SHINY CARS SHATTERED Dreams

A report on precarious workers in the Chennai automobile hub, their working conditions, and the challenges they face in the exercise of their right to freedom of association, based on worker narratives together with an analysis of the legality of precarious work under national and international law.

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International Commission for Labor Rights

INTERNATIONAL COMMISSION FOR LABOR RIGHTS

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ABOUT

The International Commission for Labor Rights, ICLR, is a 501(c)(3) non-profit that is based in New York, and coordinates the pro bono work of a global network of lawyers committed to advancing workers' rights through legal research, advocacy, cross-border collaboration, and the cutting-edge use of international and domestic legal mechanisms.

OUR PRINCIPLES

We believe that all working people have certain core rights, which we are committed to defending:

- to form and join unions, and to bargain collectively for better conditions at work
- to earn enough to support themselves and their families, so that children do not have to work
- to work freely, without force or coercion
- to be free from discrimination in the workplace

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Contents

Preface

In 2012, the International Labor Organization's Committee of Experts raised an alert regarding the urgency of global problems surrounding precarious work.[1] The Experts underlined "the negative impact of precarious forms of employment on trade union rights and labour protection." The Experts emphasized, in particular, concerns of "short-term temporary contracts repeatedly renewed; subcontracting … to fulfil statutory permanent tasks; and the non-renewal of contracts for anti-union reasons."

They noted that employers sometimes "hide a real and permanent employment relationship" behind precarious work assignments. Finally, the Experts called for studies of such problems just at a time when the engagement of precarious workers has been noted to be rapidly climbing in India. With this timely attention to precarious work in mind, and considering the importance of international instruments including ILO Conventions and Recommendations, the Universal Declaration of Human Rights (UDHR) and other human rights treaties, researchers for the International Commission for Labor Rights undertook this landmark study of precarious work in the Chennai auto sector.

Informing ICLR's research on precarious work, of course, are the imperatives of Article 23 of the UDHR:

- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- Everyone, without any discrimination, has the right to equal pay for equal work.
- Everyone who works has the right to just and favourable remuneration ensuring for himself and herself and his or her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- Everyone has the right to form and to join trade unions for the protection of his or her interests.

The UDHR was signed and affirmed by all member countries of the United Nations on December 10, 1948. The Declaration embodied the highest aspirations of the peoples of the world who had emerged from the Second World War eager to find ways to prevent a recurrence of the scourge of war which had plagued humankind twice in the 20th century. In the Preamble to the Declaration, this aspiration is expressed as follows: "the disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...."

The UDHR, in declaring freedom from fear and want to be among the highest aspirations of the people of the world, was the first document to posit the indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other. Article 23 articulates the right to work, the right to free choice of work, and just and favorable conditions at work, to non-discrimination at work, and to just and favorable remuneration ensuring an existence worthy of human dignity. Clause (4) which provides everyone with a right to form and join trade unions to protect his or her interests is an acknowledgement that workers' organization into trade unions is the best way to ensure that the other rights in Article 23 are achieved. The organization of workers into trade unions enables them to protect their interests to work under just and favorable conditions, in a non-discriminatory environment and with just and favorable remuneration worthy of human dignity.

This report studies the widespread use of precarious workers in the Chennai automobile hub in the State of Tamil Nadu in India by certain multinational auto companies and their supplier companies, and evaluates the legality of such work under international law, based on the fundamental rights model of the UDHR, as well as domestic law. This report comes at a time when labour law reforms aimed at enhancing flexibility for employers in the manufacturing sector are on the anvil. The findings in the report establish that the need of the hour is to enhance protection for precarious workers in the manufacturing sector both under the law and in practice, and not to increase flexibility for employers. The report also establishes that it not just the generation of additional jobs that matters but also the quality of employment. The findings draw attention to the urgent need to improve the conditions of employment of precarious workers. The report also underscores the need for creating a suitable climate to enable all workers in the auto sector to effectively exercise their freedom of association and collective bargaining rights.

Ramapriya Gopalakrishnan
Jeanne Mirer

Abbreviations used

AICCTU	All India Central Council of Trade Unions
AITUC	All India Trade Union Congress
ASI	Annual Survey of Industries
ATP	Anna Thozhir Sanga Peravai
BMS	Bharatiya Mazdoor Sangh
CAG	Comptroller and Auditor General
CEACR	ILO's Committee of Experts on the Application of Conventions and Recommendations
CFA	ILO Governing Body's Committee on Freedom of Association
CITU	Centre for Indian Trade Unions
ECOSOC	United Nations Economic and Social Council
EPF	Employees' Provident Fund
ESI	Employees' State Insurance
FACB	Freedom of Association and Collective Bargaining
FPRW	ILO Declaration on Fundamental Principles and Rights at Work
G.O	Government Order
HMIATS	Hyundai Motor India Anna Thozhir Sangam
HMIEU	Hyundai Motor India Employees Union
HMS	Hind Mazdoor Sabha
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLR	International Commission for Labor Rights
ILO	International Labour Organization
INR	Indian Rupee
INTUC	Indian National Trade Union Congress
ITI	Industrial Technology Institute
LPF	Labour Progressive Federation
MNC	Multinational Company
NTUI	New Trade Union Initiative
RTI	Right to Information
TNC	Transnational Corporation
UAW	United Auto Workers
UDHR	Universal Declaration of Human Rights
ULF	United Labour Federation
USD	United States Dollar
UUHE	United Union of Hyundai Employees

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Executive Summary

Monday through Saturday and often Sundays too, thousands of workers stream into the sprawling auto factories of Hyundai, Ford, Renault-Nissan and others in the Chennai auto hub. They stream also into auto components and parts manufacturing factories such as Daebu Automotive Seats, Woosu and KBI. . . . Only a small number of them are "permanent" workers with the potential to earn a living wage.

> . . . permanency is an illusion for the vast majority of the workers who show up day after day to work in these factories. They are stuck in perpetual low-wage jobs filled with uncertainty. Their workplace rights are subject to whim. . . .These workers are by definition 'precarious' . . . When workers enter these companies, most enter into a workforce where they become 'permanently temporary.'

Introduction

Monday through Saturday and often Sundays too, thousands of workers stream into the sprawling auto factories of Hyundai, Ford, Renault-Nissan and others in the Chennai auto hub. They stream also into auto components and parts manufacturing factories such as Daebu Automotive Seats, Woosu and KBI. Sometimes the colour of their clothing gives their status away, other times, the quality of the clothing. Only a small number of them are "permanent" workers with the potential to earn a living wage. Then there are workers like Ganesh and Balaji (not their real names).

Ganesh from Tirunelveli began work at the factory of a global automobile manufacturer as a statutory apprentice in 2003. He was 21. He had finished an Industrial Technology Institute (ITI) course in the fitter trade. Upon completion of the statutory apprenticeship, he worked as a trainee in a supplier factory for a few months. He then returned to work in the factory where he began his career. After a year of service as a 'company apprentice' and two years of service as a trainee, the company he was working for abruptly terminated him from service along with hundreds of other trainees in December 2008. He now works as a 'contract labourer' at the factory of an automobile component manufacturer in the region. He says that he cannot get married as he has neither a stable job nor enough money to support a family.

Balaji, an ITI-trained worker from Mayiladuthurai also began his career at the factory of a global automobile manufacturer as a statutory apprentice in 2005 and completed the apprenticeship in 2006. He continued as a company apprentice in the factory and later worked as a 'trainee' with the company for three years. Although the company had led him to believe that he would be made permanent after three years of service as a 'trainee,' he was not made permanent nor given any reason for that. He was instead sent out of the company. He later secured a job as a temporary worker in an auto dealer in Chennai city. Although it is now more than eight years since he began his career in the automobile sector, he still does not have secure employment.

These stories, as those of Ganesh and Balaji, are unfortunately typical. By all accounts, Ganesh and Balaji were well-qualified to do their work and to become permanent workers. Some would say they just had bad luck. But trade unionists and legal experts would say that their predicament is the result of systematic violation of the law. Laws designed to ensure an entry into permanent employment at the workplace, failed them. Ganesh and Balaji wanted to become regular permanent workers in these factories. But permanency is an illusion for the vast majority of the workers who show up day after day to work in these factories. They are stuck in perpetual low-wage jobs filled with uncertainty. Their workplace rights are subject to whim.

Workers like Ganesh and Balaji are joined at their job sites by thousands of other workers whose employment is not directly with these companies but who are employed through contracting agencies. They work side by side with permanent employees for dramatically less pay and have no job security. Generally it is folly for them to even think of trying to build solidarity with others in their predicament to form a union. They lack any kind of representation or voice at the workplace. What their employers term as "flexibility," these workers know as uncertainty and powerlessness.

These workers are by definition 'precarious' and the work they do is 'precarious work.' When workers enter these companies, most enter into a workforce where they become 'permanently temporary.'

The ICLR Report

This report by researchers of the International Commission for Labor Rights combines case studies with a discussion and analysis of domestic and international law. The report focuses on workers in the factories of three multinational auto companies (Ford, Renault-Nissan and Hyundai) and several automobile component and parts manufacturing factories that supply them. The report presents for the first time detailed views of workers and trade union leaders. It also discusses how precarious work of the kind found in the Chennai auto hub violates national and international labour standards.

Case Studies

ICLR interviewed over 300 precarious workers from the auto manufacturing and supplier factories. Some permanent workers from the factories were interviewed as well. Information was also requested and obtained under the

Right to Information (RTI) Act as to the practices of the companies with respect to the use of contract workers.

