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MESSAGE FROM THE PATRON



THE NATIONAL LAW INSTITUTE UNIVERSITY

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M. Phil., LL.M., Ph.D.
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MESSAGE FROM THE PATRON

I am pleased to present Volume I of the NLIU Journal for Labour and Employment Laws to the legal fraternity. The inaugural volume of the journal presents several articles and papers that will undoubtedly pique the interest of all legal professionals, students, academicians, researchers and others. Topics revolving around employment laws for women and fundamental rights of labour class, among others, are dealt with in great detail by various authors contributing to this volume. It is expected that the readers find themselves enriched by these articles.

The NLIU Journal for Labour and Employment Laws is a platform for academicians, lawyers, researchers and students alike to contribute to legal discourse. The journal encourages legal research and critical thinking by rigorously evaluating the submissions on the basis of contribution to knowledge and contemporary relevance.

I would like to place on record my sincere appreciation to Mr. Mahendra Soni for successfully supervising the publication of this volume through his constant inputs to the student editors. It is indeed an achievement to publish the first volume of this Journal despite all the impediments that were countered due to COVID-19. I would like to appreciate the Editorial Team for their meticulous work and hope their enthusiasm grows with each upcoming volume. I look forward to the feedback from the readers on the contents of this volume which will further refine the Journal.

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A NOTE FROM THE FACULTY ADVISOR

The Centre for Labour Laws (CLL), NLIU has launched the Journal for Labour and Employment Law intending to encourage students, young professionals and experts to express their perspective on contemporary issues of labour laws. This initiative of CLL shall be an endeavor to allow the reads to gain from these perspectives and expand their knowledge in the realm of labour laws.

The articles selected for the very first volume of our journal are focused on a variety of thought-provoking labour issues that hold great relevance in contemporary times. A focus on these topics is necessary for the betterment of labour laws and the welfare of the working population in India. The articles like, 'The Regularization and Privatization of Water Industry for the Welfare of Sanitation Workers', 'The Menstrual Leave Policy', 'The Indian Parental Leave Policy in the Light of Non-Confirming Families', 'Compassionate Appointment to the Dependent of Frontline Workers' and 'Psychological and Legal Dimensions of Covid-19 Pandemic Resulting in Unemployment' raise some pertinent questions that the unprecedented COVID-19 Pandemic has left unanswered for labour regulation regime. It is our sincere hope that the readers would find value in these articles and would be left intrigued and inspired by the hard work of writers.

I take this opportunity to applaud the student body working for the qualitative publication of this Journal. The successful launch of the journal and this issue would not have been possible without their hard work and proactive involvement. The screening and evaluation of all the papers were conducted with utmost sincerity and integrity without any kind of laches or bias.

I would also like to thank our Patron, Prof. (Dr.) V. Vijayakumar, the Vice-Chancellor of National Law Institute University, Bhopal, for his continuous encouragement, guidance and support. I must also extend my heartfelt gratitude to all the contributors to this issue who have made this publication endeavour a success.

We wholeheartedly invite and appreciate comments, suggestions or criticism on the articles published herein and the issue as a whole. The NLIU Journal for Labour and Employment Law is determined to always strive towards betterment and any comment will be a step in this direction.



MAHENDRA SONI

Chairperson, Centre for Labour Laws
National Law Institute University, Bhopal

EDITORIAL NOTE

The inaugural volume of the Journal for Labour and Employment Law presents the readers with contemporary issues in the labour and employment industry and the relevant legal provisions dealing with the same. The Journal contains articles providing in-depth analysis of various legal concerns centred around labour and employment law, while also striving to find solutions for the same.

‘Formidability of Menstruation Leave Policy’ discusses the policy of providing menstruating employees time off from their work and the effect that it has on various jobs and establishments. The article presents the contradicting views on the effectiveness of the policy and theorises whether the intended purpose of the same has been achieved or not. It focusses on the religious practices around menstruation and how these have sanctioned the menstrual leave policy at workplaces. Finally, the article goes on to review the Menstrual Benefits Bill and suggests various methods for better establishment of a universal menstruation leave policy.

In ‘Regulation and Privatisation of the Water Industry for Better Security of Fundamental Rights of Sanitation Workers’ the author has reviewed the existing laws which govern manual scavenging and its allied activities. The article is a critique on the lack of statutory regulations which are necessary for the protection of the rights of manual scavengers, who mainly belong to the Dalit community are continuously discriminated against. Finally, it proposes for the privatisation of the water industry to ensure that the fundamental rights of these workers are not violated.

‘Psychological and Legal Dimensions of Covid-19 Pandemic Resulting in Unemployment: An Indian Perspective’ deals with the adverse effects of the pandemic on the livelihood of several million people. The author has

based their article on statistical data with respect to unemployment during the pandemic and how it has psychologically and legally impacted the people who lost their jobs. The article aims to present solutions which prioritise mental well-being and resilience on the bedrock of legal principles.

‘Conditional Social Cohesion for Non-Conforming: The Exclusionary Notions of Parenthood in Indian Parental Leave Policy’ has discussed parental leave benefits for employees and how the Indian legal regime falls short in the area. The author has talked about non-conforming families and how they need to be included in the discussion regarding parental leave benefits. The article has examined these benefits from both, the gender binary and the non-binary perspectives and has included how other legal regimes have implemented more inclusive policies. Lastly, the article calls for a review and revision of the Indian legal regime on parental leave policy.

In ‘Compassionate Appointment to the Dependent of Frontline Workers during Pandemic Era: A Way Forward’ the author has reviewed the compassionate appointment policy in India in light of the Covid-19 pandemic. The article has analysed the existing compassionate appointment policy and has highlighted its significance in addressing social security issues of Covid-19 frontline workers.

The Journal for Labour and Employment Law team hopes that the readers of this volume will gain useful insights in the area of labour and employment laws. The Centre for Labour Laws strives for excellence and this Journal is another step in that direction. We would like to thank the authors for their contributions and welcome feedback for any improvement in the quality of the Journal.

COMPASSIONATE APPOINTMENT TO THE DEPENDENT OF FRONTLINE WORKERS DURING PANDEMIC ERA: A WAY FORWARD

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ABSTRACT

Compassionate appointment is a unique system designed to provide employment to the kin of deceased government servants. Prevalence of this system finds its scope purely from welfare schemes in India, which is incompatible with the transnational labour system. Compassionate appointment is a welfare procedure availed by the beneficiaries at the approval of the respective state government on a case by case basis. Hence, this benefit cannot be claimed as an entitlement. Notwithstanding its limitations, a large section of families in India have been benefited through this scheme.

The constitutionality of compassionate appointment is still questionable, and a heap of cases has been filed in courts for judicial scrutiny in this regard. Interestingly, West Bengal Government has formulated a scheme for compassionate appointment termed as “The West Bengal Special Compassionate Appointment Scheme, 2020” to provide employment to the dependents of Covid Warrior families. The positive approach of the West Bengal Government to provide compassionate appointments has gained fresh momentum and has taken centre stage in employment law.

India’s strategic approach towards the current pandemic situation is to provide ex-gratia compensation for the frontline workers in case of death due to a deadly virus wherein, the quantum of ex-gratia payment is decided by states according to the state’s financial capability. The article provides a comprehensive view of the concept of compassionate appointment. The article explores the significance of compassionate appointment in addressing the social security issues of Covid warriors.

KEYWORDS: COMPASSIONATE APPOINTMENTS, WELFARE, FRONTLINE WORKERS, EX-GRATIA, LABOUR POLICY

INTRODUCTION

Compassionate appointment is a welfare scheme that facilitates the Centre and state governments to grant employment to the legal heirs of government servants on a compassionate basis upon fulfilling various other circumstances like eligibility, financial stance of the family, availability of vacancy, and other criteria stipulated in the scheme or any other conditions decided from time to time by the state or its agencies. In this respect, such appointments can be claimed by the legal heirs on any of the following two contingencies: (1) on account of death of an employee in harness or (2) medical invalidation of the employee while in service. Yet another ground for compassionate appointment is the acquisition of land for public projects. This ground has acquired less prominence, where those who lose land to public projects are provided with employment in the concerned project.¹

Pertinently, compassionate appointments cannot be claimed either as a right or as an entitlement. The reason being, compassionate appointment has no constitutional or statutory basis. Thus, in general, employers are not obliged to grant compassionate appointments, but considering the welfare of the government servant's family members, who may face sudden financial disruption due to the death of the earning member of the family, the departments can decide on a case by case basis. Hence, employers are not mandated to provide compassionate appointment and it is not an automatic privilege for the heirs to claim such appointments. The concept of compassionate appointment derives its support from Directive Principles of State Policy and is absolutely social welfare in nature. It can be better construed as a concession instead of a right. Due to its non-statutory nature, both claimants and employers encounter difficulties relating to its misconceptions. On the one hand, the employers reject the claims made by legal heirs on menial grounds and on the other hand, multiple claims made by the legal heirs of the deceased servant, leave the employers in a muddle.

Under this scheme, compassion is placed at the centre stage. The scheme of compassionate appointment has been operative for a long time. Since then, the appointments have been regulated by policy guidelines framed by the Department of Personnel & Training Instructions (DOP&T). Based on the requirements of the

¹ Thomas Paul, "Compassionate Appointment on Medical Invalidation" [2008] 50 JILI 391, 398

organization, conditions and guidelines are framed in order to implement the policy. At present, there is no comprehensive legislation that governs the policy of appointment on compassionate ground.

The approach of compassionate appointments is an exception to the general rule of appointment under Article 14 and 16 of the Indian Constitution. Nevertheless, the exception has been judicially recognized.² Thus, in numerous cases, the courts have observed that appointments should be made strictly on a merit basis and on the basis of open notification. At the same time, considering the welfare nature of our Country, in exceptional circumstances, employment on humanitarian grounds can be allowed. The Supreme Court has passed many significant judgments in this light and has a significant part in the evolution of the concept. Given the continuous surge in Covid cases and increasing death toll, majority of states have responded by compensating families with *ex-gratia* payment according to the state's availability of funds. Obviously, fluctuations in the quantum of the benefit provided by each state are far-reaching. Recently, a petition has been filed seeking for the court to direct the Centre and state on information and regulation of *ex-gratia* payment for the kin of essential and healthcare workers through a national policy. The said petition was rejected by the three-judge bench of the Supreme Court, comprising Justices Ashok Bhushan, Subhash Reddy and MR Shah³ on the ground that states have differentiated policy. Moreover, the Court has expressed the non-feasibility of framing a uniform national policy for *ex-gratia* compensation due to the varying financial constraints faced by the states.

Evidently, extending the scope of prevailing schemes of compassionate appointment and its applicability during any emergency situation lies with the state government. Therefore, recognising the significance of frontline workers, the present scheme has to be revamped to provide appointment to the family members of Covid warriors. This welfare benefit will widen the scope of their involvement in work.

² Tirlok Nath Arora, "Dying in Harness: Law of Compassionate Appointments" [1996] 38 JILI 38, 57

³ Samanwaya Rautray, 'Supreme Court refuses to order uniform ex gratia for Covid victims' *The Economic Times* (New Delhi, 24 August 2020)
<<https://economictimes.indiatimes.com/news/economy/policy/sc-refuses-to-entertain-plea-for-national-policy-for-compensation-to-covid-19-victims/articleshow/77716540.cms>> accessed 14 September 2020

CONCEPTUALISATION OF COMPASSIONATE APPOINTMENT

Recruitment of various grades in the government departments in India are provided under the rules/orders of concerned departments, whereas the common forms of appointment fall under the following categories: (a) Open competitive examination; (b) Appointment on deputation/transfer; (c) Appointment of Consultants; (d) Appointment on co-terminus basis; and (e) Compassionate appointment.

It is a well-established rule in public employment that appointment must be strictly made on the basis of open invitation and merit. Equality of opportunity in public employment is the constitutional mandate that represents the idea that all people should be treated alike. In compassionate appointment, no such mandate has been followed and is contrary to the benefit of equality of opportunity rule enshrined in the Indian Constitution. Compassionate appointment is a welfare scheme devolved from Centre to state and its instrumentalists. It has been reaffirmed by the Supreme Court in many cases that appointment should not be treated as another source of recruitment but merely an exception to the rule of equality of opportunity, taking into consideration the financial condition of the family of the deceased employee. In such cases, the object is to enable the family to get over the sudden financial crisis. Moreover, appointments on compassionate ground have to be made by the authorised departments in strict adherence to the scheme of compassionate appointment circulated by the Central Government. At present, compassionate appointments are awarded either on account of the death of an employee or in case of medical emergency while in service.

Dying in Harness

Dying in Harness signifies the death of an employee while in service. Dying in Harness is the basic rule which has to be met in order to claim appointment on compassionate basis. The main intent of the scheme of compassionate appointment is to tide over the financial crisis due to the sudden death of the member of the family. The scheme has entrusted the duty of genuinely examining distress and the financial incapacity of the family to the concerned departments. The departments are required to show mercy and a humanistic approach while deciding the eligibility of compassionate appointments. Notwithstanding, the non-statutory nature of compassionate

appointment, states and its machineries, in consonance with the welfare of employee, are obliged to provide appointment on compassionate grounds for eligible kin.

Medically Incapacitate Person

The term denotes “any person who retires on medical grounds due to incapacity before reaching the retirement age stipulated in the scheme of compassionate appointment”. In India, incapacitation is to be certified by a Medical board. According to 2(A)(b) of the scheme of compassionate appointment,⁴ the benefit of compassionate appointment can be claimed if the employee retired on medical grounds under Rule 2 of Central Civil Services (Medical Examination Rules) 1957⁵ or grounds under Rule 38 of the CCS(Pension) Rules, 1972 or parallel provision in the Central Civil Service Regulations.⁶ This ground is available before the attainment of 55 years of age. As per Rule 2 of CCS (Medical Examination Rules) 1957, medical ground means either the government servant has to suffer from a contagious disease or physical/mental disability, making him/her inefficient to discharge duties.

Prior to the introduction of the Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation Act, 1995] services of the employees with disabilities, who were medically de-categorised were terminated as per the terms of rule of the respective departments. Whereas, at present, if the employee is a permanent government servant, who is not in the position to continue in any post because of this medical condition, he may be allowed to opt for retirement. In such cases, request for an appointment on compassionate ground to an eligible ward may be considered.

SERVICE JURISPRUDENCE AND COMPASSIONATE APPOINTMENT

Service jurisprudence denotes the principles evolved *vis-à-vis* service. Service jurisprudence provides solutions to practical problems of labour-related issues that arise due to insufficient laws. Service jurisprudence plays a significant role in the

⁴ Government of India, Ministry of Personnel, Public Grievances and Pensions, *Consolidated Instructions on compassionate appointment, Scheme for compassionate appointment under the Central Government* (O.M.No. 14014/02/2012-Estt. (D), 2013)

⁵ Government of India Ministry of Health, *A Handbook on Medical Examination*, 13th June 1960, New Delhi

⁶ Government of India, Ministry of Personnel, PG & Pensions, Department of Pension & Pensioners' Welfare, O.M. Mo. 38/49/16 P&PW(A)

evolution of the concept of compassionate appointment. The concept of compassionate appointment has no statutory or constitutional basis. The concept was introduced in 1958,⁷ since then the approach is followed by Central and state governments. Till 1998, compassionate appointment was regulated by the Department of Personnel & Training with the formulation “Scheme of Compassionate Appointment under Central Government”. The Scheme was subjected to amendment from time to time, to address contemporary issues relating to compassionate appointment. For instance, initially, the only son or wife of the deceased person was entitled to claim for such appointments and unmarried daughters or illegitimate children did not fall under the category of eligible persons. These lacunas were rectified with the amendments to scheme of compassionate appointments. At present, both married and unmarried daughter are also entitled for compassionate appointments.

Public Sector Banks (PSB) started appointments on compassionate basis from 1972, where sons, daughters or widows of deceased employees were entitled to such appointments. From 1st January 1979, a uniform scheme was introduced in all PSBs where even near relatives nominated by the dependent persons were given such appointments.⁸ It is pertinent to note that the claimants have to appear for the entrance examination even to take up the job on a compassionate basis.

Since May 1982, compassionate appointment on medical invalidation was implemented. The said modification to the Scheme was made in line with the instructions by the Government of India. In 2007, Indian Bank Association (IBA) introduced the scheme for payment of ex-gratia in lieu of appointment on compassionate ground, where the dependents were paid compensation of a quantum of upto a maximum of 8 lacs and, only under exceptional circumstances dependents were provided with compassionate appointments. This amount was calculated based on the last drawn salary. However, in 2014, compassionate appointment scheme was

⁷ Parliament of India Rajya Sabha, Forty First Report on Action taken replies of the Government on the Recommendations/Observations contained in the 23rd Report of the committee on “Government’s policy of appointment on Compassionate Ground (2010)
<<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/41.pdf>> accessed 17 September 2020

⁸ Abhik Ray, Chakraborty, Suman Das, J.S. Mathai, *The evolution of the State Bank of India: The era from 1955 to 1980* vol 4 (Penguin Books India 2009) 856

re-introduced in the banking sectors, with the intervention of the Central Government.⁹

Since 1998, the task of regulating compassionate appointments has been entrusted to the Ministry of Personnel, Public Grievances and Pensions (MoPP&P). The Ministry of Personnel, Public Grievances and Pensions (MoPP&P) is a coordinating Central Government agency entrusted with matters concerning recruitment, training, and welfare of staff, etc.¹⁰ The Ministry comprises of three departments: Department of Personnel and Training (DoP&T), Department of Administrative Reforms and Public Grievances (DAR&PG) and the Department of Pensions and Pensioners' Welfare (DoP&PW).¹¹ Significantly, the Department of Personnel and Training (DoP&T) has a pivotal role in framing the policy guidelines on compassionate appointment for Central and state governments. These guidelines serve as the core document for all departments' memorandum, rules, or orders to govern compassionate appointments. The concerned departments frame their set of rules to regulate compassionate appointment keeping in consonance with MoPP&P guidelines.

