

The Government of India has adopted policies of globalization, liberalization and market economy in the wake of the serious economic crisis that enveloped the country by the middle of 1991⁵². It came after more than 6 months negotiations with the World Bank starting in January 1991. The package of reforms was announced by Narasimha Rao

51. Article 1.

52. According to National Commission on Labour, “during 1980s India had a fairly good economic performance. But towards last years of decade, and particularly in 1990-91, Indian economy entered an unprecedented economic crisis. India found difficult to raise funds in the international markets. India was in the verge of default on external payment liabilities. Under these circumstances, it was felt that there was no alternative but to undertake drastic economic reforms”. National Commission on Labour II, Chapter 4 para 29.

Government in July 1991 which consists of two separate economic policies⁵³: (1) IMF inspired programme based on balance of payment; (2) World Bank inspired programme for structural change of economy in the fields of trade, industry, foreign investments, public sector and the financial sector among others⁵⁴. Globalization and liberalization come to India as a booster⁵⁵ through the economic reforms. The sanctity of economic reforms has been derived from it. Globalization is expected to provide a useful means to develop technologies necessary for the production of goods and services that improve the well-being and flow of finance capital which will bring prosperity in India⁵⁶.

The post 1991 economic reforms adopting market oriented and globally competitive restructuring policies helped Indian economy to grow faster and become more self-reliant in managing its balance of payments, reduce the level of poverty, contributing to human security including health care, home and employment.

8.10 The New Industrial Policy

New Industrial Policy was spelt out on 24 July, 1991 by starting with the process of liberalization. It is stated that foreign investment and technology collaboration were welcomed to obtain higher technology and to increase exports and to expand the production. The

53. Vijay Joshi and IMD Little , *India's Economic Reforms 1991-2001*, Clarendon Press Oxford, p.17

54. *Ibid*

55. R. B. Jain , “Globalisation, Liberalisation and Human Welfare in India: Challenges for Governance” in M M Sankhadhar and Sharda Jain, *Social Security and Welfare Policy*, Deep and Deep Publications, New Delhi (2004), p.429 at p.433.

56. *Ibid*

number of industries reserved for the public sector was reduced to only eight and compulsory industrial licensing was made strict for 18 industries only. Fifty one percentage of foreign investment in high priority industries was made smooth. For free foreign exchange⁵⁷, a liberalized Exchange Rate Management System was framed. The industrial policy stated that large part of public sector operations other than for welfare of poorest in society, the main operating principle should be that of the market economy.

During the transition period, the complementary social measures were also taken to ensure equitable distribution of both gains and costs of economic reforms like, subsidized food supplies through a Public Distribution System (PDS), concessional loan schemes for marginal farmers and agricultural labourers, employment oriented programmes sponsoring different employment schemes like Jawahar Rozgar Yojana (JRY), Nehru Rozgar Yojana (NRY). After introduction of the new policy, government was committed to employment creation and human capital development in Rural India through Poverty Alleviation Programmes and social services such as primary health care elementary education, rural water supply and sanitation.

In February 1992, the National Renewal Fund (NRF) was introduced to provide assistance to workers who would become redundant as a result of adjustment programme. NRF along with rural and social sector improvement programmes were intended to constitute

57. On 30th December 2001, India's foreign exchange reserves touched a figure of 48.11 billion dollars. By 1st March 2002, the reserves have jumped by as much as \$ 299 million and they stood at \$50.744 billion. See Report of National Commission on Labour, Chapter 4, para 62.

a comprehensive and permanent social safety net. This is expected to provide adequate security to those who were affected by the reform policy.

Indian experience of globalization clearly indicates that there is a dynamism in the industrial fund and improvement in the quality of life. The Economic Survey (1995-96)⁵⁸ clearly indicates that the trends in improving the quality of life, increasing employment content of growth and reducing the incidence of poverty is reassuring. Again in 1999, the Presidential Address in Parliament⁵⁹ spelt out government's new strategy and policy approach to employment generation and social development through bold strategy of economic reforms. The elements of social policy include: (1) creation of more employment opportunity per year; (2) primary education and female literacy; (3) primary health services to all citizens; (4) strengthening of welfare and child health services; (5) greater attention to welfare of the disabled and aged; (6) provision for clear drinking water and (7) rural connectivity through all weather roads.⁶⁰

Being a welfare state, the government was committed to provide all types of welfare security measures. But the public concern with enormous public expenditures on social welfare programmes forced the government to impose cuts in these areas or privatize them to raise the additional resources.

58. Government of India, *Economic Survey (1995-96)*, Ministry of Finance, , March 1996

59. October 25th, 1999.

60. Government of India, *Economic Survey 1999- 2000*, Ministry of Finance, 2000 p.20.

The analysis of impact of these globalization, liberalization and privatization on worker's right with special reference to social security is the crux of the study. One argument is that the present labour laws provide over-protection to the existing employees but hinder the growth of employment for those who are outside the system. The reformists demand for removal of Section 10 of the Contract Labour (Regulation & Abolition) Act which prohibits contract labour and removal of Chapter V B of Industrial Disputes Act. According to Chapter V B of Industrial Dispute Act, employers in specified industrial establishment can affect, lay off, retrenchment and closure only with prior approval of appropriate government. In the opinion of RBI such labour protection measures have contributed to the slow growth of industrial investment and employment.⁶¹

Section 10 of the Contract Labour Act envisages prohibition of contract labour on certain conditions. Section 10 also enables the contract labour engaged in prohibited jobs to become direct employees of the principal employer. Now, in the changed circumstances, when jobs are of temporary nature, contract labour becomes necessary. The Economic Survey 2000-01 says:

“The Contract Labour Law, as it exists today makes it impossible for genuine small scale entrepreneurs to provide services to the industry. A modern contract labour law Act should encourage outsourcing of services so that new employment is generated.”⁶²

61. Reserve Bank of India, *Report on Currency & Finance*, 2001-02, Ch.VIII.

62. *Economic Survey 2000-01*, Ministry of Finance, Government of India at p. 29.