Summary of Findings from Workplace Case Studies

- **Workers Living Precariously**
  The workers in these factories are primarily statutory apprentices, company apprentices, trainees, probationers and contract workers, all in some form of temporary work. Permanent workers are much fewer in number than these categories of precarious workers. Common characteristics of these non-permanent (precarious) workers include: 1) Low wages; 2) Poor protection against termination of employment; 3) Lack of benefits usually associated with full-time standard employment; and 4) Lack of or limited rights at work, in practice including the right to form and join trade unions to protect their interests. Workers whose training begins when they are 19-22 years old are cycled on and off of regular job tracks for years without protection. One worker stated: *"We work as trainees in one company after another, year after year. Years go by. We then get age barred for better jobs."*
- **Massive use of Contract workers**
  ICLR data show high reliance on contract workers. Statistics obtained through a request under the Right to Information Act (RTI Act) show that the Hyundai factory has more than 10,500 contract employees and over 450 contractors. Developing solidarity between the direct and the contract workers for purposes of exercising their rights to form and join unions to protect their interests is very difficult in such a workforce.
- **Zero permanent worker factories**
  ICLR found that there were no permanent workers at all in a few of the supplier factories and the entire workforce on the shop floor consisted only of trainees/probationers and 'contract labourers.'
- **Abuse of training contracts**
  Workers inducted as 'trainees' and 'company apprentices' receive little or no training and, in fact, perform the same kind of work as permanent workers but are paid much lower wages. It is common for them to be terminated from service at the end of the 'training period.' Furthermore, they often work under the designation of 'trainees' or 'company apprentices' for extended periods, much beyond what was held out to them by their employers.
- **Disguised employers**
  ICLR found cases of workers who were hired and paid by the supplier but who learned later that they were allegedly employed by third-party contractors.
- **Swimming workers**
  Workers often seem to "swim" between direct and contract work. For instance, following completion of the apprenticeship period, a worker may take up employment as a contract worker in the same company and subsequently be hired by the company again as a trainee. Another example is that of a trainee from one automobile company who upon termination of service in one company takes up employment as a contract worker in another automobile manufacturing factory or automobile component manufacturing factory.
- **Low wages**
  Contract workers in both automobile and supplier factories get low wages. Their wages are just a small fraction of the wages paid to the direct workers in the factories. In the supplier factories, they may make as little as INR 3380 per month which is not sufficient to rent even a one-room apartment in or around Chennai for a month. This is despite the law which prohibits companies from paying lower wages to contract workers than regular workers doing the same or similar kind of work. Apprentices, trainees, learners, and probationers are also paid only a fraction of the amount paid to permanent workers.
- **Regular overtime work without due compensation**
  Precarious workers are routinely required to work overtime. They are, however, often often not paid wages at twice the rate for the period of overtime work, as mandated by the law.
- **Freedom of association frustrated**
  Most of the precarious workers in both the automobile manufacturing factories and the supplier factories are not unionized. Although some instances of precarious workers' joining unions and protesting their working conditions and pay in solidarity with others in their plant were reported, it is clear that the precarious nature of their employment placed major obstacles in the workers' paths if they sought to act collectively. Most workers reported being fearful to raise any workplace issues affecting themselves or their co-workers. In the case of permanent workers too, the management often refused to recognize the unions which the workers formed, exploiting loopholes in Indian labour law.

ICLR Conclusions regarding illegality of precarious work under International Law

ICLR evaluated precarious work in the context of international standards and global efforts at protecting workers and concludes that the intentional expansion of precarious work and strategic avoidance of permanent employment must be identified as a new category of violation. A summary of the bases for this conclusion is as follows:

Although some instances of precarious workers joining unions and protesting their working conditions and pay in solidarity with others in their plant were reported, it is clear that the precarious nature of the workforce placed major obstacles in the workers' paths if they sought to act collectively.

- **International Treaties and ILO Conventions and Recommendations guarantee the rights of workers to engage in collective action to protect their interests.** The overwhelming majority of all UN Member States and ILO Member States have ratified treaties and conventions that give freedom of association and collective bargaining rights the status of customary international law, or *jus cogens*, which is binding on all states. In particular, the Universal Declaration of Human Rights and ILO Conventions Nos. 87 and No. 98 guarantee the rights of workers to form and join trade unions and engage in collective action to protect their interests.
- **Guidelines and Declarations reveal a long history of international recognition of workers' rights to freedom of association and collective bargaining.** From the OECD Guidelines of 1976, to the adoption of the "Ruggie" Framework for Business and Human Rights by the Human Rights Council in 2011, international bodies have recognized the overarching importance of giving voice to workers in the workplace through the right to form and join unions and collectively bargain. These principles and guidelines are based on International Declarations, UN Human Rights Treaties and ILO Conventions.
- **UN Human Rights Treaties ratified by India also protect freedom of association and collective bargaining rights.** The International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights recognize the rights of all workers to form and join trade unions to protect their interests.
- **Precarious Work prevents workers from protecting their freedom of association, thereby violating these internationally recognized rights.** Information from the case studies shows that precarious work found in the Chennai auto hub nullifies core worker rights and must be declared a unique violation of international law.

ICLR Conclusions regarding illegality of precarious work under Indian Law

The practices described in this report are exploitative and constitute violations of constitutional provisions, national and state laws. Laws implicated include:

- **The Indian Constitution** which protects rights of workers to organize and to have a dignified life.
- **The Contract Labour Act of 1970** under which contract workers should not be engaged for jobs of a regular or perennial nature.
- **The Industrial Disputes Act of 1947.** The Act declares as unfair labour practices the actions of employers who continually hire workers on a temporary basis in order to prevent them from obtaining permanent status.
- **The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981.** The Act requires workers to be made permanent on completion of 480 days of continuous work.

These laws and others are laid out in greater depth in the report in order to provide workers, practitioners and activists with a tool kit to use in seeking redress for violations of law.

Recommendations to Employers

Based on this study and its conclusions, the ICLR makes the following recommendations to employers in the sector, including multinational enterprises:

1. Recognize that all categories of workers are entitled to just, humane and equitable conditions at work, and fair wages.
2. Respect the freedom of association and collective bargaining rights of all categories of workers.
3. Recognize that precarious work prevents workers from protecting their interests by causing impediments to their exercise of rights to freedom of association and collective bargaining.
4. Respect and comply with national and international labour standards both in letter and spirit.
5. Refrain from hiring contract workers, trainees, apprentices, learners, probationers and other categories of precarious workers for jobs of a perennial nature.
6. Respect and comply with the requirement of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 to confer permanency on workers on completion of 480 days of continuous service in a period of 2 years.

7. Respect and comply with the principle of equal pay for equal work.
8. Refrain from adopting unfair practices aimed at circumventing the applicable labour laws.
9. Refrain from acts of anti-union discrimination and acts of interference.
10. Recognize that workers' committees cannot be a substitute for trade unions and refrain from using workers' committees to undermine representative trade unions.
11. Grant recognition to and negotiate with representative trade unions.

Recommendations to the Government of India

Based on the findings of the study, the ICLR makes the following recommendations to the Government of India:

1. Recognize that employer appeals for greater flexibility under the law and in practice in the name of competitiveness only create jobs which are low paying and exploitative and do not enhance the purchasing power of the workers. Also recognize that this only furthers inequality in society, and not real growth and that such appeals and practices will only lead to a self-defeating race to the bottom.
2. Strengthen the laws for protection of workers' rights in consultation with workers' organizations, in particular by (a) explicitly prohibiting the engagement of precarious workers in any kind for work of a regular and perennial nature in industrial establishments; and (b) ensuring that the laws protecting freedom of association and collective bargaining rights in the country are in conformity with the international labour standards of the ILO.
3. Re-consider proposals to effect amendments to the law so as to afford greater flexibility to employers in the manufacturing sector.
4. Recognize that ILO Conventions Nos. 87 and 98 are binding as customary international law, and at the same time demonstrate India's commitment to respecting international law by ratifying these conventions.
5. Reaffirm the commitment made to improving the lives of workers by respecting their rights to protect their interests and develop an adequate standard of living through self-organization of trade unions.
6. Take necessary measures to ensure that all categories of industrial workers are in a position to exercise in practice their universal rights to freedom of association and collective bargaining.
7. Recognize that the full employment policy incorporated in ILO Convention 122, which India has ratified, is necessary to promote the goals of Article 23 of the Universal Declaration of Human Rights which speaks in terms of fair and just conditions of work, and fair and just remuneration consistent with human dignity.

Recommendations to the Government of Tamil Nadu

Considering that labour laws in respect to the factories covered by the study are enforced by the Labour Department of the State of Tamil Nadu, and also the fact that the State of Tamil Nadu has concurrent jurisdiction under the Constitution of India on labour-related subjects, the ICLR makes the following recommendations to the Government of Tamil Nadu:

1. Take appropriate measures to ensure that all employers in the automobile sector including multinational companies respect and comply with Indian labour laws in letter as well as in spirit.
2. Take necessary measures to strictly enforce labour laws in the automobile sector and thereby protect the rights of precarious workers in the sector including their freedom of association and collective bargaining rights.
3. Take necessary measures to ensure that precarious workers are not engaged for work of a regular and perennial nature in the sector.
4. Take necessary measures to ensure that the principle of equal pay for equal value is respected and followed in the sector.
5. Strengthen the labour administration and labour inspection system by taking appropriate measures including increasing the number of labour inspectors and giving labour inspectors thorough training on all aspects of labour laws as well as the spirit of the labour laws so as to effectively prevent employers from adopting practices aimed at evading and circumventing the laws.
6. Enact a law relating to the recognition of trade unions in consultation with representative workers' and employers' organizations.
7. Strengthen labour laws relating to precarious workers in consultation with representative workers' organizations.
8. Re-consider proposals to effect amendments to the law so as to afford greater flexibility to employers in the manufacturing sector.