On 9th October 1998, the Government updated the existing scheme, superseding all previous orders relating to compassionate appointment. The update was made in the light of various court judgements and recommendations, including the 5th Central Pay Commission Report, and the Study Report of 1994 prepared by the Department of Administrative Reforms and Public Grievance.¹² Supreme Court verdict in Umesh Kumar Nagpal v. State of Haryana, was one of the major reason behind circulating consolidated instructions on compassionate appointment. In the said Case, the Supreme Court has given detailed guidelines for regulating compassionate appointment in the absence of a comprehensive law. In May 2013, final consolidated

⁹ Indian Overseas Bank Officers Association (IOBOA), 'Guide to Your Rights and Duties' < <http://ioboa.co.in/rights&duties.html> > accessed 19 September 2020

¹⁰ GOI, Ministry of Personnel, Public Grievances and Pensions (MoPP&P) < <https://persmin.gov.in/> > accessed 17 September 2020

¹¹ Ministry of Personnel, Public Grievances and Pensions, 'Annual Report 2018-2019' < <https://dopt.gov.in/sites/default/files/AR%202018-19%20English.pdf> > accessed 17 September 2020

¹² Department of Personnel & Training, *Scheme for compassionate appointment under the Central Government* (O.M.No. 14014/6/94-Estt. (D), 1998)

instructions, guiding the appointments were made and the same are available on the official website of Department of Personnel & Training.¹³

SHRI. UMESH KUMAR NAGPAL V. STATE OF HARYANA AND OTHERS¹⁴

The question of nature and object underlying the rule of compassionate appointment has been discussed in this case. The Court has directed the public authorities and concerned governments to give due consideration to the financial condition of the family while deciding such appointments. Lapse of time is another important aspect that the Court has dealt regarding fixing of criteria for claiming appointment on compassionate basis. In May 1994, the Apex Court laid down certain guidelines to regulate compassionate appointments. At the outset, the Court opined that such appointments cannot be claimed as matter of privilege/right. Whereas, considering the financial condition of the family, the concerned department can decide either to provide *ex-gratia* or compassionate appointment. The court also fixed the time limit for making the claim. Compassionate appointments are permitted only to class III and IV posts, leading to appointment to class I and II, if legally impermissible. If the overqualified claimant is not willing to take class III and IV posts, he will not be provided higher grades. Exception to the general rule is applicable only to regular/full time jobs wherein part-time jobs, ad-hoc jobs, casual jobs do not fall under the ambit of scheme of compassionate appointment.

This judgement has brought a lot of changes in the service jurisprudence of compassionate appointment. It led the Indian Government to frame the scheme of compassionate appointment and circulate it among the state government machineries and public sector banks. Most of the departments began to deny compassionate appointments on menial ground and even deserving families were denied jobs on compassionate basis. Particularly, the banking sector replaced *ex-gratia* compensation for compassionate appointment following this judgement. Accordingly, *ex-gratia* payment of Rs.8.00 lacs was paid to the family if the monthly income of the family from all sources was less than 60% of the last drawn salary. In the year 2007, the scheme was modified to provide compassionate appointment in certain

¹³ Consolidated Instruction on Compassionate Appointment, Office Memorandum 2013, F.No.14014/02/2012

¹⁴ JT 1994(3) SC 525

exceptional cases. Finally, in the year 2014, compassionate appointment was reintroduced with the modified scheme of the Central Government.

NATURE OF COMPASSIONATE APPOINTMENT

Given the non-statutory nature of the scheme, dependents have no vested rights to claim compassionate appointment and such appointment is regarded as a mere concession. The scheme finds its root in the welfare benefit measure for dependents, as an exception to the general rule of equality of opportunity in matters of public employment. While the scheme shows certain leniency towards dependent family members of deceased employees, it also fixes the threshold to be fulfilled to receive the benefit. These include time limit within which the benefit has to be claimed, consummation of compassion and indigency.

Welfare benefit

The common law does not provide for compassionate appointment. It is a social welfare benefit framed in consonance with Directive Principles of State Policy envisioned in the Indian Constitution. The concept of social justice is indispensable for a country like India, and it is the philosophy of restoring the dignity of the poor and oppressed. In order to protect the welfare of family members of the deceased employee, the Government has framed the scheme providing compassionate appointment without which it would be difficult for them to lead a dignified life.

Not a vested right

A vested right is a complete right which can be claimed immediately or in the future, without any time constrain. Compassionate appointments are not considered as a vested right as they have some time constraint and cannot be claimed after a lapse of the specified time. Rights are 'vested' when the right to enjoyment is both, present and prospective. Thus, a vested right is a right independent of any contingency, and it cannot be taken away without the consent of the person concerned. Vested rights can arise from contracts, statutes or by the operation of any law. The scheme of compassionate appointment has no explicit time limit, though it cannot be granted after the lapse of 'reasonable time', specified in the concerned department's rule/memorandum. Nevertheless, the Central scheme for compassionate appointment states that claim for compassionate appointment can be considered without any regard to time limit, subject to the availability of vacancy i.e. total compassionate

appointments made in a year should not exceed 5% of direct recruitment and department rules governing compassionate appointments.¹⁵

Indigency

The Supreme Court, in various cases, has held that the mere death of an employee while in service does not enable the kin to claim compassionate appointment. The government or the concerned public authority has to examine the financial condition of the family of the deceased. Thus, the appointments on humanitarian grounds has to be decided by the department on need based approach.

Consummation of Compassion

Once the kin of a deceased employee accepts the post offered under compassionate appointment, he cannot claim for a higher post since his right to considered for appointment under the same rule is said to be perfected.¹⁶ For instance, once the eligible claimant accepts the post of a Clerk, he/she cannot further seek appointment as a sub-inspector since his right for compassionate appointment is consummated with the acceptance of the initial job. Once the dependent had been duly appointed under compassionate appointment, the right to seek a job under compassionate basis stands consummated. A second consideration for a higher post on the same ground would lead to “endless compassion”.¹⁷ In the case of Lalit Kumar v. Haryana, the dependent of a deceased employee was conferred with the post of Kanunago on compassionate rule and the same was accepted by him without objection. Hence, later, when the person gained additional qualification and claimed compassionate appointment for tehsildar, a higher post, his claim was denied by the Court.¹⁸

CONSTITUTIONAL BASIS OF COMPASSIONATE APPOINTMENT

The recruitment rules of any service can be regulated either by the acts of the legislature or the rules framed by the administrative authorities empowered to do so,

¹⁵ Department of Personnel & Training Establishment ‘D’ Division, ‘Frequently Asked Questions (FAQs) on Compassionate Appointment’ < https://dopt.gov.in/sites/default/files/14014_02_2012-Estt.D-30052013.pdf > accessed on 20 September 2020

¹⁶ Manager Committee of Management v. Mahendra kumar Shukla, 1994 (8) S.L.R. 518

¹⁷ State of Rajasthan v. Umrao Singh (1994) 6 SCC 560

¹⁸ Lalit Kumar v. State of Haryana, 1994 (2) S.L.R. 751

in the absence of statutory provisions. However, the law or rule framed should be in accordance with Articles 245 and 309 of the Indian Constitution. The framed laws/rules should not contravene the Fundamental Rights or Articles 310 and 311 of the Constitution. The Governor is empowered to frame rules regulating the recruitment under Article 309 of the Indian Constitution. For instance, the West Bengal Special Compassionate Appointment Scheme was framed by the Governor of West Bengal in the exercise of the power conferred upon him under Article 309 of the Indian Constitution.

Likewise, in the absence of rules framed under Article 309 or in the absence of law, the states can issue instructions regarding the principles to be followed in the matters of conditions of service and recruitment. The rules made by the authorities under such instructions should be within the scope of the Constitution and will have the same force as law. This specifies the delegation of legislative function to the executive authorities and at the same time, essential legislative functions like determination/formulation of legislative policy or enacting the policy into rule cannot be delegated.¹⁹ Thus, the Central Government has framed a scheme and instructions have been circulated to all state governments and their machineries, delegating them to frame rules in accordance with the central scheme.

It is well established that recruitment rules or service rules should not contravene or violate any Constitutional provision. However, compassionate appointments are against Article 14 and 16 of the Indian Constitution i.e. equality before law and equality of opportunity in public employment, without any discrimination based on caste, descent, place of birth etc. Nevertheless, compassionate appointment derives its origin from Article 16(2) of Indian constitution, which is a kind of an exception to rule of non-discrimination in appointment in public services on the ground of descent. Compassionate appointments are an exception to the said general rule, carved out in the interest of justice during emergencies.²⁰

RECOGNISING THE WELFARE OF FRONTLINE WORKERS BEFORE AND AFTER PANDEMIC

¹⁹ A. K. Kraipak v. Union of India. AIR 1970 SC 150

²⁰ Haryana State Electricity Board v. Hakim Singh, (1997) 8 SCC 85

COVID-19 pandemic is an unprecedented challenge to all nations, irrespective of their economic status. The situation has raised the importance of preserving the workforce of frontline labours. Given the current pandemic, the frontline workers continue to serve the society with minimal health and social security. The indispensability of essential workers has been deeply entrenched during the global pandemic situation and amplified the demand for their service to tide over the precarious condition. Realizing their moral imperatives towards the society, essential workers have put their own lives in peril for safeguarding humanity. Acknowledging their round the clock service, governments of various countries have responded by formulating new strategic approaches. India's strategic approach towards the current situation is to provide *ex-gratia* compensation for the frontline workers in case of death due to the deadly virus. The *ex-gratia* payment is given on compassionate basis since existing labour legislations for compensation in India does not extend to the death caused by disease at the workplace. The unprecedented event requires much more than mere appreciation to end their social and financial hardship.

WHO ARE FRONTLINE WORKERS?

Workers whose physical presence is required for the jobs and who are vulnerable to health risks are called frontline workers.²¹ There is no legal definition for frontline workers since the phenomenon itself is new and developed during the pandemic situation. Frontline workers can be termed as people who have to report to the workplace in the face of unknown threats and whose work could not be fulfilled in the distance mode. While mentioning the concept of frontline workers, it is pertinent to point out the correlated term - essential industry. Essential industry can be defined as organisations and government agencies whose functions are crucial to the health, safety, security and economic well-being of people. Frontline workers are people employed in essential industries.

Among frontline workers, frontline health workers are more vulnerable as they are involved in providing health services directly to communities. Comparatively more women are engaged in health sectors than men. In India, Anganwadi workers,

²¹ Adie Tomer and Joseph W. Kane, 'To Protect Frontline Workers Before and After COVID-19, we must Define Who They Are?' (*Brookings*, 10 June 2020) < <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/> > accessed 23 September 2020

accredited social health activist (ASHA) and auxiliary nurse midwife are the three categories of frontline workers, who fall within the ambit of two ministries, i.e., the Ministry of Health and Family Welfare (MoHFW) and the Ministry of Women and Child Development (MoWCD).²²

Anganwadi workers perform various responsibilities like conducting health surveys and maintaining records of the same through coordination with health establishments. ASHA workers carry door to door visits at the village level to create awareness about various health issues among people. Auxiliary nurse midwives, unlike the Anganwadi and ASHA workers, perform supervisory functions.

ASHA workers help to implement any government health scheme at the grassroots level. Their usual work is to carry out regular check-ups on babies, pregnant ladies and others vulnerable to diseases. They also distribute medicines, such as iron deficiency tablets on a regular basis. The current pandemic situation has expanded their role to keep an eye on the signs of COVID-19 among people and to disseminate precautionary tips to the community they visit. In the healthcare system in India, nearly nine lakh ASHA workers were involved in the task, who are not paid regularly for their services.²³

Frontline workers include, but are not limited to, healthcare workers. Law enforcement officers, sanitary workers, and truck drivers also fall under the category of workers whose services play a dynamic role to tide over the pandemic situation. Many of these frontline workers have been affected by Covid-19 and unfortunately, have died in the line of duty. Not only are these professionals and workers exposed to high-risk of infection but also, they have to confront the fear of contagion and spreading the virus to their family members.²⁴ Social stigma is another burden faced by family members of frontline workers. Hence, social assistance to the spouses and kin should be implemented to protect the family and their future. Considering

²² Sahil Kejriwal, 'Frontline Healthworkers' (*Indian Development Review*, 19 September 2018) <<https://idronline.org/idr-explains-frontline-health-workers/>> accessed 23 September 2020

²³ Anuradha Raman, 'At the Forefront of India's Healthcare System, ASHA Workers Soldier on – Unprotected and Poorly Paid' *The Hindu* (New Delhi, 04 July 2020) <<https://www.thehindu.com/society/at-the-forefront-of-indias-healthcare-system-asha-workers-soldier-on-unprotected-and-poorly-paid/article31979010.ece>> accessed 23 September 2020

²⁴ Amine Souadka, 'COVID-19 and Healthcare workers families: behind the scenes of frontline response (2020) 23 Lancet <[https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30117-6/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30117-6/fulltext)> accessed 03 September 2020

their services the state governments have adopted various measures to support families of frontline workers with varying capabilities, leading to a wider gulf in compensating the frontline workers families.

However, the government of West Bengal has taken the move of framing a new scheme to appreciate the services of frontline workers and to protect their families during the pandemic situation.

THE WEST BENGAL SPECIAL COMPASSIONATE APPOINTMENT SCHEME, 2020²⁵

The state government of West Bengal has galvanized the state machinery and mobilized all resources at its disposal to combat the situation arising due to the outbreak of COVID -19. It is evident from the recently designed special compassionate appointment scheme providing appointment to the kin of essential and frontline workers, who died due to Covid - 19. The Scheme came into effect from 1st April 2020 and it is based on two attributes – (1) death due to covid-19 (2) permanent incapacitation due to covid-19. As the title of the Scheme indicates, it is exceptional since it encompasses not only the permanent government servants but also employees working on a temporary basis. According to para 2(A) of the Scheme, apart from state government employees, rural and urban local bodies, public undertakings, statutory bodies or any grant-in-aid institutions have also been given benefit. Para 2(B) takes account of all frontline workers like ASHA workers, Anganwadi workers, civic police volunteers, multipurpose health workers, contractual and part-time medical personnel, including nurses, sanitary workers, people engaged in laundry, diet and drug management, etc.

Compassionate appointment under the Scheme has been made available in Group C and Group D, in line with the DoPT instructions. However, in view of the pandemic, the West Bengal Government has made certain exceptions in providing higher posts for eligible candidates with the approval of the Finance department. Pertinently, the Scheme assures the issuance of appointment on a compassionate ground within 30 days from the date of receipt of an application submitted under the Scheme. With

²⁵ The Government of West Bengal, The West Bengal Special Compassionate Appointment (to the dependant of Covid Warrior who has died or has been permanently incapacitated due to Covid-19) Scheme, 2020, Notification 2020, No. 2413- F(P2)

regard to the time limit for the application of compassionate appointments, the Scheme fixes a maximum of 3 months. However, in compelling circumstances, it allows the concerned authority to extend the time limit to one year since the death/incapacitation of an employee. It indicates the predominance of the compassionate appointment over the others given under exceptional grounds.

CONCLUSION

The pandemic induced an economic crisis, affecting the world-wide population. The frontline workers have dedicated themselves in order to fight COVID – 19, ignoring their own safety, security and economic well-being. It is the obligation of the State to protect the frontline workers and their families for their contributions towards the society. Undoubtedly, the move by the West Bengal Government, in framing a special scheme for compassionate appointment exclusively for the dependents of the employees deceased due to COVID is a way forward. Though *ex-gratia* compensation is a well-recognised approach at the global level, the continuing situation of payment of unequal *ex-gratia* compensation for COVID warriors throughout India signify the inappropriateness of the concept.

Compassionate appointment is a well-established principle in India and is a unique feature for providing employment to meet contingencies, as it does not exist in any other country. Given the situation of the pandemic, the Country is being confronted with increasing deaths each day. The unprecedented situation compels the Government to take appropriate measures to reduce the rising number of cases and be considerate towards the welfare of the people. The frontline workers, despite the danger of contamination, are soldering to fight the deadly disease. Thus, compassionate appointment to the kin of deceased frontline workers would provide a relief to the families, who maybe in mental distress due to the unexpected death of their family member on duty. Considering the financial instability of states, providing compassionate appointment would be an appropriate measure for India instead of providing lump-sum amount to the dependents of deceased workers. The need of the hour is for each state to frame a Scheme to meet the current contingency, following the model of the West Bengal Special Scheme of Compassionate Appointment to better address the issues faced by frontline workers. In this respect, the Central Government has a primary role in providing appropriate instructions to the state government and its instrumentalities.

FORMIDABILITY OF MENSTRUATION LEAVE POLICY

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ABSTRACT

The policy of providing menstruating employees time off from their work has been spreading to various jobs and establishments in the recent few years, and the debate on the impact of such policy has been growing even more steadily. There is a stark contradiction of opinion on whether the stand made by the policy is against the deplorable inequalities in the workplace, or is it a chauvinist deposition on the capability to work. Moreover, there is a running pattern of all preconcerted policies of menstrual leaves suffering from defects that render each of them opposed to the purpose it set out to achieve. The essay explores the proposition of this policy and provides its sanction in the context of religious antecedence of menstrual relief, the moral gauging of the portrayal of menstruation and the instrumentality of menstrual leaves in employment. It then turns to highlight the Indian take on menstrual leaves and the premises of the Menstrual Benefits Bill. It moves on to trace the depiction of this policy comparatively in multiple backgrounds. Lastly, it propounds & dissects the contentions clouding the idea of menstrual leaves on the touchstone of employment and makes a suggestion to better establish the premises for a universal menstruation leave policy.

KEYWORDS: MENSTRUAL LEAVE POLICY, PERIOD LEAVES, MENSTRUAL LEAVE BENEFIT, MENSTRUAL LEAVES IN WORKPLACE, PERIOD LEAVES IN EMPLOYMENT

INTRODUCTION

In August of 2020, in an unexpectedly bold move, Zomato, the India based food delivery company, introduced an annual ten days paid menstrual leave grant extending to transgender women.¹ This, however, is not the first industry, several other companies like Tata Steel & Media Giant Culture Machine already have similar policies in place, and by all means, this is not a country first either, several other nations also have legislations or at the very least an outline of such a policy, including India through

¹ Press Trust of India (PTI), 'Zomato introduces 'period leave' for employees' *The Hindu* (New Delhi, 9 August 2020) <<https://www.thehindu.com/news/national/zomato-introduces-period-leave-for-employees/article32308642.ece#>> accessed 6 September 2020

its *Menstruation Benefits Bill*.² The connotations of such a policy are debatable; some argue that it is a move that would further gender a shared workplace and undo the equality³ that is being strived for, while others plead it as an implicit entitlement under the covenants of equality in India. But what is undeniable is the window this policy provides in relation to the legitimacy of such a policy, both at an organisational and a universal scale. The takeaways from this policy are briefly its implications on equality, the overstepping on the boundaries of privacy, the aftermath that looms on employment opportunities & productivity, its rendition of dis-incentivizing the employability of women workforce and the thin thread on which the portrayal of menstruators hangs.

POSTULATION OF PERIOD LEAVES

Menstrual Leaves is not a novel idea though its sanction is nascent. Granting menstrual Leaves is affording menstruators the right to relieve themselves of their work or duty. Contemporization has juxtaposed menstrual leaves with the entitlement of leave from employment but construing this principle in this light heeds little to its legitimacy. Menstruation in various cultures has existed as an impure or polluted phenomenon. Menstrual cycles in some religions have been considered as a process of indignity and menstruators as its innuendos, tainting the religion's sanctity. The canonical texts of Hinduism symbolise menstruation as a natural process of self-purification to dispense impurities from the body.⁴ Under it, menstruators, more specifically, women, are required to seclude themselves and abstain from household work, religious rituals and other such restrictions. In Buddhism, also the phenomenon of menstruation is regarded to be antithetical to its societal notions as the process is considered to denote the impure blood of the abyssal, and menstruators as apostles of the underworld.

