

Kamala Sankaran

**Labour laws in South
Asia:
The need for an
inclusive approach**

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Kamala Sankaran

International Institute for Labour Studies
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Preface

This Discussion Paper forms part of a set of studies prepared in the framework of the ILS project “Labour law and decent work in low-income settings”, which is examining the effectiveness of labour law in protecting workers in the developing world.

A significant number of workers fall outside the scope of labour law either *de jure* or *de facto* throughout the world. Changing patterns of production and work, a weakening regulatory role of the national state over the socio-economic sphere and diminishing capacity of trade unions for collective representation have been identified as major challenges to the protective function of labour law today. Globalization, in its socio-economic, political and ideological dimensions, is considered as a key determinant of these challenges. The implications of these developments for labour law are the subject of a lively debate in the scholarly community.

The intention of the project is to contribute to this ongoing reflection from the perspective of developing countries. The above analysis appears to be relevant to their realities. However, in the developing world the limited scope and application of labour law is of course not new. The papers prepared in the framework of this project map and examine both the “old” and persistent factors and the more “recent” factors underlying the limited coverage and problems of compliance and enforcement in the South. They consider the legal, social, economic, political, ideological and cultural context in which labour law develops and operates in different regions of the developing world, taking into account global, regional, national and local dimensions. The papers also critically review some of the responses developed to enhance the application of labour law and broaden the scope of protection.

The present paper is one of six Discussion Papers which treat different aspects of this question.

The paper by Rachid Filali Meknassi: *L’effectivité du droit du travail et l’aspiration au travail décent dans les pays en développement: une grille d’analyse*, proposes an analytical framework for understanding the persistent reasons for workers’ limited access to legal protection in the developing world and examines the impact that globalization is having.

The paper by Adelle Blackett: *Trade liberalization, labour law, and development: A contextualization* deepens the analysis of the impact of globalization by focusing on the relationship between trade liberalization and labour law. The paper by Jan Theron, Shane Godfrey and Margaret Visser: *Globalization, the impact of trade liberalization, and labour law: The case of South Africa* presents South Africa as a case study from a more sociological perspective.

The other three papers examine old and new challenges facing labour law as a tool to promote social goals from specific regional perspectives. They also look at the approaches developed to address these challenges. Moreover, special attention is given to the effectiveness of labour law in promoting one specific social goal, namely gender equality. Two of these papers were prepared by Graciela Bensusán: *La efectividad de la legislación laboral en América Latina* and Colin Fenwick, Evance Kalula and Ingrid Landau: *Labour law: A Southern African perspective*. The present paper by Kamala Sankaran: *Labour laws in South Asia: The need for an inclusive approach* examines common strands in the historical evolution of labour laws in South Asia, and identifies certain key features such as the multiplicity of laws combined with the virtual exclusion of the majority of workers from the scope of such protection. The analysis of the actual capacity of labour law to deliver protection to workers is accompanied by an examination of current proposals to reform the law in the region, particularly India. The paper

notes that claims for 'flexibility' in the labour market have to be placed in the context of the need to provide decent work for the vast numbers of working people in the region. The paper also deals with the role of labour law in both providing protection and ensuring equality for women workers, specifically with reference to its instrumental capacity to achieve gender equality.

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Introduction

This paper examines the scope and function of labour law in the South Asia region, with special reference to India. The expression ‘labour law’ refers to laws dealing with employment relations, dispute resolution, conditions of work, wages and social security. The distinction followed in some countries between employment law and labour law is not maintained in this paper. Labour law refers to statutory provisions, rules, judicial interpretation and practices that have emerged in the countries concerned. The common-law tradition of most countries in this region means that the courts have played a major role in determining the scope and interpretation of the law, often going beyond what the legislature may have intended. The rich corpus of case law also needs to be analysed to understand the scope and effect of the law.

The paper is arranged as follows: Part I examines the historical evolution of labour law. Part II identifies certain key features of labour law in the region and analyses its capacity to deliver protection to workers; it also examines current proposals to reform the labour law in order to improve its reach and enforcement, and considers the ensuing debates in the region, particularly in India. Part III examines labour law specifically with reference to its instrumental capacity to achieve gender equality.

I. Historical evolution

Countries in South Asia have a common colonial heritage. Although legal systems vary today, the origins of much existing law in the sub-continent lies in the British system of common law which was received in the region, beginning with the Charter Act of 1726, and modified by the notions of “equity, justice and good conscience.”¹ By the middle of the nineteenth century, British colonialism had established its dominance over much of present day India, Pakistan, Bangladesh and Sri Lanka.² The Law Commission set up in 1856, led by Lord Macaulay, drafted a series of laws for this region, some of which are still in force today.³

The British law of master and servant laid the foundation for much of the present labour law (see Anderson in Hay and Craven, 2004). Actions for breach of contract were not civil remedies; rather criminal sanctions were imposed.⁴ This curious mix of criminal and civil remedies in labour law continues to find expression in the region, as for instance in India where denial of the minimum wage can result in an application to the designated authority for back wages, and a possible prosecution of the employer by the inspector with the prior sanction of the

¹ The dominance of the British was established, pushing out the vestiges of other colonial legal systems such as the Roman Dutch (Sri Lanka), French (Karaikal, Mahe in India); Pondicherry and Goa in India continued to be governed by civil laws as applied by the French and Portuguese respectively until much later.

² Nepal was never annexed by the British. Nepal and Britain signed a treaty in 1923 which formally recognized Nepal’s independence.

³ Take for instance the Indian Penal Code, 1860 which applied not only to British India but also to the 562 princely states (under British suzerainty) that comprised much of the South Asia region. After India and Pakistan became two political entities in 1947, the law was called the Pakistan Penal Code in Pakistan, while the original law continues in India. Since the independence of Bangladesh (erstwhile East Pakistan) in 1971, the same law is known as the Bangladesh Penal Code, 1860. These laws are identical except for some amendments made in each country. Sri Lanka has the Penal Code of 1883 which is a precursor to the (Indian) Penal Code. The Code of Criminal Procedure 1898 formed the basis of the criminal procedural laws in this region. Hay and Craven (2004) point out that in the nineteenth century with the export of indentured labour from India, Indian laws came to be borrowed in the South East Asian countries. A case of reception and borrowing of law come full circle, perhaps?

⁴ See for instance the Employers’ and Workmen’s (Disputes) Acts enacted before the 1860s.

government. An additional feature in this region has been the specific performance of a contract of employment when it was breached (instead of the usual claim for damages). This was enforced quite vigorously in the colonies to fulfil the urgent need for labour in South Asia⁵ and other parts of the world. At the same time, the idea of a contract of employment, with its implied notions of *consensus ad idem*, and freely given consent to the terms of employment, meant that criminal remedies for breach of a contract of employment or the specific performance of the contract by compelling the deserters to work, could not be equated with slavery or its equally barbaric South Asian cousin – bonded labour.

The second influence on the formation of labour law was the creation of the ILO and the impetus it gave to law-making in the region. Laws such as the Workmen's Compensation Act 1923 (1935 for Sri Lanka), Trade Unions Act 1926 (1935 Trade Union Regulations for Sri Lanka), Trade Disputes Act 1929 (replaced in India, Pakistan and Bangladesh by the Industrial Disputes Act, 1947 and Industrial Disputes Act, 1950 for Sri Lanka) were adopted in the entire region.⁶

A third phase in the formation of South Asian labour law was the period following independence (India, Pakistan, Sri Lanka) and the start of the democratization process (Nepal), in the middle of the twentieth century. This coincided with a thrust towards industrialization and towards developing what (in India) has been referred to as the 'commanding heights' of the economy. Based on the new Constitutions drafted in the course of movements for independence and social justice, there was a strong emphasis on basic rights of equality and freedom and a focus on the need to eradicate poverty and discrimination. Countries like India and Sri Lanka had a clear orientation towards a socialistic model of society, and their governments emerged as the biggest employer. The state and public sector dominated much of the secondary and tertiary sectors.

Strong trade unions had already emerged in the colonial period and these were strengthened and seen as partners in the planned development of the newly independent countries. Much of the legislation passed in this period relates to the organized, industrial and formal part of the economy.⁷ Much of the attention in labour matters, by scholars based in the South Asian region and abroad, in this period also focused on industrial relations, with theoretical and empirical work in this area (see Myers and Kannappan, 1970). Studies also point out that the industrial relations systems that emerged in this period were a compact between trade unions and management, with an important role played by the state, in order to fulfil the goals of planning and rapid industrialization (Johri, 1967; Kennedy, 1966). Some studies also point to the role of the trade unions in favouring a policy of import substitution and protectionist policies. (See de Silva, 1998.) It must be noted that labour policies were strongly "industrial relations-centric" in the sense of concentrating on labour relations in the formal sector which most closely mimicked the "West" (Kahn-Freund, 1974); labour relations in the unorganized sector were largely ignored.

In the past two decades several changes have been taking place in the labour laws of the South Asia region. The process of liberalizing and opening up the economy in India has brought about demands for urgent changes in the labour law.⁸ Changes to the labour law in Pakistan were made against the background of the proclamation of emergency (Industrial Relations Ordinance,

⁵ The demand was greatest in plantations in Sri Lanka, Assam (India) (euphemistically called tea gardens – conjuring up visions of elegant tea parties of the sahebs) and in roads and railways.