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Introduction

Over the last two decades since the adoption of the New Economic Policy, industrial employers across the country have adopted various strategies in order to reduce and externalize labour costs and have the flexibility to hire and fire workers at will.

… Various categories of precarious workers such as workers engaged through intermediary contractors, temporary workers, casual workers, 'apprentices,' 'trainees,' and 'probationers' are increasingly engaged in large numbers.

Introduction

New economic and industrial policies

In the first four decades since India's independence in 1947, India's economic policies were geared towards the development and protection of local industries. Import substitution and industrial licensing were important features of its policies. The public sector played a predominant role while the private sector was subject to a system of licensing and controls. Foreign investment in the country was restricted.[2]

In 1991, making a major departure from its earlier approach, the Government of India adopted a New Economic Policy built on the premise that globalization, liberalization and privatization would lead to rapid economic growth. The adoption of the New Economic Policy ushered in major changes in the economy. Several sectors of the economy previously reserved for the public sector were thrown open to the private sector. The system of licensing and permits that led to bureaucratic hurdles in the establishment of industries was done away with. Restrictions on imports were reduced. Restrictions on foreign investment were removed, allowing for greater foreign direct investment in India.[3]

Following these developments, the governments of various states in India also took measures to encourage the establishment of large industries and attract direct foreign investment. Vying with one another to attract foreign investment, state governments offered tax exemptions and deferrals and other incentives such as land allotment and electric power supply at concessional rates to foreign companies with the hope that it would result in rapid economic development of the state and help generate employment as well.

The State of Tamil Nadu in the south of India is one such state. It is currently ranked the second largest state in India in terms of its economic size, and is ranked first among the states in terms of the number of factories and the number of industrial workers.[4] According to the Government of the state, it is "one of India's most progressive states and amongst the top three on several economic and social indicators." [5] The Government further boasts that Tamil Nadu is the most "technically powerful knowledge State" in the country, with an "abundant availability of skilled manpower at relatively lower wage costs coupled with harmonious and peaceful industrial relations." [6]

The Government of Tamil Nadu has taken a slew of measures over the years to attract foreign investment and help establish large industries in the state. In 1996, the Government of Tamil Nadu introduced a package of incentives for 'Super Mega Projects,' that is, projects in which an investment of over INR 1500 crores was made in fixed assets within a stipulated time frame.[7]

In 2003, the Government of Tamil Nadu adopted a New Industrial Policy aimed at creating an industry-friendly climate.[8] Treating the auto sector as a priority sector, in 2007, the Government adopted the 'Ultra Mega Integrated Automobile Projects Policy' for encouraging the establishment of major automobile projects in the state. The policy is applicable to automobile projects with a minimum investment of INR 4000 crores to be made within the time frame stipulated in the policy. The benefits under the policy include land allotment at concessional prices, exemption from electricity tax for ten years and major refunds of value added and central sales taxes.[9]

The state's industry-friendly initiatives, among other factors, have contributed to the emergence of Tamil Nadu as one of the frontrunners in attracting foreign direct investment.[10] The automobile sector accounts for a large share of the foreign direct investment in the state.[11] Several automobile majors including Hyundai, Ford, Renault Nissan and BMW have established factories near Chennai, the capital of Tamil Nadu, beginning from the mid-nineties. They have been followed by many global suppliers of these companies. Investments in the Chennai auto hub by global car manufacturers are estimated to be upward of $3 billion.[12] In 2010-2011, the Chennai auto hub accounted for 31 percent of cars and 35 percent of auto components made in the country.[13]

With a view to further accelerate the pace of industrialization and growth in the state, earlier this year the Government of Tamil Nadu adopted a new Industrial Policy as well as a new Automobile and Auto Components Policy. One of the stated aims of the Tamil Nadu Automobile and Auto Components Policy, 2014 is "to make Chennai one of the top 5 centres in the world in the auto and components industry." Towards this end, it hopes "to double the exports of auto and components from Tamil Nadu by 2016." Generation of 500,000 more jobs in the automobile and components industry by 2015 is also among the policy objectives.[14]

A recent study found that 30% of all the workers in the private sector and 32% of all the workers in the public sector were contract workers. … The trend of rapid rise of precarious employment since the 1990s and the increased informalization of jobs indeed appears to be widespread across the world and not just in India.

Consequences of the new economic policies: Rise in precarious employment

Over the last two decades since the adoption of the New Economic Policy, industrial employers across the country have adopted various strategies in order to reduce and externalize labour costs and have the flexibility to hire and fire workers at will. There have been significant changes in the employment pattern in industrial establishments as a result.[15] Various categories of precarious workers, such as workers engaged through intermediary contractors, temporary workers, casual workers, 'apprentices,' 'trainees,' and 'probationers,' are increasingly engaged in large numbers. Employers have also resorted to outsourcing core production work and work of a perennial nature.[16]

On account of such practices, the share of permanent workers relative to the total number of workers in the organized manufacturing sector has declined.[17] On the other hand, the share of precarious workers such as contract workers has increased. Annual Survey of Industries (ASI) data indicates that the share of contract workers among the total number of workers in the organized factory sector in India had increased from 13.24% in 1993-1994 to 30% in 2006-2007.[18] A recent study found that 30% of all the workers in the private sector and 32% of all the workers in the public sector were contract workers.[19] The significant rise in precarious employment in industrial establishments has meant that there is a high level of informalization of jobs even in the formal sector in the post-liberalization period.[20]

The trend of rapid rise of precarious employment since the 1990s and the increased informalization of jobs indeed appears to be widespread across the world and not just in India. These developments are viewed by some as a direct outcome of globalization and the implementation of neo-liberal policies.[22] A divergent perspective is that "precarious work is not the inevitable consequence of globalization; it is the outcome of deliberate policies to use the opportunities of globalization to change the rules of the game."[23]

'Reforms by stealth'

Alongside the adoption of low-cost flexible labour practices, employers have since the 1990s been lobbying for reform of Indian labour laws so as to have greater flexibility in hiring and firing labour.[24] Employers in the auto sector too have been pressing for reforms of national labour laws to "improve manufacturing competitiveness."[25] One of their major demands is the scrapping of the requirement under the Industrial Disputes Act of prior government permission for effecting layoff, retrenchment and closure of industries employing 100 or more workers. Scrapping section 10 of the Contract Labour (Regulation and Abolition) Act, 1971 that empowers the government to abolish the contract labour system in any process or work that is of a perennial nature and necessary or incidental for the industry is also high on the agenda of the pro-reform lobby.[26] Trade unions in the country have vehemently opposed such demands; as a result, the legal provisions under attack continue to remain in force.

Nonetheless, as indicated above, employers have in practice adopted various managerial strategies that have the effect of affording them greater flexibility in hiring and firing workers than the law allows, while the state regulatory authorities look the other way, a phenomenon referred to as 'reforms by stealth.'[27] Using contract workers in large numbers for performing work of a regular nature, designation of workers as supervisors and managers while they perform the duties of shop floor workers with a view to bring them out of the purview of labour laws, termination of the services of workers before they complete 240 days of service, and the introduction of voluntary retirement schemes to reduce the number of permanent workers are examples of such strategies. Inadequate inspection and enforcement systems make it easy for employers to circumvent the law and adopt such practices.

Law reforms for greater flexibility

At a time when employers in the manufacturing sector have already been adopting various flexible practices leading to exploitation of workers, responding to the demands of employers, the Government of Tamil Nadu as well as the Central Government have proposed to afford greater flexibility to them by effecting labour law reforms.[28] The Government of Tamil Nadu has in its new industrial policy as well as auto policy spoken about allowing for flexibility in employment conditions by permitting longer working hours and flexibility in hiring

contract labour. The Government of India has already embarked on the process of amending the Factories Act permitting workers to be engaged for longer hours. It has also initiated a process of review of other labour laws with a view to effect suitable amendments in light of the National Manufacturing Policy, 2011 that aims to increase the share of the manufacturing sector in the GDP and millions of additional jobs by establishing National Investment and Manufacturing Zones.[29] The Government of Rajasthan, a state in the west of India, has also initiated labour law reforms. In June 2014, the cabinet of the Government of Rajasthan had approved amendments to the Industrial Disputes Act, the Factories Act, the Contract Labour (Regulation and Abolition) Act, and the Apprentices Act with a view to afford greater flexibility to industry.[30] Amendments to the Trade Unions Act enhancing the minimum membership requirement for the registration of trade unions have also been approved.[31] The major trade union federations in the country have opposed the move of the Government of Rajasthan.[32]

Challenges to the exercise of freedom of association and collective bargaining rights

At a time when there is a rapid rise in precarious employment and exploitation of workers in the name of flexibility, the right to organize and collective bargaining rights are of critical importance to protect workers' rights. However, a combination of various factors has made it increasingly difficult for workers in manufacturing industries in India to effectively exercise these rights.

