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Law: Is Indian Law Failing?

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# Developing Human Capabilities Through Law: Is Indian Law Failing?

Supriya Routh

## Abstract

The Capability Approach envisages a human-centred idea of development instead of an income-based idea of development. Economic development is only one of the components in human capability development. Economic development by itself cannot ensure capability promotion amongst individuals, specially in developing countries like India where majority of the population suffers from various kinds of capability deprivation. What is required under such circumstances is enabling the population to make use of economic development by enhancing their capabilities. The judicial system is an important institution in this regard. However, judicial interpretation in India is not helping the cause of capability promotion amongst the population. The judiciary is blinded by the rhetoric of economic development. Judicial interpretations show that the judiciary believes economic development by itself is sufficient enough condition in the development of the country and its people. This article, by choosing the example of labour law, shows that the judiciary is acting under a mistaken belief of development in interpreting labour jurisprudence in India. If human development is the goal of the labour laws, the judiciary needs to focus on providing social and institutional conditions for the promotion of capabilities rather than eroding such conditions in the name of economic development.

**KEYWORDS:** Amartya Sen, capability approach, development, India, judiciary, labour law

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## 1. Introduction

South Asia houses the most number of poor people in the world, amounting to a whopping 843.8 million; Sub-Saharan Africa comes a distant second with 458.1 million of poor people in a Multidimensional Poverty Index (MPI) analysis (Alkire and Santos, 2010: 44–46). As per the MPI, 55% of the population in India is poor, against 51% in Pakistan, 58% in Bangladesh, and 5% in Sri Lanka (Alkire and Santos, 2010: 45). The MPI is based on the Human Development Index (HDI) prepared by the United Nations (Alkire and Santos, 2010: 3–4; UNDP(a)). Both the HDI and MPI evaluate development on the basis of improvement in factors such as health, (child) mortality, nutrition, education, sanitation, etc., rather than only on the basis of income, or Gross Domestic Product (GDP), or wealth of a country (Alkire and Santos, 2010: 4; UNDP(b); UNDP(c)). India, despite being ahead of countries such as Senegal, Mauritania, Gambia, Kenya, on the basis of \$1.25 a-day-poor, falls behind these countries on the basis of the MPI analysis (Alkire and Santos, 2010: 30). Development analysis on the basis of GDP or Gross National Income (GNI) varies widely than on the basis of HDI or MPI (Alkire and Santos, 2010: 37–39; UNDP(c)). Countries that exhibit a better development profile on the basis of GDP analysis have been found to be lagging behind on MPI factors (Alkire and Santos, 2010: 38–39). Even though India's GDP is better than countries such as Ghana or Moldova, India's poverty count is greater too in an MPI analysis (Alkire and Santos, 2010: 39).

What follows from the brief overview of two principal types of multidimensional development analysis is that development analysis on the basis of GNI or GDP is insufficient in evaluating actual improvement in living standards so far as factors such as health, nutrition and education are concerned. Development analysis must be concerned with the improvements in the lives of the people, rather than looking at the improvement in income or GDP (which can of course be one of the factors of an MPI evaluation). As the MPI analysis has shown that a higher GDP does not always result in higher human development (in health, nutrition, education, sanitation, etc.), the claim that economic development has a trickle-down effect could be disputed. Economic development (measured in terms of GNI or GDP growth) by itself may not be a sufficient factor in improving living standards of the people around the globe. It is from this point of view that the United Nations have developed the HDI and prepares the annual Human Development Report (UNDP(d)).

The HDI and the resultant Report (also the MPI) is based on the works of Amartya Sen. For Sen, the purpose of development is the facilitation of the freedom of individuals so that they can choose the kind of life for themselves that they have reason to value (Sen, 1999: 18). He conceptualises development in the following words:

“Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development.” (Sen, 1999: xii).

Sen’s concept of development as freedom is expressed in terms of the concepts of ‘capability’ and ‘functionings’. ‘Capability’ is the freedom to choose<sup>1</sup> and ‘functionings’ are the achievement that an individual actually attains.<sup>2</sup> Capability is, therefore, the freedom available to individuals to choose the ‘functionings’ that they want to attain. Institutions are important in Sen’s theory in so far as such institutions guarantee enabling circumstances in which individuals can freely exercise their agency or initiative according to their choosing. Sen’s theory of development as freedom is based on three principal premises: first, the idea of development in terms of freedom; second, a positive concept of freedom; and third, the role of institutions in promoting development as freedom (Sen, 1999: 3–11).

In this article, these constitutive elements of Sen’s concept will be used to analyse the law’s role in capability development in India. The purpose of this article is to show that law in India is not helping the cause of actual human development where enhancement of capabilities are concerned. Law is rather becoming an obstacle in the realisation of required capabilities of the people. In contending so, the article chooses the example of labour law in India. Labour law in India has undergone radical changes in the past two decades. In the past few decades, the judiciary in India has attempted to overwrite the labour law of the country. In recent decades, the Indian judiciary has developed a labour jurisprudence that envisages economic development as a self-sufficient condition in meeting the development needs of the country’s workforce. This article argues

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<sup>1</sup>Sen explains ‘capability’ in the following words:

“A person’s capability refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles). For example, an affluent person who fasts may have the same functioning achievement in terms of eating or nourishment as a destitute person who is forced to starve, but the first person does have a different “capability set” than the second (the first can choose to eat well and be well nourished in a way the second cannot).” (Sen, 1999: 75).