² Menstruation Benefits Bill 2017 (Menstrual Bill)

³ Radhika Santhanam, 'Should women be entitled to menstrual leave?' *The Hindu- Opinion* (21 August 2020) <<https://www.thehindu.com/opinion/op-ed/should-women-be-entitled-to-menstrual-leave/article32407772.ece>> accessed 9 April 2021

⁴ Janet-Chawla, 'Mythic-Origins-of-Menstrual-Taboo-in-Rig -Veda', (1994) 29(43) *Economic-and-Political-Weekly*, 2817-2827

Menstruation in Russia under the Soviet structure was earmarked to signify subordination.⁵ The demeanour of society towards women as second-rate humans bodes from menstruation. Menstruators, mainly women, were deemed to occupy a subordinate position than men; their menstruation signified their incapacity to work in industries and affirmed their ideal role to rear and mother children. It was the reproductive potency that was attributed to menstruation and was the very foundation of gender biasness and sexism.

The idea of reliefment of menstruators has been omnipresent from female air service pilots during World War II who were barred from flying if they had cramps or women of the orthodox Christian society who were told not to use sewing machines or read novels during their periods because they might overexert themselves.⁶ Therefore, if religion or societal beliefs, even in its traditional depiction of women as domestic workers, emphasized their need to seclude & relieve themselves of their household duties, then it cannot be said that application of the same principle for menstrual leaves in employment is an outlandish proposition, having been already recognised in the roots of our customs. And if menstruation is viewed as incapacitation of menstruators to work and the rudiment for affixing their role in homes instead of a workplace, then, should not the idea of equality alleviate this inequality and incapacity through menstrual leaves in the workplace.

But all of this pales in comparison to the real reason why menstrual leaves in employment are not only asked but also expected. Its premise rests on the prevailing lack of any arrangement for coping with menstruation. There has been a considerable dip in the female workforce in as much as 19.6 million⁷ which the World Bank attributes to the deplorable sanitation amongst other reasons.⁸ The entirety of small-

⁵ Sarah Ashwin, *Gender, State and Society in Soviet and Post-Soviet Russia* (Routledge 2000)

⁶ Prof. Sharra L. Vostral, *Under Wraps: A-History-of-Menstrual-Hygiene-Technology*-(Lexington Books 2003)

⁷ Arvind Jayaram, 'Proportion of women in workforce declines' *The Hindu Business Line* (23 November 2017) <<https://www.thehindubusinessline.com/economy/Proportion-of-women-in-workforce-declines/article20675093.ece>> accessed 9 April 2021

⁸ Luis A. Andres, Basab Dasgupta, George Joseph, Vinoj Abraham, Maria Correia, 'Precarious Drop: Reassessing Patterns of Female Labor Force Participation in India' (2017) World Bank Policy Research Working Paper No. 8024 <<https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-8024>> accessed 9th June 2021

scale & rural working environments that accommodates the maximum of the female workforce lacks a basic convenience room with sanitary supplies.⁹ Even though there are legal provisions for creches and sanitation stations,¹⁰ their fruition reaches only a very few establishments, and they rarely see the light in the unorganised sector.¹¹ The inextensibility of legislated provisions in some areas and the non-existence of any in other areas is leading to a gender gap in economic activities, which can only be plausibly countered by the conferment of menstrual rights.

MENSTRUAL LEAVE IN INDIA

Menstrual Leaves have existed in India, albeit at a disparity. Besides existing in a slow-growing list of corporations, menstrual leaves were also present in certain schools in Kerala¹² entitling all women teachers and secondary division students¹³ to take leaves and even absent themselves from examinations. The Education Director also approved this policy, citing it as a necessary resolution to well-being and dissolve the taboo.¹⁴

Moreover, the outset of period leaves as a government decision was first adopted by the 1992 Janata Dal led Bihar Government.¹⁵ It conferred every women employee in government service a two-day special leave owing to 'biological reasons'¹⁶ in addition to other eligible leaves that could be availed through a simple, informal intimation.

⁹ Zubair Ahmed Khan & Hina Varshney, 'Implementation-of-the-Labour Welfare Provisions for Women Workers in the Unorganised Sector in India: A Critical Analysis' (2013-14) 21 ALJ 63

¹⁰ Factories Act 1948, s 48; The Contract Labour Act 1971; The Mines Creche Rules 1966; The Plantation & Labour Act 1951, s 12

¹¹ Jayaram (n 7)

¹² Press Trust of India (PTI), 'A Kerala School Granted Period Leave 105 Years Ago' *NDTV* (Thiruvananthapuram, 20th August 2017) <<https://www.ndtv.com/kerala-news/a-kerala-school-granted-period-leave-105-years-ago-1739698>> accessed 9 April 2021

¹³ Jyothsna Latha Belliappa, 'Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organisations' (2018) *Indian Journal of Industrial Relations* 53

¹⁴ P Bhaskaranunni, *Kerala in the 19th Century (Pathonpathaam noottaandile Keralam)*, (Kerala Sahithya Academy 1988)

¹⁵ Ankita Dwivedi Johri, 'When Lalu Prasad gave nod for leave during menstruation' *The Indian Express - Opinion* (31 August 2020) <<https://indianexpress.com/article/opinion/columns/when-bihars-women-got-period-leave-6575393/>> accessed 9 April 2021

¹⁶ Kavita Krishnan, 'Period-leave-debate-is-a-reminder-that-workplaces-must-provide-for-women's-needs' *Scroll -In*, 23 July 2017) <<https://scroll.in/article/844732/period-leave-revival-of-debate-is-a-reminder-that-workplaces-must-provide-for-womens-needs>> accessed 9 April 2021

The main focal point of this incipient policy was that it applied to all women incumbent in Government services without any precondition of age or indulgence into the nature of work or service or reasons for availing it.

Nearly 25 years later, another deliberation on period leaves was made, this time at the Union Government by tabling of the Menstrual Benefits Bill in the Parliament in 2017 by the Member of Parliament, Arunachal Pradesh; *Ninong Fring*. The bill seeks to better the workplace facilities and backdrop for menstruating women. It stipulates the application of menstrual leaves on a sectoral basis to both private and government factories, plantations and shops with ten or more employees and any other workplace requiring equestrian, acrobatic and alike skills.¹⁷ Any women employee of these establishments or student of 8th standard or above are entitled to four days of paid/NOC leave a month.¹⁸ Any women forgoing to avail of this shall be given overtime pay and thirty minutes of break twice a day.¹⁹ The bill also enables the woman with the right of self-perception of her menstruation; thus, no one except her shall aver her factum for seeking leave.²⁰ It also prescribes the provision of rest and recreation facilities for menstruating women either conjoint or separate to the shared facilities by establishments with fifty or more employees.²¹ Lastly, it obligates the establishments to intimate the benefits of the bill to its women employees²² and makes any interference or impediment to any of its benefit a punishable offence.²³

But as per the Ministry of Woman & Child Development, there seems to be no plan for the proposed bill besides ad-libbing.²⁴ The plan of action for consecrating menstrual

¹⁷ Menstrual Bill (n 2), s 2

¹⁸ *ibid* s 4

¹⁹ *ibid* s 4

²⁰ *ibid* s 8

²¹ *ibid* s 6

²² *ibid* s 7

²³ *ibid* s 10

²⁴ Chandrika Manjunath, 'The-Menstruation-Benefit-Bill-Proposes-Two-Days-Menstrual-Leave. Does-This-Help-Women?' (*Feminism in India*, 1 February 2018) <<https://feminisminindia.com/2018/02/01/menstruation-benefit-bill-2017/>> accessed 9 April 2021

leaves within the labour laws is, at present, nothing more than increasing awareness at adolescence.²⁵

Besides the inaction, there are few more latent defects in the proposed bill, mainly that its provisions, instead of stimulating female workforce, makes their employment more costly to employers. Its inadvertent self-attestation of right and sanction for its contravention creates an exposure of the other population to malicious prosecution & vilification. Its implications on backlog or productivity are debatable, and more importantly that the facet of period leaves in itself spits on the gender parity that is being built for so many years.

COMPARATIVE POLICY REVIEW

Menstrual leave for women is certainly not a new thought; they have existed in several regimes that go way back. In Japan, they can be traced back to the precept of World War II, a time when women had to step in the shoes of the labour force as the war ensued. The Japanese Labour Standards law²⁶ was put in place whereby women were entitled to a two-day menstrual leave request or '*seiri kyuka*'²⁷ from dangerous or excruciating work.²⁸ What can be extracted from this is that the policy was aimed not purely as a welfare enactment but rather one to reinforce its labour force which at that time comprised of mostly women, and to protect their reproductive health in hazardous sectors. Moreover, the entire policy was no more than a mere enabling provision for period leaves that defected from any form of clarity on the number of days of leave and if they are to be paid leaves. Because of this unclarity, employers reduced this policy to a one-day unpaid early leave grant, and women who pushed for a whole day leave with pay faced harassment & discrimination.²⁹ It is pertinent to take note of the fact that the Japanese culture has been surrounded by the notion of

²⁵ *ibid*

²⁶ The Labour Standards Law 1947 (LSA)

²⁷ *Report of International Labour Organization on National Labour Law Profile: Japan* (1965)

²⁸ J. Molony, *Equality-Versus-Difference: The-Debate-over-Motherhood-Protection 1915-1959*, (1993) Japanese Women-Working, ED-JA-NET-HUNTER 122, [268]; LSA (n 26), art 68

²⁹ Rachel B. Levitt and Jessica L. Barnack-Tavlaris, 'Addressing-Menstruation-in-the-Workplace: The-Menstrual-Leave-Debate' (2020) In (eds) The-Palgrave-Handbook-of-Critical-Menstruation-Studies

menstruation being an impious and impure process that is opposed to religion.³⁰ Naturally, if any interpretation of period leaves is left to employers of an already biased society, then its purpose would be defeated. It was these gaps in the menstrual policy that led to its repeal despite the backlash from women labour unions. The highlight of the Japanese policy is that it stemmed more due to the external economic needs of the country rather than the inherent well-being of menstruators.

In Indonesia, special labour laws for women were enacted as the country freed itself from its colonial grips. The Indonesian Labour Law Act³¹ comprised of several “women-oriented” laws³² that prohibited them from working in the evening except where such work has to be carried out by a woman,³³ this barred their employment in mines and quarries³⁴ and prevented them from performing any work that would endanger their health or morality.³⁵ Amidst them was a provision that granted two days of menstrual leave with full wages.³⁶ However, the entitlement of this policy was preconditioned to the existence of perceivable pain, thus, again leaving its implementation at the whims of the employers. The Indonesian policies were driven much more by the moral wheels of its society, and the entitlement had nothing to do with equalising the workplace but was solely to reflect the societal view of a woman.

In South Korea, workplaces, especially in its service sector, hugely encompassed only males, the female population for a long time remained untapped.³⁷ The female workforce of South Korea was further held back by a growing number of irregular

³⁰ T. Mokomo, ‘Menstruation Sutra Belief in Japan’, *Japanese Journal of Religious Studies* (1983) 10 (23) 229,[235]

³¹ Labour Act 2003 (LA)

³² *Report of International Labour Organization Jakarta on Unofficial-Translation-of-Major-Labour-Law-of-Republic-of-Indonesia* (2006)

³³ LA (n 31), art 7

³⁴ *ibid* art 8

³⁵ *ibid* art 9

³⁶ *ibid* art 13, “Now Art.81”

³⁷ Joonmo Cho, Gi Seung Kim and Taehee Kwon, “Employment-Problems-with-Irregular-Workers-in-Korea: A-Critical-Approach-to-Government-Policy” (2008) *Pacific Affairs* 81, 407-426. DOI:10.2307/40377726

female workers.³⁸ In response to this, the Labour Standards Act³⁹ was reimagined and put in place to break the pattern of irregularity and overhaul the labour sector to be more conducive. In its vigour, a provision for one day paid menstruation leave every month was introduced.⁴⁰ However, the policy also provided that in case the women should choose to not avail this benefit, she shall be entitled to additional pay. While this deliberation was to ensure that women who sought such leaves would not be harassed by their employers, as they themselves would be compelled towards the availment of the policy to avoid paying the additional wages. But the entire scheme proved rather counter-productive as the additional allowance led to a wider pay difference being created between both the genders. Moreover, the poor were further excluded from reaping the benefits due to the compulsion to overcome their poverty. The lack of privacy in the availment process further weakened the policy's efficacy. Women were required to intimate their supervisors about the type of leave they wanted to take in a society where menstruation was so taboo that talking about it was considered shameful. Thus, a move that was meant to produce a conducive and equal workplace was reduced to 'on-paper existence due to its inadvertence and the attributed elements of privacy and social taboo.'⁴¹

Menstrual Leaves came into existence in the country of Zambia by way of revision of its employment law⁴² which introduced the 'Mother's Day' provision.⁴³ Under it, all females (irrespective of its nomenclature) were entitled to one day a month of paid leave from employment without needing to plead any 'why for' to any employer. However, in the provision's explanation, an informal limitation has been imbibed stating that any women who take this benefit should not utilise the day to go or do

³⁸ Lee Byoung-Hoon & Eun Soo, 'Labour Politics of Employment Protection Legislation for Nonregular Workers in South Korea' (2009) *Korea Journal* 49, 57-90

³⁹ The Labour Standards Act 2012

⁴⁰ *ibid* art 71

⁴¹ Jung-Min-ho, Kim Bo-eun & Bahk Eun-ji, 'Menstrual leave – an-entitlement-men-reject' *The Korean Times* (Seoul, 30 September 2012)
<<http://www.koreatimes.co.kr/www/news/culture/2014/04/399123535.html>> accessed 9 April 2021

⁴² Employment Act CAP 268

⁴³ *ibid* s 54(2)

anything except rest.⁴⁴ It is argued that this undeniable leave is widely abused and encouraging laziness in the guise of a natural process.⁴⁵ It also misses the implications it can have on productivity should anyone pair this special leave with their ordinary ones and cause a massive workload or absenteeism in the organization.⁴⁶ While it is true that the menstrual leave is for a day only, but due to the law's stringent penalty of large fines and even suspension of operational license, employers fear refuting any ordinary leaves that are combined with it.⁴⁷ Another infirmity of the policy is the moral policing in its explanation. Women have been cast a need for justifying their leave through their activities on that day. While the restriction 'on going out on a party' is certainly not outlandish, the impeachment of any activity outside does nothing but create a stigma of ridicule for the women in the society. It is important that women are allowed to go out so that they can attend medical help or simply catch fresh air as their biological need calls for them to seek comfort, which was the main idea behind menstrual leaves in the first place.⁴⁸ But the moral lens created by the policy is preventing it; instances, where a woman who was found farming at her home after availing the leave was fired without any probe, are further aggravating this moral fear.⁴⁹ And this apprehension of women has spilled into their ordinary leaves as well; many women refrain from going outside even on their normal leaves.⁵⁰

To understand the praxis of such a policy, scrutinising its implications in existing systems becomes imperative. The different shades of this policy in different countries

⁴⁴ Kennedy Gondwe, 'Zambia women's 'day off for periods' sparks debate' *BBC News* (Lusaka, 4 January 2017) accessed 9 April 2021

⁴⁵ TRT Agency, 'Zambia's controversial menstrual leave law' *TRT World* (30 January 2017) <<https://www.trtworld.com/life/zambian-women-can-take-menstrual-leave-but-some-say-its-not-fair-286497>> accessed 9 April 2021

⁴⁶ Correspondent 'Zambia's-controversial 'Mother's-Day' law-applicable-to-all-women' *Africa-News* (5 January 2017) <<https://www.africanews.com/2017/01/05/zambia-s-controversial-mother-s-day-law-applicable-to-all-women/>> accessed 9 April 2021

⁴⁷ Iftikar Ahmad, 'Decent Work Check 2021 – Zambia' (2021) *Amsterdam Wage-Indicator Foundation* <<https://wageindicator.org/documents/decentworkcheck/africa/zambia-english.pdf>> accessed 9 April 2021

⁴⁸ TRT, (n 45)

⁴⁹ Will Worley, 'The country where all women get a day off because of their period' *The Independent* (London, 4 January 2017) <<https://www.independent.co.uk/news/world/africa/zambia-period-day-off-women-menstruation-law-gender-womens-rights-a7509061.html>> accessed 9 April 2021

⁵⁰ TRT, (n 45)

showcases the differing attributes & deficiencies. It is these strands that will help in highlighting the shortcomings & strengths of a formula for menstrual leave policy.

FORMULATING THE POLICY ON MENSTRUAL LEAVES

The difficulty in devising a menstrual leave policy is the contention that it would lead to the gendering of the workplace and backpedal the equality that has been slowly created. Such an approach would be equivalent to the admittance of women being incapable than men. Thus, while it would benefit menstruators, it would also masquerade their fragility. When viewed from the lens of gender, the policy undoubtedly paints a picture of inequality, but what the contenders fail to see is that this policy does not purport an asymmetry between both genders but rather leads to the existence of a difference in the working sphere.⁵¹ The difference here is not between man or woman but between the difference in circumstances for both genders within a common environment, i.e., workspace.

Thus, at its heart, what the policy should be is not a mere parchment to grant leave from duty but instead a set of outlined alternatives to provide relief so as to diminish the difference of ability, not capability. One way to do so is that universally it should be providing alternatives like availing the option to work from home on such days, the provision of intermediary breaks, or to recluse by way of half-days. In contrast, leave grant should be reserved for sector-to-sector application where it is necessary or in scenarios where no other option is viable.

Moreover, mere perception of incapability is not the reason for the incapability that is stereotyped and has more to do with the outlook of society and its people. Thus, the argument that the policy would distil subordination may be imaginable but definitely not deducible conclusively. It is argued that such a policy should, in theory, produce equal opportunity, as employers would be compelled to delegate more work to women in attempts to ensure proper utilization of their human resource. In essence, the patriarchy that precludes women from delegations would be dismantled and provide recognition to the capability of women.⁵² But just because delegation is increased, it does not mean a qualitative increase. And further, such a policy can also make short

⁵¹ Carol-Lee-Bacchi, *Same-Difference, Feminism & Sexual-Difference* (first published 1990, Allen & Unwin 1995) 150

⁵² Barnack, (n 29)

of this argument as it also shows the predicament of overburdening menstruators in their normal working days, leading to more exploitation than amelioration under the policy.