The large-scale employment of precarious workers in the manufacturing sector has led to greater segmentation and fragmentation of the workforce. Such fragmentation of the workforce coupled with the reduction of permanent employment would obviously impact the exercise of freedom of association and collective bargaining rights of workers in the sector as a whole. Indeed, flexible labour practices in the post-liberalization period are found to have weakened trade unions and eroded their bargaining power.[32]

In addition, the increasing resistance and hostility of employers to trade unions makes it extremely difficult for workers to effectively exercise their freedom of association and collective bargaining rights. There have been various reports in recent times about instances of employers, including those in the auto sector, resorting to dismissals, suspension and transfers, and even physical attacks on workers to prevent them from forming and joining unions of their choice. There are also reports of the widespread refusal of employers to recognize representative unions and engage in negotiations with them.[34]

At a time when it is increasingly difficult for even permanent workers to effectively exercise the right to organize and collective bargaining rights, it is all the more difficult for precarious workers to exercise these rights. It is an established fact that the ability of precarious workers to form and join trade unions to protect their interests and participate in union activities is limited on account of the lack of security of employment and the relative ease with which they can be terminated from service.[35] In fact, trade union activists are of the view that this is precisely one of the reasons why employers engage precarious workers in the first place.[36]

While there are instances of precarious workers in manufacturing industries in India, including Tamil Nadu, forming trade unions, and engaging in collective bargaining with employers/contractors, and some examples of contract workers waging struggles in solidarity with permanent workers, such instances are relatively few and are exceptions to the rule.[37] Efforts to organize contract workers in India have generally led to dismissal of workers, harassment, false police complaints, and termination of contracts between the principal employers and the contractors.[38]

The ICLR study

Entering the daily life of the industry, ICLR decided to conduct firm-level studies aimed at gaining a better understanding of how labour practices adopted by employers impact the ability of precarious workers to exercise their freedom of association and collective bargaining rights. Given that the automobile sector is one of the largest and fastest growing sectors in India,[39] and one with a high inflow of foreign direct investment, it was chosen for the focus of the study. The high presence of multinational companies in the sector meant that the study would afford the opportunity of examining the labour practices adopted by multinational players in India.

The July 2012 incident of violence in the Manesar factory of Maruti Suzuki that took place when the ICLR study was underway also brought to the fore the need to take a closer look at labour practices and industrial relations in the automobile sector. The incident brought into focus the massive engagement of precarious workers at low wages for production work in the industry and the joint struggle by the permanent as well as precarious workers of the industry to put an end to such exploitation. The incident also highlighted the situation of unrest and tension created by the employer's continual disregard of the freedom of association and collective bargaining

rights of the workers.[40] Other incidents in the auto industry in the recent past, including the struggle of the workers in Shriram Pistons and Rings in Bhiwadi in Rajasthan for establishing a registered trade union of permanent as well as precarious workers, also underscore the need to examine labour practices and industrial relations in the auto sector.[41]

Chennai being a major automobile hub, ICLR decided to interview precarious workers from the automobile manufacturing factories in the area. The components and parts used in the manufacture of automobiles are largely sourced by the auto manufacturers from supplier factories in the area that in turn may procure them from Tier 2 suppliers. Considering the importance of the component and part manufacturing factories in the auto sector, it was decided to also interview precarious workers from the components and parts manufacturing factories, or supplier factories.

Although ICLR understands that there is no standard definition of the term 'precarious workers,' in this report the term 'precarious workers' has been used to refer to apprentices, trainees, casual workers, temporary workers, probationers, and contract workers in the auto sector who have no job security and do not enjoy the benefits attendant to permanent employment. (See discussion in section 1.) On account of practical considerations of restraints on time and resources, the field studies were restricted to only three large-scale multinational automobile manufacturing companies in the region and some of their supplier companies.

This report contains observations and findings based on the aforesaid field studies. While the report focuses on the labour practices adopted by some of the multinational players in the automobile sector in Tamil Nadu and their suppliers, the ICLR acknowledges at the outset that the use of such practices does not appear to be restricted only to the companies in question. As stated above, the reliance on the services of precarious workers appears to be widely prevalent both in other companies in the automobile sector and other sectors, not just in India but across the globe as well.

In addition to case studies and factual findings, this report includes an analysis of the applicable national and international labour standards and human rights laws with which to examine the legality of the use of precarious workers in the sector.

Structure of the report

The section-wise structure of the report is as follows:

Section 1 of the report discusses what constitutes "precarious" work so that there will be a common understanding of the practices which have this designation. It also describes the forces which have given rise to "precarious work" and the challenges posed by "precarious work."

Section 2 contains case studies and findings and observations on precarious workers in the Chennai auto hub and the special problems of precarious workers based on ICLR's research.

Section 3 contains case studies and findings and observations related to the freedom of association and collective bargaining rights of workers in the Chennai auto hub.

Section 4 contains the perspectives of national and state leaders of nine trade union federations on the obstacles to the organization of precarious workers and the ways to overcome them.

Section 5 contains an analysis of the relevant Indian law including constitutional provisions and provisions of national and state law. This section cites the reasons why precarious work of the kind found in the Chennai auto hub violates domestic law.

Section 6 contains a discussion on gaps between the law and practice.

Section 7 addresses international labour and human rights law and cites the reasons why precarious work of the kind found in the Chennai auto hub must be considered illegal under international law.

Section 8 is a brief section on the obligation of the Government of India and the courts in India to respect and follow international law.

Section 9 contains the report's conclusions and recommendations.

Endnotes

[1] The Committee's full title is "The Committee of Experts on the Application of Conventions and Recommendations." See ILO, Giving Globalization a Human Face, International Labour Office, 2012, para. 985 available online at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf

[2] Government of India, Ministry of Labour, Report of the Second National Commission on Labour, New Delhi, 2002, paras. 3.3-3.30

[3] Ibid, para.4.31

[4] Industries Department, Government of Tamil Nadu, Policy Note 2014-2015, cms.tn.gov.in/sites/default/files/documents/industries_pn_e_2014_15.pdf

[5] Industries Department, Government of Tamil Nadu, Policy Note 2012-2013, pp. 2,3 http://www.tn.gov.in/policynotes/pdf/industries.pdf (last accessed on 20 June 2014).

[6] Ibid.

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[13] Business Today, More Spaces to Park: Five auto manufacturing hubs compete for investment, October 16, 2011 available online at http://businesstoday.intoday.in/story/five-auto-manufacturing-hubs-compete-for-investment/1/18955.html

[14] Tamil Nadu Automobile and Auto Components Policy, 2014, Industries Department, Government of Tamil Nadu available online at cms.tn.gov.in/sites/default/files/documents/Automobile_Policy.pdf, p.8, and p.10

[15] Shyam Sundar, K.R, Non-regular workers in India: Social dialogue and organizational and bargaining strategies and practices, ILO, Geneva, 2011, p.5.

[16] Sharma A., Flexibility, Employment and Labour Market Reforms, 41(21) Economic and Political Weekly, 27 May 2006, 2078, 2083. Also see Roy Chowdhury, Globalisation and Labour, 39 (1), Economic and Political Weekly, 3 January 2004, 105, 106

[17] Shyam Sundar K.R, Non-regular workers in India, note 16 above, pp. 8 and 12

[18] See Shyam Sundar, K.R, note 16 above, pp. 7 and 11-14.

[19] See IndustriAll Global Union, Precarious Work in India, New Delhi, 2012, p.2 that refers to a study of the V.V. Giri National Labour Institute to assess the impact of the proposed amendments to the Contract Labour Act on the economy and financial implications for the central and state governments.

[20] Informal workers are workers who do not have employment security, work security and social security. It has been estimated that the informal workforce constitutes 92% of the total workforce in India. National Commission for Enterprises in the Unorganized Sector, Report on conditions of work and promotion of livelihoods in the unorganized sector, New Delhi, 2007, p.1 available online at https://docs.google.com/file/d/0B9w08mnxUvF9U2JSOWFtUi1US2VkSm0xR3BacFhUZw/edit?pli=1

Studies indicate a high incidence of informal employment even in the formal sector or organized sector in India. See National Statistical Commission, Government of India, Report of the Committee on Unorganised Sector Statistics, 2012, p. 29 where there is a reference to a paper by Ramesh Kolli and Anindita Sinharay's paper entitled "Share of Informal sector and Informal Employment in GDP and Employment" as per which in 2004-2005, informal employment accounted for 62.6 of total employment in the private corporate sector.

[21] See IndustriALL Global Union, The Triangular Trap, 2012; Beneria, Lourdes, Changing Employment Patterns and the Informalization of Jobs: General Trends and Gender Dimensions, International Labour Office, Geneva, 2001, pp.2-4, available online at http://www.ilo.int/public/english/protection/ses/download/docs/gender.pdf and ILO -ACTRAV, Policies and Regulations to Combat Precarious Employment, International Labour Office, Geneva, 2011, pp.8-10 available online at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_164286.pdf

[22] Beneria, Lourdes, Changing employment patterns and the informalisation of jobs, note 22 above, p. 18.

[23] ILO-ACTRAV, Policies and Regulations to Combat Precarious Employment, note 21 above, p. 20 .

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[34] For example, Pratap, S., Trade Union Repression in India, Asia Monitor Resource Centre, online at www.amrc.org/hk/node/1201

[35] ACTRAV, Policies and regulations to combat precarious employment, note 21 above, pp. 33 and 40 and IndustriAll Global Union, The triangular trap, Geneva, 2012, p. 16.

[36] Interview with Mr. V. Prakash, Honorary President, ULF.

[37] See Shyam Sundar, Non-regular workers in India, note 16 above, pp.22-23 for examples of such instances.

[38] See Shyam Sundar, K.R, Contract Labour in India, The battle between flexibility and fairness in Shyam Sundar K.R (ed), Contract Labour in India: Issues and Perspectives, Daanish Books, 2012, p.1 at p.29.