<sup>2</sup>Sen explains ‘functionings’ in the following terms:

“The concept of “functionings” which has distinctly Aristotelian roots, reflects the various things a person may value doing or being [footnote omitted]. The valued functionings may vary from elementary ones, such as being adequately nourished and being free from avoidable disease [footnote omitted], to very complex activities or personal states, such as being able to take part in the life of the community and having self-respect.” (Sen, 1999: 75).

that the recent judicial development of labour law in India is based on a faulty premise of development.

Based on Sen's 'capability approach', the article contends that labour law should be concerned with development of capabilities of the workforce in the country, which would require institutional, social, economic and political support that is envisaged by the Constitution of the country. Labour law should not merely become a factor in facilitating economic development (measured in terms of GDP). The article has two principal parts. In the first part of the article, Sen's capability approach is considered. The main themes of the capability framework are identified, which would be used to examine the labour jurisprudence in India. The second part of the article is concerned with the judiciary developed labour law in India in recent decades. This part of the article identifies attempts by the judiciary to change labour law in such a manner so that it becomes an instrument in economic development of the country. In making its case, the article considers few instances where there has been a shift in labour jurisprudence in India. This part of the article also proposes that the purpose of labour jurisprudence should be enhancement of capabilities of the workforce of the country, rather than helping the country's economic development. The article ends with a small concluding section.

## 2. Development in terms of freedom

Sen observes:

“Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, *inter alia*, play a prominent part in the process.” (Sen, 1999: 3).

Sen offers a multidimensional view of development (Sen, 1999: 3–4, 18– 19, 33–40, 74–86; Alkire, 2002b: 182–184). He sees the end of development as the facilitation of the real freedom of individuals (Sen, 1999: 3–36). Such freedom is the freedom to do or to be that an individual value doing or being (Sen, 1999: 74–75).

### 2.1 Concept of freedom in Sen's theory

Elizabeth S. Anderson observes that 'Sen offers a rich way to understand freedom' (Anderson, 1999: 316). Sen's concept of freedom has distinct Aristotelian roots (Nussbaum, 1987; Sen, 1999: 14–15, 24, 73, 75). Aristotle saw human

functioning in terms of being able to choose and live a “flourishing living (eudaimonia)” (Nussbaum, 1987: 3).

According to Sen an individual has real freedom (Sen, 1999: 3, 36; Alkire, 2005: 121) when she is able to choose the kind of life that she wants to lead (Sen, 1999: 74–75) – Sen terms this freedom as ‘capability’ (Sen, 1993: 33; Sen, 1999: 74–75). Sen defines ‘capability’ as a ‘functioning’ set that an individual can choose to achieve (Sen, 1999: 75). ‘Functionings’ are what individuals actually achieve in their lives (Sen, 1999: 75). Hence, choice is central to Sen’s conceptualization of freedom (Alkire, 2005: 121–122).

Sen’s notion of freedom is far from a negative notion of freedom that is equivalent to non-interference by the state (Sen, 1999: xii, 63–67). His notion of freedom is a substantive notion of positive freedom (Sen, 1988: 272) that enables an individual to achieve in life what she wants. Sen’s focus on ‘freedom to’ (‘do’ or ‘be’) is captured by the use of the terminology ‘capability’ (Alkire, 2002a: 6). Sen’s notion of freedom has two principal dimensions: first, the socio-economic dimension that creates appropriate conditions for individuals to exercise their choice, and second, the individuals’ own initiative or agency to lead the kind of life she has chosen (Sen, 1999: 10, 17–19, 31; Sen, 1993: 39; Sen, 1985b: 169–221). In Sen’s own words: “The capability of a person depends on a variety of factors, including personal characteristics and social arrangements.” (Sen, 1993: 33).

John Alexander observes: “Freedom [according to capability theorists] is not merely the absence of interference, but also the possession of different capabilities to achieve valuable human functionings.” (Anderson, 1999: 316–318; Alexander, 2008: 4).<sup>3</sup> Benedetta Giovanola asserts that Sen’s conceptualisation of freedom “allows us to think of human beings in a *dynamic* frame in which they are constantly involved in the process of ‘becoming’ themselves and realizing themselves.” (Giovanola, 2005: 252).

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<sup>3</sup>Taking a leaf from Sen’s argument Alexander further notes: “A person who is poor, uneducated, unemployed, afflicted by a preventable disease or socially excluded might encounter no interference from the state or fellow citizens, but he or she certainly lacks the required capacities and opportunities to live a life of freedom. This being the stark reality in most of our contemporary capitalist liberal democracies, it is important to emphasize the idea that a society fails to treat some of its members as equals not only when it restricts or interferes with them, but also when it permits them to grow up in poverty and suffer serious forms of capability shortfalls and deprivation. Hence, the capability theorists, as it is argued here, are not against interferences *per se*. It is well within the spirit of the capability approach to tolerate certain qualified forms of ‘interferences’ for distributive purposes and for the provision of public goods so that maximum conditions for basic capabilities can be realized for all citizens. Particularly when these interventions are capabilities-promoting for everyone and are stipulated to take place under the purview of a fair rule of law and in compliance with human rights, they can hardly be considered as interferences in the negative sense of the term.”