Worker's Rights in Free Trade Policy

Government of India has assigned highest priority in economic policy and planning with a determined drive to improve productivity especially in public enterprises⁶³. This is in fact advanced as the rationale for enlarging the role of private enterprises, especially foreign capital which is supposed to be more efficient and productive than public enterprises.⁶⁴ The new economic policy adopted in India fascinated towards friendly market approach is based on the pillars of economic liberalization, privatizations and globalization.⁶⁵ Unfortunately, the new economic policy measures do not contain any specific reform proposals to integrate the labour in the overall framework of policy changes. Labour policies do not form a part of the adjustment programme under the imprint of economic liberalization. Hence liberalization, modernization and globalization may bypass the working class. The wave of liberalization is free to create its impact on employment and earning of the work force.

The argument that workers' rights should be included in the trade agreement is because of two reasons: (a) worker's rights would help to address the disparity of wealth in developing countries and (b) as a result, political stability could be attained which in turn will stimulate investment, economic growth and free trade. If the disparity of wealth is not addressed, any economic benefit, that a new trade agreement may generate all likely to be distributed "very unevenly among different

63. This happened from 1991, after adopting New Economic Policy.

64. BM, "Disciplinary Labour: Government's New Priority", *Economic and Political Weekly*, Aug.9, 1986, p.1392.

65. Sudama Singh and S.S.P. Sharma, "Economic Liberalization", *Economic and Political Weekly*, Aug.9, 1986, p.192.

social classes⁶⁶. One argument is that as a tool to encourage adopting and enforcing worker's rights provisions such as freedom of association and the right to organize and bargain collectively such provisions would help to expand the role of unions and may help to promote political stability by expanding the middle class.⁶⁷ Unions have the ability to promote political development by organizing workers to become a significant pressure group for positive social change.⁶⁸ Once organized, unions get the ability to negotiate with employers to improve worker's rights, to collect and disseminate information to workers and raise worker morale.

The opponents for including workers' rights provisions in the free trade agreement put forth many arguments to support their position. The major arguments include: (1) improvements in social welfare will automatically follow economic growth and can only occur if costs are kept low to attract foreign investment;⁶⁹ (2) forcing nations to adopt worker's rights provision infringes on the sovereignty of those nations; (3) worker's rights are social welfare issues and trade law is not an appropriate forum for social legislation; (4) including workers rights provisions in trade agreement will unnecessarily slow down the trade liberalization process and (5) including worker's right is burden some and costly as there is always a tension between the goals of free trade

66. Katarina Wahlberg, *Causes and Strategies on World Hunger*, available at <http://www.globalpolicy.org/soecon/hunger/economy/2008/05>, accessed on 20th March 2009

67. Steve Charnovitz, "Fair Labour Standards and International Trade" 20 *Journal of World Trade*, 70(1986)

68. *Id.*, at p.72.

69. Benjamin N.Davis, "The Effects of Worker Rights Protection in US Trade Laws: A Case Study of El Salva Der", 10 *AM U.J. International Law & Policy (FAS)* 1177.

global market efficiency on one hand and competition and worker's rights and social welfare on the other.

The MNCs

Multinational corporations are huge business organizations which are head quartered in one country and operate across national boundaries. They are always trying to take advantage of the opportunities available due to liberalization of free international trade. Free trade would allow MNCs to move their manufacturing operations to nations where the business conditions are the most favourable viz., cheapest labour, permissive health, safety and environmental standards. They can assemble their products as cheaply as possible, then ship the products to consumers in to her nations without having to pay trade prohibiting tariffs.

Free Trade and Export Processing Zone and Industrial Parks

Export Processing Zones and Industrial Parks are another example which represents global sourcing as an integral component of economic restructuring in the world economy. These can be managed by a host government willing to enter into a long term contract with MNCs. The original EPZ was established in Ireland in 1959 as a tariff-free, integrated stopover for the storage repacking and labeling of manufactured goods for final shipment to product markets.⁷⁰ Weak host governments compete with one another to attract DFI and MNCs, not only with direct subsidies,

70. UNCTAD, *Export Processing Free Zones in Developing Countries: Implication for Trade and Industrialization Policies* United Nations, New York, (1985).

but also by prohibiting strikes and unions in EPZs⁷¹ and by subordinating worker rights. The host countries hope to benefit from imports of capital and technology, but the social costs of these benefits are huge. MNCs representing international capital who are world-class profit maximisers are interested in maximizing global return on capital. Hence EPZs represent the most modern application of tools in economic growth. Using the technologies and management techniques EPZs may indeed maximize value added.⁷²

But one cannot ignore the fact that globalization and liberalization provide job and thereby increasing income levels. The MNCs bring opportunities and wealth to developing countries. Growing number of MNCs gives evidence that they are voluntarily subscribing to global human rights codes of conduct and policies. The existence of MNCs provides a win-win outcome for workers i.e., the workers are provided with contemporary skill training.