There is also the case of productivity being affected by such policy. It is argued that if women absent themselves from a simple intimation, not only would the entire schedule be disturbed but also her important work from the last moment notification of, what essentially is an unobjectionable, leave. But no such case can be made out as productivity has seen no impact, be it Japan or Bihar; rather, the capability of this policy of improving turnover is clearer.⁵³ Further, shifting the focus of policy from the grant of leave to working out the alternatives like reassignment etc., as mentioned above, can sufficiently cure this defect. After all, productivity is not the measure of output of labour but rather the inclusivity and efficacy of the workspace.⁵⁴

Another set of criticism that is associated with the policy is its infringement of privacy. Menstruation is an individual's matter of concern, and deep within the boundaries of personal life, so the mandate of such a policy like in Indonesia where not only the factum of menstruating has to be intimated, but also the precondition of pain pervades all layers of privacy. Menstruation is often tied to a woman's subordination and fragility by society,⁵⁵ in such a scenario, the dignity of menstruator is trampled in the name of a policy for their benefit. At the same time, the idea of self-attestation of this right leaves it wide open for misuse & indistinguishable from normal leaves. It does not end here; those availing the benefits are also imperilled to harassment and ridicule at the workplace, as seen in Japan.⁵⁶ While acts of harassment can be traced, the conjecture of same cannot be placed entirely on the policy, as indulgence in harassment & sexism needs no excuse.⁵⁷

⁵³ Smruti Koppikar, 'It's 2020: The Idea of menstrual leave is long overdue' (*Live Mint*, 20 August, 2020) <<https://www.livemint.com/opinion/columns/it-s-2020-the-idea-of-menstrual-leave-is-long-overdue-11597937609117.html>> accessed 9 April 2021

⁵⁴ Jacquilyn Weeks, 'Un-/Re-Productive-Maternal-Labour-Feminism' (2011) 23(1) JECS 31

⁵⁵ Krishnan, (n 16)

⁵⁶ Barnack, (n 29)

⁵⁷ Krishnan, (n 16)

Given the precarity, what the policy should entail is that the self-attestation should be conveyed to a female HR officer. The grant of leave should be preconditioned to any diagnosis like dysmenorrhea, PCOD etc. or any declaration of a doctor indicating the seriousness or severity to avoid misuse. The entire process of communication, logistics and paperwork, should be declared confidential and its sharing, prohibited. At the same time, workplace vilification can be controlled by reinforcing the existing laws on harassment.

It is also pointed out the impact such a policy can have on the employability of menstruators. It is said that the concoction of paid leaves or entitlement of overtime pay can render menstruators as an expensive workforce, thus severely disincentivising their employment. Therefore, what the policy should also consider is creating a tax exemption and hiring subsidies to a certain threshold so as to strike a balance in equality & employability. Further, the policy should also require workplaces to be equipped with at least semi-private sanitation stations & supplies and also consider subsidising⁵⁸ and making these hygiene products tax free to ease this imposition.

CONCLUSION

Each shade of menstrual leave policy that has already existed suffers from a defect owing to the detour it takes into the moral deliberations and outreach on gender difference. The result has remained the same, widening of gender asymmetries & biasness, and provocation on an already temperamental issue. The last integer in the formidability of this policy is the policy itself and, more importantly, its underlying principle in issue. Menstruation is considered to be a symbol of subordination. It is considered a measure of reproductive potency and an inference on the role of women. It is feared that separate preferential treatment of menstruation will reinforce other seclusionist practices and hinge orthodox thinking.⁵⁹

However, the taboo surrounding menstruation and the consequent ambivalence that typically forces a menstruator to conceal their menstruation is the source of decrementing psychological health & stemming attitude of inferiority. And so, a policy

⁵⁸ Manjunath, (n 24)

⁵⁹ Barnack, (n 29)

that is meant to increase the workforce rate of menstruators and sensitise the menstrual rights can hardly be said to reinforce the orthodox role of women merely because its touchstone is orthodoxical. At best, it can be responsible for flat lining the stigma surrounding menstruation if not dissipating it. Yet, it fails to achieve this because the policymakers view this from the lens of gender. A policy that is meant to improve the working environment to ensure parity should seek to only remedy the disparities in employment and not the dissimilarities in notion. It is only when neutrality is sought instead of moral parity, can a successful period leave policy can be formulated.

REGULATION AND PRIVATISATION OF THE WATER INDUSTRY FOR BETTER SECURITY OF FUNDAMENTAL RIGHTS OF SANITATION WORKERS

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ABSTRACT

This article is a review of the current regime of laws governing manual scavenging which includes sewage work and allied activities. The article points to the lack of statutory regulations necessary to protect the rights of sanitation workers in India who mainly belong to the Dalit community and have been discriminated against for centuries under the caste system prevalent in India. It lists the most common diseases caused by working in open sewage without any protective gear and discusses the lack of legal infrastructure that results in rampant exploitation of such workers who are not accounted for by state governments, and the responsibility of whose deaths are evaded by local authorities and private contractors alike. It argues that the current plight is sustained due to the irregular and temporary status of employment conferred on the workers, which results in several violations of labour laws, including but not limited to untrained workers being sent to work in manholes, resulting in certain death and the routine evasion of responsibility by local authorities and contractors. It further argues that privatisation of the water industry, on similar lines as has been done in the UK, can help change the status quo and help secure the fundamental rights of workers' that have been violated continuously for decades.

KEYWORDS: MANUAL SCAVENGING, LABOUR RIGHTS, FUNDAMENTAL RIGHTS, PRIVATISATION, WATER INDUSTRY

INTRODUCTION

Sewage work in India is currently undertaken on an ad-hoc basis by workers¹ who are a part of the unorganized sector of the Indian labour market. Statutory bodies, such as the Delhi Jal Board (DJB), responsible for the maintenance of sewers and drains, do

¹ People's Union for Democratic Rights, *Chronic 'Accidents': Deaths of Sewer/Septic Tank Workers Delhi, 2017-2019* (Report, September 2019)

not carry the responsibility of ensuring the quality of work or the working conditions for workers hired on contract. Working in manholes and sewers requires workers to work in extremely hazardous environments and is an inherently dangerous job. It includes handling of toxic substances, working in toxic environments and is the cause of illnesses such as infections caused from hand to mouth contact during eating, skin contacts through cuts, scratches, or penetrating wounds, respiratory problems and cardiovascular degeneration, and the inhalation of harmful gases like hydrogen sulphide may also cause death by asphyxia.² While this ongoing violation of the rights of sanitation workers in India can be dubbed as a form of caste violence, the lack of statutory regulations for maintenance of sewers, and loose labour laws that allow private contractors to exploit workers are also relevant in this context, since the presence of statutory regulations, an end to contractual sewage work, and the inability of employers to escape from liability for the death and trauma of workers would allow for the economic upliftment of workers as well as erosion of caste-based stigma.

Governments do not keep official records of deaths of sewer workers. Varied sources claim different numbers of deaths caused due to entering manholes, etc.³ By the Supreme Court's estimation, there are over 12 lakh manual scavengers and state governments are heavily guilty of underreporting these numbers.⁴ Nonetheless, sewer deaths are a very common incidence, partly due to the illegal status of manual scavenging.⁵

REVIEW OF CURRENT LAWS

² Ajeet Jaiswal, 'Sewage work and occupational health hazards: an anthropological insight' [2018] *Journal of Archaeology and Anthropology: Open Access* 211

³ PTI, '631 people died cleaning sewers, septic tanks in last 10 years' *The Hindu* (Chennai, 20 September 2020) <<https://www.thehindu.com/news/national/631-people-died-cleaning-sewers-septic-tanks-in-last-10-years-ncsk/article32652733.ece>>; The Wire Staff, '50 people died cleaning sewers in the first 6 months of 2019' (*The Wire*, 24 July 2019) <<https://thewire.in/labour/manual-scavenging-sewer-deaths-2019>>; Damini Nath, '110 deaths by cleaning sewers, septic tanks in 2019' *The Hindu* (Chennai, 11 Feb 2019) <<https://www.thehindu.com/news/national/110-deaths-by-cleaning-sewers-septic-tanks-in-2019/article30795201.ece>> Dhaval Desai, '282 deaths in the last 4 years: How Swachh Bharat Mission failed India's manual scavengers' (*The Print*, 27 Jan 2020) <<https://theprint.in/india/282-deaths-in-last-4-years-how-swachh-bharat-mission-failed-indias-manual-scavengers/354116/>>

⁴ *Safai Karamchari Andolan & Ors v Union of India & Ors* [2014] 11 SCC 224

⁵ Rajnarayan R. Tiwari, 'Occupational health hazards in sewage and sanitary workers' [2008] *Indian Journal of Occupational and Environmental Medicine* 112

Manual scavenging, which includes sewage work⁶ is currently prohibited by The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013 (hereinafter referred as “the PEMSAR Act” or “the Act”) and The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Rules, 2013 (hereinafter referred as “the Rules” or “the PEMSAR Rules”). Section 2(1) (d) of the Act defines the term “hazardous cleaning” as manual cleaning of sewer or septic tank by an employee without the employer fulfilling his obligations to provide protective gear and other cleaning devices and ensuring observance of safety precautions. Employment of manual scavengers is prohibited by Section 5 of the Act. Contracts, agreements and other instruments engaging manual scavengers are declared void under Section 6(1) of the Act. However, Section 6(2) carves a proviso to Section 6(1) by stating that no person employed as a manual scavenger on a full-time basis shall be retrenched and if willing, shall be retained in employment and assigned work other than manual scavenging.

Section 7 prohibits the hazardous cleaning of sewers and septic tanks. No person, local authority or any agency shall engage or employ, either directly or indirectly, any person for hazardous cleaning of a sewer or septic tank.⁷ For the prevention of such employment, Section 4 of The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Rules, 2013 enlists a total of 44 units of equipment that are to be given to all workers by their employers. This list is not exhaustive. The term “employer”, however, is not defined anywhere in the Rules. Therefore, it is unclear whether the employer for this purpose would be the contractor or the principal employer i.e. the local authority or any other person or company engaging the contractor.

The Act also stipulates the total mechanization of the work of scavenging, cleaning sewers, and allied activities under Section 33. Under Section 5 of the Rules, 14 different types of machinery are required to be used by persons engaged in the cleaning sewers or septic tanks. The local authority must ensure that such machinery is used. However, according to the Rules, it is not the responsibility of the local authority of the government to *provide* such equipment. Therefore, workers and contractors are left to

⁶ The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013, s 2(1)(g)

⁷ The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013, s 7

their own devices to source the said machinery and equipment, even though it is the duty of every local authority and other agency to use appropriate technological appliances for cleaning of sewers and septic tanks.⁸ A bone of contention in the Act is that no suit, prosecution or any other proceedings shall lie against the appropriate government or any officer of the government for anything which is done in good faith.⁹ The wide and vague ambit that this provision gives can leave room for the local authority to plead innocence in cases where workers are sent off to work without proper equipment and stop the prevention of manual scavenging. There should be absolute liability of the local authority in such cases, to deter the practice of manual scavenging as far as possible. Moreover, this particular Section has the potential of creating challenges against workers or their families seeking remedies. No such protection is carved out for the contractors. However, in the recent High Court of Jammu and Kashmir judgement, in the case of *Executive Engineer, PWD and R and B v Commissioner Workmen's Compensation*¹⁰ it was held that the principal employer is liable to compensate a worker engaged by contract.

The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Rules, 2013 provide extremely comprehensive rules and procedures to be followed when carrying out the intended work under the said Rules. However, implementation of these Rules is lax, as we see that workers continue to work without training and equipment, entering manholes and sewers to work manually due to a dearth of machinery, resulting in numerous deaths. Sections 6-8 provide such stringent measures that would produce a change in the state of affairs if followed rigorously and implemented to a tee. These include all safety precautions to be taken while working, and regular medical examinations, etc. This is, however, not the case, since the responsibility and liability can be evaded by the government authorities as stated above.

⁸ The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013, s 33

⁹ The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013, s 34

¹⁰ *Executive Engineer, PWD and R and B v Commissioner Workmen's Compensation*, [2018] SCC OnLine 367 (J&K)

The irregular and temporary status of employment conferred on the workers, being employed indirectly through contractors, also poses major problems in fulfilling the duties of employer under Section 5 of the Rules.

Moreover, Section xxxviii, Schedule II of the Employees Compensation Act, 1923 also covers workers employed in the cleaning of sewer lines or septic tanks. However, Schedule I, which includes the injuries covered, in case of which the employee is eligible for compensation do not cover the severe illnesses such as hepatitis A, leptospirosis, dermatitis, various eye and skin infections, musculoskeletal problems - mainly of the spine, and respiratory complications caused by sewage work.¹¹

IRREGULAR EMPLOYMENT OF WORKERS AND INACCESSIBLE RIGHTS

One of the main reasons why sanitation workers continue to be exploited is because of the temporary nature of their employment. Even though sanitation work is a recurring job, requiring personnel daily to maintain, clean, unblock sewers, etc., the employment of workers is done by private contractors, who are engaged by the local municipal bodies as and when required.¹² This leads to a couple of problems.

Firstly, the contractual nature of the work leaves the onus on the contractor to provide for safety equipment to workers since neither the Act nor the Rules define the term “employer”.

The Act provides for the rehabilitation of full-time manual scavengers only. However, most of the manual scavengers are usually self-employed or contract employees.¹³ The Act has no provision for the rehabilitation of workers not employed as full-time manual scavengers. If the PEMSR Act were to be strictly implemented as it is, most manual scavengers would be unemployed and out of work. The Contractual Labour (Regulation and Abolition) Act, 1970 makes provisions for the welfare and health of workers employed on a contractual basis. Sections 16-19 list down facilities such as

¹¹ Rajnarayan R. Tiwari, ‘Occupational health hazards in sewage and sanitary workers’ [2008] Indian Journal of Occupational and Environmental Medicine 112

¹² People’s Union for Democratic Rights, *Chronic ‘Accidents’: Deaths of Sewer/Septic Tank Workers Delhi, 2017-2019* (Report, September 2019)

¹³ Ministry of Social Justice and Empowerment, *Guidelines for Survey on Manual Scavengers in Statutory Towns* (2013)

canteens, restrooms or alternate accommodations, other facilities such as wholesome drinking water, sufficient latrines and urinals, and washing facilities. In addition to this, the contractor is also required to provide first-aid facilities. If in case the contractor fails to provide for these, the principal employer is liable to provide such amenities. However, the 2013 Act does not mandate the requirement of or enlist any protective gear or necessary equipment in case of hazardous jobs such as sewage cleaning and other sanitation work. Moreover, if such work is mainly carried out on a contractual basis, there should be mandatory registration of establishments that carry out sanitation work.

Secondly, there are no regulations related to the training of employees. While legislation that seeks to preserve the health and safety of workers exists, seldom have the workers been trained for the dangerous job that they are about to undertake.¹⁴ Section 6(3)(i) stipulates for such training. It states –

(i) All employees who are present on-site during cleaning work are given training and adequately familiarised with the knowledge to operate all equipment involved in cleaning work, to avoid injuries or diseases associated with such work and to take necessary steps in case of an emergency arising at the place of work and the training shall be conducted every two years and the employees shall be familiarised with any changes in method and technique to the above.

The need for training should be fulfilled by the Ministry of Health by setting up institutes for such training where the employees need to undergo mandatory training for an appropriate period, to be taught and trained in all required precautions, emergency protocols, and the use of all equipment including relevant machinery. Unskilled workers should not be allowed to undertake this job. Contractors should maintain the records of all their employees who should be permanently employed on a full-time basis only, after having passed the training required under Section 6(3)(i) of the Rules. All contractors should be registered under Section 7 of the Contractual Labour (Regulation and Abolition) Act, 1970, so that local authorities have a record of all establishments engaged in sewage work.

¹⁴ People's Union for Democratic Rights, *Chronic 'Accidents': Deaths of Sewer/Septic Tank Workers Delhi, 2017-2019* (Report, September 2019)

The Occupational Safety and Health (hereinafter referred as “OSHA”) Act of 1970 in the United States of America stipulates for training and education of workers in their respective job prospects for the supply of qualified personnel and informational programmes on the importance of and proper use of adequate safety and health equipment under Section 21(a)(2). The OSHA Act also directs that the Secretary of Health and Human Services shall provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by the Act.¹⁵ For the purposes of the Act, it establishes the National Institute of Occupational Safety and Health, which is authorized to develop and establish recommended occupational safety and health standards¹⁶ and perform all functions under Sections 20 and 21 of the Act.¹⁷

Thirdly, the Supreme Court in the case of *D. N. Banerji v P. R. Mukherjee*¹⁸ observed that the levy of taxes for the maintenance of the services of sanitation and the conservancy or the supply of light and water is a method adopted and devised to make up for the absence of capital – meaning that, the venture of sanitation work is not a lucrative business. Therefore, when carried out by contractors, lack of capital is a major bar to the mechanization of scavenging and sanitation work. One way that mechanization can be achieved is through the lease of machinery by the local authorities to contractors, and the trained employees may use said machines for their work. This would also enable to carry out scavenging and other allied activities according to the procedure prescribed in Section 33 of the PEMSAR Act, which stipulates the use of modern appropriate technology for cleaning sewers, septic tanks, and other spaces within the control of the local authority. It is not possible for contractors to pay for lakhs of rupees of machinery since sanitation work is not undertaken for profit maximization.

The Parliament of India passed the Occupational Safety, Health and Working Conditions Code, 2020 in September. This Code is a blanket statute that repeals 13

¹⁵ Occupational Safety and Health Act 1960, s 21(c)(1)

¹⁶ Occupational Safety and Health Act 1960, s 22(c)(1)

¹⁷ Occupational Safety and Health Act 1960, s 22(c)(2)

¹⁸ *D. N. Banerji v P. R. Mukherjee* [1953] AIR 58 (SC)

Acts regulating employments of different kinds.¹⁹ The Code also repeals The Contract Labour (Regulation and Abolition) Act, 1970 and introduces instances where labour may be employed contractually, i.e. through a contractor. These include instances where the normal functioning of the establishment is such that the activity is ordinarily done through a contractor, or the activities are such that they do not require fulltime workers, or in the instance where there is a sudden increase of volume of work in the core activity which needs to be accomplished in a specified time.²⁰ The Act does define the term employer.²¹ However, it does not take into account the occupational hazards and safety of sewage workers at all. The new Code has no safeguards for persons employed in sanitation work. These safeguards exist in the Manual Scavenging Rules only. However, the implementation, as reiterated, is vague and not up to the code at all, since workers' deaths continue to happen.

Sanitation and scavenging are industries and should be treated so. It has been held in the case of *Bangalore Water Supply and Sewerage Board v A. Rajappa and Others*²² that absence of capital does not negative "industry". In the case of *Corporation of the City of Nagpur v Employees*,²³ the health department of the municipality was held to be an "industry", and the Supreme Court held –

“This department looks after scavenging, sanitation, control of epidemics, control of food adulteration and running of public dispensaries. Private institutions can also render these services.”