Based on Aristotle and Karl Marx, Sen holds that individual freedom has intrinsic value (Sen, 1992: 41; Sen, 1999: 18; Alexander, 2008: 455). It is this intrinsic value of freedom that every good society should promote as a social good (Sen, 1992: 41). The intrinsic value of freedom is “significant in itself for the person’s overall freedom” (Sen, 1999: 18). Sen notes that intrinsic freedom is not only important as a valuable social good, it is also “important in fostering the person’s opportunity to have valuable outcomes.” (Sen, 1999: 18, xii). In this sense, freedom is instrumental in attaining other valuable things in the society (Sen, 1992: 41; Alexander, 2008: 455). It is in this instrumental sense that freedom is a precondition to either well-being achievement or agency achievement of an individual. Freedom in its instrumental sense is important “in judging how good a ‘deal’ a person has in the society.” (Sen, 1992: 41). Social development, therefore, needs to be judged on the basis of freedom in both its intrinsic as well as its instrumental senses (Sen, 1999: 18).

In Sen’s proposition of freedom as determinant of development public policy has a significant role to play (Sen, 1993: 44). According to Sen, freedom “in terms of the choice of functionings” is a combination of an individual’s command over commodities or resources (individual ‘entitlements’) and the individual’s personal conversion factors<sup>4</sup> (Sen, 1985a: 13; Sen, 1999: 74; Robeyns, 2005: 99). Therefore, public policy needs to ensure the appropriate availability of commodities and resources (entitlements) that could help in individual conversion of characteristics into respective ‘functionings’ (Sen, 1993: 44; Robeyns, 2005: 99).

## 2.2 Role of institutions in Sen’s approach

Sen observes: “Society might accept some responsibility for a person’s well-being, especially when that is in some danger of being particularly low.” (Sen, 1992: 71). He argues that with respect to public goods (Sen, 1999: 128), it is the duty of society to ensure the minimum well-being of its people (Sen, 1992: 141). Society’s (or, more precisely, the state’s) role is important with respect to matters (public goods) such as ‘social security’, ‘poverty alleviation’, ‘removal of gross economic inequality’, ‘pursuit of social justice’, (Sen, 1992: 141) ‘education’, ‘health’, ‘nutrition’, ‘civil liberties’, etc. (Dreze and Sen, 2002: 6–7).

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<sup>4</sup>Personal conversion factor is an individual’s personal characteristics and ability to convert those characteristics into functionings with her command over resources. What is important to note is that ‘conversion factors’ are not *per se* commodities or resources or characteristics (including liberty and rights, etc.). ‘Conversion factors’ are *intangible combination of circumstances* that facilitates ‘freedom to choose’ (capabilities). Definite categories of ‘conversion factors’ (i.e., personal, social or environmental) converts the characteristics of other categories (*inter se*) into ‘functionings’.

Even though Sen values the institution of free market (Sen, 1999: 112–119) (his support for the market arises from his perception of the market as one of the most significant domains for the exercise of freedom and the market's capacity for economic development), his adherence to the virtues of the free market is far from being unconditional (Sen, 1999: 45–49, 120–129; Sen, 2009: 83). Sen holds the role of social provisioning of public goods as utmost important for the promotion of 'basic capabilities' of individuals (Sen, 1999: 127–129). He argues that social provisioning needs to supplement the free market (Sen, 1999: 142–145). However, even though the government is given a preeminent position in social provisioning, there are reasons enough not to expect the government to be a benevolent public good provider: "The implicit faith in the goodness and the good sense of the government that underlies much reasoning in favour government-led economic development cannot, frequently, stand up to scrutiny." (Dreze and Sen, 2002: 45).

Thus, the role of the government needs to be mediated by the parliament, the legal system, the judiciary, opposition parties, the electoral process, the media and so on, all of which together constitutes the concept of the state (Dreze and Sen, 2002: 45). The concept of the state is much broader than that of the government (Dreze and Sen, 2002: 45). Thus, a debate in terms of either the free market-led development or the government-led development is incomplete at best as both of these perspectives depend on a bunch of other factors, *inter alia* 'the extent of competition in the market', 'openness of entry', 'scope of manipulability', 'the nature of the government', 'power of the ruling political groups', 'political system of the state', 'legal system', 'political freedom and treatment of opposition', 'value of dissent' (Dreze and Sen, 2002: 46).

What follows from Sen's analysis of the role of institutions in promoting well-being and capability is that there need not be any prioritisation of one institution over the other (Sen, 2009: 75–86). Institutions need not be limited to either the government or the market. A society should choose institutions that promote development as freedom in accordance with the necessities of the particular society (Sen, 2009: 75–86). No institution is final or conclusive; instead, institutions must be continuously evaluated, and then either continued or discarded based on their performance (Sen, 2009: 75–86).