In spite of all these, India is also continuing with economic reform ignoring the depressing effects on the growth of healthy working force. The Planning Commission expects that 8 to 9 million additional

71. Errol.P.Merides and Ani K.Lalonde-Roussy (Eds.), *Bridging Global Divide on Human Rights—A Canada-China Dialogue*.

72. *Id.* at p.346. For eg. In Maquiladoras in U.S.Mexico burden and some EPZs in South and South East Asia, the MCVCS and the institutions which are managing these industrial estates exact rents from the impressive value added that is generated, the condition of labour is generally pitiful. The labour are not covered by any labour codes and social security. Workers live in virtual slavery or bondage and women workers in particular are exploited often being dismissed for uniform reasons as marriage pregnancy or refusal to submit to virginity tests. Like this in Butane which is one of the largest EPZs with all major MNCs of the World present located in Indonesia. The workers here even do not have employment contracts with the companies, wages and terms are fixed unilaterally. And government actually guarantees a policy of no strikes and disturbances.

employment opportunity will be generated per year in Eighth Plan and about 9.5 million per year in Ninth Plan.⁷³ It is true that due to the reform measures, there is a change in the size structure in favour of small and medium industries which in turn have contributed positively to employment expansion. In such a situation i.e., labour issues and trade are inter-dependent and worker's rights are sufficiently trade related to warrant their inclusion in trade agreements because they influence a competitive position of products in the global market place. The question is no longer whether there is a linkage between worker's rights and trade but rather how to effectively link the two without creating unrealistic burden on trade.

The main issue involved in this matter is whether worker's rights provisions will affect the sovereignty of independent nations. The rights are assured by the states according to its culture, political leadership and the nature of its own economic philosophy, resources etc. The argument is that it will be affected when International Trade Agreement include worker's right provisions. It is not true because of the following reasons: (1) the parties that sign international trade agreements are not 'forced' to do anything and the parties involved have choice as to whether or not to participate and if they choose to participate, they are doing so with their consent; (2) it is the inherent nature of international trade agreement that the parties to the agreement have to compromise on certain sovereign rights; and (3) as nations become more and more interconnected and economically benefited, the sovereignty concept must be changed to

73. Planning Commission, *Ninth Five Year Plan (1997-2002)*, Vol.1, pp.201-203.

accept flexibility in international agreements. Hence the argument against sovereignty can be excluded.

Secondly, there is nothing new in incorporating worker's rights in trade agreement between or among nations. For example, the generalized system of preferences (GSP)⁷⁴ authorizes United States to grant duty free treatment to eligible products which meet certain criteria. The GSP requires that for the eligibility the countries must take steps to "afford internationally recognized worker rights" including the right of association, prohibition of forced labour, minimum age for employment of children, the right to organize and bargain collectively, condition of work with respect to minimum wages, hours of work and occupational health and safety.

Thirdly, International Trade Agreements which include worker's rights provisions can have impact on improving conditions of the working class. These can promote worker's rights across the globe and has a positive influence on the improvement of labour standards in the developing countries.

Next is the question of enforcement of these basic standards. The question becomes relevant, because the non-enforcement will end in probable failure of labour standards.

While prescribing the labour standards itself, it should be followed by strict enforcement mechanisms. That will help workers to play meaningful role in economic development of their country. In case of

74. Bobbi Lee Meloro, "Balancing the Goals of Free Trade with Workers Rights in a Hemispheric Economy", 302 *Miami International Law Review* 433 (1990).

persistent violations, strict monetary sanctions must be implemented. These types of monetary sanctions against violators will provide an incentive to encourage compliance.

Along with sanctions, technical assistance should be made available to those countries which do not have resources to comply with the standards. This is because of the fact that primary objective is not to impose sanctions or not to put barriers to free trade but to raise labour standards. Thus the assistance can help the non-complying state to achieve guarantee for complying the standards as per agreement.

Another method is monitoring. An independent, multilateral organization which is well-suited for monitoring can be framed under the agreement or any other efficient existing agency can be assigned the same.

Thus, a balanced approach to conceive the goals of free trade efficient global market and competition on the one hand and worker's rights and social welfare on the other, can be adopted to release the tension effectively.

When entering into such type of International Trade Agreements, the countries especially the developing countries must understand or take a realistic approach towards impact of new information technologies in the global labour market.⁷⁵ The term global labour market itself conveys a meaning that of a shift from the old concept to that labour is a commodity which takes part in the trading process. The basic transformations of the

75. Mario Rodriguez, "Illegal Termination of Workers", *Economic and Political Weekly*, August 30, 1986, p.1536.

global labour market which deserve particular attention while making standards are:⁷⁶

- (i) flexibilisation of working time and in growing importance of part-time employment;
- (ii) the expansion of ‘informal’ labour market, particularly the “service and black economies”;
- (iii) new forms of segmenting and decentralizing the labour process telecommuting world wide subcontracting, global networks of satellite design centers;
- (iv) new methods of employing the productive potential of women’s labour by means of integrating the homework economy and of industrializing the family;
- (v) new forms of automating scientific, technical and managerial tasks, for instance new approaches to design and engineering automation (CAD & CAL) to computer aided production planning and scheduling (CAP) and to computer-integrated manufacturing system; and
- (vi) new forms of world wide sourcing for all types of labour, from unskilled to scientific technical and managerial duties.

8.11 The Recommendations of National Commission on Labour, 2002

The Government of India identified that globalization, liberalization, privatization and consequential technological developments are the main

76. Diester Ernest, “New Information Technologies and Developing Countries: Implications for Human Resources Development”, *Economic and Political Weekly*, August 1986, p.103 at p.105.

factors which affect the labour in order to assure international competitiveness.