[39] Government of India, Business Portal of India, Automobile Industry online at www.business-standard.com/article/companies/fast-growing-sectors-foretell-consumption-story-112081200027_1.html

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Objectives and Methodology

Aims of the study

The study aims at

- learning about the labour practices prevalent in the automobile sector;
- learning about the experiences of the workers in the sector in exercising their freedom of association and collective bargaining rights;
- identifying the obstacles to the effective exercise of the right to organize by precarious workers in the sector.

The study also aims at

- examining the legality of the use of precarious workers in the automobile sector in light of national and international labour standards and human rights norms.

Methodology

Workers interviewed and the approach used

Workers from the factories of Hyundai Motor India Ltd., Renault Nissan Indian Automotive Private Limited and Ford India Pvt. Ltd. that are subsidiaries of major MNC automobile manufacturing companies were interviewed for this study. In addition, workers from the following supplier factories were interviewed: Asahi India Glass Ltd., Bright Auto Plast Ltd., Caparo, Dae Chang India Pvt. Ltd., Daesung Autoparts India, Daewoo Automotive Seats Systems Ltd., Dong Sung Automotive Pvt. Ltd., Delphi-TVS, Gates Unitta India Pvt. Ltd., Gestamp, Grupo Antalino, HSI Automotive India Pvt. Ltd., Ingkor Tech (P) Ltd., JKM Automotive, KBI, KMF Automotive Pvt. Ltd., Mobis India, Motherson Automotive Pvt. Ltd., Myoung India Pvt. Ltd., Premium Steerings Pvt. Ltd., Sharda Motors Industries, Sungwoo Hitech (Chennai) Ltd., UCAL Fuel, Yazaki, Yushin India Pvt. Ltd., Comstar and Amalgamation Valeo Clutch Pvt. Ltd. Workers from Nippon Express Pvt. Ltd., a company engaged in making auto parts delivery to one of the manufacturers, were also interviewed.

The ICLR research team consisted of a lawyer-researcher and students from the Ramakrishna Mission Vivekananda College, Chennai who volunteered to participate in the field studies. A student from IIPM, Hyderabad also participated in the field research. Another independent researcher participated in the field studies done in 2014. The students were trained in interview techniques and were involved in formulating questions for the interviews. For the purpose of gathering data for this report, the research team interviewed over 300 precarious workers from the factories of the aforesaid three companies as well as automobile component factories that supply those companies. The workers interviewed were mainly trainees, apprentices, probationers and contract workers collectively described as precarious workers or non-regular workers. Several permanent workers were also interviewed. Workers from Tamil Nadu as well as migrant workers from other states in India and Nepal were interviewed. The majority of the interviews were conducted in 2012-2013. Some interviews were also conducted in 2014. All the interviews were conducted by a minimum of two members of the team in order to ensure that the responses of the workers were accurately recorded.

Initially, the team members tried contacting the workers at the bus stops where the workers were picked up by the company buses. While some of the workers did respond to the questionnaires when contacted at the bus stops, the team members found that, by and large, the workers were reluctant to speak with them there as they could possibly be seen by their supervisors or management officials. Moreover, the interviews also had to be quickly completed as the workers interviewed had to catch buses.

The team therefore decided to conduct the interviews only at places where the workers were comfortable. It also decided that, instead of randomly approaching the workers and requesting them to respond to a questionnaire, it would be better to approach them with the help of trade union contacts and workers in the automobile sector whom team members knew. Opting for such an approach, it was thought, would make the workers interviewed feel more at ease and enable the team to engage in more in-depth conversations with them. The workers interviewed using this approach were mainly those randomly contacted during field visits. In addition, workers whom the team's trade union contacts or worker friends had earlier contacted and who had indicated their willingness to speak with members of the team were also interviewed. While some of the workers were interviewed individually, in some cases focus group interviews were conducted.

Most of the interviews were conducted at either the places where the workers live or in other villages and towns that they frequent. The interviews were mainly conducted at Sriperumbudur, Oragadam, Maraimalainagar, Sunguvarchattiram, Singaperumalkoil, Thiruvallur, Poonamallee and Chennai. While some of the interviews were conducted at their homes, others were conducted in other places where they were comfortable such as the homes of their friends or relatives. Some of the interviews

Many of the precarious workers interviewed were scared to speak with the team members as they feared that they may lose their jobs or not get confirmed in service if the management knew that they had disclosed information … They had to be repeatedly assured … that their names would not be disclosed anywhere.

were conducted at other spots identified by the workers. Some of the workers were interviewed in the offices of the unions they belong to.

Although questionnaires had been framed to interview the workers, the team members found that the workers were more comfortable if they engaged in informal conversations with them rather than question-answer sessions sticking to the pattern of questions set out in the questionnaire. At the same time, the team made sure to cover all the areas covered by the questionnaire.

Briefly put, the team asked the workers about their background, their work experience, the kinds of work they do, the wages they receive, the conditions under which they work, the problems they face at work, social security benefits, freedom of association in the factory they work in, how they view their ability to organize themselves, and labour inspection. The workers interviewed were also generally asked about the various categories of workers in the factories where they work, their numbers and the kind of work they do.

Many of the precarious workers interviewed were scared to speak with the team members as they feared that they may lose their jobs or not get confirmed in service if the management knew that they had disclosed to outsiders information about the workforce in the establishment, their wages and working conditions, and their grievances. They had to be repeatedly assured, prior to, during and after the interviews that their names would not be disclosed anywhere. The team did not tape the interviews as the workers did not wish to be subsequently identified in any manner by their employers as having shared information with outsiders. At times, if the workers were not comfortable with any of the team members taking notes during the interviews, team members wrote up the substance of what the workers said and made note of their reactions immediately after the interview was conducted.

Although the research team originally intended to interview a larger group of workers, because of the practical difficulties of accessing and interviewing the workers, the team proceeded with the study on the basis of a restricted sample. Given the fact that the views obtained from this sample covered a wide range of opinion and were often consistent, the ICLR believes that the limited numbers interviewed do not affect the validity of the findings.

Findings based only on worker interviews

The findings in this study are based on worker interviews conducted by the ICLR research team. The research team did not contact management officials from the concerned companies for ascertaining their views on employment practices and industrial relations in the automobile sector for two reasons: firstly, the report is aimed at documenting worker narratives and perspectives; secondly, on the basis of what the team members learnt from other researchers who had made such efforts, the team determined that any attempt to interview managers could needlessly delay or even scuttle the process of the publication of this report. It was therefore decided not to ascertain the views of the employers.

The findings in the report are based on the perceptions of the workers and their own personal opinion and views. ICLR does not claim that everything told to the research team members by the workers is true. However, given the reluctance of many of the workers to speak to the researchers and the consistency of the narratives, ICLR does not have reason to believe that the workers interviewed were not telling the truth to the best of their knowledge.

Interviews with trade union leaders

The research team thought it important to interview leaders of the major national trade union federations in the country about their perspectives on the obstacles to organizing precarious workers in the automobile sector and ways to overcome the obstacles. The team therefore interviewed national and state level leaders from seven national trade union federations: INTUC, AITUC, CITU, HMS, BMS, LPF and AICCTU. It also interviewed a representative of the ATP and leaders from two independent trade union federations: ULF and NTUI. Their perspectives have been incorporated in the section on findings.

Information obtained under the RTI Act

The Right to Information Act (RTI Act) proved to be a valuable tool to obtain information from the Labour Department about the number of contract workers, the contractors through whom they are employed and the kind of work they do in two of the automobile manufacturing factories covered by the study, and this information has been discussed in the section on findings and observations.

Photo: thehindubusinessline.com

SECTION 1
Precarious Work

The paradox of the last decades wherein precarious work is on the rise is that GDP and productivity growth has not been followed by a similar growth in wages and living standards. For many workers, wages are stagnating or declining. Societies are getting richer but wealth is mostly concentrated at the top.

SECTION 1: Precarious Work

Background: The "precarity" in precarious work

In the introduction to this report, the following categories of workers were identified as precarious workers in industrial establishments in India: 'apprentices,' 'trainees,' 'probationers,' 'temporary workers,' 'casual workers,' and 'contract workers.' [42] ICLR recognizes that there is no one standard definition of the terms 'precarious work' and 'precarious workers' and different definitions have been adopted by different trade union federations and others.[43] Regardless of the different definitions, there are some characteristics that are common to all precarious workers:

- Low wages
- Poor protection from termination of employment
- Lack of access to social protection and benefits usually associated with full-time standard employment
- Lack of or limited access to rights at work including the rights of freedom of association and collective bargaining.[44]

ICLR's concern with the impact of the rise in "precarious" work parallels the concerns of workers generally. In late 2011, the ILO Bureau for Workers' Activities (ACTRAV) held an important conference on "Policies and Regulations to Combat Precarious Employment." The working paper prepared by ACTRAV for this conference provides a comprehensive roadmap to the discussion of "precarious work" and policies to combat it. In addition to listing the types of work considered "precarious," the ACTRAV working paper provides important insights into the rise of "precarious work" and its impact both economically and socially. The most important insights in this paper are stated below:

Precarious employment is described as an old phenomenon re-emerging. While the term "precarious" work may be new, the labour movement "has always had the objective of making labour less precarious, in other words to de-commodify labour." Organized labour in industrialized countries particularly after World War II was largely successful in making non-precarious forms of work the standard employment relationship along with social security, rising wages and collective bargaining.

The trade union movement's success in promoting the standard employment relationship led to the creation of a broad middle class, and upward social mobility for many. Wage rates set in collective bargaining often set the wage rates for the rest of the economy.[45]

The post-World War II compromise (between labour and capital) was a triple promise:

(1) Capital shared some of the wealth produced with workers;

(2) Workers no longer challenged the system, and

(3) The state corrected market outcomes through progressive taxation and welfare provisions. This regime allowed for rapid growth of profits in absolute terms. It promoted equality but restricted the freedom of capital.