There is, thus, no restriction on the creation of new institutions or the institutionalisation of new characteristics that promote individual conversion factors in turning commodity characteristics into functionings. Sen points to the necessity of multiple institutions in a society to ensure that these institutions exercise countervailing power over each other, thereby balancing power in the society by preventing one institution from becoming too powerful (Sen, 2009: 81). It is in these respects, therefore, that democracy and public participation



becomes very important in Sen's idea of development as freedom (Sen, 2009: 345–346).

### **3. Promoting development through labour law: Indian labour jurisprudence**

The Constitution of India is based on the principles of socialism, secularism, democracy, and socio-economic-political justice (The Constitution of India). By providing for constitutional rights to life (Constitution of India: Article 21), health (Constitution of India: Articles 23, 24, 39, 41, 42, 43, 47), education (Constitution of India: Article 21-A), social protection (Constitution of India: Articles 38, 39, 39-A, 41, 42, 43, 46, 47), etc., the Constitution of India seeks to provide enabling institutional infrastructure for actual human development. A careful perusal of the Fundamental Rights (Part III) and the Directive Principles of State Policy (Part IV) with respect to work and the workers would clarify that most of the guarantees are aimed at improving human capability.

However, series of Supreme Court decisions have shown that mere formal guarantees are not enough in ensuring development of workers (and the population at large).<sup>5</sup> Despite establishing appropriate institutions and structures to build an egalitarian society, rights of the citizens had to be realised through the intervention of the judiciary at an individual level,<sup>6</sup> in which process the judiciary earned for itself the distinction of being one of the most activist judiciary of the world (Shankar and Mehta, 2008).

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<sup>5</sup>See *Bandhua Mukti Morcha v. Union of India* (1984) 3 Supreme Court Cases (hereinafter 'SCC') 161; *Babulal Parate v. State of Maharashtra*, All India Reporter (hereinafter 'AIR') 1961 Supreme Court (hereinafter 'SC') 884; *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42; *Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37; *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; *State of H.P. v. Umed Ram* (1986) 2 SCC 68; *Upendra Baxi v. State of U.P.* (1983) 2 SCC 308; *Rudul Sah v. State of Bihar* (1983) 4 SCC 141; *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235; *Standard Vacuum Refining Co. of India v. Workmen*, AIR 1961 SC 895.

These are some of the representative cases where the Supreme Court extended the institutional protection to be applicable to typical individual requirements. The nature and scope of the institutional protection have been defined by the Supreme Court in its interpretation of Fundamental Rights in Part III, and Directive Principles in Part IV of the Constitution of India. The Court specifically extended the scope of the Articles 14, 19 and 21 to the needs of the people. In absence of such active interference by the Court the constitutionally guaranteed 'institutional-empowerment' mechanism would have largely been a policy objective incapable of practical realisation.

A portion of the discussion in this part of the article has appeared in Supriya Routh, The Judiciary and (Labour) Law in the Development Discourse in India, 44: 2 *Journal of Law and Politics in Africa, Asia and Latin America*, 237–257 (2011).

<sup>6</sup>Ibid.

It is useful to look at some of the specific changes introduced in Indian labour jurisprudence in order to promote development of workers. The Supreme Court of India, working under a socialist Constitution, had the opportunity to interpret the definition of “industry” under the Industrial Disputes Act (IDA) 1947.<sup>7</sup> In *Bangalore Water Supply & Sewerage Board, v. A. Rajappa and Others* (1978 (002) SCC 213) the Supreme Court clarified the true import of the term *industry* as used in the 1947 statute.<sup>8</sup> Working under a socialist constitution and under circumstances prevailing in the country where the significant majority of the workers were (and still are) excluded from legislative protection it would seem only natural for the Court to interpret the term in such a manner so that the majority of the employment relations (and thereby, majority of the workers) could be brought under its definition, and thereby brought under the protective umbrella of the statute. Delivering the majority judgment Justice Krishna Iyer delineated that industry is characterised by:

- (i) systematic activity, (ii) organized by co-operation between employer and employee ... (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes ... (1978 (002) SCC 213: para 140)

The definition did not have a number threshold to qualify as an industry. Accordingly, if a systematic cooperative activity is performed even by a small number of people, it would qualify as an industry. Such an interpretation helps a significant number of workers who are traditionally outside the labour law purview by making the law applicable to even small establishments where an employer–employee relation exists. Thus, a liberal beneficial reading of the definition would help workers receive legislative protection under the IDA. Justice Krishna Iyer observed:

“[P]ersonality of the whole statute has a welfare basis. The mechanism of the Act is geared to conferment of benefits to workmen and resolution of conflicts. Its goal is amelioration of the conditions of the workers, not from a neutral position but from a concern for the welfare of the weaker lot.” (1978 (002) SCC 213: para 18) (emphasis added).

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<sup>7</sup>An Act to promote amicable industrial relations and settlement of disputes principally between workers and employers.

<sup>8</sup>The IDA in section 2(j) defines: “‘industry’ means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen’.

“A worker oriented statute must receive a construction where the keynote thought must be the worker and the community as the constitution has shown concern for them in Articles 38, 39 and 43” (1978 (002) SCC 213: para 12) (emphasis added).