There is an imperative need to introduce a legislation that allows for the employment of sanitation workers on a permanent basis by a contractor, only after having trained mandatorily for the required work. Trained employees should be classified as skilled workers, with better pay, health insurance, and other such benefits that are necessary to better protect the rights of the workers. This has already been implemented by the

¹⁹ Occupational Safety, Health and Working Conditions Code 2020, s 143(1)

²⁰ Occupational Safety, Health and Working Conditions Code 2020, s 57(1)

²¹ Occupational Safety, Health and Working Conditions Code 2020, s 2(1)(u)

²² *Bangalore Water Supply and Sewerage Board v A. Rajappa & Ors* [1978] 2 SCC 213

²³ *Corporation of the City of Nagpur v Employees* [1960] AIR 675 (SC)

Delhi Government on some level.²⁴ The elimination of manual scavenging is only possible by regulating the work of scavenging and allowing the workers to be employed permanently under the contractors. All such establishments that employ workers and undertake sanitation work should be registered with the local government.

An interesting alternative to this system is the privatization of the water industry, whereby firms on the state level, with a monopoly in a state, carry out the functions of providing potable water and sewage facilities to all residents of the state and are governed by a regulatory body such as Ofwat in the United Kingdom.²⁵ Ofwat, formed under the Water Industry Act, 1991, is primarily responsible for the protection of consumer interests and ensuring that water companies properly carry out their functions. Similar companies in India could be set up at the state level under the Companies Act, 2013. Since the said companies would be monopolies, a regulatory body would also be responsible for price regulation, to allow affordability, similar to the situation in the UK. According to the 2015 report by the Comptroller and Auditor General of the UK, the regulatory framework had inter alia improved the quality of both environmental and drinking water since privatization in 1989, reduced customer bills over time, and encouraged companies to improve efficiency. Ofwat established strong regulatory protections which reduce the likelihood of company financial failure and its impact on services if it does occur, and the regulatory framework has helped to establish a favourable climate for financing, benefiting both companies and consumers. Since privatization in 2015, the regulatory capital value of water companies has increased by £49 billion.²⁶

A similar structure in India, where the workers are employed directly by the Companies would result in amelioration of the conditions of workers. They would be required to be trained under an appropriate statute, and the employer, i.e. the Company would be held to be directly responsible for ensuring that rights of sanitation workers are not violated instead of a total evasion of responsibility by the undefined

²⁴ Staff Reporter, 'Upgraded status, better pay for sewage cleaners' *The Hindu* (Chennai, 06 Aug 2013) <<https://www.thehindu.com/news/cities/Delhi/upgraded-status-better-pay-for-sewage-cleaners/article4994932.ece>>

²⁵ Comptroller and Auditor General, *The Economic Regulation of the Water Sector* (Cm HC 487, 2015)

²⁶ Comptroller and Auditor General, *The Economic Regulation of the Water Sector* (Cm HC 487, 2015) paras 7-16

“employer(s)” scuffling to prove that it’s not their jurisdiction to take responsibility for worker deaths.²⁷ Private investment and consumption would also allow for the companies to obtain machinery and safety equipment, which could be further subsidised by the Government to promote setting up of such companies and in addition to that, subsidies could also be provided for setting up water treatment plants, as has been done in Malaysia, where sewage and water treatment have been completely modernised in just 50 years through Government intervention.²⁸

A structure where workers have the status of permanent employees would also abate their distress resulting from lack of health insurance and medical facilities since it would be easier for them to be able to access these facilities, which would be more easily provided for by their employers, i.e., the companies. These matters of economic transformation would, however, be subject to risk assessment.

FUNDAMENTAL RIGHTS OF WORKERS

The Supreme Court, in the case of *Safai Karamchhari Andolan v Union of India*,²⁹ has held that the practice of manual scavenging, including manual cleaning of sewers, is violative of Article 21 of the Constitution of India. The term “life” in Article 21 has an extensive meaning and means more than mere animal existence.³⁰ Article 21 includes the right to live with human dignity, free from exploitation. It includes the protection of health and strength of workers, men, women, and of the children against abuse, opportunities and facilities for children to develop in a healthy manner and conditions of freedom and dignity, educational facilities, just and human conditions of work and maternity relief.³¹ The right to health, medical aid to protect the health and vigour of a worker while in service or post-retirement is a fundamental right under Article 21, read with the directive principles in Articles 39(1), 41, 43, 48A and all related Articles and

²⁷ Viajayta Lalwani, ‘No jurisdiction: Delhi authorities pass the buck on deaths of five workers cleaning septic tank’ (*Scroll.in*, 16 Sept 2018) <<https://scroll.in/article/894197/no-jurisdiction-delhi-authorities-pass-the-buck-on-deaths-of-five-workers-cleaning-septic-tank>>

²⁸ Centre for Policy Research, *Institutional and technological reforms in urban wastewater management: Story of Malaysia* (Research Report, 2017)

²⁹ *Safai Karamchhari Andolan & Ors v Union of India & Ors* [2014] 11 SCC 224

³⁰ *Francis Coralie v Administrator, Union Territory of Delhi* [1981] AIR 746 (SC)

³¹ *Bandhua Mukti Morcha v UOI* [1984] AIR 802 (SC)

fundamental human rights to make the life of workmen meaningful and purposeful with dignity of a person.³² The practice of manual scavenging, coupled with caste stigma, intensifies the practice of untouchability and causes discrimination. It is, therefore, also violative of Article 17. 95% of persons employed in manual scavenging are persons belonging to scheduled castes.³³ This is a clear violation of Article 14 of the Constitution of India since a single community of people is discriminated against by forcing them to carry out an occupation that violates human dignity, while slowly chipping away their health and life under the garb of traditional caste roles.

CONCLUSION

The role of caste, which has not been discussed much in the present article, due to a question of scope, cannot be ignored. The law cannot dictate social hierarchies and disenfranchise stigmas merely by legislation and constitutional provisions. Legislations can, however, be used to secure better conditions that have a direct correlation with dignity and serve the purpose of bringing life to constitutional provisions, envisioning a more egalitarian world. Perceptions can be changed when workers do not have to carry out an essential work of the society sullied in the waste of the very society that neglects them. Sewage work can neither be neglected nor be discontinued. It can, however, be mechanised, and the people who carry out the work can be given the means to ensure that they do not contract chronic diseases that the law flatly fails to recognise and account for in the form of medical examinations, healthcare, etc. Radical changes in the sanitation industry are necessary for the state to be able to fulfil its constitutional obligation to secure the rights of workers by ensuring the employment of trained workers, who are employed by their contractors permanently. This, it is believed, is the first necessary step in remedying the wrongs caused to sanitation workers, firstly due to caste-based stigma and secondly due to inadequate infrastructure and loose implementation of statutes.

The main reason for the loose implementation of statutory regulations for sewage work, especially the PEMSAR Rules, 2013 can be attributed to the fact that the responsibility of government authorities is not sufficiently carved out. In *Safai*

³² *Consumer Education and Research Centre v UOI* [1995] AIR 922 (SC)

³³ *Safai Karamchahi Andolan & Ors v Union of India & Ors* [2014] 11 SCC 224

Karamchari Andolan,³⁴ the Supreme Court directed that the families of workers who had died during sewage work should be compensated with ₹10 lakhs. This included only workers registered in the schedule of the Act. However, quite shockingly, in the same judgement, the Court has also acknowledged the sheer ignorance on part of the states, as reported by the petitioners, in collecting adequate data on the numbers of manual scavengers in each state, which resulted in severe underreporting and even downright refusal of the existence of any such workers, meaning that it is entirely possible that the said compensation would not be meted out to many such families suffering due to callous and wilful negligence by state governments. This highlights the need for the permanent status of employment of workers, whose families should be able to avail such compensation when a working member of the family (possibly the only) dies.

However, this compensation directed by the Court should not replace actual policy changes necessary to stop such deaths of workers altogether. Privatisation of the water industry, therefore, is also a fairly viable alternative, with a Central regulatory body that ensures that the interests of both the consumers and the companies are meted out. Consumers would be directly billed by the company, and they would pay for the services of sewage cleaning and maintenance, etc. The current regime of municipalities hiring contractors on tax money with meagre pay, who in turn hire labour without any proper legal regulations to ensure their safety, has resulted in rampant violation of the rights of workers, since, as mentioned before, responsibility can be avoided because the very laws governing these workers do not define the term “employer”. Moreover, mechanisation is expensive, and cannot be undertaken by contractors or individual workers alone, due to the non-lucrative nature of the work. However, privatisation of the water industry can change the status quo when monthly bills are paid at a fixed rate by a considerable amount of the population, citizens are charged for other services, and capital investment is allowed in the water industry. The more lucrative nature of the business, along with subsidies on setting up water treatment plants, to the subsidisation of setting up sewage treatment plants by private firms³⁵ can truly

³⁴ *Safai Karamchari Andolan & Ors v Union of India & Ors* (2014) 11 SCC 224

³⁵ Centre for Policy Research, *Institutional and technological reforms in urban wastewater management: Story of Malaysia* (Research Report, 2017)

transform not only the sewage system of India but also the conditions of workers can be improved to secure their rights.

While the caste system helped establish the status quo, whereby a whole community is subjected to such an obnoxious form of discrimination, constitutional provisions coupled with a radical State action can help change not only the working conditions of the workers but also the destigmatise sewage and sanitation work and allied activities that are perceived as reasons to discriminate against, and ostracise individuals who are merely carrying out an important function necessary in an urbanising world.

PSYCHOLOGICAL AND LEGAL DIMENSIONS OF COVID-19 PANDEMIC RESULTING IN UNEMPLOYMENT: AN INDIAN PERSPECTIVE

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ABSTRACT

COVID-19 or the novel coronavirus has exposed the entire world to unprecedented situations and circumstances. It has resulted in an unprecedented and unforeseeable health crisis. In addition to the health crisis, the economic and social disruption threatens the livelihood and wellbeing of millions. It is estimated that more than 25 million people have lost their jobs or will be losing their jobs as a result of this economic slump followed by the recession. According to a report by the International Labour Organization and the Asian Development Bank, as many as 41 lakh youths lost their jobs, with most of the job losses occurring in the agriculture and construction sector.¹ Despite the schemes of the government to try and stop firing employees from companies, many people still have to bear the brunt of these layoffs. The author aims to provide an accurate profile of the current statistical data on unemployment due to the on-going pandemic, the psychological and legal dimensions arising thereof. The author aims to provide conclusive solutions on promoting mental health, well-being and resilience based on legal principles. The author will follow a positivist paradigm of research and will have an interpretative approach throughout the paper.

KEYWORDS: COVID-19, UNEMPLOYMENT, MENTAL WELL-BEING, HUMAN RIGHTS, LABOUR LAWS

INTRODUCTION

The COVID-19 pandemic is seen as the century's biggest global health crisis and the most profound threat to mankind since World War II. At the time of writing this paper, more than 35 crore people (globally) have been infected and more than 9 lakh people

¹ 'New ILO-ADB report addresses the impact of COVID-19 on youth employment in Asia and the Pacific' (*International Labour Organization*, 18 August 2020) <https://www.ilo.org/asia/media-centre/news/WCMS_753049/lang--en/index.htm> accessed 15 October 2020

(globally) have lost their lives to this contagion. Almost all nations seek to slow down disease transmission by monitoring & treating patients, quarantining individuals suspected to have been infected by contact tracing, preventing large gatherings, enforcing maximum or partial lockdowns, etc. Loss of life from any pandemic causes irretrievable harm to society. Many of the affected countries have agreed to enter absolute lockdowns to prevent further transmission of the disease in the population. In various countries, international flights and even all kinds of commercial transport have been deferred.

All flights are suspended with a special exception for those associated with essential services. All education, industry, sports and spiritual institutions are closed in almost all the countries affected by COVID-19. Industries (except for basic services) are suffering, which in many countries have been closed for a long time. People from the tourism and transport sector face severe difficulties as well.

Many so-called strong countries now face a danger of high inflation and rising unemployment, arising from the lack of productivity and the disproportionate expenses under which the patients of COVID-19 and their families are being treated and rehabilitated.²

The pandemic has led to job losses in all industries, with an estimated 6 crore Indians out of the 60 crores who work (or 1 out of 10) in India in danger of losing their jobs before the autumn break.³

According to the World Trade Organization (WTO) and the Organisation for Economic Co-operation and Development (OECD), COVID-19 has been described as the world's greatest danger to the global economy since the 2008-09 financial emergency.⁴

² Wessel, D., 'COVID-19 and the economy: Your questions, our answers, Brookings' (*Brookings*, 2020) <<https://www.brookings.edu/blog/up-front/2020/04/01/covid-19-and-the-economy/>> accessed 18 September 2020

³ Mahesh Kulkarni, 'Pandemic Impact: Coronavirus may swallow one in 10 jobs in India' *Deccan Herald* (28 April 2020) <<https://www.deccanherald.com/business/pandemic-impact-coronavirus-may-swallow-one-in-10-jobs-in-india-831211.html>> accessed 15 October 2020

⁴ 'The impact of the coronavirus (COVID-19) crisis on development finance' (*OCED*, 24 June 2020) <<http://www.oecd.org/coronavirus/policy-responses/the-impact-of-the-coronavirus-covid-19-crisis-on-development-finance-9de00b3b/>> accessed 15 October 2020

The onset of this era of global unemployment during this Pandemic period is related to a severe loss of life and disease, causing extreme sorrow and trauma to many. The pandemic essentially divides human race into 2 categories. The vast majority of us (those who write, and those who read this essay) are absolutely privileged to be in the first category, who are relatively less affected by this pandemic-induced unemployment. The pandemic just intensified the complexity of this privilege. One is an experience encountered in secure employment where telecom is possible by people with a high level of education. Their life is however complicated, work has turned around, childcare is complicated and it is scary to leave the house. The other experience is faced by those who fall in the second category, the majority of the working population, those who are unable to work from home and thus lose their employment every day, whose employment is either lost or salaries are reduced, and who not only fear of contracting the virus but also of their wealth and means to survive.⁵

Thus, the COVID-19 pandemic is not only a danger to our people, because of its risk to human life and resulting economic hardship, but also because of its invisible emotional stress. Recent days have seen modern history's sharpest economic decline and a historic unemployment surge. The rise in unemployment due to the global pandemic, which is compounded by the financial crisis, is bound to have profound effects on the mental wellbeing of society. For example, several countries saw the rates of depression, anxiety and alcohol and drug use increase following a global financial crisis induced unemployment in 2007-08.⁶

In this paper, the author will primarily discuss the current statistics of unemployed people in various industries and sectors of the economy (due to the on-going pandemic). Secondly, the author will discuss the psychological aspects of unemployment during the pandemic. Thirdly, the author will discuss the legal dimensions of job-losses during the pandemic. Furthermore, the author will provide

⁵ David Blustein, Ryan Duffy, Joaquim Ferreira, Valerie Cohen-Scali, Rachel Gali Cinamon, Blake Allan, 'Unemployment in the time of COVID-19' (2020) 119 *Journal of Vocational Behavior* <<https://dx.doi.org/10.1016%2Fj.jvb.2020.103436>> accessed 18 September 2020

⁶ Erica Hutchins Coe, Kana Enomoto, 'Returning to resilience: The impact of COVID-19 on mental health and substance use' (*McKinsey*, 2 April 2020) <<https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/returning-to-resilience-the-impact-of-covid-19-on-behavioral-health>> accessed 17 September 2020

the steps taken by the government of India to protect people's right of job-security. Subsequently, the author discusses what steps have been taken by governments of some other countries and if these can be applied in India. Thereafter, the author will discuss the measures which can be employed for promoting employee well-being and resilience during and post pandemic.

STATISTICS

In addition to the health crisis, the economic and social disruption, the pandemic also threatens the livelihoods and wellbeing of millions. The unemployment rate in India, especially in the metropolitan cities, has increased to a tremendous 27.1% since the start of the lock-down, which was only 7.6% (rural) and 9.65 (urban) before the pandemic started.⁷ The hardest hit in the employment is recorded in micro, medium, small enterprises and unorganised industries.⁸ In India, most government and private sector firms have, since March, taken the recourse either to sack workers to unspecified leave without pay or to wage cuts up to 85 per cent.⁹ According to a report by the International Labour Organization and the Asian Development Bank, as many as 41 lakh youths lost their jobs,¹⁰ with most of the job losses occurring in agriculture and construction sector. Regional youth unemployment in 2019 was 13.8%, compared with 3% for adults, while over 160 million young people (24% of the population) were not employed, skilled or qualified.¹¹

⁷ 'Coronavirus Update (Live): 30,391,828 Cases and 951,230 Deaths from COVID-19 Virus Pandemic' *Worldometer* (2020) <<https://www.worldometers.info/coronavirus/>> accessed 18 September 2020

⁸ Yogima Seth Sharma, 'Unemployment rate falls to pre-lockdown level: CMIE' (24 June 2020) *The Economic Times* <<https://economictimes.indiatimes.com/news/economy/indicators/unemployment-rate-falls-to-pre-lockdown-level-cmie/articleshow/76528571.cms?from=mdr>> accessed 18 September 2020, See also: Scroll Staff, 'Industry body says traders, MSMEs lost 35 lakh jobs since 2014, names demonetisation among reasons' *Scroll.in.* (17 December 2018) <<https://scroll.in/latest/905977/industry-body-says-traders-msmes-lost-35-lakh-jobs-since-2014-names-demonetisation-among-reasons>> accessed 18 September 2020

⁹ 'Organised private sector plans layoff, salary cut amid COVID-19 crisis: Report' *Economic Times* (14 May 2020) <<https://economictimes.indiatimes.com/jobs/covid-19-effect-organised-private-sector-planning-layoffs-salary-cut/articleshow/75736642.cms>> accessed 18 September 2020

¹⁰ '41 lakh youth lose jobs in India due to COVID-19 pandemic: ILO-ADB Report' *Economic Times* (18 August 2020) <<https://economictimes.indiatimes.com/news/economy/indicators/41-lakh-youth-lose-jobs-in-india-due-to-covid-19-pandemic-ilo-adb-report/articleshow/77613218.cms?from=mdr>> accessed 17 September 2020

¹¹ New ILO-ADB report addresses the impact of COVID-19 (n 1)

According to Statista, 1.3 million people in India alone were reported to be working for the automotive industry.¹² Nissan motors are considering cutting 20,000 jobs, as the Japanese carmaker is struggling to recover.¹³ The biggest job-losses among the salaried employees were faced by teachers, accountants and engineers.¹⁴ Dell Technologies Inc. recently informed employees about the loss of jobs as the electronics giant tries to minimise costs as the global economy staggers.¹⁵ According to the Centre for Monitoring Indian Economy (CMIE), the number of salaried employees losing employment during the coronavirus pandemic has risen even more than 1.8 crores since April.¹⁶

According to the data from the National Sample Survey and the Periodic Labour Force Survey (PLFS), an estimated 136 million, government and private sector employees are at immediate risk in the post-corona India.¹⁷

¹² Statista Research Department, 'India - automotive sector employment 2017' (*Statista*, 2020) <<https://www.statista.com/statistics/581257/projected-automotive-sector-direct-employment-in-india/>> accessed 18 September 2020

¹³ 'Nissan considering more than 20,000 job cuts as Covid-19 hits sales: Report' *Business Standard* (22 May 2020) <https://www.business-standard.com/article/companies/nissan-considering-more-than-20-000-job-cuts-as-covid-19-hits-sales-report-120052201707_1.html> accessed 18 September 2020