In 2001-02, budget speech, Finance Minister, proposed certain amendment to law (a) to facilitate outsourcing of activities without any restriction and; (b) to offer contract appointment. Thus the Government of India appointed a National Commission to (1) suggest rationalization of existing laws relating to labour in the organized sector; and (2) suggest an umbrella legislation for ensuring a minimum level of protection to the workers in the unorganized sector⁷⁷. The Commission took into account the need to ensure a minimum level of protection and welfare to labour, to improve the effectiveness of measures relating to social security, safety at places of work and occupational health hazards; to pay special attention to the problems of women workers, minimum wages, evolving a healthy relation between wages and productivity and to improve the efficiency of the basic institutional framework to ensure the protection and welfare of labour.

The chapter 8 of the Report deals with social security. The Commission found that ‘the crucial link between productivity and industrial efficiency cannot be denied. The level of wages depends on the economic efficiency of the undertaking or industry. Workers have to be as interested in productivity as the management is’⁷⁸.

The Commission acknowledged that a scheme of protection and welfare has to include assistance to meet exigencies as a result of

77. Report of National Commission of Labour II, Chapter 1.

78. *Id.* Chapter 1.21.

unemployment, temporary unemployment, and accidents at places of work, insurance against accidents and occupational health hazards, care in old age, constant upgradation of skills necessary for continued employment.⁷⁹ The Commission mentioned that it was needful to attain and retain the degree of international competitiveness that an economy needs in the era of globalization.⁸⁰ The Commission continued that competitiveness depends not merely on technology, credit, inputs and managerial skills, but also on the contribution that labour makes. The commitment of the work force to quality and productivity must be high. This commitment and new work culture that calls for competitiveness can be created only when workers feel that they are receiving fair wages, a fair share of profits and incentives.⁸¹

Favouring Globalisation: A Paradigm Shift

The Commission elaborately discussed the impact of globalization on Indian labour. Adoption of policies favouring globalization has brought a paradigm shift in the economic and commercial field in India. According to the Commission, the broad features of the economic reforms were:⁸²

- (i) The government opened major sectors of the economy to private sector;
- (ii) Foreign investment was invited in all these sectors;

79. *Id.* at Chapter 1.14.

80. *Id.* at Chapter 1.19.

81. *Id.* at Chapter 1.20.

82. *Id.* at Chapter 4.31.

- (iii) All restrictions on the entry of the private sector into the field of infrastructure and strategic industries were removed;
- (iv) There are more freedom for financial institutions;
- (v) By the cuts in CRR and SLR over a period of years, more funds have been made available by the RBI to the banks. Banks can also approach capital markets for raising funds;
- (vi) Private capital and foreign investments have been allowed in such areas as construction of roads, ports, airports, telephone services etc.;
- (vii) The government wants to reduce its investments in the public sector enterprises;
- (viii) Import restrictions have been reduced;
- (ix) Subsidies are being cut, tax rates are being reduced and the entire fiscal system is being streamlined; and
- (x) The Controller of Capital Issues stands abolished.

All these efforts aim at improving our international competitiveness. But in fact, the new economic policy seems to be resulting in the closure or disappearance of many Indian companies⁸³, especially those engaged in consumer goods industry⁸⁴, apart from mergers and acquisitions of wholly owned subsidiaries¹³ of foreign

83. The commission observes that the Indian entrepreneurs find it is difficult to survive against multinationals whose resources cannot be matched. NCL II Chapter 4 para 91.

84. The main reason is that the competition is with cheap imported good or goods produced locally by MNCs in India.

companies. During such type of reforms, the main apprehension affecting labour are identified as⁸⁵:

- (i) Conflicts due to one line development i.e., development of non-public sector alone discarding public sector;
- (ii) Illegally hiring workers without signing contracts in India;
- (iii) Forcing workers to work extreme hours;
- (iv) Non-payment of salaries on stipulated scale and date;
- (v) Refusal of employers of their worker's insurance for industrial accidents, unemployment etc.;
- (vi) Failure by enterprises to offer working protection facilities;
- (vii) Harassment of women workers in factories;
- (viii) Violation of labour laws and even preventing workers from joining trade unions; and
- (ix) Reduction of opportunities for employment as most of the entrepreneurs wants to reduce their cost.

The Commission found that it was true that a large number of workers lost their jobs as a result of VRS, retrenchment and closures (both in organized and unorganized sectors). There are indirect compulsions, pressure tactics, innovative forms of mental harassment, compelling employees to resign by seeking to terminate them.¹⁴

85. Report, National Commission on Labour II Chapter 4 Para.208.

The following observations were made by the Commission¹⁵:

- (i) Trade unions did not give a call for strike, because they were afraid that a strike may lead to the closure of the unit;
- (ii) Service sector workers are becoming dis-interested in trade union activities;
- (iii) Nature of industrial dispute and the demands are changing and settlement is tried to be resolved in bipartite level;
- (iv) Government attitude is also changing towards workers and employers and permission for closure or retrenchment are easily granted;
- (v) Recovery proceedings against employers who make heavy dues of workers are not seriously pursued;
- (vi) Labour adjudication machinery is more willing to entertain the concerns of industry; and
- (vii) Migration of workers across boundaries is desirable.

The basic characteristic of labour flowing from India to the industrialized countries is of permanent migration⁸⁶. They are generally persons with professional expertise, technical qualification or other skills. Apart from these, there are other types of migration especially to middle East even by unskilled or clerical labour⁸⁷. In case of developed

86. *Id.* Chapter 4 para.315.