⁶ Industrialization in Nepal took place later than in other countries in the region. Thus trade unions were formed only after industrialization began in the mid 1930s and disputes emerged shortly thereafter. The Factories Act was passed in 1959.

⁷ See for instance in India social security laws such as the ESI Act 1948, EPF Act 1952 and Pakistan (applicable to Bangladesh (erstwhile East Pakistan also))– Employment of Labour (Standing Orders) Act 1965, Working Journalists (Conditions of Service) Ordinance 1960, Road Transport Workers Ordinance 1961, Tea Plantation Labour Ordinance 1962, Minimum Wage Ordinance 1961, Employees' Social Insurance Ordinance 1962.

⁸ See for instance the Report of the National Commission on Labour (2002) which recommends changes in labour law in the light of globalization, and also changes to address the needs of those in the informal economy.

2002). The procedure for dispute resolution was streamlined in Sri Lanka (Industrial Disputes (Amendment) Act, 1990. No. 32) and the revamped Labour Act, 1992 of Nepal followed the restoration of democracy there. These changes reflect the repositioning of labour law in this region. Instead of acting as a protective measure to secure workers' rights labour law is now considered to be a way to ensure faster growth and flexibility. It is also a way to make the region an attractive destination for investment.

II. Labour law in South Asia – Features and proposals for reform

Features of labour law in the South Asia region

At the risk of over-generalization and over-simplification, I indicate below some of the features of labour law in the region that merit detailed study.

Limited scope of labour law

Labour laws in the countries of the region are not universally applied and exclude several groups of workers or groups of establishments from their scope. It is generally the formal or organized sector (typically the larger scale manufacturing and service sector) that is covered by labour law.

Labour laws often apply only to certain sectors of the economy, or in some cases to what is interpreted judicially to be an “industry”. This is achieved by having laws dealing with the safety and health of workers limited to factories, mines, plantations or certain specific sectors.⁹ Exclusion is achieved in other ways also. The labour laws variously determine minimum levels of employment as conditions for their applicability and so exclude vast numbers of smaller establishments.¹⁰ Most establishments in India employ less than 10 workers and are thus below the threshold limit. This aspect coupled with definitions of workers based on *functional* or *remunerative* criteria excludes certain categories of workers such as those in domestic work, those in managerial or supervisory levels, teachers and doctors whose work does not fall within the description of workmen or those earning above a certain ceiling, which results in limiting the coverage of labour laws.¹¹ Casual workers and workers engaged by contractors are often excluded from the definition of ‘worker’ or ‘workman’ in these laws, on the grounds that they have not put in the requisite minimum eligibility period (in the case of social security benefits) or are not ‘employed’ (in the sense of being under direct control and supervision) and are thus not deemed to be within the scope of a ‘contract of service’ vis-à-vis the principal employer. As a result many labour laws apply only to a small proportion of the workforce. Thus although an enterprise may be covered by the law due to its size or sector (and thus be part of the formal economy), a number of workers employed within such enterprises could still fall outside the

⁹ Thus the Factories Act, 1934 of Pakistan, the Factories Act, 1965 of Bangladesh, Factories Act, 1948 of India, Factories Ordinance, 1950 of Sri Lanka, the Labour Act, 1992 of Nepal apply to factories and other specified establishments, but not to all establishments where workers are engaged or employed.

¹⁰ Thus, in India most of the labour laws have a threshold limit of 10 or 20 employees for laws relating to social security or conditions of work to apply; the limit is even higher, fixed at 50 or 100 in the case of laws which deal with terms of employment and procedures to be followed for disciplinary action and lay down retrenchment, lay-off and closure compensation. See the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947 as examples of the latter category. In Pakistan several labour laws apply to workplaces with more than 50 workers. See Afzal, 2006, p. 116.

¹¹ Thus for example, in Bangladesh, managerial and administrative employees are excluded from the right to association; (section 3(a) of the Industrial Relations Ordinance, 1969), while under the Trade Unions Act, 1926 managerial and administrative staff have the right to form unions but are excluded from the scope of the Industrial Disputes Act, 1947 in India.

scope of the law due to the nature of the work they perform or other exclusionary criteria. It is thus possible to talk of informal employment within a formal enterprise.¹²

Changes due to economic policies have also had their effect on the number of people covered by the labour laws. Thus, in India, the loss of around 1.1 million jobs in organized sector manufacturing between 1995 and 2001 (part of the period of liberalization) has meant a reduction in the number of persons covered by labour laws. Simultaneously, there has been an increase in the number of contract workers in the same sector. Contract labour is defined as those engaged by a contractor/intermediary to work in the establishment of the principal employer. Such workers would – given the limitations of the definition – be outside the scope of the protective labour laws in most instances.¹³ As noted earlier some of the labour laws apply only to workers directly employed; in other cases contract labour is explicitly included in the scope of the law but this is by no means universal. Laws such as the Contract Labour (Regulation and Abolition) Act, 1970 empower the government to abolish contract labour if the jobs are perennial; this law is seen as reducing the flexibility of the labour market, and is at the centre of debates about labour law reform. This question is discussed later.

It is estimated that well over 90 per cent of all workers in this region are in the informal (or ‘unorganized’¹⁴) sector, and this proportion is growing. Workers excluded from labour law would fall within the informal sector.¹⁵ The informal sector normally covers workers in agriculture, in small-scale establishments, the self-employed and also casual, temporary workers in the formal sector who are not covered because they do not have the minimum required period of employment in a given year to be eligible for benefits.¹⁶ More than 50 per cent of workers in the unorganized/informal sector are self-employed and this is a factor to keep in mind while formulating policies for this sector. The percentage of women in the unorganized workforce is higher than the percentage in the organized sector.

Macro and micro level studies point to the shift of employment from the organized to the unorganized sector. This tendency has increased with globalization¹⁷ and the fall in organized sector manufacturing. Further, even within the organized sector there has been a decline in full-time employment and an increase in casual and contractual employment. This has meant that even in non-agricultural sectors, employment is characterized by the absence of a clear

¹² The Government of India, for instance, defines informal employment as informal jobs both in informal and formal enterprises and in households. Employees are considered to have informal jobs if their employment relationships are, by law or practice, not subjected to standard labour legislation, taxation, social protection or entitlement to certain employment benefits. For further details, see www.mopsi.nic.in. In any event, not being protected by the law is not the only feature of informality. As the ILO Report notes, ‘The different groups have been termed “informal” because they share one important characteristic: they are not recognized or protected under the legal and regulatory frameworks. This is not, however, the only defining feature of informality. Informal workers and entrepreneurs are characterized by a high degree of vulnerability. They are not recognized under the law and receive little or no legal or social protection and are unable to enforce contracts or have security of property rights.’ ILO, 2002, p. 3.

¹³ Studies indicate that 1.1 million workers lost their jobs in the manufacturing sector across major states and industry groups. This coincided with a phenomenal growth of contract labour. The proportion of contract workers rose from 40 per cent to 62 per cent between 1990 and 2002 in manufacturing sector employment in Andhra Pradesh. See Sharma, 2006, p. 2081. Between 1984 and 1998 the use of contract labour grew from approximately 7 per cent of total work days to 21 per cent in the period. The growth was more marked in the case of the public sector enterprises, though in absolute terms private firms engage in twice as much contracting out. See Anant and Sankaran, 2003. For further details of the impact of globalization in India, see *Report of the Study Group on Globalisation and its Impact, 2002*.

¹⁴ I use the expression ‘unorganized’ and ‘informal’ interchangeably; ‘unorganized’ sector is used in Indian laws and policies.

¹⁵ Certain laws such as the minimum wage law apply to the informal economy.

¹⁶ For details of the labour law concerning the informal economy see Sankaran in Davidov and Langille, 2006. In India, in the case of workers engaged in agriculture, forestry, fisheries and plantations the proportion is over 99 per cent; 75 per cent in the manufacturing sector; 78 per cent in the building and construction sector; 98 per cent in the trade and commerce sector and 61.5 per cent in the transport, storage and communication sector.

¹⁷ Some commentators maintain that the ‘inflexibility’ of the formal economy bound by rigid labour was one of the reasons for the decline in employment growth in this sector. Changes in the production processes have also contributed to these shifts. See Sharma, 2006.

employer-employee relationship, a high incidence of home-based work, under-employment and lack of regular employment. This is particularly true for women workers, with most women working in the unorganized sector in this region (Unni, 2001). Yet the legal framework for regulating employment relationships is largely focused on “typical” full-time regular employment in the organized sector.

Many people in this sector are the ‘working poor’ who do not earn a minimum wage and whose conditions of work are precarious and unsafe. Family labour is engaged in some home-based occupations. Child labour is also present here. Debt bondage may also be present. Piece-rate work, casualization and contractualization of work are prevalent and are increasing. Employment is often seasonal and intermittent. It is essential to provide decent work to increase the productivity and viability of this sector.