With the advent of "globalization" capital started to reverse the institutional and distributional trends of the long post-war period.[46]

What former ILO analyst Guy Standing has called "the precariat" class[47] grew out of "an interaction between abuse of economic power, economic liberalization, global capital mobility, fierce lobbying against protective labour laws, and a whole range of state policies guided by economic thinking" that relies on the "efficiency of markets." [48] Mainstream economists present the resurgence of precarious workforces as an inevitability: "where each single measure looks like an adaptation and reaction to forces deemed beyond the control of any actor." [49] In fact, precarious work "is not the inevitable consequence of globalization, it is the outcome of deliberate policies to use the opportunities of globalization to change the rules of the game." [50]

The paradox of the last decades wherein precarious work has been on the rise is that GDP and productivity growth have not been followed by a similar growth in wages and living standards. For many workers, wages are stagnating or declining. Societies are getting richer but wealth is mostly concentrated at the top.[51]

Therefore, precarious work is "a means for employers to shift risks and responsibilities on to workers. It is work performed in the formal and informal economies and is characterized by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of

Precarious work not only impacts the individual by depriving the worker of the financial and emotional stability and long-term benefits which accompany a permanent job; but such instability also impacts society as well. Precarious workers face low pay, and often deleterious working conditions.

uncertainty and insecurity." [52] It is characterized by the "uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with standard employment, low pay, and substantial legal and practical obstacles to joining a trade union and bargaining collectively." [53]

Employment commonly associated with precarious work involves triangular and disguised hiring practices, bogus self-employment, sub-contracting and agency contracts. Precarious work is further associated with fixed-term, short-term, temporary, seasonal, day-labour and casual labour. Employers claim the need to use these forms of work for flexibility in response to such factors as "globalization, technological change and transformations in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment." These excuses result in employers coming up with ever expanding ways to try to "circumvent regulations or find loopholes in regulations to increase the profitability of their business at the expense of their workers." [54]

Precarious work not only impacts the individual by depriving the worker of the financial and emotional stability and long-term benefits which accompany a permanent job; but such instability also impacts society as well. Precarious workers face low pay, and often deleterious working conditions. Precarious work "leaves workers in unstable and insecure situations which disrupt their life planning options." An epidemiological study revealed that "precarious workers are less likely to receive adequate training for the tasks they are required to perform," more likely to suffer a higher incidence of occupational disease, and "are often exposed to hazardous work environments, stressful psychosocial working conditions, increased workload and disproportional travel time between multiple jobs at multiple sites." [55]

Given the stressful and unstable position that precarious workers find themselves in, "few feel confident enough to organize and bargain collectively at the risk of losing their jobs. As such, the 'precarisation' of the workplace has implied not only the removal of an important role for civic participation, but also can be seen as a strategic way of weakening the labour movement." [56] Even if precarious workers want to organize, they can run into difficult, if not impossible, situations where their co-workers, working at the same enterprise, may all have different employers depending on the subcontract they are employed under.[57]

This army of precarious workers lives "in a permanent status of insecurity and deprived of their employment rights in any meaningful sense." [58] Their precarity can also be "instrumental in frightening the remaining standard employees into concessions and subordination." [59] Moreover, as ACTRAV has eloquently noted: "Producing a large group of 21st century proletarians injects a level of fear and insecurity in the labour market not seen for decades…." [60]

Endnotes

[42] In this report, the term 'contract workers' refers to workers engaged through an intermediary contractor. They are workers who are employed through one company or agency but work for another user enterprise.

[43] ACTRAV, Policies and Regulations to Combat Precarious Employment, ILO, Geneva, 2011, p. 6

[44] Ibid, p. 7

[45] Ibid, p. 19

[46] Ibid, p. 19

[47] G. Standing, The Precariat: The New Dangerous Class, Bloomsbury, London 2011

[48] ACTRAV, note 35 above, p.18

[49] Ibid, p.20

[50] Ibid, p. 20

[51] Ibid, p.18

[52] Ibid, p. 5

[53] Ibid

[54] Ibid

[55] Ibid,p. 15

[56] Ibid, p.17

[57] Ibid, p. 26

[58] Ibid, p. 21

[59] Ibid

[60] Ibid

An an aerial view of one of the Chennai Auto Hub centers from googlemaps.com.

SECTION 2

Precarious workers in the Chennai Auto Hub and their working conditions — Observations and Findings

Brief overview of the factories covered by the study

Hyundai

Hyundai Motor India Limited, a subsidiary of the Hyundai Motor Company of Korea has a huge automobile factory in Irangattukottai in Sriperumbudur Taluk, Kancheepuram District. The factory was established pursuant to a Memorandum of Understanding (MOU) dated 18 July 1996 entered into between the company and the Government of Tamil Nadu. The factory commenced commercial production in 1998. The factory has two plants, the second commissioned in 2008. It has a production capacity of 630,000 units per annum. More than 2000 cars are reportedly manufactured per day in the factory.[61] According to the workers interviewed, two cars are manufactured per minute. The cars manufactured in the factory include models like the i10, i20, EON and Santro. Cars manufactured in the factory have a huge domestic market. They are also exported to 120 countries in Europe, the Middle East, Latin America, Africa and the Asia Pacific region.[62] The company is the second largest car manufacturer and the largest exporter of passenger cars in India.[63]

Ford

Ford India Private Limited, a subsidiary of Ford Motor Company, U.S.A has an automobile manufacturing factory at Maraimalainagar located about 45 km from Chennai. In October 1995, it entered into a joint venture with Mahindra and Mahindra Ltd. resulting in the incorporation of Mahindra Ford India Ltd. In 1996, Mahindra Ford India Ltd. entered into a MOU with the Government of Tamil Nadu following which the company established a factory at Maraimalainagar for the manufacture of the Ford range of cars. Subsequently, Ford increased its stake in the company and the company was renamed Ford India Private Ltd. in 1998. The factory manufactures cars as well as petrol and diesel engines. Cars sold under the brand names Figo, Fiesta, Endeavour, and Ecosport are manufactured at present in the factory. The factory has the capacity to produce 200,000 cars and 340,000 engines a year.[64] Cars manufactured in the factory are sold in India and also exported to Europe, South Africa, the Middle East and Jamaica.[65]

Renault-Nissan

Renault Nissan Automotive India Pvt. Ltd., a joint venture of Renault Group BV, Netherlands and Nissan Motor Co. Ltd, Japan has an automobile manufacturing factory at the SIPCOT Industrial Estate, Oragadam, about 40 km from Chennai. On February 22, 2008, the company had entered into a Memorandum of Understanding (MOU) with the Government of Tamil Nadu for setting up the plant and had been allotted over 600 acres in the SIPCOT Industrial Estate for the purpose. The factory began commercial production in late 2009. It has two production lines and a production capacity of 400,000 units a year.[66] The second production line in the factory was commissioned in 2012. Earlier, cars sold under the Nissan or Renault brand names were manufactured on the same production line. Cars sold under the brand names Nissan Micra, Nissan Sunny, Renault

Fluence, Renault Duster and Renault Koleos are manufactured in the factory. Cars produced in the factory are sold in the domestic market and also exported to more than 100 countries in Europe, Asia and Africa.[67]

Supplier factories

A large number of automobile component and part manufacturing factories in the Chennai automobile hub supply a range of parts required for the manufacture of automobiles, from engine and gear parts to glass panels and door handles. The component manufacturing factories vary in size from small shops to giant enterprises, from local ventures to global suppliers. Some manufacturers are dedicated vendors who supply parts to just one automobile manufacturer while some supply several companies. Apart from catering to automobile manufacturing factories in India, some manufacturers export to other countries as well. ICLR interviewed workers from over thirty factories[68] that supply automobile components and parts to the factories of Hyundai, Ford and Renault-Nissan.

Precarious work in the Chennai Auto Hub: Observations and Findings

Monday through Saturday and often Sundays too, thousands of workers stream into the sprawling auto factories of Hyundai, Ford, Renault-Nissan and others in the Chennai auto hub. They stream also into supplier factories such as Daebu Automotive Seats, Woosu and KBI. Sometimes the colour of their clothing gives their status away, other times, the quality of the clothing. Only a small number of them are "permanent" workers with the potential to earn a living wage. Then there are workers like Shanthi, Ganesh and Balaji (not their real names)

Shanthi joined an automobile parts manufacturing factory in 2010 as a Learner. She was not given any appointment order in writing when she joined service and was only told that she was being hired as a Learner for a year. She continued to be retained in employment beyond the one-year period. Although she was designated a 'Learner,' she did the same kind of work on the assembly line as the permanent workers in the factory. She was, however, paid a monthly wage of only Rs.6000/- while her permanent co-workers were paid a minimum of Rs.10,000/- to do the same kind of work. After working as a Learner for over two years, her services were orally terminated in 2012 in accordance with the normal practice in the company of using the services of Learners for only two years. She asked her employer to issue her a certificate of experience to enable her to join another auto company. The concerned Manager refused and instead asked her to work as a 'contract labourer' under any of the twelve labour-supply contractors of the company. Having no choice, she opted to work as a 'contract labourer' in the same company and continued to the same work as before on a daily wage of Rs. 200/- paid to her on a monthly basis. Four years after she begun her career in the auto industry, she is now a 'contract labourer' earning a wage of about Rs.5000/- a month. She says that the money she earns is just enough to cover her basic expenses.