Interpretation given to the definition of ‘industry’, however, did create significant problems because of the flexibility and indeterminacy inherent in the interpretation. The definition thus clarified by the Apex Court in 1978 was being interpreted differently by different courts, sometimes in conflict with each other (State of UP, 2005). This necessitated the Court to revisit the definition in 2005, although with a different orientation this time – a neoliberal orientation. Although the constitution of India is still socialist and the fundamental rights and directives to the states have not been amended,<sup>9</sup> the higher judiciary has been proselytised with the idea of neoclassical development doctrine by this time.

The neoclassical development doctrine, popularly known as the Washington Consensus, envisages that economic development by itself is sufficient enough in improving living standards of the population at large (Berry, 2003: 15, 17; Stiglitz, 2003: 25, 27, 78–80, 213–214; Aninat, 2007: 16–19; International Monetary Fund, 2007: 14–15). Accordingly, the rule of law, good governance and restructuring propaganda did penetrate the judiciary and the lawmakers (Sinha, 2004: 1; Sinha, 2009: 117). The Supreme Court in 2005 found that its 1978 clarification of the definition ‘industry’ is not authoritative, and the IDA is not labour welfare legislation (State of UP, 2005). The Court speaking through Justice Dharmadhikari, in a significant departure from its earlier approach (especially during the 1970s and 1980s) observed:

“[T]he statute under consideration cannot be looked at only as a worker-oriented statute. (State of UP, 2005: para 37) ‘A worker oriented approach in construing the definition of industry, unmindful of the interest of the employer or the owner of the industry and the public who are ultimate beneficiaries, would be a one sided approach and not in accordance with the provisions of the Act.’” (State of UP, 2005: para 42)

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<sup>9</sup>Part II of the Constitution of India provides for Fundamental Rights that could be enforced by the judiciary. However, the Directive Principles of State Policy, delineated under Part III of the Constitution, are not enforceable by the judiciary. Even though not enforceable, the Directive Principles of State Policy are fundamental in the governance of the country.

The Court further noted:

“An over expansive interpretation of the definition of “industry” might be a deterrent to private enterprise in India where public employment opportunities are scarce. The people should, therefore, be encouraged towards self-employment.” (State of UP, 2005: paras 40–41)

Thus, the Court argued that an expansive definition of industry is a deterrent to private entrepreneurs. The Court argued that overemphasis on the rights of the workers leads to undue financial hardship on the part of the employer. Such hardship results in ousting the employer from the market, which adversely affects the workers (State of UP, 2005: para 40). The underlying justification for challenging the existing expansive definition by the Court was based on development rhetoric in the garb of creation of employment. The Court implied that generation of employment could be possible only when private entrepreneurship is given unrestricted freedom (free from any obligation) to operate in a market economy. This implication of the Court strikingly resonates with the neoliberal development logic of the ‘Washington consensus’ and structural adjustment policies forced by the international financial institutions.

The Court referred the matter to a higher Bench for a revision of the definition of industry. The higher Bench is, however, yet to be constituted, thereby leaving the 1978 decision unaltered. The Court itself could not overrule the 1978 decision because of a lower Bench strength than the former one. It is still the 1978 decision that decides when an entrepreneurship would be an ‘industry’.

As per the Washington consensus, one of the most important structural adjustments for capital against labour is labour flexibility. Labour flexibility is dealt with by the Contract Labour (Regulation and Abolition) Act, (CLRA) 1970 in India.<sup>10</sup> The statute permits employment of labour on a contract basis. The statute also compels abolition of the contract labour system from an industry, and thereby promotes the use of regular employees under certain circumstances.<sup>11</sup>

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<sup>10</sup>Expressing the legislative intent in a nutshell the long title of the Act reads: ‘An Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.’ Thus, wherever abolition of the system was not possible, the legislation requires proper regulation of the system. The principal object was to arrest the growth of contract labour and where its abolition is not possible, to regulate the conditions of employment to prevent exploitation and atrocities associated with and inherent in the system.

<sup>11</sup>The CLRA Act regulates the employment of contract workers in non-regular and seasonal jobs. Regulation of employment of contract workers ensures appropriate conditions at work and other welfare measures. But, however, the law prohibits employment of contract workers for works that are regular and perennial in nature, and has to be performed on a day-to-day basis. The law

During the decades of the 1980s and 1990s, the Supreme Court generally promoted regularisation of the services of the erstwhile contract labourers upon abolition of the contract labour system from an industry,<sup>12</sup> except for the aberration of a two judge Bench in the *Deena Nath and others v. National Fertiliser Ltd. and others* (AIR 1992 SC 457) case. However, after the *Deena Nath* decision (refusing to regularise the services of the contract workers upon abolition of contract work from the undertaking), a three judge Bench quickly restated the law in *Air India Statutory Corporation v. United Labour Union* (1997 (1) LLN 75 SC). In the *Air India Statutory Corporation* case the Supreme Court observed that abolition of the contract labour system ensures right of workers to their regularisation as employees in the establishment in which they were hitherto working as contract labour through the contractor. The contractor stands removed and a direct employer–employee relationship is established.

However, a setback to the above position came with a five judge Bench judgment of the Supreme Court in the 2001 case of *Steel Authority of India Limited v. National Union Waterfront Workers and others* (2001 (7) SCC 1). This decision overruled the *Air India* case and restored the position laid down in the *Dena Nath* case. Thus, as it stands today, contract workers do not have any right to become regularised if their services are terminated, and the establishment is required to make regular appointments afresh.