The past couple of decades have seen new categories of exemptions – the case of export zones in the region. The choice of an export-led industrialization strategy led to the creation of Export Processing Zones in Sri Lanka. National labour law clearly privileges the maintenance of export sector manufacturing in Sri Lanka over the normal trade union rights of the workers.¹⁸ India enacted a Special Economic Zone Act in 2005 but in the face of opposition had to restrict the law to procedures for setting up such zones rather than the regulation of labour relations within such zones. Bangladesh passed the Bangladesh Export Processing Zones Authority Act, 1980 providing for the establishment of EPZs that could attract FDI and increase export earnings. Instructions have been issued to retain a minimum of labour standards in these zones. Despite the enactment of the more recent EPZ Worker Association and Industrial Relations Act of 2004, in Bangladesh, serious allegations of violation of trade union rights in these zones continue.¹⁹ Pakistan too follows a system of exempting export zones from the scope of labour laws.²⁰ Indian labour laws are applicable to such export zones, but their enforcement is deliberately kept weak; prior permission from the Development Commissioner in charge of these zones is required before inspection can take place, resulting in the enforcement agencies often turning a blind eye to lack of compliance (Oberai et al., 2001). Maintaining very high levels of membership in order to qualify as a bargaining agent for collective bargaining is a related aspect of limiting trade union rights.²¹

The conventional explanation for dualism in the labour laws and the exclusion of vast numbers of workers from protection was the view that the spearhead of growth would be the modern industrial sector and that gradually the dual economy would be consolidated with the formal sector (Sethuraman, 1997). Another explanation for such exclusion from the law could also be based on the lack of ‘demand’ for such a law from a poorly organized segment of the

¹⁸ For instance, the Emergency (Maintenance of Exports) Regulations (No. 1 of 1992) prohibits the intimidation of persons employed or engaged in enterprises which manufacture articles for export with the intention of disrupting the activities of such enterprises. Persons guilty of such an offence shall be liable to imprisonment for a term between 10 and 20 years. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) in its 75th report in 2004 states that the Board of Investment (BOI), the overseeing authority of the zones, indicated in a communication dated 21 May 2004 that it has made arrangements to insert an additional clause to section 9A of the Labour Standards and Employment Relations Manual as per which a duly nominated representative of a trade union, who is not employed in a BOI enterprise but whose trade union has members employed therein, whether within or outside the EPZ, shall be granted access to the enterprise/EPZ under certain conditions.

¹⁹ See for example, Report of the CEACR, 77th Session, 2006 on the manner of interference by the Bangladesh Export Processing Zones Authority (BEPZA) and discrimination against leaders of Active Worker Representation and Welfare Committees (WRWCs).

²⁰ See for instance the exclusion of the right to form trade unions in these zones in the Industrial Relations Ordinance, 2002 and the comments by the CEACR.

²¹ For example, in Bangladesh, there is a 30 per cent membership requirement for registration of a trade union. That is to say that 30 per cent of the total number of workers in the establishment or group of establishments in which it was formed are required to be union members. There is a further requirement to have one-third of employees as its members in order to be able to negotiate at the enterprise level. See sections 7(2) and 22 of the Industrial Relations Ordinance, 1969, and comments on this in the *Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), 75th session, 2004*.

economy. Sectors such as agriculture, construction, home-based and other activities in the unorganized or informal sector are outside the purview of the important labour laws in the countries in the region, with the result that there is no institutional mechanism for dispute resolution, and no regulations governing the terms and conditions of work. This, in turn, has contributed to the low levels of unionization among these workers.²²

Multiplicity and lack of uniformity in the law

A common feature is the existence of multiple laws enacted to deal with conditions of employment in various sectors of the economy, such as in India²³ and in Bangladesh.²⁴ Consolidation has taken place to some degree in Sri Lanka, with perhaps the greatest consolidation in Nepal. Other efforts are also afoot to consolidate or simplify the labour law.²⁵

Multiple laws with differing definitions of ‘worker’, ‘employer’, ‘establishment’, ‘industry’, ‘wages’ has meant a lack of uniform coverage. People may be covered under a law dealing with conditions of work but may be excluded from the scope of a social security law because their income is above the maximum income coverage limit. Uncertainty in the capacity of the law to protect all those working in a sector it supposedly covers erodes its authority as much as the non-applicability of the law to many sectors of the economy.

Multiplicity of laws has another dimension affecting its capacity to serve its purpose. Each law creates its own authority for compliance and adjudication of disputes. Currently in India, disputes relating to non-payment of wages or to compensation for injuries are dealt with at the state level by authorities notified by the various state governments under the different laws. In addition, in the case of a federal country like India or Pakistan, each state government notifies the number and location of authorities under different labour laws in the manner it considers expedient. If all quasi-judicial powers were handed over to a unified labour judiciary with broad jurisdiction, some degree of uniformity in labour adjudication would develop. There have been proposals at various times for a unified labour judiciary that would have the power to deal with all disputes and offences under the labour laws. (At present there are different sets of authorities/courts dealing with civil and criminal remedies under the labour laws). However, labour administration will vary across states with a federal structure.

Another aspect relating to the lack of uniformity is the constitutional structure of the country. Unlike other countries (Sri Lanka now having limited devolution of powers), India and Pakistan have federal Constitutions where both the central and provincial legislatures can legislate on labour matters. As a result there is considerable variation across states/provinces in some labour questions. Where the central legislature has enacted a law, uniformity prevails due to a supremacy clause. Thus the important areas of trade union formation and dispute resolution are centrally determined in both countries. Even where a central law has ‘occupied the field of legislation’, flexibility and deference to federal concerns have been achieved in a number of

²² In the case of India, early commentators on industrial relations and labour law noted that the government’s labour policy with regard to the unorganized sectors is “in direct proportion to the amount of trouble and worry that labour can give to the government. That accounts for the fact that agricultural labour, which is phenomenally dumb and helpless, derives the least measure of support and assistance from the government,” Subramanian, 1967, p. 314.

²³ In India at the Central level there are the Factories Act, 1948; Mines Act, 1952, Plantations Labour Act, 1951, Beedi and Cigar Workers Act, 1966; the Child Labour Act, 1986, Dock Workers (Regulation and Employment) Act, 1948; Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981; Motor Transport Workers Act, 1961; Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; and Shops and Establishments Acts of different states.

²⁴ Bangladesh has the Road Transport Workers Ordinance, 1961; Tea Plantations Labour Ordinance, 1962; Factories Act, 1965; Shops and Establishment Act, 1965; Working Journalists (Conditions of Service) Act, 1960; Apprentices Ordinance, 1962; Inland Water Transport Workers (Regulation of Employment) Act, 1992; Newspaper Employees (Condition of Service) Act, 1974; Dock Workers (Regulation of Employment) Act, 1980.

²⁵ In the case of Pakistan there is a move to reduce the number of labour laws from 27 to six, see Reinecke and White, 2004. In India the National Commission on Labour, 2002 has suggested similar rationalization and consolidation for the unorganized sector, while attempts have been made to codify the labour laws in a single law. See *Indian Labour Code*, 1994 (Draft) prepared by National Labour Law Association.

ways. A state law could take the form of entirely new legislation or it could be an amendment to the central law with reference to the state. The other characteristic of labour laws in a federal state is that many of the centrally enacted laws have given the power of enforcement to the 'appropriate government', thereby ensuring provincial variation in the manner in which laws are applied. It also means that some provinces/states could decide, for political or economic considerations, to be more lax than others with respect to labour law compliance.²⁶

Dominant role of the state and juridification of disputes

One of the early impacts of colonial rule in this region was the establishment of a centralized legislative authority, and the creation of a 'modern' legal system that claimed greater normative authority (backed by the full force of coercive machinery) in all matters compared to existing normative systems. This early view of law as a 'modern' force and the legal system as the superior normative order to settle disputes is also reflected in the ease with which compulsory adjudication as the method of settling industrial disputes came to have primacy in many countries in the region.

The diminishing of what some commentators have called the non-state legal systems in this region (Baxi, 1982; Rudolph and Rudolph, 1967; Jain, 1990) has underscored the growth of the power and influence of the state in those areas where it chose to intervene.²⁷ The intervention of the formal legal system in labour matters has been a deliberate choice made by the parties in power, as is demonstrated by a clear decision *not* to intervene as much in areas of 'personal' matters leaving it to the religious normative system to decide disputes.²⁸ Even with respect to labour matters, it was implicit (though never formally acknowledged) that since the applicability of the labour law was limited,²⁹ disputes that arose in the agricultural sector or informal economy (to which the laws relating to labour relations or dispute resolution did not extend) would be settled by other (non-legal) means. Thus till today, in most countries in the region, disputes arising between agricultural labourers and employers over terms and conditions of employment are 'settled' outside the fold of the law. This is because the reach of the labour law is limited, and does not cover all employment relations. In areas where the labour law does not apply, social and political processes resolve disputes: by episodic social unrest and violent conflict, out-migration by labour in search of better work, and rarely, collective trade union pressure. Of significance is also the fact that there is no comprehensive anti-discrimination law in India prohibiting discrimination in hiring and dismissal on caste or religious grounds; the Constitution prohibits it only in state employment, and generally prohibits the practise of 'untouchability' (egregious forms of discrimination against 'lower' castes) by private persons also. Caste and religious networks therefore reproduce themselves in the gradually growing informal economy as the formal economy (often state economy – since the government is the largest formal sector employer in India) shrinks in the liberalized era (Hariss-White, 2003; Breman, 1996).