Ganesh from Tirunelveli began work at the factory of a global automobile manufacturer as a statutory apprentice in 2003. He was 21. He had finished an Industrial Technology Institute (ITI) course in the fitter trade. Upon completion of the statutory apprenticeship, he worked as a trainee in an automobile component manufacturing factory for a few months. He then returned to work in the factory where he began his career. After a year of service as a 'company apprentice' and two years of service as a trainee, the company he was working for abruptly terminated him from service along with hundreds of other trainees in December 2008. He now works as a 'contract labourer' at the factory of an automobile component manufacturer in the region. He says that he cannot get married as he does not have either a stable job or enough money to support a family.

Balaji, an ITI-trained worker from Mayiladuthurai also began his career at the factory of a global automobile manufacturer as a statutory apprentice in 2005, and completed the apprenticeship in 2006. He continued as a company apprentice in the factory and later worked as a 'trainee' with the company for three years. Although the company had led him to believe that he would be made permanent after three years of service as a 'trainee,' he was not made permanent nor given any reason for that. He was instead sent out of the company. He later secured a job as a temporary worker in an auto dealer's establishment in Chennai city. Although it is now more than eight years since he began his career in the automobile sector, he still does not have secure employment.

Shanthi, Ganesh and Balaji wanted to become permanent workers in the factories where they work but permanency is an illusion for the vast majority of the workers who work in factories in the Chennai auto hub. They are stuck in perpetually low-wage jobs filled with uncertainty. Their workplace rights are subject to whim. What their employers term as "flexibility," these workers know as uncertainty and powerlessness. ICLR spoke to over 300 workers at Hyundai, Ford, Renault-Nissan and a number of supplier factories in the Chennai auto hub to hear the story from the perspective of line workers. The observations and findings on the following pages are based on worker narratives.

> . . . permanency is an illusion for the vast majority of the workers who work in factories in the Chennai auto hub. They are stuck in perpetually low-wage jobs filled with uncertainty. Their workplace rights are subject to whim. What their employers term as "flexibility," these workers know as uncertainty and powerlessness.

A Plethora of Precarious Workers

Precarious workers labelled as 'apprentices,' 'trainees,' learners,' 'probationers' and 'contract labour' are employed in the automobile manufacturing factories as well as the supplier factories. A brief description of the different categories of workers who constitute the work-force in the factories follows:

CATEGORIES OF WORKERS

Apprentices

Apprentices in the automobile manufacturing factories are of two kinds: statutory apprentices and company apprentices. The intake of statutory apprentices (also called 'government apprentices' or 'Act Apprentices') is mandated by the Apprentices Act, 1961 which requires certain kinds of factories to impart practical training to technically qualified persons. The law makes a distinction between such apprentices and other categories of workers in the same industrial establishment. The stipend to be paid to statutory apprentices is prescribed by the law. The period of statutory apprenticeship is generally one year. As per the law, the employer does not have any obligation to offer employment to statutory apprentices upon completion of the apprenticeship period unless there is a specific condition to that effect in the contract of apprenticeship. However, on completion of the period of apprenticeship, depending upon the needs of the employer, statutory apprentices may be recruited afresh by the employer as 'company apprentices' or 'trainees' either immediately after the one-year period or after a break.

'Company apprentices' are workers who are not covered by the Apprentices Act but are designated as apprentices by the employer. Company apprentices in the automobile manufacturing factories are technically qualified persons. Many of them are recruited through campus interviews. Company apprentices in the supplier factories include both those who have undergone some technical training course and those who have just completed school education. The duration of the period of 'company apprenticeship' varies in different establishments and ranges from 6 months to 3 years.

Learners

In one of the automobile manufacturing factories covered by the study, apart from apprentices and trainees, there is another category of workers called 'Learners.' They are classified as Learners level-1 and Learners level-2 depending upon whether they are in the first or second year of training. In that factory, persons who are 12th standard passed, that is, those who have completed their school education, but do not have any kind of technical education, are recruited as learners. After they complete 2 years as learners, they become eligible to be recruited as trainees. In a few of the component manufacturing factories too, workers who have only completed school education but do not have technical education are designated as 'Learners.'

Trainees

Trainees in the automobile manufacturing factories include those directly recruited in that capacity as well as those retained in service on completion of the period of 'company apprenticeship.' In the automobile manufacturing factories, the period of 'training' ranges from 2 to 3 years. Trainees are classified on the basis of the phase of 'training' they are undergoing. For instance, trainees in the first year may be described as T1 trainees and those in the second year as T2 trainees. In one automobile manufacturing factory covered by the study, trainees in the first year of training are called basic level trainees and those in the second and third years of training are called advanced level and excellent level trainees, respectively. Movement from one level of training to another may be conditional on an appraisal process. A trainee may be retained at the same level if found unfit by the employer to move to the next level. In some of the supplier factories, there are two categories of trainees: company trainees and short-term trainees. Workers appointed as short-term trainees generally work for a fixed period of only one year. Company trainees may work in that capacity for longer periods.

Probationers

On completion of the "training" period, trainees may be designated as probationers. The period of probation generally lasts between 6 months and a year. It may, however, be extended by the employer if found necessary. Upon 'satisfactory completion' of the period of probation, workers may be confirmed in service as permanent workers. In some of the supplier factories, workers having both a technical qualification and work

experience in the sector are directly recruited as 'probationers' for a period of 6 months to a year. However, in some cases, they are continue to remain 'probationers' much beyond that period without being conferred permanency.

Contract workers

Contract workers (referred to locally as 'contract labourers') are workers in triangular employment relationships. They are engaged through an intermediary labour supply or labour-only contractor or agency, and work for another company. Their engagement through an intermediary makes them different from the other categories of workers referred to above who are directly engaged by the company they work for. In both the automobile manufacturing factories and supplier factories, contract workers in the factory are engaged through a number of contractors.

Casual workers and temporary workers

Although the standing orders of some of the companies in the automobile sector allow for the engagement of casual workers or temporary workers, the practice of engaging workers as 'casual workers' and 'temporary workers' appears to have waned. On the other hand, the engagement of 'contract labourers' has progressively increased.

Confirmed workers

Confirmed workers or permanent workers enjoy security of employment and, unlike the aforesaid categories of workers, are not employed for a fixed term. Relative to the aforesaid categories of workers, confirmed workers have better pay and benefits including health care benefits. They are better protected against arbitrary dismissals and other unfair labour practices of employers.

Profile of the precarious workforce

Intra- and Inter-state migrant workers

Much of the precarious workforce in the automobile manufacturing factories as well as the supplier factories consists of intra-state migrant workers from different parts of Tamil Nadu such as Madurai, Trichy, Tiruvannamalai, Tuticorin and Ariyalur. Some of the precarious workers interviewed had the perception that employers in the sector largely prefer to recruit precarious workers from other cities and towns as they are less likely to have any 'local support' and more likely to follow all the instructions of the management. A large number of inter-state migrant workers, particularly from Assam, Bihar, Orissa and West Bengal, are also employed in the factories. Workers from Nepal are employed in some of the factories as well. The inter-state migrant workers and workers from Nepal are generally engaged as contract workers. Some of the inter-state migrant workers interviewed said that they had been recruited by contractors in their respective home states who were in touch with local contractors and had come down for work along with others who had been similarly recruited. There were others who said that they had come down for work on the suggestion of a friend or relative and had been recruited locally after they had approached a local contractor seeking work. The duration for which the inter-state migrant workers and workers from Nepal work in the factories varies. While some of them said that they work in the factories for 6-8 months, save some money and return to their home states, there are others who have been working in the factories in the Chennai auto hub continuously for more than 5 years.

Gender composition of the workforce

While the workforce in the auto manufacturing factories is predominantly male, women workers are employed in production in several of the auto component manufacturing factories in the sector. In some of the supplier factories, in fact, the majority of the workforce is made up of young women workers including inter-state migrant women workers.

Age structure of the workforce

Apprentices and trainees in the automobile manufacturing factories are generally young workers in the age group of 18 to 25 years. The workers of one automobile manufacturing factory stated that only persons born after 1990 are recruited by the management as trainees. The age of the contract workers in the manufacturing factories encompasses a wider range. While many of them are in their twenties and thirties, a number of them are also in their forties. In the supplier factories too, the majority of the apprentices and trainees are young workers.

Education

As stated before, apprentices and trainees are technically qualified persons. They could either be diploma holders[69] or ITI certificate holders.[70] According to the workers interviewed, in the last few years, automobile manufacturers have shown a marked preference for diploma holders over ITI-trained persons and, therefore, the scope for recruitment of ITI-trained persons as company apprentices or trainees in the automobile manufacturing factories has substantially reduced. The educational qualifications of the contract workers widely vary. While some of the contract workers have just passed class V or just completed elementary school education, there are others who are ITI certificate holders and even graduates.

Precarious Workers — The Overwhelming Majority

In two of the automobile manufacturing factories surveyed, precarious workers make up the majority of the workforce and the number of confirmed or permanent workers is significantly lower in comparison to the number of precarious workers. The different categories of precarious workers and their numbers in the three automobile manufacturing factories surveyed are indicated on the following pages.