¹⁴ Mahesh Vyas, 'Engineers, teachers, accountants: Biggest job loss among salaried employees' *Business Standard* (15 September 2020) <https://www.business-standard.com/article/opinion/job-losses-in-white-and-blue-collar-workers-120091401137_1.html> accessed 16 September 2020

¹⁵ Nico Grant, 'Dell to Trim Workforce This Week in Move to Stay Competitive' *Bloomberg* (14 September 2020) <<https://www.bloomberg.com/news/articles/2020-09-14/dell-to-trim-workforce-this-week-amid-pandemic-fueled-recession>> accessed 18 September 2020

¹⁶ Mahesh Vyas, 'Salaried job losses' (*CMIE*, 20 August 2020) <<https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2020-08-20%2014:52:49&msec=036>> accessed 18 September 2020, See also: 'What Job Losses in the Formal Sector Tell us About the Lockdown's Impact on Economy' *Wire* (19 August 2020) <<https://thewire.in/economy/job-losses-formal-sector-lockdown-impact-economy-coronavirus-cmie>> accessed 18 September 2020

¹⁷ Karishma Jain, 'COVID-19 pandemic impact: 50 lakh salaried jobs lost in July, 1.8 crore since April, says CMIE' *DNA India* (19 August 2020) <<https://www.dnaindia.com/business/report-covid-19-pandemic-impact-50-lakh-salaried-jobs-lost-in-july-18-crore-since-april-says-cmie-2838404>> accessed 17 September 2020, See also: 'The COVID-19 impact on government sector jobs amidst crisis - Is your job safe?' *Hindustan Times* (10 August 2020) <<https://www.hindustantimes.com/brand-post/the-covid-19-impact-on-government-sector-jobs-amidst-crisis-is-your-job-safe/story-w1WfAuLJdJWZrKDwvDvzTO.html>> accessed 17 September 2020

The number of salaried workers reported in 2019-20 was 86.1 million.¹⁸ In April 2020, that dropped to 68.4 million. Their number decreased to 67.2 million by July 2020. While informal jobs like service-delivery have increased after the lockdown was announced, there has been no improvement in formal jobs. Non-wage workers rose from 317.6 million in 2019-20 to 325.6 million in July 2020.¹⁹ This suggests an increase of almost 8 million workers or a 2.5% increase in informal work. However, on comparing, wage-earning workers were down 18.9 million and decreased by 22%.²⁰

In April 2020, 1.77 crore salaried employers lost their jobs and 100,000 salaried staff lost their employment in May 2020. According to reports, approximately 50 lakh jobs were lost in July, following 39 lakh jobs, in August.²¹ The decline in the number of workers in rural and urban areas is almost uniform in terms of the percentage change between 2019-20 and July 2020. In rural India, the decline was 21.8% and in urban India it was 22.2%. In June 2020, this decreased by 22.5%.²² The tourism wage bill for services decreased by 30%, hotels and restaurants decreased by 20.5%, road transport decreased by 27.6%, education by 28%.²³

The real estate sector's wage bill has been down by 21%. The telecoms sector's wage bill rose by 10.7%. Banks saw their wage bill rise by 16.6% and security broking firms saw their wage bill rise by 13.5%, but production companies have seen their wage bill dropped by 7%. Textiles have taken the greatest hit in manufacturing. The pay bill decreased by 29%. Textiles are a labour-intensive sector and this sharp decrease

¹⁸ What Job Losses in the Formal Sector, *Wire* (n 17)

¹⁹ *ibid*

²⁰ Unemployment Rate in India (n 12)

²¹ Karishma Jain (n 18)

²² Karunjit Singh, Kritika Suneja, 'Urban unemployment rate fell in January-March 2019, official data reveals' *Economic Times* (23 November 2019) <<https://economictimes.indiatimes.com/news/economy/indicators/indias-urban-unemployment-rate-slows-in-march-quarter-government-data-reveals/articleshow/72199226.cms?from=mdr>> accessed 18 September 2020

²³ 'Tourism & Hospitality Industry in India: Market Size, Govt Initiatives, Investments IBEF' (*IBEF*, 2020) <<https://www.ibef.org/industry/tourism-hospitality-india.aspx>> accessed 18 September 2020)

in the wage bill means that workers in the industry have decreased dramatically. The same happens in other work-intensive industries like leather.²⁴

PSYCHOLOGICAL DIMENSIONS

In April 2020, there were over 2 million patients with COVID-19 worldwide.²⁵ The Indian government has implemented a Lockdown policy, just like many other nations. Quarantine and other limitations altering the normal way of life are, for the most part, an uncomfortable experience with psychological implications. The global economy's turmoil following the COVID-19 contributed to the lack of access to jobs for millions of people. In effect, these same people will face the pain of work loss and the burden of job search in the future. However, the particular danger emerging from the interruption by the pandemic to individual working lives is theoretically undervalued in these discussions. As a result of COVID-19 failure, the world economy is waning million people's access to work.

Research indicates a high prevalence of mental distress symptoms such as pain and discomfort as well as stress in quarantine over a longer duration of more than three years. The pandemic of COVID-19 and the economic crisis that resulted as a result of it affected the mental health of many and created new challenges for people with a mental illness. As a result, many individuals are subjected to conditions related to poor mental health effects, such as loneliness and loss of jobs as the pandemic progresses. Job loss includes increased depression, anxiety, distress and low self-esteem and can lead to higher rates of illness and suicide. For several, a temporary (furlough) or permanent work loss (layoff) led to a financial loss immediately.²⁶

Recent polling data indicates that over half of people with losses of earnings or jobs reported negative effects of chronic anxiety or stress, and lower incomes indicate

²⁴ Unemployment Rate in India (n 12)

²⁵ 'Coronavirus disease 2019 (COVID-19) Situation Report – 84' (WHO, 13 April 2020) <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200413-sitrep-84-covid-19.pdf?sfvrsn=44f511ab_2> accessed 18 September 2020

²⁶ Nirmita Panchal , Rabah Kamal , Cynthia Cox, and Rachel Garfield, 'The Implications of COVID-19 for Mental Health and Substance Use' (KFF, 10 February 2021) available at <<https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>> accessed 17 September 2020

greater rates of significant negative effects on mental health in comparison with elevated incomes.²⁷

The loss of any job can be emotional, but it can bring additional stressors to the mix in our established world of greater uncertainty. Psychologists observe that losing a job sometimes equates to losing a loved one; the emotional journey can include some stage of mourning, from shock and denial to frustration and negotiation and finally acceptance and hope.²⁸ Studies indicate that people who suffered financial, housing and work deprivation as a result of the Great Recession were more vulnerable to mental health problems.²⁹ So how will people with this extraordinary condition preserve some equilibrium and stability of their mental faculties?

Feelings of stigmatisation were also prevalent among those who had more challenging quarantine effects in contrast with the public in general, who had less of a negative impact on the unexpected state; work losses had a deteriorating effect on their feelings. Participants in furlough show higher levels of depression relative to unemployed or full-time workers. The older the participant, the lower the perceived stress level, among those who work full time or are already unemployed. Increased regulation was combined with lower levels of stress for all participants.³⁰

One can experience many emotions and disturbing thoughts if the COVID-19 pandemic has left him/her unemployed. They could feel, for instance:³¹

- a) Loss of personality and meaning
- b) No longer appreciated and necessary
- c) Angry, afraid and jealous of those who are still able to work

²⁷ *ibid*

²⁸ Climent-Rodríguez, Navarro-Abal, López-López, Gómez-Salgado, Marta García, 'Grieving for Job Loss and Its Relation to the Employability of Older Jobseekers' (2019) 10 *Frontiers In Psychology* <<https://dx.doi.org/10.3389%2Ffpsyg.2019.00366>> accessed 18 September 2020

²⁹ Damian Fowler, 'Unemployment during coronavirus: The psychology of job loss' *BBC* (28 March 2020) <<https://www.bbc.com/worklife/article/20200327-unemployment-during-coronavirus-the-psychology-of-job-loss>> accessed 18 September 2020

³⁰ Elie Mimoun, Amichai Ben Ari, Daniella Margalit, 'Psychological aspects of employment instability during the COVID-19 pandemic' (2020) 12(S1) *Psychological Trauma: Theory, Research, Practice, and Policy* <<http://dx.doi.org/10.1037/tra0000769>> accessed 18 September 2020

³¹ Nirmita Panchal, Rabah Kamal, Cynthia Cox, and Rachel Garfield (n 27)

- d) Broken, as if they don't understand what to do next
- e) Worried about how they and their family care for yourself and their basic needs
- f) Not everyone would get these emotions, but occasionally they might experience some of them while coping with unemployment

The first step in dealing with unemployment's mental and emotional consequences is to understand the natural feeling.³²

A place of work has a sense of trust, self-esteem, and power rather than being just a source of financial capital. This result is consistent with the interpersonal suicide theory, which suggests that the experience of the individual as a social burden and lack of association contribute to emotional distress. However, a new psychological epidemic has broken out due to the confusion surrounding the current pandemic. Their social status abruptly shifted, with an unclear tenure, and produced a potential feeling that they have become a burden. The risk of self-harm and suicide is increased in this population.³³

The human costs of this situation are likely to be significant from a psychological standpoint. Apart from the utilitarian aspect of compensation, the human beings derive essential importance and significance from their work. It is seen as a motivating force, represents ideals and communicates personal convictions, which are deemed to be limitless by their self-concept.³⁴

On the other hand, those who do not already work retain the consistency of the everyday routine that might improve their sense of control and retain their emotional distress levels. These findings form an initial basis for an understanding of the adverse effects of job status, particularly furlough, on vulnerable communities. This notion is supposed to trigger an awareness of the need for allocated mental help for individuals to adapt to abrupt changes in their status.³⁵ Taken together, over and above COVID-

³² 'COVID-19 and unemployment: How to cope' (2020) <<https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coping-with-unemployment/art-20485976>> accessed 18 September 2020

³³ Elie Mimoun, Amichai Ben Ari, Daniella Margalit (n 31)

³⁴ Nina Vindegaard, Michael Eriksen Benros. 'COVID-19 pandemic and mental health consequences: Systematic review of the current evidence' (2020) 89 *Brain, Behavior, and Immunity* <<https://doi.org/10.1016/j.bbi.2020.05.048>> accessed 18 September 2020

³⁵ *ibid*

19, mass unemployment bears a significant human cost apart from the destruction by the virus itself. As millions struggle after the pandemic to find new jobs, psychologists are responsible for understanding the tremendous individual and mental suffering caused by the unemployment. It will also be the duty of psychologists, when trying to address an otherwise insurmountable problem, to provide researchers and policymakers with observations and guidance.³⁶

In general, people should consider and reflect on the aspects of their situation that they can and cannot manage and focus on the ones which are in their control. Finding and enforcing immediate issues (such as reducing household spending for a certain period) and understanding that, in the short term, it would be difficult and necessary to make improvements before circumstances improve.

The COVID-19 pandemic and the economic crisis that resulted as a result of it affected the mental health of many and created new challenges for people with a mental illness. As a result, many individuals are subjected to conditions related to poor mental health effects, such as loneliness and loss of jobs as the pandemic progresses. During India's lock-down, sudden national travel bans, the lack of employment, contributing to lack of financial means to cover everyday food expenses along with quarantine regulations, have all contributed to high levels of anxiety and panic. Today's national impediments to public transit networks will eventually become the social obstacles to psychiatric consultation.

Those working mainly in informal professions are subject to job losses due to limited or negative industrial growth. In recent times, the textile industries of the city of Surat, mostly employing migrant workers, have declared the stoppage of the production activities, in which export orders are expected to be lost and the domestic demands declined.

While mental health services are available online, only a fraction of people with the knowledge of those programmes and those with access to the internet and smartphones can benefit. Perhaps what is different about the current state of unemployment is that it is temporary and that people will return to work once things

³⁶ Matthew P. Crayne, 'The traumatic impact of job loss and job search in the aftermath of COVID-19' (2020) 12(S1) *Psychological Trauma: Theory, Research, Practice, and Policy* <<http://dx.doi.org/10.1037/tra0000852>> accessed 18 September 2020

are settled. In addition, there is proof that the mutual existence of such an experience makes us all feel together.³⁷

In order to minimise the psychological distress and avoid potential mental health effects, it's necessary to develop a holistic intervention framework including psychological stress screening and targeted intervention. In addition to specialist mental health professionals, production officers, general practitioners and qualified community health workers, public mental health programmes should be incorporated to resolve the mental illness upturn of internal migrant employees. Furthermore, restrictive measures introduced during lock-down and containment COVID 19-policy, linked to the downgrading of labour protection and health laws and legislation in India, have a capacity to compound and precipitate the adverse impacts to domestic migrant workers' psyche. In view of the harmful working angle which increases vulnerability, the community in mental health should be prepared for the challenge of psychological diseases in this working community.

Mental wellbeing is a crucial factor that needs to be dealt with and it is important for workers to take measures to tackle psychological illness by generating pandemic awareness and psychological preparedness.³⁸ While treating any psychological illness caused due to the pandemic, the external circumstances of the unemployed person need to be carefully evaluated including, the possibility of re-employment, financial status, families and living conditions. As well as certain other questions need to be answered. These are:

1. How are constructive and negative emotions and opinions lack of work expressed and co-constructed by the family members?
2. What are the family habits and dynamics that enable unemployed and other family members and act as social capital?
3. Do job search actions provide other family members with a way of modelling?

³⁷ D. Fowler (n 30)

³⁸ Ranjana Choudhari, 'COVID-19 pandemic: Mental health challenges of internal migrant workers of India' (2020) 54 *Asian Journal of Psychiatry* <<http://dx.doi.org/10.1016/j.ajp.2020.102254>> accessed 18 September 2020

4. How do unemployed spouses and children view themselves and how do they shape their own career development?

Second, the strengths and growth edges of the individual, especially as they affect the actual situation, should be assessed. These reviews may be carried out on paper or online. On the basis of these initial estimates, statistical analyses such as clusters may be used to shape various categories of unemployed, perhaps partially based on the likelihood of re-employment following the pandemic.

LEGAL DIMENSIONS

There are primarily two groups of employees – ‘workmen’ (blue-collar) and ‘non-workmen’ (white collars – managerial/administrative positions). Although the terms and conditions of employment of workers are regulated by the provisions of the Industrial Disputes Act (ID Act), 1947 employees with white-collar are covered under private agreements or under the Shop and Establishment Act of State under which they work. In the absence of any rules about wage reductions due to Covid-19 under the shop and establishment laws and the Payment of Wages Act 1936 or workers employment agreements, employers shall not be allowed to reduce the wages of their employees unless it is amicably negotiated and agreeable to the employees.

A) HUMAN RIGHTS DIMENSIONS

Since most people find their identity and some of life’s meaning in their jobs, job insecurity will be dominant in the post COVID period. Since people have a human right to work, it is implied that job security is also a human right.³⁹

Employment protection or job security gives workers a variety of advantages, from economic stability to retirement plans, self-esteem, and a sense of order. The emphasis of personal identification is generally on occupation and workplace membership; the workers often identify themselves in terms of living conditions. However, it is undeniably a contractual arrangement between employer and employee. The theory is

³⁹ ‘The Rights Related to Labour’ (*Icelandic Human Rights Centre*, 2021)
<<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-rights-related-to-labour>> accessed 15 April 2021

that men of full age and knowledgeable understanding should have absolute freedom of contracting and that such contracts should be upheld.⁴⁰

The right to work and to not be fired illegally, etc. are considered to be politically guided by international labour rights that are important to the substantive realization of human dignity, as they give the State a constructive responsibility for intervention and it is argued that they will undermine individual freedom, and distort the functioning of the free market. There is no clear definition of "job protection" in any law.⁴¹ It coexists, however, with the terms 'tenure security' and 'right to work,' both of which relate to the rights that are provided to an employee by any statute to govern the circumstances in which the employer may terminate the employee. Adeogun claims that security at work requires the safeguarding of an employee from sudden or unjust dismissals and compensation for disappearances of workers for economic reasons. He claimed that no employee should lose the job except for a valid reason which is connected with the professional requirement or conduct of the employee or the operational or legitimate reasons.⁴² He refers to job-security as social protection since an employer's genuine interest in his work helps him secure his family's economic future based on his job prospects.⁴³

The basic structure of various attempts to describe workplace safety is the recognition that work's security requires an appropriate defence that is offered by statute for workers without any justifiable cause against the sudden termination of their employment. Therefore, workplace health means assurance or confidence that an employee has the right to keep his job free from worries and fear of unjust dismissal. Labour rights are rights which relate to the position of a worker in particular.⁴⁴ Many

⁴⁰ David P. Weber, 'Restricting the Freedom of Contract: A Fundamental Prohibition' (2013) 16(1) Yale Hum. Rts. & Dev. L.J. <<https://digitalcommons.law.yale.edu/yhrdlj/vol16/iss1/2>> accessed 18 September 2020

⁴¹ 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 23' (OHCHR, 1948) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23963&LangID=E>> accessed 18 September 2020

⁴² A.A. Adeogun, 'From Contract to Status in Quest for Security' *An Inaugural Lecture delivered at the University of Lagos* (9 April 1986) p. 32

⁴³ *ibid* n. 34

⁴⁴ Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal <<https://doi.org/10.1177%2F201395251200300204>> accessed 18 September 2020

of these are solely for a person and some are collectively practised. They may include the right to work in a freely chosen job, the right to a fair job, the right to protection against arbitrary and unjustified dismissal, the right to strike etc. Such rights may be built on different bases such as equality, integrity or power.

The right to work can be understood from various points of view. A job can be seen as a right to get to jobs, the right to do a job and the right to safety in the workplace. This way of working means that any individual has the right to secure livelihood. This requires the right of a person to earn a living from work and to obtain a decent standard of living. It's a right to fight unemployment and oddity. The underlying moral principle behind this right is that everybody should have a role in their society's productive structure. An economic right to work would include recognition, in the current economic order, of the individual's claim that he can do a useful remuneration task.

B) INTERNATIONAL LAW OBLIGATIONS

Article 23 of the Universal Declaration of Human Rights (UNDHR)⁴⁵ provides that everyone is entitled to jobs, to free education, to a fair playing field and protection against unemployment. In Article 6(1), the International Covenant on Economic Social Cultural Rights (ICESCR)⁴⁶ lays down the right to work which includes the right to a job. Article 1(2) of the Convention Number 122 of the ILO⁴⁷ makes it imperative of each member state to ensure the exercise of work on all citizens for and looking for work. It also specified that "the full exercise of this right shall include the technical and vocation guidance and training programmes."