The central role played by the government and courts in labour disputes (often more frequent than settlement through collective bargaining) has led to the greater 'juridification' of all disputes and grievances. For instance, the power of the government to refer a dispute for adjudication 'at any time' in India has meant that bipartite or alternative modes of dispute redressal have played a limited role.³⁰ Similarly in Sri Lanka, under the Industrial Disputes Act,

²⁶ Some states such as Gujarat and Rajasthan in India have recently demanded that labour matters be removed from the concurrent list in India and handed over for legislation exclusively to the states.

²⁷ For example, see its intervention in introducing compulsory adjudication as contrasted to collective bargaining in industrial matters imposed in present-day India, Pakistan and Bangladesh by the Defence of India Rules in 1941.

²⁸ This is so in almost all countries in the region. Thus Bangladesh after 1971 has chosen not to intervene in matters relating to Hindus who continue to be bound by the ancient uncodified Hindu law, while very little legislative intervention has taken place in personal law matters governing Muslims in India. Pakistan however has chosen to modify to a much more radical degree the Shari' a applicable to its Muslim population.

²⁹ For instance, in India most of the labour laws apply to establishments which employ a varying minimum number of workers; in Pakistan labour laws apply only to workplaces with more than 50 workers.

³⁰ Micro-level studies of the industrial adjudication processes point out that on average adjudication of an industrial

the government can refer a dispute to adjudication or arbitration, yet the award of an Industrial Court has greater weight than an award of an arbitrator and cannot be repudiated, unlike the latter which can be repudiated after 12 months. However, in Nepal under the Labour Act 1992, the government can only refer a dispute not settled in direct negotiation or conciliation to an arbitrator or a tripartite committee with the mutual consent of parties. While the need to give importance to bipartite negotiations is periodically raised by governments, trade unions and employers, no concerted effort has ever been taken on this front. One reason for this is the reluctance of the government to lose control of the industrial relations machinery, which is seen as pivotal in insuring industrial peace and growth; the other is the concern among trade unions that in sectors where they are weak, reliance on collective bargaining may make them vulnerable.

The recent period of liberalization and globalization has seen a decline in union power in the region. Privatization of the erstwhile public sector has created a major dent in the traditional bases of the trade unions. Downsizing and the increased use of casual and contract labour have also contributed to this. In selected countries in Asia a decline of trade union density and trade union influence has been noted (Kuruvilla et al., 2002). On average, the union density in India is around 50, or, in other words, half the workers in unionized establishments stay outside unions (Ramaswamy, 1992). While talking of union membership in this region, it may be better to speak of union influence rather than a fee-paying membership, since it appears that a large number of workers are reluctant to pay dues but are in complete solidarity with a union during a struggle (Bhowmik, 1992). However in certain industries like banking, insurance, ports and docks unionization is quite high; it is also higher in larger establishments than in small/ medium ones. Unionization rates in Sri Lanka are markedly higher than in other countries in the region. The multiplicity of trade unions and the growing number of splits is another problem. Due to the political nature of trade unions in this region, we have a multiplicity of unions affiliated to the different political parties. The trade union laws for all the countries in the region have contributed to this. The minimum number required to form a union has been kept quite low in most countries till recently.³¹ Further, the law has always recognized and permitted the political links of trade unions, through provisions permitting outsiders to be on the executive of the unions, the creation of a political fund which workers can opt to donate, permitting political support as legitimate trade union objects, etc. Recent changes to the law in Pakistan and India have addressed the question of multiplicity.³² There are also moves to reform the labour laws in Bangladesh along the same lines.³³ Emergency measures which have frequently been imposed in all the countries of the region have taken their toll on the trade unions. For instance, as part of the emergency measures several trade union rights have been curbed in Sri Lanka.³⁴

Another aspect that strengthens the primacy of the state in all labour disputes is the *exclusive* power of the government in most cases to refer a dispute to adjudication in India, Sri Lanka, Nepal. (The power to refer a dispute to adjudication is a distinct but related aspect of the tripartite nature of labour relations, with a pre-eminent role of the state in such matters). The power of reference is a discretionary power with the government, to be exercised according to

dispute takes 3 years to conclude. Around 40 per cent of the disputes are abandoned because the worker is unable to pursue the court case further, and even when pursued until the end in a majority of the cases, the workers get no relief. See Saini, 1995.

³¹ In India, Pakistan, Bangladesh it was seven.

³² Through an amendment in the (Indian) Trade Unions Act in 2001, at least one-tenth of the membership or one hundred workmen, whichever is less, is required for registration of a trade union. In Pakistan by the new law of 2002 this is fixed at one-fourth. Pakistan's law also requires all members of the trade union to be employed in the trade or industry, thereby curtailing political leadership of trade unions.

³³ A tripartite Labour Law Reform Committee (LLRC) was reconstituted by notification of 24 August 1998 to review the draft Labour Code of 1994. See *Report of the CEACR*, 70th Session ILC, 1999.

³⁴ Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000. Gazette, Part I, 2000-05-03, No. 1130/8, pp. 1A-37A contains provisions on the control of meetings, processions and publications.

the need for a binding judicial resolution of the dispute (and subject to limited judicial review).³⁵ The lack of direct access to remedies for the workers becomes even more important in rights, as contrasted to interest disputes. Often (with the exception of Nepal) there is no separate machinery for rights and interests disputes. Trade unions have often asked for this direct access to remedies to be broadened in certain case, bypassing the need for a governmental reference to move the courts. It is necessary to address the question of whether workers should have the right to launch proceedings upon failure of statutory conditions relating to safety and health or whether this should be at the discretion of government as at present. The question of access to remedies, which is also discussed later, is in many ways linked to how the state enforces labour law. The structure of industrial relations which was developed over 50 years ago, placing the state at the very centre of enforcement, was meant to safeguard the interests of society and to resolve disputes that could not be settled through bipartite methods, by referring them to compulsory adjudication. Today, when juridification of disputes has come to stay, there is a need for independent access to the courts/tribunals by the parties.

The importance given to the state in dispute settlement means that adequate attention has not been paid to the development of bipartite settlement of disputes in some countries, notably India. Many countries in the region have laws dealing with the recognition of trade unions for the purposes of collective bargaining. In Pakistan the Trade Union (Amendment) Ordinance, 1960 provided for compulsory recognition of trade unions. Disagreements over the method of determining the bargaining agent – the check-off or the system of secret ballot – have been an obstacle. India still has no provision in the central law to determine the bargaining agent in an establishment/industry and no provision for compulsory recognition of trade unions. In the mid-twentieth century these two countries were often contrasted with the United States, where the National Labour Relations Act, 1935, with its provisions for recognition of a bargaining agent, was instrumental in developing the trade union movement. Timely legislative provisions regarding recognition of a bargaining agent might have gone a long way in reducing multiplicity and helped consolidate the trade unions.

Current debates around labour law

Labour law and economic development

One of the questions that globalization has thrown in sharp relief is the function of labour law and its effect on economic development. Many of those calling for reform and flexibility in the labour law have based their argument on the adverse effects that rigid labour laws have on economic development. Thus in India the understanding that labour laws pose ‘rigidities’ that hamper the ‘flexibility’ of business interests is quite well debated. The degree of state control and the related ‘inflexibility’ of labour law has been at the centre of current debates to delete Chapter V-B of the Industrial Disputes Act in India – a provision that requires prior permission from the government before retrenchment, lay-off or closure of units by large employers.³⁶ The lines have been fairly rigidly drawn in this debate, with trade unions wanting governmental intervention to safeguard employment levels and existing rights of job security while industry demands what is termed an ‘exit policy’ (Debroy and Kaushik, 2006). However, even where the labour laws are considered to be ‘rigid’, the poor enforcement of laws and the contractualization and casualization of the labour force often provide enough ‘flexibility’. Other areas for labour law reform have focused on the deletion of section 9A of the Industrial Disputes Act, 1947 which requires prior notice to be given to the workers concerning conditions of service, the need to remove government power to order abolition of contract labour in jobs that are permanent or perennial, and instead to allow the use of contract labour in non-core, peripheral jobs, and the

³⁵ Where disputes are not referred for resolution using the state’s industrial relations machinery, parties are free to use collective bargaining to settle matters. Given the often skewed nature of industrial power, it is the workers who more often than not seek governmental intervention in such disputes.

³⁶ The Second National Commission on Labour (2002) recommends doing away with prior government permission in cases of lay-off and retrenchment, retaining it only in the case of closure of an undertaking.

need to simplify and harmonize labour laws and if possible to consolidate them (this last point of course having widespread consensus).