87. According to National Commission, since independence, two distinct types of labour migration have been taking place from India. One is movement of persons with technical skills and professional expertise and second is flow of unskilled or semiskilled workers in manual or clerical occupations.

countries, they have well-established social security system and they can easily take care of their workers. Whereas, in developing countries, the situation is different particularly when they face contingencies like closure of industrial units.

With respect to these changes, the Commission suggested certain modifications in the existing labour laws. They include:

- (i) Usage of gender neutral expression ‘worker’ instead of commonly used ‘workman’ in labour legislations⁸⁸;
- (ii) The law will apply uniformly to all establishments,⁸⁹ irrespective of its size and nature of its activity in case of maternity benefits, child care, workmen’s compensation and medical benefits;
- (iii) Dispute settlements are preferred through a recognized negotiating agent which can be made binding on all workers without governmental intervention⁹⁰;
- (iv) Inclusion of provisions of law for determining negotiating agents, particularly on behalf of workers⁹¹;
- (v) Provision for authorities to identify the negotiating agent, to adjudicate and so on⁹²;

88. *Id.* at Chapter VI para 31.

89. *Id.* at Chapter VI, para 16.

90. *Id.* at para 34.

91. *Id.* at Chapter III, para 35.

92. *Id.* at para 34.

- (vi) The changes in labour laws must be accompanied by a well-defined social security package that will benefit all workers irrespective of organized or unorganized sector, administrative, managerial or other categories.⁹³

The Commission also recommended for repeal of chapter V A of Industrial Disputes Act⁹⁴ and to give adequate compensation to workers and on dispute, redressal through arbitration and adjudication⁹⁵.

Under chapter VIII, the Commission recommended a security system in which the state should bear the responsibility for providing and ensuring an elementary or basic level of security, partly or wholly contributory. In such a system, state has a minimum responsibility and it maximizes the role and share of individual and group responsibility.

The Commission appointed a task force and it recommended that wage ceiling and employment threshold can and should be uniform with a provision for raising the wage ceiling and its eventual removal and lowering employment threshold and its ultimate removal.⁹⁶

Another suggestion is to use the word 'employee' as a comprehensive term inclusive of all categories of employees

93. *Id.* at para 37.

94. *Id.* at para 85. This provision is approached by the commission on the point of view of society as a whole. The reason is stated as industrial efficiency is essential for social progress and the protection and generation of employment also imperative for social justice and social progress.

95. *Id.* at para 87.

96. This is based on ILO's Minimum Standard Convention.

employed in any employment.⁹⁷ The Commission suggested a change from an employer's liability scheme to a social insurance scheme.⁹⁸ The National Health Policy assigns a minor role to health insurance to supplement the public services. The Commission suggested delinking the employment injury and maternity.

With regard to ESI Act also the study group on social security⁹⁹ urged that the benefit structure on the ESI Scheme should be unpacked, and provision should be made for extension of the scheme for one or more benefits separately or in groups. The study group further suggested that immediate steps to be taken to extend the scope of the Act for purposes of employment injury benefit and maternity benefit throughout the country.

The Commission also called for a law to place all provident funds under a common regime.¹⁰⁰ The Commission suggested that EPFO should organize an inquiry into the working of all exempted funds by an independent agency and review the entire scheme of granting exemptions from the provisions of this Act.¹⁰¹

It was also suggested that an integrated insurance scheme providing for gratuity, unemployment benefits, lay off and retrenchment compensation be evolved and be entrusted to the EPFO for its implementation.

97. *Supra* n.63, Chapter 8.96.

98. *Id.*, Chapter 8.97.

99. *Id.* at Chapter VIII, para 10.6.

100. *Id.* at Chapter VIII, 115.

101. *Id.* at para 126.

The National Renewal Fund (NRF) was established in 1992 to provide a form of wage guarantor which had to be used for re-training, re-deployment, counseling etc.¹⁰² It is also observed that the present welfare funds can be transformed into instruments of social security by expanding the coverage of the funds; broadening the range of benefits, modifying the financial arrangements for providing benefits and decentralizing the administration of the funds.

The Commission appreciated the working of National Social Assistance Programme (NSAP) as it served the long felt need for uniform material minimum standards for providing social assistance to weaker sections of society. It should also be designed for the payment of children's allowance on a universal basis, subject to a means test to persons below poverty line.

The Commission suggested that the social security system can be of three kinds: (1) Social insurance type of contributory schemes; (2) subsidized insurance/welfare fund type of partly contributory and partly socially assisted schemes and (3) social assistance schemes which will be wholly non-contributory¹⁰³. The mechanism for delivery should be based on two key principles: (a) It should be as decentralized and as close to the beneficiaries as possible; and (b) it should be tripartite or multipartite involving workers, employers, governments and other stakeholders.¹⁰⁴

102. *Id.* at para 160.

103. *Id.* at Chapter VIII para. 434.

104. *Id.* at para 418.

The Commission recommended for establishment of a comprehensive social security system co-ordinating various departments. It was also recommended for a Department of Social Security within Ministry of Labour to co-ordinate, monitor and review specific programmes among various ministries and the states. The Commission recommended to create Social Security Fund of India and a Social Security Fund of each state may be set up. On analysis of the report of the Commission, it is very clear that the Commission accepted and supported the new economic reforms.

8.12 Conclusion

Today in India, only about 8% of workers actually get the benefits available under these Acts. The rest 92%--over 30 crores--work in the unorganized sector, and either are not eligible for coverage, or these Acts are just not implemented for them, with the result that these workers have insecure employments and low incomes. They have no coverage of social security, and have to spend out of their meager incomes for all contingencies such as illness and children's education and in their old age they become helpless. This is in spite of the fact that they contribute over 60% of the country's GDP.