Article 15 of the African Human and Peoples' Charter provides that all persons are entitled to work on equal terms and equal terms for equal work under equitable and satisfactory circumstances.⁴⁸ Besides, Article 22 of the Charter also states, in respect of the freedom, identity, and the equal enjoyment of the shared human heritage, that

⁴⁵ United Nations Declaration on Human Rights 1948, art 23

⁴⁶ International Covenant on Economic Social Cultural Rights (ICESCR) 1976, art 6(1)

⁴⁷ Employment Policy Convention 1964, art 1(2)

⁴⁸ African Charter on Human and Peoples' Rights 1981, art 15

all citizens shall have the right to their physical, social and cultural growth.⁴⁹ Consequently, when the State gives her a legal right to work, it was suggested that employees' rights should be best protected. Therefore, a more inclusive understanding of the right to integrity and the right to property is required, acknowledging the indivisibility and dependence of all rights.⁵⁰

The above provisions of the international and regional treaties make it clear that the right to jobs in every civil society, which considers the well-being of its people primordial, is fundamental.

C) JOB-SECURITY AS A HUMAN RIGHT

Many principles of job security are designed to protect a worker from violations. The organized private sector in India expects to minimize/terminate its employment as a result of the coronavirus pandemic and lockdown, a study says. According to the most recent survey results, 68% of the employer surveyed are either starting or planning to lay off.⁵¹ This is reflected in MyHiringClub.com and Sarkari-Naukri.info Layoff.⁵² In the 25 major cities, the online survey included 1,124 companies across 11 industries. This survey was conducted at the beginning of May 2020.⁵³

The survey indicates that the highest layoff rate is 49% among retailers, led by hospitality/aviation/travel (48%), automotive / manufacturing & engineering (41%), real estate (39%), and power (38%), in the retail and FMCG sector. The survey indicates that workers with 6-10 years of experience have a 31%, followed by those with 11-15 years of experience (30%). The expected layoff rate for workers with over 15 years' of experience was 21%, for young people (1-5-year experience), it was 18%.⁵⁴

⁴⁹ African Charter on Human and Peoples' Rights 1981, art 22

⁵⁰ Philip, F., 'Job Security as a Human Right: Prospects and Challenges', (SSRN, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2768789> accessed: 24 May 2020

⁵¹ 'COVID-19 effect: Organised private sector planning major layoffs, salary cut' *Financial express* (14 May 2020) <<https://www.financialexpress.com/jobs/covid-19-effect-organised-private-sector-planning-major-layoffs-salary-cut/1958994/>> accessed 18 September 2020

⁵² Organised private sector plans layoff (n 9)

⁵³ *ibid*

⁵⁴ *ibid*

63% of the respondents from the TimesJobs survey reported that the outbreak of coronavirus affected the way they work. 27% of the professionals claim that the IT sector is the worst affected by COVID-19. 23 per cent of those surveyed stated that job security is their main concern at this moment. A recent survey conducted by TimesJobs reveals that 45% of Indian professionals worry about losing international jobs as a result of the pandemic COVID-19. The survey showed that 'job protection' is the biggest condition of professionals.⁵⁵

Most of the professionals surveyed (67%) have reported that during the Coronavirus time, employment in multi-national companies (MNCs) are most vulnerable. Nearly 45% of professionals have claimed that the COVID-19 spread will negatively affect recruitment activities in different industries.⁵⁶

John Rawls argues in his influential 'A Justice Theory' that everyone has an equal right to justice and that fairness must prevail. In the sense of work, to understand what this means, we need to look at what Rawls called the 'veil of ignorance.'⁵⁷ It is better to be a part of a society where everyone can get a job rather than born into a society where some people have jobs that they can maintain while others don't have a job. Naturally, in a perfect world, all conditions should be preferred, but no country has even come close to that perfect.⁵⁸

Most people begin living without money, and many go through life with little accumulation. Jobs are essential for food, proper housing, meaning for life and status. If there are governments to protect life, equality and the quest for happiness, the right to work must be the main responsibility.

D) CURRENT LAWS-SUFFICIENT OR INSUFFICIENT?

⁵⁵ 'COVID-19 pandemic makes job security a major concern among employees: TimesJobs survey' *TimesJobs* (19 March 2020) <<https://content.timesjobs.com/covid-19-pandemic-makes-job-security-a-major-concern-among-employees-timesjobs-survey/articleshow/74690407.cms>> accessed 30 May 2020

⁵⁶ *ibid*

⁵⁷ Ronald Sokol. 'Opinion: The right to a job?' *The New York Times* (11 October 2007) <<https://www.nytimes.com/2007/10/11/opinion/11iht-edsokol.1.7851269.html>> accessed 30 May 2020

⁵⁸ *ibid*

The unorganised migrant workers' sector is not covered by social security programmes for employees, and as such is considered a workforce that is ignored, with only a few ineffective laws, including The Rule of Building and Other Construction Workers, 1996,⁵⁹ to prevent abuse. Although an occupational disease is identified separately as a disease contracted by a worker, arising from and during employment, the discussion is currently on whether or not the COVID 19 infection which is acquired during work should be treated as an occupational illness.

The Government have allowed the restart of factories, with a limited number of employees, through partial relaxation of the lock-down, and some state governments have also granted exemptions from legislation that was initially designed to protect jobs in factories, industries and other establishments. In addition to easing basic occupational and industrial health regulations, the acute shortage of jobs in urban areas has forced available staff to work for 12 hrs rather than 8 hrs, primarily to improve production. This is inconsistent with Section 51 and Section 54 of the Factories Act of 1948.⁶⁰ Given these contradictions in the effective policies and regulations maintaining the safety of employees in disasters and health emergencies, the financial interests of the unorganised sector are the need of the hour considering the pandemic situation.

Public health authorities must also pay due attention to the migrant workers' psychosocial problems when formulating COVID-19 epidemic policies. Ignorance of the prejudice on internal migrant workers by the pandemic would not only impede our efforts to prevent COVID-19 from spreading in future but it may also worsen the existing gaps in mental health.

E) CAN THE EMPLOYERS TERMINATE THE CONTRACT OF EMPLOYEES DURING THE PANDEMIC?

Under the terms of the respective employment contracts, the termination of white-collar workers shall be supervised and the Shop & Establishment Act of the respective State shall be applicable. If the employer is to claim force majeure provision for termination of the employment contract, the fact that employment agreements do not

⁵⁹ The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996

⁶⁰ The Factories Act 1948

usually have a fixed period is necessary and, because the lockdown is temporary, it would be hard for the employer to prove that Covid-19 made the employment agreement 'impossible' or has frustrated its performance.

As regards the workers, it is important to remember that the procedure of retrenchment is exceedingly complicated and tedious and demands that the employer gives three months' warning or compensation in place of that retrenched employee. In addition, retrenchment often requires prior authorisation from the government, which is another difficult process. Given that businesses will need their regular workforce after the lockdown has been lifted, management needs to analyse fairly the temporary difficulties in maintaining their workers against the financial benefits that could arise from the same. .

F) IS THE LAY-OFF POSSIBLE?

Lay-offs are defined in the Industrial Disputes Act of India as a failure of, refusal or failure of a manufacturer due to the lack of carbon, power or raw materials or the accumulation of inventories, the breakdown of machinery or natural disaster, or other related reason to be unable to provide employment. The worker stays employed by the company, but on a lower wage during the lay-offs. Eligible workers from the class can demand up to 50% of the basic salaries and lay-off care benefits. The employer can proceed to the retraining if the lay-off continues for 45 days or longer. The reimbursement for the dismissal is flexible with the compensation due for the dismissal. The lay-off procedures shall vary depending on the number of working employees and the type of operation performed. The terms of lay-offs shall have to be agreed mutually for non-workers.

G) RETRENCHMENT/TERMINATION

Employers may opt for a retrenchment/termination but the same is regarded as a convenience termination and all procedures such as the notice period, notice to government officials, retrenchment compensation, free payment, leave encashment etc. will have to be completed. In addition, a lot of government meetings are accessible to avoid termination of employees due to COVID-19.

H) CAN THE SALARIES BE REDUCED?

The ID Act provides that employers may reduce wages for workmen. However, any changes in wages will be a change in the terms of service for which the employee must be given a notice of 21 days before such a change is made. In addition, such adjustments can be carried out only if the employee is willing. Likewise, the ID Act allows for lockdown clauses, but it is difficult to state the benefits for the employers. While government's efforts are mostly to protect the blue-collar employees, courts may take a liberal approach and even expand their benefits to white-collar employees. Therefore, after appraising them on the financial crisis of the organisation, a better solution could be to persuade workers to support salary reductions. After a mutually beneficial arrangement between employers and workers, a decrease in pay and working hours may be accomplished.

Many associations from Maharashtra, whose hearing is still pending before the Supreme Court, have challenged the Order of the Government of the Union of 29/03/20, which ordered all employers to regularly pay their employees' wages without deduction due to Covid-19. The petition submitted by Nagreeka Exports Limited, a textile company based in Mumbai, claimed that the lockdown caused significant losses of about of Rs 1.5 crore. The plea argues that when they are obliged to pay in full, "we will have far-reaching consequences." In addition, the petitioners had to pay full salaries to all of their employees, which amount to about Rs 1.75 crore, in accordance with these orders, dated 29th March, 2020 and 31st March 2020.

The plea challenged the constitutional validity of the MHA order dated 29 March 2020, which states: "All employers, whether in industry, shops and businesses, are entitled to pay the salaries to their employees, at work, on a due date, without deduction for the time their businesses are closing for lockdown period." The Supreme Court, in a judgment delivered on 15th May, also asked the Centre and the State not to prosecute any private business or factory for non-payment of wages.

1) CAN THE EMPLOYEES BE ALLOWED TO AVAIL EARNED LEAVE?

The ID Act and the employees' white-collar agreement as well as shop and establishment act of the State concerned provide for leave provision for workers. There are no specific provisions in these legislations authorizing employers to direct their employees to make use of earned leaves. With regard to white-collar employees, they may have provisions on compulsory leaves in their employment agreements viz. the

garden-leave clause which may prove useful in this respect. The best approach will eventually be to negotiate and collaborate with employees.

The State Government of Karnataka released a circular requiring employers to grant paid leave of 28 days to employees who tested positive for COVID-19. Employers in Karnataka were thus, expected to give their workers certain additional paid leave to their employees.

J) CAN THE COMPANY BE FORCED TO PAY CONTRACT WORKERS, IF THE CONTRACTOR FAILS TO DO THE SAME?

Companies typically hire contract employees in production processes. It is now a settled legal position, that the principal employer is liable for paying his contract employees if the contractor fails or refuses to pay salaries. The extension of lockdown has not only angered employees because they are unable to make money, but it has also created issues for their employers. As a result, the main employer of businesses receives requests for payment from these employees. It is worth noting that businesses are entitled to compensation only if services are received and compensation is pending to their contract employees. As the Government Order of 29.03.2020 makes no distinction between full-time and contracted employees, all and/or all current responsibilities of their contract workers must be cleared by businesses.

WHAT STEPS HAS INDIA TAKEN TO PROTECT PEOPLE'S RIGHT OF JOB-SECURITY?

A group of organized workers who may lose their jobs because of the pandemic of the coronavirus will be paid health benefits by the Union government. It will be in line with the steps that other nations, including India, have taken to address the effects of the COVID-19 pandemic on working people.⁶¹

Since the MHA Order does not specify who is a worker, it is necessary to make sure that the MHA Order is properly interpreted by various statutory provisions, which specify the word "worker" and by the law, which define 'salaries' and also employees

⁶¹ Jidesh Kumar, 'India: FAQ's For Indian Employers: Can Employees Be Terminated During COVID-19? (Mondaq, 25 April 2020) <<https://www.mondaq.com/india/employment-and-workforce-wellbeing/923218/faq39s-for-indian-employers-can-employees-be-terminated-during-covid-19>> accessed 18 September 2020

to whom salaries have to be paid.⁶² The Code of Wages, 2019 is an Act of the Indian Parliament that consolidates four labour laws on compensation for salaries and bonus and universalizes rules on minimum wages and the timely payment of wages to all Indian workers.⁶³

But this Code will only come into force at a future date notified by the Central Government, although it is published in the Official Gazette. The current regulations continue until that day. The Payment of Wages Act, 1936(POW Act) determines the term 'wages'. In the preamble to the POW Act, it says that the wages of certain categories of working persons are governed by a statute while the payment of wages to certain categories of employed persons is expedient. This indicates that there are other types of working people who are not covered by this order. The POW Act stipulates clearly that workers engaged in a factory, business or other establishments covered by the Act, in compliance with section 2(vi) and 3, are entitled to a salary. The POW Act does not regulate most businesses and employees engaged in industry, factory or other establishments but exercising their management, administrative and supervisory role, as mentioned above. Furthermore, in accordance with the Article 1(6), the POW Act states specifically that it applies to those employee groups whose wages are not greater than INR 24,000 per month.⁶⁴

The term worker, as defined in section 2(l) of the Factory Act of 1948, means an individual employed directly or through any agency (including a contractor), whether for remuneration or not in any manufacturing phase, with or without the knowledge of the principal employer, but does not include any member or a member of the Union's army.⁶⁵

The Shops and Commercial Enterprises Act, 1961 (SCE Act) states that the salaries ought to be paid to the workers according to the Payment of Wages Act (each state has its own shops and commercial law, along with strict rules). Pursuant to the POW Act,

⁶² Ministry of Labour and Employment, Advisory of Ministry of Labour and Employment requesting employers to not terminate or reduce wages of their employees/workers due the COVID-19 outbreak dated March 20th, 2020, D.O. No. M-11011/08/2020

⁶³ The Code on Wages Act, 2019

⁶⁴ Jidesh Kumar (n 62)

⁶⁵ Factories Act 1948, s. 2(i)

workers receiving more than INR 24000/- a month do not have to be paid the salaries under the MHA Order and are thus not subject to the POW Statute. Under paragraph 2 (cc) of the ID Act, "closure" implies the permanent termination of a workplace or a part of it. As a nation of common law, our laws are narrowly interpreted. It should also be known that this does not refer to a business that allows work from home or is partially working or is not closed down.

An Employer may discharge employees who are not obliged to be paid wages in compliance with the MHA Order and whose services are not protected by the MHA Order. The termination shall be done for such employees in compliance with the contract of employment between the employees properly concluded and/or with the law of the SCE of the appropriate jurisdiction, where the employer is situated and the employee is engaged.

Where the workers are receiving salaries, they cannot be dismissed in the form of the MHA Order and will remain to be employed and compensated until such time as the Government prescribes in respect of the MHA Order and the lockdown is continued. Unilateral changes to a contract of employment are not necessary unless the contract of employment between the employer and the employee is unique to this effect. If the employment agreement or handbook does not provide a corporation with exclusive powers, it shall require the consent of the workers, indirectly or explicitly, prior to the alteration affecting the conditions of employment.⁶⁶ The provisions of the various legislations and the MHA order explicitly state that the employers must only pay salaries to eligible employees. It is also mentioned in the preamble and definitions. Based on the definitions and interpretations set out in the different laws above, it is clear that salaries only have to be paid by employees in the following types of employment, namely (a) staff at an industrial enterprise; and (b) shop and enterprise employees, who are not excluded from the SCE Act of the State in question.

The Government is covering these employees during the pandemic by the 'Atal Beema Vyakti Kalyan Yojana' which offers unemployment insurance for employees who have subscribed to the Employment State Insurance (ESI scheme). The ESI is a voluntary

⁶⁶ Jidesh Kumar (n 62)

health-care insurance program administered by Employees State Insurance Corporation (ESIC) for formal sector employees in India.⁶⁷

Under the scheme, operational since July 2018, unemployed employees are compensated for up to three months of unemployment in cash. This can only be used once in a lifetime. The Ministry of Labour and Employment aims to extend this program and allow workers to take advantage of employment insurance if they are affected. Workers get 25 per cent of the average wage they have earned in the program for the last two years. However, a significant prerequisite for unemployed people is to be subscribers of ESIC for at least two years to earn unemployment compensation. In fact, about 1 million employees were registered when the scheme became effective in July 2018.⁶⁸

- Experts noted that it might not be appropriate to cover a significant portion of the Indian government's labour force and provide all the affected employees with unemployment insurance.
- There is minimal coverage of the ESI system. This policy extends to all plants and factories with at least ten workers. According to the Sixth Economic Census 2013-14, around 98% of the companies employed less than 10 people.⁶⁹

WHAT INDIA CAN ADOPT FROM SOLUTIONS ALL OVER THE WORLD?

- Work-time/partial unemployment compensation cuts that reimburse workers for hours worked out in France, Germany, Italy and the Netherlands are being expanded or simplified.⁷⁰

⁶⁷ 'Atal Bimit Vyakti Kalyan Yojana: National Portal of India' (2020) <<https://www.india.gov.in/atal-bimit-vyakti-kalyan-yojana>> accessed 23 August 2020

⁶⁸ 'Unemployed? ESIC to settle payment claim under Atal Bimit Vyakti Kalyan Yojana within 15 days' *Financial express* (21 August 2020) <<https://www.financialexpress.com/money/unemployed-esic-to-settle-payment-claim-under-atal-bimit-vyakti-kalyan-yojana-within-15-days/2062123/>> accessed: 23 August 2020

⁶⁹ Jha, S., 'India to offer unemployment benefits to workers affected by coronavirus' *Business Standard* (New Delhi, 20 March 2020) <https://www.business-standard.com/article/economy-policy/india-to-offer-unemployment-benefits-to-workers-affected-by-coronavirus-120031901409_1.html> accessed 23 August 2020

⁷⁰ 'Almost 25 million jobs could be lost worldwide as a result of COVID-19, says ILO' (*International Labour Organization*, 18 march 2020) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_738742/lang--en/index.htm> accessed 23 August 2020

- The Chinese government has advised the employers not to terminate migrant workers in the event of sickness or containment. In many countries, including the United States, employment insurance benefits have been extended. The Social Security Scheme in the Philippines is set to offer unemployment insurance for up to 60,000 unemployed people.⁷¹
- Countries such as Italy and Japan provide financial assistance and simplify teleworking procedures.⁷²
- Conditions for paid autonomous sick leave in Ireland, Singapore, Kenya.⁷³

CONCLUSION

According to a Think Tank, 12 crores Indians have become unemployed in 1 month.⁷⁴ It is expected that an additional 49 million people will fall into poverty because of the pandemic.⁷⁵ Approximately, 122 million people have lost their jobs.⁷⁶ Apart from the health crisis, the financial and social instability threatens millions' livelihoods and wellbeing. Since most people find their identity and some of their life's meaning in their jobs, job insecurity will be dominant in the post COVID period. Since people have a human right to work, it is implied that the job security is also a human right.⁷⁷ Despite the schemes of the government to try and stop firing employees from companies, many people still have to bear the brunt of these layoffs. The showrooms of these shops were closed and the sales saw a freefall. Now things will get a little Darwinian, those who are big players are likely to survive, the rest may not. What we need is the proper implementation of the provisions of international instruments mentioned

⁷¹ *ibid*

⁷² Atal Bimit Vyakti Kalyan Yojana (n 68)

⁷³ *ibid*

⁷⁴ Upmanyu Trivedi & Vrishti Beniwal, '12 Crore Indians Lost Jobs Last Month amid Virus Lockdown: Think Tank' *NDTV* (28 May 2020) <<https://www.ndtv.com/india-news/coronavirus-lockdown-122-million-lost-jobs-in-india-last-month-amid-virus-lockdown-think-tank-2236340>> accessed 18 September 2020

⁷⁵ 'An additional 49 million people may fall into extreme poverty this year due to COVID-19: UN chief' *The Hindu* (10 June 2020). <<https://www.thehindu.com/news/international/an-additional-49-million-people-may-fall-into-extreme-poverty-this-year-due-to-covid-19-un-chief/article31792896.ece>> accessed 18 September 2020

⁷⁶ Upmanyu Trivedi & Vrishti Beniwal (n 75)

⁷⁷ *The Rights Related to Labour* (n 40)

hereinabove. Taking into account the strong international economic implications of COVID-19, policymakers need sound evidence urgently in order to better analyse the situation, map vulnerable communities and provide a suitable response to the resulting emotional distress.