The questions raised here relate to a broader question: whether labour law is inimical to economic growth, and whether adherence to such laws hampers economic development. The lack of empirical studies on the effect of labour law regulation on the economy is noticeably absent in much of the debate.³⁷ There is a need to review and analyse the literature available to see if various myths about the effects of labour law are correct or not. There is also perhaps a need for more studies to be carried out.

Without attempting to be in any way comprehensive, I draw attention to some studies on the effect of labour law in India in certain sectors/areas, in order to draw some tentative conclusions (Sharma, 2006; Anant et al., 2006; Sundar, 2005). In an early study, Kaushik Basu *et al.* (1997) developed a model for studying the effect of provisions for retrenchment compensation under the Industrial Disputes Act (IDA) on labour. Another study on the effect of pro-worker amendments to the IDA covering 1958-92 shows that these are associated with lowered investment, employment, productivity and output in registered manufacturing;³⁸ however, the methodology of the study has been criticized (Bhattacharjea, 2006). Fallon and Lucas too have argued that job security provisions have hampered employment demand (1991). A study done in 2005 shows that higher FDI in a sector increases the wage rate but has no effect on employment. On the other hand the export intensity of a sector is positively related to employment but not wage rates. The study concludes that this could be because of rigid labour laws and points to the need for special economic zones (SEZs) with flexible labour laws and other incentives (Banga, 2005). The calls by many employers' groups, economists and academics for 'flexibility' in the labour law and for an exit policy have also cited the example of China and its flexibility as the mantra behind its success.³⁹

On the other hand studies have pointed out that labour law-related problems might not be as serious for industry as perhaps infrastructure or institutional constraints. A large sample survey of informal sector establishments revealed that labour problems were a fairly low priority for informal sector employers.⁴⁰ In a recent study, Bezellier (2004) considers the effect of core labour standards (as identified by the ILO Declaration on Fundamental Principles and Rights at Work). He finds that labour standards have positive effects on per capita income, greater for countries with medium or strong labour standards. These Fundamental Principles and Rights can be considered relatively cost-less since they do not pertain to wage levels, social security or redundancy costs. The OECD study (1996) stated that there was nothing to suggest that non-compliance with core labour standards produced gains in competitiveness. A more recent survey (Brown, 2000) updates these findings on various facets of trade, foreign investment and GDP growth.

There is a need to assess the kinds of studies that have been done and to draw appropriate conclusions. However, it must be emphasized that regulation through labour law is necessary in order to maintain any notion of social justice and human rights. Regulation is also necessary in order to prevent a 'race to the bottom'. An idea often put forward is that standards are costly and

³⁷ For instance, the *Report of the Second National Commission on Labour* (2002) has also not carried out any studies on the impact of labour laws on the economy.

³⁸ Besley and Burgess, 2002; Roy, 2002; Freeman, 1993, and Bhalotra <http://www.ecn.bris.ac.uk/ecsr/papers/indialib.pdf>.

³⁹ See the *Report of the Second National Commission on Labour (NCL)* (2002) para 4.127 ff which mentions the submissions of various employers' associations calling for a regime like that of China. Note however, that the NCL headed by the Chairman visited China and found no evidence of the much touted lawless paradise! See also various articles calling for flexibility in the labour laws (primarily dealing with manufacturing and services in the organized sector) in Debroy and Kaushik, 2005.

⁴⁰ See www.mospi.nic.in. Similarly, an older Reserve Bank of India study which reveals that labour costs contributed to only 2 per cent of industrial sickness. Also see World Bank investment climate surveys cited in ILO GB.297/ESP/1, Geneva, November, 2006, and various World Bank Doing Business reports.

that by not imposing standards countries can keep labour and other operating costs low. Thus they gain an advantage in a liberalized trading world. However, from a human rights perspective such a view is untenable.

Legislating for the informal sector

One of the issues that have been debated in India in the recent past is the basis on which the labour laws should be extended to the unorganized/informal sector. Should this sector be defined in terms of an employment limit or in terms of capital invested? Or should the laws apply to certain designated employments, whatever the employment level or amount of capital invested? The Second National Commission on Labour in India recommends the creation of umbrella legislation to cover this sector. It also recommends that the law should not only have universal coverage, but that it should also cover self-employed persons within certain income or wealth limits. In continuation of this, the National Commission on Enterprises in the Unorganized Sector has recommended a national minimum level of social security to all unorganized/informal workers, who constitute 91 per cent of the workforce (406 million in 1999/2000). The National Commission has proposed a draft 'Unorganised Workers' Social Security Bill, 2006' for this purpose.⁴¹ Another question is whether there should be a comprehensive law dealing with conditions of work, wages, regulation of employment and social security for this sector or if social security should initially be extended to this sector, with other areas subsequently legislated upon.⁴² While consensus exists on the need to protect informal-sector workers, the budgetary allocation and funding for such schemes are still being debated. Countries in the region are also proposing legislation for SMEs and MSEs;⁴³ the impact this will have on labour law coverage and enforcement will have to be studied.

This section has attempted to situate the debate in the current economic climate. There is fairly widespread agreement that the requirement for government permission to retrench workers or close down business can be withdrawn or diluted only if unemployment benefits are greatly increased. The recently introduced unemployment benefit in the provident fund law in India is indicative of attempts to build a consensus. The move to restrict contract labour to core aspects of the establishments has been more controversial. The diversity of political views and the race among different state governments to attract investment have led to some states making changes in their regulatory framework sooner than others. Labour law reforms have traditionally worked in India when approved through the tripartite route; this aspect needs to be kept in mind.

Compliance with ILO Fundamental Principles and Rights at Work

The adoption of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up in 1998 has exerted pressure on countries in the region to reform their labour laws in line with the fundamental Conventions.⁴⁴ Pakistan and Sri Lanka have ratified the eight Conventions dealing with the four areas of the Fundamental Principles.⁴⁵ All the countries in the region have ratified Conventions No. 29, 100 and 111. Conventions No. 87 and 98, dealing with

⁴¹ The Bill provides basic social security cover including hospitalization up to Rs. 10,000 per illness, maternity benefit up to Rs. 1,000, personal accident cover up to Rs. 25,000, sickness benefit of Rs. 50 per day during hospitalization, life insurance of Rs. 15,000 and a provident fund for those above the poverty line and old age pension for those below the poverty line. A revised bill has been presented in 2007.

⁴² See for instance the various points of view of the debate in the Economic and Political Weekly, Vol XLI, No. 32 (2006).

⁴³ Thus India enacted the Micro, Small and Medium Enterprises Development Act, 2006 (this law does not include labour-related provisions).

⁴⁴ Ratification record of countries in the region: Bangladesh has ratified all except Convention No. 138; India has not ratified Conventions No. 87, 98, 138 or 182; Pakistan and Sri Lanka have ratified all the fundamental Conventions.

⁴⁵ The Forced Labour Convention, 1930 (No. 29), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the Discrimination (Employment and Occupation) Convention, 1957 (No. 111); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182).

the right to organize and collective bargaining, raise the greatest difficulties for ratification in this region. Some of the sectors which pose a problem for ratification or compliance, if ratified, are examined briefly below.

Essential services

One of the sectors where labour laws dealing with trade union and collective bargaining rights have restricted application is in essential services and public services. Countries in the region have given themselves sweeping powers to ban strikes and agitation in essential services. In Sri Lanka for instance, as part of the emergency imposed in the country, the amendment to the law provides that the President may require, or may delegate to anyone the power to require any person to do any work or render any personal service in aid, or in connection with, national security or the maintenance of essential services.⁴⁶ Pakistan has gone so far as to prevent workers from leaving their essential service employment without prior permission.⁴⁷ India has often had recourse to Essential Services Maintenance Acts which not only prohibit strikes, go-slows and refusal to work overtime in an elastic and administratively-determined list of essential services, but also permit strikers and trade union leaders who are not employed in the industry to be arrested without warrant.

One reason why almost all countries in this region have had complaints in the Committee of Freedom of Association (CFA) regarding curtailing of rights in essential services, is the excessive number of services that such laws cover. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the ILO has defined essential services as “services whose interruption would endanger the life, personal safety or health of the whole or part of the population”.⁴⁸ The CFA has found that the following are not essential services: general dock work, aircraft repairs, banking, teaching, the supply and distribution of foodstuffs, petroleum industry, mining and even transport in general. It has, however, considered the following to be essential services: hospitals, water supply, telephone and electricity services.⁴⁹ The CFA has held that serious long-term effects on the economy due to a strike do not qualify for a prohibition of the right to strike on the grounds of essential services. The ILO has drawn a distinction between essential services and public utility services. While a strike can be prohibited in the former, the CEACR is of the view that the authorities could establish a system of minimum service in public utilities rather than impose an outright ban on strikes.⁵⁰ This has been suggested in some cases in South Asia.⁵¹

Every country in the region has resorted to curbing trade union rights on the grounds of the greater common good, without providing adequate alternative mechanisms for raising and resolving disputes. While emergency conditions⁵² could be treated as a case of *force majeure* overriding normal democratic avenues, denial of rights on a more regular basis has grave implications for the credibility and legitimacy of the labour law as an instrument to maintain industrial peace together with social justice. This becomes all the more critical since essential services are usually government-dominated and are the most unionized and most vocal sectors.