Hence apart from a small segment, the large mass of labour force in India who are also contributing to the development of this country is on streets with out any type of social security coverage. An innovative and revolutionary transformation of the social security system, considering the new challenges and existing social order in India, is need of the hour.

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CONCLUSIONS AND SUGGESTIONS

“With out a revolutionary theory, there can be no revolutionary movement.”

-Lenin¹

One of the main realities facing communities in the twenty first century is the impact of globalization on the local economies. Globalization means the change, moving from central planning to a free market economy as experienced in countries like India. In this context, the approaches to economic reforms attain much significance. The accelerated approach for immediate and drastic change as favoured by IMF and World Bank involves restructuring the economy through integration of national economies, privatization, decentralization and deregulation along with support for entrepreneurship and free market competition². The restructuring process proceeds through three stages: first, a shake out of the old economy by eliminating unprofitable operations; second, developing private sector by recruiting the excess labour made redundant by reforms; and third, establishment of

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1. Vashtey Kenway, “Lenin’s Theory of Social Revolution: What is to be Done?” *Socialist Alternative*, September, 2007 at p. 120, available on www.sa.org.au, accessed on 21st January, 2009
 2. Asfaw Kumssa and John F. Jones, “The Social Consequences of Reform in Transitional Economies”, 26 *Int’l J. Soc. Econ.* 194 at p.195 (1991). See also Richard Jackman, “Economic Policy and Employment in the Transition Economies of Central and Eastern Europe: What Have We Learned?” 133 *Int’l Lab. Rev.* 327 (1993), Martin Godfrey, “The Struggle Against Unemployment: Medium Term Policy Options for Transitional Economies, 134 *Int’l Lab Rev.* 3 (1995)

equilibrium and competition in the new system, through market forces rather than active intervention of government³.

In India, due to the importance given to welfare and socialistic principles, the acceptance of globalization, liberalization and privatization as part of economic reforms has caused serious concerns. There is no dispute in the immediate consequences of radical reforms in the economic development of India. But the main implications of these reforms on the government is how far it can balance its obligations under the Constitution of India especially Part IV. The mere fulfilling of the directions and obligations under international treaties and agreements has created a piquant situation where the economic reforms and development are carried out in contrary to the existing constitutional jurisprudence and without any theoretical background too. This has created a condition where “development itself interferes with human and social development”⁴. This brings the government more responsibility to ensure that the benefits of globalization are evenly, justly and fairly distributed. At the same time it is to be ensured that the new economic measures should not result in greater injustice and inequality to the underprivileged sections. The development of new institutions and structures without strengthening or renewing the traditional systems will cause massive uncertainty about future direction. This is the same with regard to the measures of social security

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3. Richard Jackman, “Economic Policy and Employment in the Transition Economies of Central and Eastern Europe: What Have We Learned?” 133 *Int’l Lab. Rev.* 327,
 4. Paul Streeten, “The Social Dimensions of Development”, in Enzo Grilli & Dominick Salvatore (Eds.) *Economic Development* 145. See also Pradumna B. Rana, “Reform Strategies in Transitional Economies: Lessons from Asia” 23 *World Development* 1157 (1995)

of labour. Thus the possible solution is to secure both, economic prosperity for the society and social security to the labour force.

The historical and conceptual analysis of social security reveals that the term itself has undergone gradual but drastic changes in its meaning and content. In the initial stage it was a charity to the poor. The international documents and I.L.O. principles, transformed it in to a basic human right, which protects the worker from economic distress. International agencies like I.L.O have played a significant role in the development of the principles of social security and in attaining its universal acceptance.

The worldwide scenario of the impact of globalization shows that the present economic reforms across the world has affected social security of labour especially in transitional economies like India, China, Brazil, Mexico etc., where economic reforms and policies favoured by the WTO are implemented without any scientific studies or of their future impact. Some countries have realised that development is not economic prosperity alone and have started introducing changes in their approach towards neo-leberalistic economic policy. Thus, while supporting the policies of globalization, importance is given for the upliftment and protection of their people from exploitation, both economic and social. The U.S., though a capitalist country had adopted many social welfare measures. But with advent of globalization it is slowly withdrawing the social welfare measures through gradual privatization of the social security system. While in U.K., the development of social security can be traced from

15th century and through out its development the government has been trying to balance the reformation policies as well as welfare measures. In the area of social security, the U.K. government is giving more importance to rehabilitation policies including overall skill development than mere social assistance. But in the present economic situation the U.K. is trying to increase the personal responsibility element to lessen state liability.

Sweden can be treated as a classic example where the government was successful in adopting the economic formula of capitalism and welfarism. Its well established social security system from the very beginning based on schemes providing benefits, in cash or in kind or in both is noteworthy. Social insurance system makes up the major part of the public expenditure for social security with respect to cash benefits. To cope up with the changes introduced by globalization, the Swedish government is promoting investments which gives individuals substantial flexibility and that promotes social insurance system like unemployment insurance and sickness benefits.

In India, the laws governing social security enacted by the British are still in force with some minor amendments on coverage or on contribution amount, without any substantial changes to the provisions. The major drawback of the legal framework covering the social security system in India is the multiplicity of laws, shortage of coverage, lack of policy, scarcity of implementation mechanism and above all, lack of clarity in principles which need to be followed. Moreover there are many governmental schemes or packages with unchecked discretionary

powers to administrative authorities causing serious governance issues in the areas of transparency and selection of beneficiaries.