Although regularisation of contract workers was jeopardised by the abovementioned judgments, regularisation of temporary casual workers in the public sector undertaking was effectively negated by the Apex Court in a 2006 judgment. In 2006, in *Secretary, State of Karnataka and others v. Umadevi and others* (2006 (4) SCC 1), the Supreme Court held that even though the employer is entitled to get their work done by temporary and casual workers on a regular basis, they are under no obligation to regularise the service of these workers (2006 (4) SCC 1). The Court's decision reasoned that regularisation of temporary and

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mandates employment of permanent workers for regular and perennial jobs. The 'appropriate government' (the Union Government or the Provincial Government) is to declare abolition of contract labour from an industry if it is found that contract workers are being employed to perform regular jobs. Upon such declaration by the government contract labour system stands terminated from regular jobs in an industry, and the employer is under obligation to appoint regular employees to fill up the vacancies caused by the abolition of the contract labour system. The CLRA Act is silent on the prospect of regularisation of employment of the contract workers who were employed in the industry before abolition of the system. It is with respect to this silence that the Supreme Court is called upon to decide whether contract workers can claim right to regularisation upon abolition of the contract labour system from an industry. See generally the *Standard Vacuum Refining Co. of India* (AIR 1961 SC 895) case.

<sup>12</sup>See *Lal Bevtia Hotel and Bakery Mazdoor Union v. Bharat Petroleum Corporation*, 1993 (1) Labour Law News (hereinafter 'LLN') 965 SC; *Munna Khan v. Union of India*, 1989 (Suppl.) (2) SCC 99; *R.K. Panda and others v. Steel Authority of India and other*, 1994 (2) LLN SC 378; *N.F. Railway Porters v. Union of India*, 1995 (71) FLR 75 (SC).

casual workers, whose appointment did not follow the prescribed procedure, would prejudicially affect employment prospects of a large pool of unemployed workers (Secretary, 2006 (4) SCC 1: paras 12, 36, 41, 42). However, the facts of the case itself betrayed the Court's logic.

The Court was dealing with cases where workers were employed for ten to twelve years as temporary workers. During this so-called<sup>13</sup> temporary period of more than ten years they did not receive welfare and benefits that the permanent workers were entitled to (Secretary, 2006 (4) SCC 1: paras 6–7). Therefore, for all effective purposes the employer was getting their regular work done by employing (same set of) temporary workers who were not treated at par with permanent workers. On the one hand, this is a cost-saving mechanism enhancing the establishment's competitiveness and, on the other hand, such an arrangement negates employment of the large pool of unemployed workers whose cause the Court purportedly crusades for. In the instant case even though the judges ordered regularisation of employees working for more than ten years in an establishment, they prospectively negated any such regularisation (even if the workers are temporarily employed in an establishment) with a direction to the employer to be judicious in their employment of temporary and casual workers (Secretary, 2006 (4) SCC 1: paras 36, 44). The Court, however, did not see any illegality in the employment of temporary or casual workers (Secretary, 2006 (4) SCC 1: para 36). The Court justified such arrangement by observing that '[t]he courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of the affairs of the State or its instrumentalities ....' (Secretary, 2006 (4) SCC 1: para 34).

While deciding the case, interestingly the learned judges of the Supreme Court asserted that their predecessors (in the Court) misunderstood the connotation "socialist" in the preamble of the Constitution, and got swayed by that misunderstood idea in charting the course of labour jurisprudence.<sup>14</sup> The success of neoclassical proselytisation over the socialist ideal is further apparent when a judge of the Court, writing in a law review, observed:

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<sup>13</sup>"so-called" because it seems odd that a worker would work for more than a decade in an establishment in a temporary position, and even then the work could qualify as decent work.

<sup>14</sup>2006 (4) SCC 1. Justice P.K. Balasubramanyan delivering the judgment on behalf of the Court observes: 'This Court [erstwhile] seems to have been swayed by the idea that India is a socialist republic and that implied the existence of certain important obligations which the State had to discharge. While it might be one thing to say that the daily rated workers, doing the identical work, had to be paid the wages that were being paid to those who are regularly appointed and are doing the same work, it would be quite a different thing to say that a socialist republic and its Executive, is bound to give permanence to all those who are employed as casual labourers or temporary hands ...' (in para 16).

“[L]iberalisation is essentially a *laissez faire* policy, which seeks to reduce the government interference to the minimum. Its primary aim is privatisation and its ultimate aim is a capitalist economy. A question arises as to how far socialism, which our Constitution strives for, has suffered a setback.” (Sinha, 2004: 2)

This ideology finds its place in his decision where he notes that in view of the changed economic policy of the country, an earlier approach to industrial relations protecting only workers’ interest needs to be discarded (Hombe Gowda Educational Trust (2006) 1 SCC 430: para 26). What such neoliberalism entails for labour law is further explained by a Judge:

“To catch the international bus of industrial production and compete globally, a complete change in the mindset of all concerned is required. We cannot achieve our desired economic aims, unless changes are made in our labour policy. On account of globalization, there is an increase in demand to rectify the distortions in our labour laws.” (Sinha, 2004: 2)

The ‘distortions’ in labour laws of the country the learned judge refers to are welfare measures, beneficial provisions and safeguard measures for workers, which emanate from the Constitution of India. These are *distortions*, because these are not compatible with *desired economic aims* influenced by neoliberal ideals. In this backdrop, the underlying agenda remains the overhaul of the beneficial labour guarantees in favour of a more flexible labour regime that suits global capital (Sinha, 2004). However, the concerned judge made no effort to consider the purpose of *desired economic aims*. Economic aims were itself taken to be the end of development, rather than one of the means of development.