⁴⁶ Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000. Gazette, Part I, 2000-05-03, No. 1130/8, pp. 1A-37A

⁴⁷ Pakistan Essential Services (Maintenance) Act (ESA), 1952, and corresponding provincial Acts, prohibit employees from leaving their employment, even by giving notice, without the consent of the employer, as well as from striking. See the comments of the CEACR (2006) concerning this aspect of the law with reference to the Forced Labour Convention, 1930 (No. 29).

⁴⁸ *General Survey* paras. 213-214 (1983). This was repeated by the CEACR in 1994. See *General Survey*, para. 159 (1994). The CFA has narrowed its definition of what constitutes “essential services” from services whose “interruption may cause public hardship” or “serious hardship to the national community” to conformity with that of the CEACR.

⁴⁹ *Digest* paras. 544-545 (1994).

⁵⁰ *General Survey*, para. 160 (1994).

⁵¹ Such a measure was suggested in Case No. 1024 where the Government of India had banned a railway strike on the grounds that it was an ‘essential service’. Case No. 1024, 211th Report, para. 538.

⁵² Imposed on occasion in all the countries in the region.

The position of employees in essential services is closely linked to that of government employees.

The position of government employees and the 'sovereign state'

South Asian countries, barring India, have ratified either or both of ILO Conventions No. 87 and 98. The reluctance (in India) and the delay (in other South Asian countries) in ratifying these Conventions, particularly No. 98, has stemmed primarily from the granting of trade union rights to government employees. India has faced the greatest problem in ratifying the related Conventions with respect to its own employees, since they are denied the right to collectively raise disputes with the state under their respective conduct rules. Machinery such as the Administrative Tribunals allows government employees to raise individual disputes, and the Joint Consultative Machinery in place for central government employees permits negotiation on only limited matters. Right from the framing of Conventions No. 87 and 98, now included in the Declaration on Fundamental Principles and Rights at Work, and its Follow-up, 1998 there has been a debate internationally about the extension of trade union rights to categories of employees such as civil servants, the police and the armed forces. The delay or reluctance of countries in this region to ratify many of the fundamental Conventions comes from their adherence to the Anglo-Saxon jurisprudence of treating government employees as holding tenure during the pleasure of the sovereign and by the nature of their duties as being distinct from those of other employees.⁵³ The enhanced conditions of work enjoyed by government servants, such as constitutional remedies in the event of dismissal, pension and health benefits are considered the *quid pro quo* for stripping them of their normal civil and political rights, including the right to strike. It appears that the position has not changed much these last 50 years. Governments in this region continue to place restrictions on their employees and this continues to be a source for discussions/complaints in the CEACR and the CFA of the ILO.⁵⁴ From colonial times, the 'steel frame' was the lynch pin that served to implement colonial rule. The common law doctrine of state immunity for wrongs committed by its servants was brought into the region to prevent the colonial state being dragged to court. Unquestioning loyalty from its servants in return for better conditions of work than those available to others was the compact on which the rule was maintained. Independence and democracy have still not stripped authority of its special privileges and immunities in this region.

Other core Conventions

The existence of child labour, even bonded child labour has been a recurring problem in this region. One of the reasons for non-ratification of Conventions No. 138 (Bangladesh and India) and 182 (India) is the piecemeal prohibition of child labour in certain kinds of work. The recent notification (2006) in India prohibiting child labour in domestic service, hotel and restaurants would be a step in bringing labour law into line with ILO standards. Nepal, which has ratified these two Conventions, recently enacted the Child Labour (Prohibition and Regulation) Act which entered into force in November 2004.⁵⁵ In the case of Pakistan, (which has also ratified both these Conventions), the Employment of Children Act of 1991 provides that children under 14 years of age shall not be employed in the occupations listed in Parts I and II of

⁵³ There is a category of 'service law' as contrasted with 'labour law' practice among lawyers in the courts in this region which corresponds to the cases arising from the service conditions of state employees which are governed by status rather than a contract of employment.

⁵⁴ There have been cases from Bangladesh against restrictions on government servants' trade union rights during the imposition of martial law and the curtailment of rights under the Industrial Relations Ordinance of Pakistan 2002. As recently as 2003 a state government in India enforced the provisions in its conduct rules denying the right to strike to government employees ranging from teachers to secretariat staff and dismissed over 200,000 employees. They were later reinstated but with the clarification by the Supreme Court that government employees do not have a 'moral or legal right' to strike.

⁵⁵ There are some doubts about how far this law will prevent child labour in the informal sector. See *Report of the CEACR*, 76th Session, 2005.

the Schedule of the Employment of Children Act. Sri Lanka has prohibited child labour under the Women, Young Persons and Children Act, 1956.

All countries in the region have ratified Conventions No. 100 and 111. Yet as the CEACR reports reveal, discrimination between men and women on the basis of unequal pay for work of equal value continues to be a contested issue. Non-equal treatment of groups based on caste, religion, and gender also continue to be reported to the CEACR from countries in this region.⁵⁶ Bonded labour is a persistent problem. Nepal recently enacted the Kamaiya Labour Prohibition Act, 2002, which prohibits debt bondage and provides for rehabilitation of freed *kamaiyas*; Pakistan had enacted the Bonded Labour System (Abolition) Act, 1992, and India had enacted the Bonded Labour System (Abolition) Act, 1976 with similar goals.

Improving the enforcement of labour laws

The consolidation of laws (referred to earlier) has often been suggested as a means of labour reform. Simplification has also been mooted because of the large number of overlapping registers that have to be maintained by employers and the number of returns to be submitted. In the case of the informal sector this aspect is seen to increase the cost of compliance and the reluctance of many to come within the scope of the law. Most countries in the region have a system of inspection to ensure compliance, with prosecution and other legal actions taken to enforce the law in cases of non-compliance.

A reduction in the number of laws and corresponding authorities should result in fewer inspections. 'Inspector Raj' is a term often used in India to highlight the bureaucratic harassment faced by employers in complying with a cumbersome law. In order to reduce the number of registers an employer has to maintain, India has enacted some laws. Currently a proposed amendment of 2005 (bill pending in Parliament) of the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Central Establishments) Act 1988 proposes to reduce the number of returns to be submitted to Government. This has been opposed by unions as being further evidence of the government's policies to relax labour laws in these times.⁵⁷ In recent years, the enforcement of labour laws in export zones through regular inspections has almost ground to a halt in the name of preventing harassment of employers and providing an investor-friendly environment. Prior permission has to be granted by the Development Commissioners or ministry officials before inspections can be carried out. Of course, since labour laws apply workers are free to pursue their rights, but in the near-absence of unions and the low levels of unionization among women workers who constitute a high proportion of the workforce in such zones, labour laws are quite easily flouted. In the agricultural sector (where it is mainly the minimum wage law that applies, with some states having legislation protecting the conditions of work of agricultural workers), the close ties between the inspectorates and the landowners have been highlighted as a reason for the poor enforcement of labour laws in this sector (Bremner, 1985; Hirway and Abraham, 1990). The power granted to the state, as noted above, to grant prior permission to prosecute in cases of violation again reduces the certainty of enforcement.

In the current debate about simplifying labour law and making it investor friendly, self-certification is a proposal often put forward.⁵⁸ This has been viewed with suspicion by workers.

⁵⁶ For instance, the widespread violence against women and their sexual harassment at the workplace despite the enactment of Suppression of Violence against Women and Children Act 2000 in Bangladesh continue to be examined.

⁵⁷ The Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Central Establishments) Act 1988 provides exemption to employers in small and very small establishments from furnishing returns and maintaining registers under certain labour laws. 'Small establishments' has been defined as establishments in which not less than 10 and not more than 19 persons are employed or were employed on any day in the preceding 12 months. 'Very small establishment' is defined as an establishment in which not more than nine persons are employed or were employed on any day in the preceding 12 months. The exemption is granted with respect to nine laws mainly relating to wages and weekly holidays. There is no exemption for the laws of social security at present.

⁵⁸ Unions have also put forward a call for worker-certification of establishments.

Other proposals include the appointment of independent auditors to monitor compliance with the codes of conduct. Compliance is not with the labour laws of the outsourced country of production but a common labour standard evolved by the manufacturer. Codes of conduct can be noted in sectors where there is a link with international trade, particularly in the footwear, textile and clothing sectors. However, unions have expressed concerns that codes of conduct may result in the “privatization” of labour administration. Further there is some evidence to suggest that MNCs have been somewhat selective in their choice of issues to include in their codes. While state-based inspection systems are sanction based, such voluntary systems would be an incentive for the social partners, particularly the employers, to improve their brand image. Voluntary codes would of course in no way supplant, but merely supplement existing inspection procedures. Given the high degree of subcontracting taking place domestically in the countries of this region, there is scope for introducing such voluntary codes in sectors where there is sub-contracting to ancillary units, in order to ensure compliance with labour standards. Employers, subcontractors and trade unions could agree upon the need to recognize certain minimum labour rights in the subcontracting chain and also arrive at mutually agreeable means of monitoring these codes.