Policymakers should urge those in quarantine to preserve their social relationships in order to alleviate emotional tension, to allow problems sharing and to provide legitimate social support. Normal and feeling to belong should be amplified in order to minimise stigmatic feelings arising from being unemployed. Resources should be expanded for psychological and financial aid. In order to alleviate the discomfort, strain, and sorrow of people who find their way through it, it is recommended that authorised government facilities develop synchronised treatment protocols. It is also recommended that media outlets and employees receive information and advice to promote public dialogue on emotional distress, highlight the many viable solutions for clinical and emotional treatment and communicate hopeful messages.

Keeping an optimistic approach will be critical in designing and prioritising mental health services for most disadvantaged, in implementing disadvantaged group-specific needs-based approaches with accurate risk communication strategies, and in ensuring consistency with the emerging COVID-19 epidemiology.⁷⁸

⁷⁸ Adrija Roy, Arvind Kumar Singh, Shree Mishra, 'Mental health implications of COVID-19 pandemic and its response in India' (2020) *International Journal of Social Psychiatry*, <<https://doi.org/10.1177%2F0020764020950769>> accessed 18 September 2020

CONDITIONAL SOCIAL COHESION FOR NON- CONFORMING: THE EXCLUSIONARY NOTIONS OF PARENTHOOD IN INDIAN PARENTAL LEAVE POLICY

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ABSTRACT

The nexus between social security and social justice have been well-established. Parental leave benefits for employees have been one such tool to social security, justice and labour welfare. But if we are to examine our domestic labour law regime, the national policy is uneven with the maternity benefits system suspended in a void. And even within this minimal policy, discriminatory notions of motherhood can be found in abundance. Briefly put, the rightful opportunity for a labourer to initiate parenthood has been limited to the most normative family models.

The paper will assess how the Indian parental leave policy works in detriment to the shifting paradigms of non-confirming families. Effect of the policy will be assessed from within and outside the binary gender construct since the parenthood of non-binary gender in India is rarely addressed. The Question of “How the supposedly futuristic labour codes have addressed this state of affair” has also been included in the essay.

Amongst suggestions, the essay has referred to countries that have incorporated gender-neutral terms in their parental leave regulations and thus, have effectively become inclusive. Also, the moral imperative of the government to assure social security in a developing country has been reiterated, alongside how Judiciary can become an effective catalyst for social transition.

In conclusion, a reminder has been placed as to why a review of this policy is vital for the country’s labour force and overall sustainable development.

KEYWORDS: MATERNITY BENEFITS, GENDERED LEAVE POLICY, TRANS-INCLUSIVE WORKPLACE, NON-TRADITIONAL FAMILY, GENDER-NEUTRAL LEGISLATION

INTRODUCTION

Iterating from the Magna Carta of the modern age, the Universal Declaration of Human Rights,¹ ‘everyone, as a member of society, has the right to social security.’² The nexus between social security and social justice is globally well-settled, the former often being described as a prerequisite for social cohesion and justice.³ One such tool to gender justice through social security is maternity benefits in employment. Its initial appearance was in the International Labour Organization’s (ILO) Maternity Protection Convention, 1919⁴ and in India, through the Bombay Maternity Benefit Act, 1929.⁵ But as observed in ILO’s report in 2014, assessing the impact of the Maternity Protection Convention that is nearing its centenary, ‘discrimination based on pregnancy, maternity and family responsibilities is still prevalent everywhere.’⁶ Dialogues about discrimination in gendered parenthood were often raised but parents of non-traditional families are unspoken of and childcare is still largely attributed to women. A plain testament of it can be found in our domestic labour law regime on parental leave. Maternity Benefits Act, 1961⁷ is the only legislation made with the sole purpose of facilitating the rightful opportunity of a labourer to initiate parenthood. Certain other laws like the Employees’ State Insurance Act, 1948⁸ has a few provisions on parental leave but only the All India Services (Leave) Rules, 1955⁹ (AISL rules) and Central Civil Services (Leave) Rules, 1972¹⁰ (CCSL rules) form an exception with fifteen

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR))

² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)) art 22

³ International Labour Organizations, 100th session of the International Labour Conference, Report VI, ‘*Social Security for Social Justice and a Fair Globalization*,’ (17 June 2011)

⁴ International Labour Organization, Maternity Protection Convention No.3 (adopted 28 November 1919, entered into force 13 June 1921)

⁵ Bombay Maternity Benefit Act 1929

⁶ International Labour Organization, *Maternity and paternity at work Law and practice across the world*, (13 May 2014).

⁷ Maternity Benefits Act 1961

⁸ Employees’ State Insurance Act 1948

⁹ All India Services (Leave) Rules, 1955, Rule 18

¹⁰ Central Civil Services (Leave) Rules, 1972, Rule 43A

days of leave for the father. One would expect the purportedly futuristic labour codes to address this issue but they seem to have maintained the status quo. Immaterial of the global shift in gender notions, desideratum being the exception obviates the insular nature of Indian parental leave policy.

The essay in its first part will discuss this nature from within the gender binary construct and in its second part, from outside the gender binary construct. It will briefly analyse several models of non-traditional families, their access to parental leave and benefits will be assessed, in reference to the latest labour law codes. In the third part, the essay will offer suggestions, restating the importance of governmental and judicial intervention and in the fourth part, the essay will conclude by summarizing the need for fair treatment in employment, in reference to the Indian employment sector.

WITHIN THE BINARY SCHEMA

Black's Law Dictionary describes family in the most '*common use*' to be a unit with 'a father, a mother and children, immediate blood relatives,¹¹ the traditional use referring to a heterosexual, two-parent family with biological children. There has been a departure from this framework globally, with reflections of it in India too. The 2017-18 report of Central Adoption Resource Authority (CARA) has observed that with the change in social mores, more single women are coming forward to make adoptions.¹² The CARA has initiated a policy in 2018-19, of providing ante date seniority to female single prospective parents of up to 6 months, where they are counselled to adopt older children.¹³ But incidentally, according to Maternity Benefit (Amendment) Act, 2017¹⁴ only a woman who is adopting a child younger than three months of age can avail a twelve weeks maternity leave benefit.¹⁵ The time period is taken to declare a child

¹¹ Black's Law Dictionary 728, (Revised 4th Edn. 1968)

¹² CARA, Annual Report 2017- 2018, (4 December 2018)

¹³ CARA, Annual Report 2018- 2019, (20 November 2019)

¹⁴ Maternity Benefit (Amendment) Act 2017

¹⁵ Maternity Benefit (Amendment) Act 2017, s 4

legally available for adoption,¹⁶ the cumbersome nature of the adoption procedure that follows,¹⁷ and the bias prevalent against single parents¹⁸ makes it impracticable for women to adopt a child of that age. This leads to most adoptive mothers, particularly single mothers, not being able to avail maternity leave under this act. The aforesaid twelve weeks period is also applicable to a commissioning mother under the Maternity Benefit Act,¹⁹ leaving her little room to provide essential infant care. This situation challenges the '*very objective*' of this amendment act, aimed at 'providing full maternal care to a new-born child during the most formative period'²⁰ through enhanced maternal benefits. When these pictures are pieced with the twenty-six weeks of leave for a biological mother, what is revealed is a policy favouring normativity. Chapter VI of the novel Code on Social Security, 2019,²¹ while discussing Maternity Benefits also shows no improvement on this state of affair. When treated unequally by the law, over how a woman chooses to initiate parenthood, it is not only the aspects of care and communing that is affected but the labourer is deprived of the safety net of social security via medical bonus,²² protection from arbitrary discharge or dismissal while on maternity leave etc.²³

There are greater restrictions on single men hoping to adopt,²⁴ based on biased conceptions of sexual abuse and by disassociating men with childcare, yet there are some men opting for adoption.²⁵ But for an adoptive single father, unless covered under the aforementioned AISL rules and CCSL rules, there exists no national policy

¹⁶ CARA, Adoption Regulations 2017

¹⁷ CARA, Adoption Procedure for Residents of India

¹⁸ Shephali Bhatt, '*Despite a favourable law, why do single women and men struggle to adopt a child in India,*' The Economic Times

¹⁹ *ibid* n. 15

²⁰ Discussion on the motion for consideration of the Maternity Benefit (Amendment) Bill 2016

²¹ Bill No. 375 of 2019

²² Maternity Benefit Act 1961, s 8

²³ Maternity Benefit Act 1961, s 12

²⁴ CARA, Eligibility Criteria for adoptive Parents

²⁵ *ibid* n. 18

for parental leave. This scanty period of fifteen days is yet again found on adopting a child not older than one year of age,²⁶ whereas the biological need of a child for a protective attachment figure extends until the formative years and the absence of it can hinder psychological well-being.²⁷ A well-intended Paternity Benefit Bill was introduced in the parliament in 2017,²⁸ providing for a leave period and several other benefits like Parental Benefit scheme and an attached fund,²⁹ covering a larger base of employees. But it's notable that this bill too, proposed a fifteen days leave period,³⁰ reiterating the conventional idea that care work is majorly a job of the mother. Nevertheless, the bill did not see the light of the day and paternity leave has found no place in the Code on Social Security. Exclusion of more women from the labour force due to the economic cost of providing parental benefits has been a matter of concern since the parliamentary debates on the Maternity Benefit Bill dating back to 1961.³¹ But an endeavour at stabilizing this by introducing a parallel paternity leave policy has not yet been attempted. Ironically so, India has ratified the Convention on the Elimination of all Forms of Discrimination Against Women³² in 1993 and the convention obligates the state parties to take measures to modify social and cultural patterns and restate the common responsibility of men and women in bringing up a child, terming maternity as a '*social responsibility*'.³³

With implied restrictions in surrogacy and legal adoption, same-sex couples have limited recourse to parenthood, specifically a Cis male couple. If a female couple is opting for assisted reproduction, the delivering partner can avail all the benefits under

²⁶ *ibid* n. 9

²⁷ Muhammad Imtiaz Subhani and others, '*Are parents really attached to their adopted children?*' Springer Plus Online, (2014) 3 (545)

²⁸ Introduction of the Paternity Benefit Bill 2017

²⁹ Paternity Benefit Bill 2017, s 5

³⁰ Paternity Benefit Bill 2017, s 4

³¹ Parliament Debate, November 20 1961, Second Series No 1 pg 187

³² Convention on the Elimination of all Forms of Discrimination against Women (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

³³ Convention on the Elimination of all Forms of Discrimination against Women (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 5

the Maternity Benefits Act, but this is the only inclusive benefit provided to non-normative couple.

OUTSIDE THE BINARY SCHEMA

While discussing the non-binary gender, the caveat stands that parenthood is not a social justice priority of these communities in India. But it is important to note that several sections of these communities have embraced their own dimensions of acquired family, with judicial recognition to several aspects of their family. The Allahabad High Court, in the case of *Ashish Kumar Misra [P.I.L.] Vs. Bharat Sarkar*³⁴ has observed that a 'transgender can be considered the head of an eligible household' under the National Food Security Act, 2013. Moreover, the High Court of Himachal Pradesh in *Sweety (Eunuch) Vs. General Public*³⁵ has held the succession based on *guru-chela parampara* of *kinner* community to be a valid model of succession. These judgments when read alongside the Transgender Persons (Protection of rights) Act, 2019,³⁶ one can visualize an attempt to bring them to the forefront of social participation, including employment. Under the provisions of the act, a prohibition against discrimination³⁷ includes 'the unfair treatment in, or in relation to, employment or occupation'³⁸ and the obligation of establishments and other persons³⁹ under this act includes non-discrimination against 'any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues'.⁴⁰ This builds a strong case for a fair employment sector. But the void in addressing a parental leave policy still poses the question, as to whether the lawmakers have considered all the social and biological intricacies of gender

³⁴ *Ashish Kumar Misra [P.I.L.] v. Bharat Sarkar*, Misc. Bench No. 2993 of 2015 Indian Law Reports Allahabad Series pg. 510

³⁵ *Sweety (Eunuch) v. General Public*, AIR 2016 HP 148

³⁶ Transgender Persons (Protection of rights) Act 2019

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *ibid*

ambiguity⁴¹ before indefinitely concluding that a trans-person has no resort to parenthood.

Madurai bench of Madras High Court, in the case of *Arun Kumar vs. The Inspector General of Registration*⁴² has held the marriage between a Hindu man and Trans-woman to be a valid marriage, opening a channel for legal adoption as a couple. But eclipsing all the previously discussed complications peripheral to leave for an adoptive parent, the most intricate question raised is “Whether a trans individual can avail the leave, if they don’t identify to be a woman or man?” The same question arises in terms of a Trans-individual attempting to legally adopt as a single parent,⁴³ and in case of Trans pregnancies. If addressed within the word of law, the answer to this question will be in negative.

The requirement to conform to an identity with which one does not conform to, is violative of the rights conferred on them by the Transgender Persons (Protection of rights) Act, 2019 and the judgement of *NALSA Vs. Union of India*.⁴⁴ Irrespective of whether one chooses to utilize or not, their right to social security prevails. Remarkably for the recent labour law compilation to four codes, the only code that has addressed the trans-community is the Occupational Safety, Health and Working Conditions Code 2019,⁴⁵ regarding separate sanitation facilities. Matters elementary to one’s dignity being the sizable change is rather regressive for a welfare state that is seven decades old.

SUGGESTIONS

Several private companies in the country are introducing inclusive parental leave policies, not just in the form of paternity leave but also to encourage LGBTQ+

⁴¹ Ramya Kannan, ‘Why are there objections to the Transgender Persons Bill?.’ The Hindu, December 01, 2019

⁴² *Arun Kumar v. The Inspector General of Registration*, W.P. (MD) NO. 4125 of 2019, W.M.P. (MD) NO. 3220 of 2019

⁴³ Mini Muringatheri, ‘Transgenders raise the adoption question,’ The Hindu, 04 January 2020

⁴⁴ *NALSA v. Union of India*, AIR 2014 SC 1863

⁴⁵ Working Conditions Code 2019

households to thrive.⁴⁶ While the reformatory policies of private companies are well-appreciated, the government in a developing country needs to be involved in assuring social security, so as to optimize the distribution of welfare.⁴⁷ There exists a “*moral imperative*” with a government to tackle social exclusion, which if left unaddressed creates substantial costs - economically, socially and politically.⁴⁸ To refer a way forward, one can find countries like France, Luxemburg, Portugal, Spain and Sweden that use gender-neutral terms in the laws to refer to the parent in the context of leave policies,⁴⁹ effectively resulting in the inclusion of same-sex and transgender parents.

The judiciary has been vocal about the right to motherhood⁵⁰ as a fundamental right under Article 21 of the Constitution of India, whereas, right to parenthood is a more inclusive term, which is still tucked under the garb of a liberty right and not a welfare right.⁵¹ Even the status as a liberty right is derivative of right to reproductive autonomy and privacy,⁵² making judicial interventions an imperative catalyst to a gentle transition.

Governmental agencies like the CARA need to be sensitized about this shift in family paradigm. Several officials, like those who prepare Home Study Report which is crucial to deciding whether one can adopt or not, are often unreceptive of diverse family models.⁵³ This particularly delays the process, often resulting in an employee not being able to avail the leave benefit since the age barrier placed on the adoptive child is not more than a year, in any of the relevant Act or Rules.

⁴⁶ K. Sunil Thomas, ‘Reliance, Tata, Mahindra on global list of LGBT+ inclusive companies,’ *The Week*, 19 November 2019; Kasmin Fernandes, ‘Pride Month 2020: LGBT+ Allies in Corporate India,’ *The CSR Journal* 30 May 2020

⁴⁷ Robin Burgess and others, ‘*Social Security in Developing Countries: What, Why, Who, and How?*’ Oxford Scholarship Online (2011)

⁴⁸ World Bank, ‘*Social Inclusion- Understanding Poverty*,’ (2014)

⁴⁹ European Commission Employment, Social Affairs and Inclusion, ‘*Leave policies and practice for non-traditional families*,’ (2019)

⁵⁰ *Hema Vijay Menon v. State of Maharashtra*, AIR 2015 Bom R 370

⁵¹ J Boivin, G Pennings, ‘*Parenthood should be regarded as a right*,’ (29 March 2012)

⁵² *B.K. Parthasarathi v. Govt. of A.P.*, AIR 2000 AP 156

⁵³ *ibid* n. 18

CONCLUSION

Non-traditional families generate images of decline or creativity, crumbling social foundations and historical consistency versus modern malaise.⁵⁴ Indian family laws with the religious accent seldom show any flexibility towards them, unless under the rare judicial interventions. Childcare and other unpaid care work is still principally held to be the obligation of a woman and motherhood as central to her self-actualization. These are gender stereotypes that work to the detriment of both the binary genders. But an employee, as a valuable human resource, deserves a full life to present their full productivity.⁵⁵ India has consistently ranked low in terms of labour welfare,⁵⁶ inclusive of the recent 'Commitment to Reducing Inequality Index 2020.'⁵⁷ Therefore, India is required to review its gendered employment policies and uphold its commitment to the Sustainable Development Goals 2030, specifically, goal 10 i.e. "*Reduce inequality within and among countries*".⁵⁸

⁵⁴ Nancy E. Dowd, '*Changing Family Realities, Non-Traditional Families and Rethinking the Core Assumptions of Family Law*,' (2002) Int'l Surv. Fam. L (pp. 439-470)

⁵⁵ Thomas Right and Russell Cropanzano, '*Psychological well-being and job satisfaction as predictors of job performance*,' (2000) 5 84-94 Journal of occupational health psychology

⁵⁶ Aditi Nigam, '*India among 'worst' countries for workers' rights*,' The Hindu Business Line, 21 June 2016

⁵⁷ Development Finance, Oxfam Report, '*The Commitment to Reducing Inequality Index*,' 3rd Edition 7 October 2020

⁵⁸ United Nations Department of Economic and Social Affairs Sustainable Development



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