In consecutive cases, the Court has changed its earlier position to make labour subservient to capital’s requirements. The constitutional guarantee of equal pay for equal work (Constitution of India: Articles 38, 39) has been diluted by the Court and is made subject to considerations of permanence of employment,<sup>15</sup> educational qualification,<sup>16</sup> sanctioned post,<sup>17</sup> etc. Wrongful terminations were earlier met with reinstatement and payment of back wages;<sup>18</sup> such terminations

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<sup>15</sup>*State of Orissa v. Balaram Sahu*, AIR 2003 SC 33; *State of Rajasthan v. Kunji Raman*, AIR 1997 SC 693; *Mahendra L Jain v. Indore Development Authority*, (2005) 1 SCC 639; *Apangshu Mohan Lodh v. State of Tripura*, AIR 2004 SC 267.

<sup>16</sup>*HP Gupta v. Union of India* (2002) 10 SCC 658; *MP Rural Agriculture Extension Officers Association v. State of MP*, AIR 2004 SC 2020.

<sup>17</sup>*Ghaziabad Development Authority v. Vikram Chaudhary*, AIR 1995 SC 2325.

<sup>18</sup>*State Bank of India v. N. Sundara Money* (1976) 1 Labour Law Journal (hereinafter ‘LLJ’) 478 SC; *L. Robert D’souza v. Executive Engineer, Southern Railways*, (1982) 1 LLJ 330 SC; *Punjab*

are now compensated by lump sum payments,<sup>19</sup> and reinstatement is possible only in rare cases.<sup>20</sup> Burden of proving the fact of employment relation has been shifted from the employer<sup>21</sup> to the worker,<sup>22</sup> despite the mandatory burden of the employer to keep workers' records under law.<sup>23</sup> Such shift in burden makes it easier for the employer to manipulate employment relations by avoiding documentation, especially in a country where the majority of the workers are illiterate.

Recently, the Court upheld the disinvestment of Bharat Aluminium Company Limited (BALCO) (erstwhile a Government of India undertaking) by the Government of India, made without even giving a hearing to the workers of BALCO (BALCO Employees Union, AIR 2002 SC 350). The decision was made in negation of constitutional requirement of workers' participation in management.<sup>24</sup> The Court categorically rejected any requirement of prior notice to the workers by the management (in this case, the Government of India) before the disinvestment decision, even if such a decision affects workers' interest (BALCO, 2002). Justifying the disinvestment decision of the government the Court observed that disinvestment decision might have been necessary for efficiency, competitiveness and economic development (BALCO, 2002), thus implying that it would be myopic to attend to only the workers' causes who worked in BALCO.

Thus, the above orientation of the highest judiciary is increasingly abolishing worker's welfare and benefits to establish a labour jurisprudence that is facilitative of neoclassical capitalism (although under the 'development' garb). Invocation of neoliberal justification, however, directly interferes with the welfare, and therefore development in the sense of improvement of capabilities and living standards of workers.

Sen's insight on development is useful to remember in this context. Somewhat contrary to the neoclassically baptised judges of the Indian Supreme Court, Sen warns of the danger of dependence on the neoliberal development agenda (Sen, 1997: 2). Sen contends that a *free market*-dependent growth often

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*Land Development & Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh*, (1990) II LLJ 70 SC.

<sup>19</sup>*Rolston John v. Central Government Industrial Tribunal cum Labour Court*, AIR 1994 SC 131; *Employers, Management of Central P & D Institute Ltd. v. Union of India*, AIR 2005 SC 633; *Haryana Tourism Corporation Ltd. v. Fakir Chand*, AIR 2003 SC 4465; *Branch Manager, M.P. State Agro Industries Development Corporation Ltd. v. S. C. Pandey* (2006) 2 SCC 716.

<sup>20</sup>*Ibid.*

<sup>21</sup>*K. C. P. Employees Association, Madras v. Management of K. C. P. Ltd.*, Madras, AIR 1978 SC 474.

<sup>22</sup>*Range Forest Officer v. HD Hadimani*, AIR 2002 SC 1147.

<sup>23</sup>Section 25D of the Industrial Disputes Act 1947.