This necessitates that the new economic policy to be streamlined by taking in to account the welfare policies followed hither to so as to bring continuity to the social security system. The reforms should be based on principles which reflect the aspirations of the people and changing needs of the society and to promote the values of labour since major share of Indian prosperity depends on labour.

But in practice, in the various reform processes labour is given the least priority. Some arguments favour economic development without any consideration for labour. They view labour as a part where reduction of cost is possible and not prepared to treat them as a direct beneficiary. In the economic front labour should be considered as part of society i.e., when society is benefited they will also get benefited. But in the present circumstances various fiscal and economic policies fail to take in to account the contribution of labour to development for giving proportionate benefits as other contributors like manufacturers and promoters. This approach has caused the marginalization of the labour force. The employers also try to evade the existing labour welfare laws to maximize profit. For instance, in most of the small scale industries the employers try to keep the maximum number of workers to the statutory minimum⁵.

This implication of economic reforms introduced in 1991 has caused the government to introduce several welfare legislations.

5. For example, some employers keep workers strength less than 20 to prevent application of Employees Provident Fund Act and less than 100 for evading application of Chapter V B of Industrial Disputes Act.

Legislations like National Rural Employment Guarantee Act, 2005 and Unorganised Sector Social Security Act, 2008 were passed by Parliament while several other Bills are still pending. These measures will strengthen the ongoing welfare approach and help the welfare schemes to face the changes introduced by globalization. For instance, the Bill to amend the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 is proposed for making the enforcement and compliance of labour laws faster and easier with the help of information technology. Another Bill to amend Payment of Gratuity Act, 1972 will cover teachers in educational institutes while the Bill to amend Employees' State Insurance Act, 1948 enables the utilization of medical facilities of Employees State Insurance Corporation to implement the Rashtriya Bhima Yojna are pending for getting Parliament's approval. Amendment to Plantation Labour Act, 1951 to add a new chapter on safety and amendment to Workmen's Compensation Act, 1923 in order to replace the term workmen by employee to make it gender neutral are also pending⁶. Though these amendments do not solve the problems of labour in the globalized world, they would add to efforts to make the welfare measures more attractive and adaptable to globalization. But, the government has taken a lethargic approach to these amendments. There is no serious effort from the part of trade unions as before to get them implemented.

The weakening of trade unions was mainly due to the taking over its soul, human resources, from it. Under the economic reforms the human resource departments have taken the power to influence the

6. *Economic Times*, November 19, 2008.

authorities away from the workers. This has even caused bringing together of the trade unions in many organized sectors following different ideologies or philosophies for the benefit of workers. But this movement is also not capable of maintaining unity among workers. Except in certain category of industries, the workers are not organized in all sectors like domestic workers, daily wage earners, etc. The government categorized them under unorganized sector and some initiatives have been taken for providing security of job and income⁷. But unfortunately these provisional efforts are not effective enough to make out their basic need to social security.

In the organized sectors also there are a lot of workers who are working on 'daily wages' or on contract for short period and hence virtually they are out of the "protection" of the organized sector. The names of these daily or contract wagers may not be in the pay rolls and there will be no evidence in office about their whereabouts as they come to do work, get wages and go. Another group is those who work under the outsourcing agencies who do not even know anything about their real employers. At the same time there are developments on the part of the government through policies by relocating a protected employee to an unprotected condition⁸ through various restructuring

7. For example, The National Rural Employment Guarantee Act, 2005, The Unorganised Sector Workers' Social Security Act, 2008

8. For example, if an employee is working in government organization, his rights are constitutionally protected under Art. 311 of Constitution of India. If that organization is converted to a company, he has become a public sector employee protected under welfare legislations for organized sectors. Again if that public sector undertaking is privatized or divided into different units, they may go out of all kinds of statutory protection. Thus this employee is now in the unorganized sector and not covered by any social security protection.

process as in the case of workers under the earlier Postal and Telegraph Department.

The changes introduced by the forces of globalization affected the feasibility of categorising workers as organized and unorganized. This makes the “organization centered classification” to be shifted or changed to “worker centered classification” on the basis of job security and income. Thus, in general this classification can be termed as formal or informal workers.

The main objective of welfare measures for workers is to provide social security in periods of unstabilised economic condition. For achieving this objective, innovative public measures should be adopted along with traditional security measures for sickness, old age, death etc. Hence to ensure social security, the state has to: (a) provide a replacement of lost earning; (b) promote health by providing medical care; and (c) provide assistance to families.

Apart from the constitutional and welfare obligation, being a founder member of I.L.O. India has a solemn obligation to consider I.L.O. agenda viz., right to work and fundamental principles. Though India has not ratified I.L.O.’s Convention on Social Security, India right from independence is following the principles of I.L.O. Hence there will not be any legislative restrictions on India for incorporating I.L.O. mandates to reshape the social security system in harmony with economic reforms, with the support of international community.

Considering all factors, the social security benefits which the state can provide be classified in to (a) old age benefit (b) disability benefit

(c) death benefit (d) sickness benefit (e) maternity benefit (f) medical care benefit (g) employment injury benefit- on death, temporary/permanent disability, medical services (h) unemployment benefit and (i) family benefit.

In order to provide social security under the above said heads, the state has to streamline its approach towards the concept. In order to uphold the constitutional mandate, the state has got mandatory duty to recognize social security as a right and to find measures to ensure that right. The present incomprehensive ad hoc mechanisms under different schemes are not at all feasible in the current condition. A right based approach will enhance confidence in the minds of the workers and definitely that confidence will be reflected in the augmentation of social development. All the social security measures should be promotional and protective in the nature. The 'promotional social security' is meant for those who are in the lowest strata of the society with very low wages and 'protective social security' is for social protection of the under privileged.