The consolidation of laws should also help create a unified labour judiciary, empowered to deal with all manner of disputes – employment relations, trade union recognition, wages, social security – cutting across both large-scale and unorganized sectors. At present the Presiding Officers of Industrial Tribunals or the authorities competent to hear claims under the different labour laws belong either to a general judicial service cadre or they are administrators who are liable to be frequently transferred. The result is that they are unable to develop an adequate degree of specialization and orientation for labour adjudication. It has been repeatedly pointed out that the task of the labour judge is different from that of the generalist judiciary. A single window court or Industrial Relations Commission (as in Pakistan) is often suggested to deal with claims/petitions/disputes arising from all labour laws in addition to magisterial powers to prosecute for an offence which is presently pursued separately in the criminal courts.⁵⁹ By amalgamating civil and criminal powers in the Industrial Relations Commission, litigants will have a “single window” through which to seek their rights. In India, the Gujarat Labour Laws Review Committee has recommended reviving the idea of the National Commission on Labour of setting up a Labour Judicial Service.⁶⁰ This has since been considered by the Second National Commission on Labour in India. This specialist judiciary would receive special training/orientation in order to deal effectively with labour adjudication.

The central role played by the government and courts in labour disputes has led to the greater ‘juridification’ of all disputes and grievances as noted above. One innovation to deal with the backlog of cases that plague the labour judiciary has been to set up *Lok Adalats* as a form of Alternate Dispute Redressal (ADR) mechanism which can dispose of pending cases.⁶¹ These are more informal proceedings before a judge that have been used in many jurisdictions/branches of law in India. The relatively new Legal Services Authority Act 1987 and the National Legal Literacy Mission in India have provided a boost to the setting up of such *Lok Adalats*.⁶² Certain states in India have experimented with *Lok Adalats* in labour matters and more work needs to be done to assess how viable an alternative these are for speedy, and just, disposal of cases. Apart from the relatively informal *Lok Adalats*, fast-track procedures in the formal courts to deal with

⁵⁹ National Labour Law Association, 1994. This Draft Labour Code has been introduced as a Private Members’ Bill in the Lok Sabha in 1997.

⁶⁰ Government of Gujarat, *Report of the Labour Laws Review Committee* (1974) p. 17. This was been repeated once again in the India Labour Code prepared in 1994.

⁶¹ See recommendation of the NCL on Lok Adalats (loosely, people’s courts – these are settings where judges or lawyers help in speedy disposal of pending cases; and such settlements are recognized as binding settlements in the law).

⁶² Lok Adalats are presided over by judges from the formal judiciary. While Lok Adalats have frequently been set up in accident claims cases, matrimonial disputes and sometimes even compoundable criminal matters, their use in labour matters has been relatively infrequent.

inordinate delays in the judicial system have been mooted and implemented in some areas of criminal law; and the creation of such ADRs has been suggested for labour matters also.

The right to legal aid (as provided in some labour laws) is also suggested as a means to help workers gain access to their remedies. In such cases, the need to shift the burden of proof onto the employer is often recognized. Traditional common law requires that the burden of proof be upon the persona asking for relief.

In several countries in the region, basic rights overlap to some extent with rights under labour law, such as the right not to be exploited and the right to organize; these basic/fundamental rights are enforced by constitutional remedies such as writ remedies. These are in addition to the remedies under labour law, and are often swifter and easier to enforce given that they then become high profile cases. Thus the existence of bonded labour, non-payment of minimum wages, trafficking of women and child labour would in most of these countries be not only a violation of the labour law but also of the Constitution. Some element of 'constitutionalization' of labour matters is inevitable, and is often resorted to by unions and activists given their relative speed and media attention. Recourse to the apex court in labour matters is possible only when there is an explicit overlap between fundamental rights and labour rights in the areas of arbitrary termination of employment by the state (constitutional right to livelihood), non-payment of minimum wages (constitutional prohibition against forced labour), use of child labour (again constitutionally prohibited). The use of this recourse to constitutional remedies to protect fundamental rights may well increase in the coming years, given the fact that the apex court in India (which hears both constitutional matters and is the highest appellate court in respect of labour matters), has been perceived as reversing an earlier liberal era of the broadening of labour rights provided by labour law in its appellate jurisdiction.

III. Law and gender equality

Women in India are employed mainly in large establishments where 1000 or more workers are employed or in the informal sector. The areas in the formal sector where women are employed are the textile industry, the export processing zones, the fish processing industry and the call centres where much business processing outsourcing work is done. Studies note the low levels of unionization of women in these sectors. They are usually quite educated, young and unmarried and employers are known to prefer such women because of their relative docility and the high chances of their leaving employment after a few years. More and more women are employed in the informal home-based sectors with deteriorating work conditions and in conditions of unpaid work, as already noted (Mitra, 2006). However, studies also indicate that despite lower labour force participation rates than men, there is a higher incidence of unemployment among young women, implying that their absorption in the labour market is lower than that of young men. This has been attributed to reduced choices for women, and fewer opportunities to avail of employment outside the home (Chandrasekhar, 2006).

Gendered notion of 'work'

Initial economic accounting practices in India only counted work that was economically productive. Women's unpaid domestic work within the household or work that resulted in products that were consumed within the household were not treated as economically productive. In short, work which did not involve a market transaction and thus did not fetch a 'price' was not treated as having economic value and therefore did not count in the calculation of national income. The women's movement in India has helped to raise awareness of these invisible contributions of women to the well-being of their families. As a result there have been some changes in the manner that national accounts perceive a major part of women's work. Today production for self-consumption is treated as economic activity. Yet various household activities

that women perform – such as cooking, cleaning and other domestic work, the upbringing of children, and care of the aged and the infirm – have yet to be counted as economic activity.

Treating these activities as economically productive would mean putting a monetary value on the work that is performed by women within the home. However, imputing a value does not mean that women expect to be paid for the work they do. Quite often the care provided by members of the household is given freely, and not in the expectation of a return. Yet there is a need for this work to be acknowledged publicly as contributing to society and the family. Ascribing a value to it would not only bring it within the policy makers' vision, it would most likely enhance the position of women who do such unpaid work in the eyes of their family and in society. For instance, we note that one of the poorest paid groups of workers in urban areas are women who are domestic workers. One reason for their low level of wages is the fact that in the eyes of the employers, the nature of the work performed – cooking and cleaning – are unpaid and unrecognized labour done by the women of households. As a result the employers see no reason to pay a market wage for the work, even though the identical job performed outside the home, say by a cook in a hotel, would command higher wages.

Yet another problem is posed by voluntary work which women engage in. While such work may be economically useful, the fact that it is voluntary may exclude such persons from the scope of wage employment. The case of *anganwadi* workers (village level workers who run the tens of thousands of Integrated Child Development Services, health care programmes in India) who are not paid even minimum wages on the ground that they are volunteers working for a social cause has been a point of much protest.

Gendered nature of labour law

The law often does not accord the work done by women due status or protection and thus at the very threshold women workers suffer exclusion or at least discrimination. Labour law does not extend, by and large, to the informal sector where 95 per cent of women workers are employed. Their invisibility is (among other reasons) due to the low priority accorded to women by the law and the view that home-based work or domestic work does not fall within the formal definition of 'work' as traditionally understood. Only certain home-based work such as rolling cigarettes (*beedi*) is recognized as work under Indian law. The definitions of 'worker' do not always cover people engaged through a contractor; since informal sector home-based workers are invariably engaged through a complex chain of contractors and sub-contractors, the workers may find it difficult to get legal protection, even if the law extended to this sphere.

The enforcement officers of the labour inspectorate accord a low priority to carrying out inspections in the informal sector where only limited laws such as those relating to minimum wages apply. The scattered nature of the establishments, lack of official vehicles and support staff make it easier for the inspectors to cover several establishments located in a compact industrial zone and to complete their monthly quota of inspections in an efficient manner.⁶³ A gender audit of the labour enforcement mechanisms as done in other areas of policy making does not appear to have been carried out in many of the countries.

The bulk of labour laws in India are premised on the existence of an employer-employee relationship in order for a person engaged in an activity to be classified as a 'worker' (or a workman, employee or employed person as the case may be) and hence by implication engaged in 'work'. It appears that wage employment is a necessary condition for legal protection.⁶⁴ In the case of unpaid family helpers (such as in agriculture), the fact that their work is unremunerated

⁶³ Many of these aspects of labour inspection, with recommendations to strengthen the labour enforcement machinery, are contained in the Report of the National Commission on Labour, 2002.