<sup>24</sup>Article 43A of the Constitution of India. Moreover, in the *National Textile Workers' Union v. P.R. Ramakrishnan*, (1983) 1 SCC 228 case, the Court had held that workers have a right to be heard in the winding up proceedings of a company.



comes at the cost of neglect of human ends (Sen, 1997: 2), such as nutrition, health, education, etc. (Sen, 1997: 4–5, 7–10, 13–14, 17–19) He notes that economic development by itself is not enough a condition to address social inequality and disparity (Sen, 1997: 5, 7). Therefore, positive state initiatives with respect to health, nutrition, education, social protection, etc. are a must for actual equitable development of a society (Sen, 1997: 4–5, 9–11, 13–14, 17–18). Hence, although economic development is important for overall social development, it can at best be one of the factors in the development process. What is important for a developing country like India is to enable its citizens (and workers) so that they can take advantage of economic development (Sen, 1997: 4–5). And, that is precisely what the Constitution of the country seeks to achieve through its Fundamental Rights and Directive Principles (Constitution of India: Part III, Part IV).

The alarming neoliberal sycophancy of the Apex Court has recently been lamented by two judges of the Apex Court in utter desperation. In a judgment delivered in January 2010 (*Harjinder Singh*) a division bench of the Court anxiously points out:

“Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the *raison d’etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers.” (Harjinder Singh: para 23)

The judges asserted that this disturbing trend is mistakenly sought to be validated in the name of globalisation and liberalisation of the economy (Harjinder Singh: AK Ganguly).

The neoliberal development ideal is based on the contested (if not faulty) premise of economic development percolating down to the lower strata of society (Stiglitz, 2003: ix–xvi, 3–10, 20–21, 214–222, 248–250). The discourse is based upon an economic growth-based understanding of the development paradigm. However, it has been established that development never happens equally on a nationwide (or international) scale (Halperin, 2007: 543–558; Samuel). It is the elites of the respective societies that benefit from the economic development process (Stiglitz, 2003: ix–xvi, 3–10, 20, 21, 214–222, 248–250; Samuel; Halperin, 2007: 543–558). The voice of the poor and marginalised is not heard and their plight is ignored in the dominant development paradigm (Blake, 2000: 173–174, 178–181, 184, 187–188).

Labour jurisprudence in India, of late, is thus, suffering from two-pronged shortcomings. First, the role of labour law in the country is reduced to the facilitation of *economic aims* of the country. Labour law no longer is an instrument that promotes workers' cause; it is rather being interpreted as an instrument in the promotion of economic development and private capital in the country. The rhetoric of economic development has entrenched labour jurisprudence to a damaging extent – so much so that labour standards are declared as *distortions* in the process of economic development and promotion of private capital. The judiciary, in justifying dilution of labour standards, worked under the belief that economic development is a sufficient enough condition for the overall development of the country, its population and the workers in particular.

The second problem with labour law in India is the judicial understanding of the development discourse. Judicial understanding of development is very much shaped by the hegemonic neoclassical understanding of economic development advocated and marketed by international financial institutions (i.e., the World Bank and the International Monetary Fund, IMF) in pursuance with the so-called Washington Consensus. The problem with such an understanding is that economic development is taken to be the end of development rather than one of the means of development, as Sen has pointed out. Such an understanding of development remains ignorant of the inequalities and diversities within a society. It fails to appreciate that people situated across a diverse socio-economic-cultural and political spectrum cannot derive equal benefits from economic development. This is particularly true for a developing country like India where a significant number of the population is uneducated, malnourished and suffers from curable health problems (India, HDI, 2011). Therefore, as a precondition to the enjoyment of economic development it is necessary that capabilities of the population is enhanced so as to enable them to (effectively) choose how to participate in the process of economic development and how to benefit from such development. The Constitution of India does just that.

The Constitution of India endeavours to improve capabilities of the population by providing for institutional framework in which multidimensional development of the population could take place. By providing for guarantees such as equality, freedom of vocation, education, right to work and livelihood, health and nutrition, socio-cultural development, etc. the Constitution promotes social conditions for the development of capabilities. Once the population is appropriately educated, nourished, healthy and has the option of participating in the socio-economic-cultural-political affairs of the country and the world, they can effectively exercise their choice to do something or be someone. It is only then that economic development constitutes an important means in the overall development of the population.

What it entails for labour law in the country is that labour laws need to get back to the basic Constitutional goals if it is to serve the development cause of the population. Labour laws need to guarantee appropriate social-economic-political conditions in which capabilities of the workers could be improved. This will mean that labour jurisprudence comes out of the vicious cycle of linking labour law with a (faulty) development discourse, and conceptualising development in terms of economic improvement. It is an urgent requirement of labour jurisprudence in India that constitutional guarantees and labour statutes are interpreted and enforced in their letter and spirit, rather than for purposes that is too distant (*economic aims* of the country) for worker wellbeing.

#### 4. Conclusion

It is unfortunate that over the past few decades (decades during which India became a participant in the free market) the judiciary is attempting to rewrite labour laws in India so as to promote the cause of private capital induced economic development (measured, principally, in terms of GDP). The HDI and MPI analyses show the futility of measuring development only in terms of GDP. Effective development needs to be measured from a multidimensional perspective (as suggested by the HDI and MPI analysis) so as to measure improvement in capabilities of the population. This means that labour jurisprudence needs to promote capabilities of workers rather than promoting economic development. The Supreme Court's recent pronouncement that dilution of constitutional guarantees to promote economic development is a dangerous proposition (Harjinder Singh: AK Ganguly) is hopefully a step in the right direction. Otherwise, if the current trend of the judiciary is to continue, it is not in the distant future that the majority of the population of the country will work for the betterment of the minority few.

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