Social security to workers can be provided under different schemes. The schemes can be fixed on the basis of liability. Generally the schemes can be (a) Employer Liability Scheme; (b) Provident Fund Scheme; (c) Social Assistance Schemes; (d) Social Insurance Schemes; and (e) Mixed System

Employer liability scheme is a system where the sole responsibility is on employers in providing cash benefits and medical care services to their employees who suffer a work related injury or an

occupational disease. The benefits are provided directly by the employers or through an insurer. But this system has some drawbacks. The cash benefit may be a lump-sum amount for long term contingencies. Another one is the medical benefits which may be limited. The third one is if the insurer is paying the money, he may raise many technical questions to resist claims. Provident fund scheme is compulsory savings schemes wherein contributions from both employers and employees are accumulated in the individual account of the employees. The accumulated savings with interests are paid in a lump-sum when the employee attains retirement age or upon total disability or prior to death before retirement. Partial withdrawals are allowed from individual accounts prior to retirement to meet certain specified needs. The main shortcoming which can be pointed out in this system is the lump-sum amount may not meet long term needs.

Social assistance schemes are completely a non contributory in nature. These schemes are entirely financed from government exchequer. The benefits under these schemes can be classified under 'universal' where the benefits are provided under flat rate basis and 'means tested' where the beneficiary proves his need for financial assistance.

Social insurance schemes are compulsory contributory schemes. The contributions are paid to a common fund from which the cost of benefits and the cost of administration of the funds are met. The contributions are met by employees, employers or both and/or government.

Mixed system consists of elements of social insurance and social assistance. Such a system can have room for the lower strata of the society in the social security programmes. Those who prove the need of the assistance should be given assistance from the government. The criteria for eligibility and the benefits can be fixed by the government. Likewise social insurance is good for disability and work injury benefits to those who are capable of providing contributions. But the coverage of the insurance should be made compulsory under this system. The contributions must be based on earnings and benefits are based on contributions paid. Hence those who are paying higher contributions will receive higher benefits. For this purpose an independent financial system should be established for easy management of the social security system with provisions for giving a social security number⁹ to each citizen. There can be different set of social security measures for non-resident Indians. The government can also sign transnational agreements for those who are working abroad to avoid double payment by the employees.

The major aspect for consideration in ensuring social security benefits in India is coverage¹⁰. In order to identify the needs of diverse sections of the population for social security, it is necessary to classify the total population into different groups. Population of India may be

9. Under 'Re-inventing EPF India Project' Government of India has taken measures to provide social security number. Till 31st March, 2008, 33,48,391 members are given the social security number according to Oscar Fernandes, Minister of State for Labour and Employment. See <http://pib.nic.in/release> accessed on 12th April 2009.

10. *Is informal Normal? Towards More and Better Jobs in Developing Countries*, OECD (2009). See also *Express India*, April 10, 2009 available in www.expressindia.com release, accessed on 12th April 2009.

classified into a working population and non-working population. The working population can again be classified into wage earners, self employed and unemployed. Wage earners can be categorized as:

- (i) those who are employed in the government sector;
- (ii) those who are employed in the organized sector, public or private, excluding government;
- (iii) those who are employed in the unorganized sector; and
- (iv) the non-working population that consists of the old, the infirm and the young who are unemployed and unemployable.

The first priority must be given to the people of last category i.e., the old, infirm and the young persons who are destitute as far as social security is concerned. For this, the first charge is to be created on the resources of the state i.e., social security must be provided to them by way of social assistance. Then comes unemployment category, whose priority need are employment and a source of income. Employment schemes in the nature of public works can be provided as a means to find employment and income to the unemployed.

The third category includes people who are employed in casual or temporary basis and self-employed. They need protection of their employment. Actually they are under the category of regular employment. Though their regular income is assured, they need protection in contingencies. They need food security, old age security, health security etc. Women workers need maternity protection and help

in upbringing their children. Social insurance is the best method for providing social security to these kinds of people.

In this context the following suggestions are made with a view to effectively implementing the social security systems. The coverage of all labour welfare legislations should be widened. The multinational corporations and industrial units in special economic zones must be made accountable in ensuring the labour rights. The protection of workers rights in case of termination of employment should be made stringent and the coverage should be expanded. The present system of multiple schemes under diverse heads, including the ad-hoc heads¹¹, should be avoided. All sections of workers, whatever is the economic condition, should be given social assistance and/or social insurance. When they get income, compulsory methods should be adopted to make sure that they invest money in social security plans so that the government will not be burdened at the time of their misery. For those who are not in a position to invest money, government should come forward with assistance programmes and more stress should be given to rehabilitate and re-equip them.

As recommended by second National Commission on Labour a comprehensive social security system is a welcome step, but not in the sense as it is proposed. The recommended arrangement for comprehensive social security system is just to compile various existing programmes of different ministries and departments. In other words, the recommended comprehensive system is for integration of the existing

11. As mentioned in Chapter 4, many of such schemes are under Prime Minister's poverty Alleviation programmes.

programmes in the organized sector. This may not serve the purpose. The system should streamline the existing system under different enactments and avoid multiplicity and also should cover all workers, formal and informal. The benefits should be clearly defined and delivered at the benefit of the recipient. The system should be made more user-friendly and should not be traumatized whatever be the economic strategies. In such a system, the workers will become more confident and efficient to compete and contribute to the prosperity of the country than ever before. For this objective a single administrative authority should be framed under a comprehensive and well structured legislative framework to recognize and declare social security as a right.

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