⁶⁴ It must be pointed out that the mere existence of this employer-employee nexus is not sufficient to bring such cases within the ambit of the law. Certain kinds of activities by their very nature are excluded from legal protection, such as domestic service or spiritual activities, chosen as examples of activities that were excluded from the purview of the Industrial Disputes Act, 1947 by the judgement in *Bangalore Water Supply v. A Rajappa* AIR 1978 SC 548.

has not prevented it from being considered economic activity. The gendered understanding of what constitutes work makes women particularly vulnerable to falling outside the scope of labour law. The law may choose to treat their activity not as 'work' and therefore not as entitled to protection. Protecting the private domain of the family seems to be the operative principle here and the work, for example, performed by children on family farms, typically stands outside the attempts of the law to regulate or prohibit it.⁶⁵

Gendered impact of 'neutral' laws – instances

a) Social security. Where women work and social security benefits are mandated by the law, the method of delivering benefits sometimes has a gendered impact. Thus where maternity benefit is provided through a social insurance system, the cost of providing the benefit is distributed among all workers and employers. In contrast to this, employers' liability systems cast the burden exclusively upon the employer, creating a disincentive to employment. In India maternity benefit is provided by the Maternity Benefit Act 1961 (employers' liability) and the Employers State Insurance Act 1948 (insurance). Studies have shown that there is a greater tendency to avoid employing women workers under the former scheme. Failure to convert all employer liability schemes into a insurance model could then have a differential impact upon women's employment.

b) Under-valuation of women's work. Occupational segregation by sex and the resultant differential wage levels are other causes for concern. The Indian Parliament passed the Equal Remuneration Act in 1976. This law provides for equal remuneration of men and women workers and for the prevention of discrimination against women on the grounds of sex in matters relating to employment. Thus under the law, an employer is obliged to pay any worker remuneration which is not less than that paid to a worker of the opposite sex employed to perform the same or similar work. The employer cannot discriminate between men and women at the time of recruitment or in conditions subsequent to employment such as promotion, training or transfer.

However the Act does not lay down guidelines about what constitutes 'same or similar work'. Normally it has been noted that women's work is treated as unskilled or requiring less effort and these aspects have been used to justify payment of wages lower than those paid to male workers. Thus for example in agriculture, traditional practices which forbid women from using tools, result in men handling the plough while women may do such work as rice transplanting, which is often more arduous and back-breaking.

This persistent under-valuation of women's work, which often involves long hours of drudgery, results in lower wages for women despite the existence of a law requiring equal remuneration. As a result, many commentators have pointed out that there is a need to replace the expression 'same and similar' with the phrase 'work of equal value'. This would permit disparate jobs to be assessed and evaluated for the value they add to the production process even if they are different from jobs performed by another person. The question of equal pay for work of equal value has received greater attention in India in recent years. The ILO Committee of Experts has determined that the equal pay for 'work of the same or similar nature' laid down in the Equal Remuneration Act is not sufficient compliance with Convention No. 100. It is necessary to carry out detailed studies in order to assess the comparable worth of different jobs. Occupational segregation resulting in women's jobs being accorded a lower value also needs to be tackled.

Establishing equality of wages between dissimilar jobs that have equal value could help reverse the under-valuation of those jobs where women are concentrated and which are therefore treated as 'women's jobs' and thus low paid. Studies show that women's wages in agriculture are on average 71 per cent of the male wage (Harriss-White, 2004). Fixing minimum wages permits

⁶⁵ Note for instance the exclusion provided by s.3 Child Labour (Prohibition and Regulation) Act, 1986 of work performed by family members.

different rates to be fixed for skilled, semi-skilled and unskilled work. The problem is that work done by women is often classed as unskilled (weeding or transplanting in agriculture) while work traditionally done by men (ploughing) is treated as semi-skilled or skilled.

c) *Occupational segregation and piece-rate wage system.* Another aspect of wage discrimination faced by women is the lack of regular income. Casual jobs are typically outsourced for women to perform in their homes. *Beedi*-rolling, finishing garments in ancillary units doing labour intensive parts of production, *papad*-rolling (lentil flatbread) – these are some of the myriad jobs that home workers, usually women, perform in rural and urban areas. This work is usually paid on piece-rate basis. Even if a woman were to work for over ten hours a day with help from her children, she would hardly earn the minimum wage for an eight-hour day. Piece rates contribute to the lower wages earned by women compared to men. Women are also paid less because of lower skill levels. The poorer education given to girls is a reflection of family and social biases against them. Their inability to upgrade their skills and hence their earning capacity could also be a result of their considerably lower income and wealth levels in India. Discrimination in inheritance laws is also to blame for this. Another factor is women's inability to take up other jobs since they are burdened with domestic and child care responsibilities. The result is persistent inequality in wage rates.

Nature of the labour law for women – equality or protection?

Another question that arises is whether the labour laws should provide for equality or go further and make affirmative provisions for women. Should the laws be gender neutral, in the sense of treating women as equal with men or, given the socio-economic conditions facing women, should they treat women differently, that is make special provisions for them? The Indian Constitution envisages both kinds of treatment as feasible. Thus while Article 15(1) states that no person should suffer discrimination on the basis *inter alia* of sex, 15(3) permits the state to make special provision for women.

On the basis of Article 15(3) mentioned above, quota-based reservations for women in government jobs, the reservation of seats for women in elected bodies such as *panchayats* and municipalities, and setting up exclusive women's colleges have all been part of the constitutional scheme and upheld as affirmative action that benefits women. Denying women the right to hold jobs in combat wings of the armed forces or to work in certain prison jobs or in unsafe conditions, usually night work or in underground mines, have also been upheld as provisions that protect women. There is of course, serious reconsideration currently going on among women activists, trade unions and policy makers, about how the lines of protection should be redrawn. It has to be determined when protection becomes paternalism. When and under what circumstances protective measures should be taken is a matter for serious debate and the issue of night work for women captures this dilemma, as discussed below.

Night work by women

In India, women who work in factories and offices are prohibited from working at night.⁶⁶ Some other sectors such as nurses in hospitals, call centres, those offices not covered by the various laws banning night work or where exemptions have been granted, allow women to work at night. The Factories Act 1948 stated that no woman should be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m., with the proviso that the hours may be varied provided that no woman may work between 10 p.m. and 5 a.m. However, the law itself provides ways in which this ban on night work can be circumvented. The law provides that the state government may exempt women from the ban on night work in fish curing or fish canning factories, where the employment of women during night hours is necessary to prevent damage

⁶⁶ See Factories Act 1948 and the Shops and Establishment Acts of different states. Women working in hospitals and in agriculture are exempt from such laws. This has been struck down as unconstitutional in a recent case by the Madras High Court *Vasantha R. v. Union of India* 2001 II LLJ 843 (Mad.). The case was decided by the Madras High Court.

to, or deterioration of any raw material. This exemption can be subject to such conditions as the government deems necessary.⁶⁷

There is pressure for liberalization of the present laws that prohibit night work for women in those sectors that are fast opening up. These would include electronics, information technology, food processing, agro industry and textiles. These sectors either require continuous processing to prevent deterioration of raw materials (as in the case of food processing) or they may include back-office outsourcing establishments that take advantage of information and communications technology to provide greater employment to both men and women. Demands for night work for women on the grounds of preventing discrimination have been raised in these areas. The National Commission on Labour, appointed by the Government of India to look into several labour questions, has recommended that the ban on night work by women can be lifted if the number of women workers per shift in an establishment is not less than five, and if the management is able to make satisfactory arrangements for their transport, safety and rest after or before shift hours.⁶⁸ The matter is currently pending a final legislative decision. (Recently the government has announced a decision to revoke the ban on night work in factories). If permitted, it is expected that night work would open further avenues of employment for women. Yet, there is an urgent need to take into account the high degrees of violence that women face on the streets while travelling to work, poor public transport facilities and the levels of sexual harassment at the workplace⁶⁹ that can be expected to increase if night work is permitted.

Conclusions

The capacity of law to create a level playing field in the world of work and create decent work is limited by the non-universal scope of the law itself. Recognizing the dichotomy between work and employment, thereby including self-employed, contract, and 'atypical' workers in the law, and making informal work visible in the eyes of the law still constitute major challenges in this region. At the same time moving towards a more inclusive application of the labour law cannot be done at the cost of eroding hard-won rights. There is a need for law reform that is participatory and that gives a voice to workers' organizations. This indicates the need to organize workers in the informal sector. The current economic liberalization and growth in many countries in the region have no doubt triggered several calls for a new look at labour law and the 'costs' for the labour market. Yet, given the complex, unequal and diverse societies that exist in the region, the need for a labour law that provides for humane and decent work can hardly be overemphasized.

⁶⁷ See Factories Act 1948, s 66(2). For instance the rules made under this Act in the state of Tamil Nadu (where the present case arose) provide that no woman shall be employed before 6 a.m. or after 7 p.m. for more than three days in a week; and no woman shall be employed after 11 p.m. and before 5 a.m. The number of days on which a woman may be so employed cannot exceed fifty days in a year.

⁶⁸ See Report of the National Commission on Labour, 2002 available at <http://www.labour.nic.in>. Unlike countries in Europe which have denounced certain International Labour Conventions (No. 41 Night Work (Women) Convention (Revised), 1934 and No. 89 Night Work (Women) Convention (Revised), 1948) on the basis that women do not require protection except in cases of pregnancy and maternity, trade unions in India argue that there is a need to continue to prohibit night work of women. Since factories employing women are in the export sector, it is argued that the demand for permitting night work is driven by the need to have a third shift rather than an assessment of women workers' real position in the workplace.

⁶⁹ The well known *Vishaka* judgement delivered by the Supreme Court has not only defined sexual harassment but also mandated all work places to set up complaints committees to deal with sexual harassment faced by women.

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