Table 1: Number of apprentices, probationers and permanent workers in the factory of Hyundai as per information furnished under the RTI Act (as of 29 March 2013)

Category of workers	No.
Diploma Apprentices	1437
Government Trade Apprentices	832
Trainees (Hyundai Industrial Trainee 1 and Hyundai Industrial Trainee 2	1409
AMSUP* (Probationers)	254
Technician H1 to H6 (Permanent workers)	1986

**AMSUP= Advanced Model Skill Up Programme*

Table 2: Number of contractors and contract workers in Hyundai as per the information furnished under the RTI Act (as of 19 March 2012)

Number of contractors*	456
Number of contract workers	10,756

** The list of contractors of Hyundai furnished under the RTI Act includes the names of several automobile components suppliers such as St. Lumax Ltd, Visteon Automotive India Pvt. Ltd., MRF Ltd., Exide Industries Ltd., Amalgamation Valeo Clutch Pvt. Ltd., etc. Over 100 such suppliers are named in the list of contractors. Thus, not all of the contractors named in the list are exclusively labour supply contractors. About 750 workers are engaged through such component supplier companies. The list also includes those providing services such as a/c maintenance, computer networking, system support, civil and road works, housekeeping, canteen services, security services, pest control, drinking water, wastewater plant maintenance and septic tank cleaning. About 75 such contractors are named in the list. Some of the contractors providing such services provide similar services to other companies as well. Sodexo Pass Services (I) Pvt. Ltd., Thermax Limited and Aqua Designs India Pvt. Limited are examples of such companies. Over 2800 workers are engaged through such contractors.*

Table 3: Number of workers in Renault-Nissan according to the workers interviewed

Category of workers	No. of workers in 2012	No. of workers in 2014
Permanent workers	150-300	1600
Trainees	4000-4500	2000
Government Apprentices	----	More than 100

Table 4: Number of contractors & contract workers in Renault-Nissan as per information furnished under the RTI Act in 2013

Number of contractors	13
Number of Contract workers*	2829

**As per the information furnished under the RTI Act, 1604 contract workers are engaged in the following kinds of work: housekeeping and equipment cleaning, food service, security service, civil work, flooring work and effluent treatment work.*

According to the workers interviewed, the number of contract workers engaged on the shop floor in Renault-Nissan has considerably reduced in 2014 and fewer than 300 workers are now engaged as 'contract labour' on the shop floor.

In the factory of Ford, according to the workers interviewed, the total number of precarious workers is presently less than the permanent workers. However, that was not the case earlier as indicated by the table below.

Table 5: Number of workers in Ford, according to the workers interviewed

Category of workers	No. of workers in 2012	No. of workers in 2014
Confirmed workers	1313	3009
Trainees	2120	145
Company apprentices	93	1417
Act apprentices	515	-----
Contract workers	over 1000	650

The table above would indicate that while the number of trainees and contract workers has significantly reduced in Ford in the last two years, the number of company apprentices has substantially increased.

The composition of the workforce in the supplier units is similar, with the number of precarious workers being far

more than the number of precarious workers. The following table indicates the number of precarious workers in some of the supplier units.

Table 6: Number of workers in some of the automobile component manufacturing factories, according to the workers interviewed (at the time of the worker interviews in 2012)

Name of company	No. of Permanent workers	No. of Trainees	No. of Contract workers*
Daewoo Automotive Seats Systems Ltd.	30	110	500
KBI	Nil	100	Nil
Woosu Automotive India Ltd.	Nil	93	100
Asahi India Safety Glass Pvt. Ltd.	200	150	500
Bright Auto Plast	80	25-30	150
JKM Dynamatic Technology Ltd	220	24	800

The following table would indicate that the pattern of employment in the supplier factories is similar even now.

Table 7: Number of workers in a couple of the automobile component manufacturing factories, according to the workers interviewed (at the time of the worker interviews in 2014)

Name of company	No. of Permanent workers	No. of Learners/ Apprentices	No.of Contract workers*
Yazaki	125	180	1495
UCAL Fuel	152	860	310

Zero Permanent Worker Factories

Table 6 above would indicate that there are some component manufacturing factories where there are no permanent workers at all, and the entire workforce consists of just contract workers or just trainees, or both trainees and contract workers. Thus, in the case of the supplier factories, while many of them have adopted a lean and dual production model[71] where a small number of workers are permanent while the majority are not, there are some that have adopted a lean and mean model where none of the workers have any employment security.

Disguised Employment Relations, Abuse of Training Contracts

The workers of the three automobile manufacturing factories that the ICLR team interviewed all stated that the apprentices and trainees work alongside the permanent workers on the shop floor in all shifts and do regular production work just like the permanent workers in the factories. The workers also said that barely any training was given to the workers recruited as apprentices and trainees. The workers of one factory stated that the actual training given to apprentices and trainees on the line varies from a day to a week, based on the aptitude of the worker.

The workers interviewed cited line feeding, assembly work, door assembly, fixing engines, quality check work and external quality check as examples of the work done by trainees. The workers from one of the factories stated that trainees and apprentices are deployed alongside the permanent workers in the blanking and stamping department, body shop, paint shop, TCF, MP&L, Engine, Quality and Launch Departments, Plant Engineering and Production Engineering Departments, and do the same kind of work as permanent workers. They stated that while the substantial majority of the trainees are engaged in production work in the factory, some of the trainees are engaged in maintenance work as well. Workers from the supplier factories similarly stated that 'trainees,' 'learners' and 'probationers' are engaged for regular production work.

According to the workers interviewed, contract workers in the automobile manufacturing factories are not just employed for 'peripheral work' such as housekeeping and gardening but are also engaged for production work/ production-related work/ maintenance work alongside the direct workers. Contract workers of one automobile manufacturer said that they do the following kinds of work: CO_2 welding, spot welding, fitting, painting, store keeping, quality checking, auditing, material handling and movement, maintenance, and line repairs. According to the workers interviewed, contract workers engaged in the factory of Hyundai through TVS Logistics do the following kinds of work: forklift operation, tow-truck operation, raw material checking, component feeding, material movement and arc welding. They said that contract workers engaged through TVS Logistics in Ford do the work of forklift operation, parts distribution, loading, unloading and movement of raw material.

The workers interviewed gave illustrations to indicate that many of the contract workers in the factories are engaged in the same or similar kind of work as the permanent workers in the factories. For instance, in the

paint shop of one factory, the work of application of the underbody sealer is done by both permanent workers and contract workers. Similarly, the work of painting the car bodies is now mainly done by contract workers but permanent workers also do the work. Historically, the work is said to have been mainly done by the permanent workers in the factory.

Information furnished under the RTI Act indicates that a large number of the contract workers are engaged in the Hyundai factory for the following kinds of work: material handling, material movement, loading and unloading, welding, sub-assembly work, fabrication, painting, wax application, cylinder head knockout cutting, fixing of LPG kits, stay handling, spray and repair, support activity and maintenance. Contract workers are also used for the test driving of cars. In the factory of Renault-Nissan, as per the information given under the RTI Act, contract workers engaged through Upshot Utility Services and NYK Auto Logistics (India) Limited are engaged in the work of material movement, depacking and accessories fitment. Workers engaged through Upshot Utility Services are also engaged as helpers and drivers.

Workers from the supplier factories that the ICLR team interviewed stated that contract workers are employed for the same kind of work as the permanent workers in the factories In some of the supplier factories in fact, production work is entirely carried out by workers engaged as 'trainees,' 'probationers' and 'contract labour.' They also pointed out that some contract workers involved in quality checking work and customer service work report for duty daily at the MNC automobile manufacturing factory for which supplies are made.

That being the case, the labelling of workers who perform production work and production-related work of a regular/permanent nature routinely as 'apprentices,' 'trainees,' 'probationers' and 'contract labour' is an obvious ploy to disguise the true nature of the employment relationship between the workers and the companies they serve. The staggering numbers of workers in these categories indicate that the Chennai auto hub is rife with disguised employment relationships.

Sham contracts

Apart from such disguised employment relationships, sham contract arrangements are also prevalent in the Chennai auto hub. Some of the workers interviewed described instances where workers hired directly by a company were told later that they are engaged by a third party they never met or have no knowledge of. In some cases, third-party contractors have been interposed after the workers had raised demands with the management seeking permanency or wage revision, or engaged in any kind of protest against the management. For instance, the drivers engaged by a company engaged in auto parts delivery allege that after they raised a demand for issue of confirmation orders to them, the management of the company issued them wage slips bearing the name of another concern in a bid to make it appear that they were contract workers engaged through that concern and not direct workers of the company. They say that earlier their wages used to be directly deposited into their bank accounts by the company. Another such case concerns the directly recruited workers of a component manufacturing company. According to the company's workers, when the management initiated legal proceedings before a civil court against the workers seeking orders restraining them from assembling near the factory gate, it claimed that they were contract workers engaged through two successive contractors that the workers had never heard of and that it had no employer-employee relationship with them.[72]

Unlicensed contractors

According to the workers interviewed, many of the intermediary contractors through whom workers are supposedly engaged in the supplier factories do not have any licence as mandated by the Contract Labour Act. They claim that the only role of many such contractors is to introduce such workers to the management of the user enterprise for the purpose of recruitment and they are paid a commission for each worker who is recruited by the company. The workers interviewed also say that in many of the supplier factories, there is a large pool of contractors with fewer than 20 workers being supposedly engaged through each contractor. This enables them to function without obtaining any licence under the Contract Labour Act.

Permanently Temporary Workers

The apprentices, trainees, learners and probationers all aspire to be confirmed in service as permanent workers in the companies they work in. With each additional year of service, their hopes of being confirmed in service increase. However, according to the workers interviewed, from 2005 onwards, the chances of their being made permanent in the auto manufacturing factories as well as component manufacturing factories has considerably reduced. A large number of the trainees/apprentices/probationers in the auto manufacturing factories are not retained in service beyond the completion of the so-called training period.The trainees interviewed allege that it is very easy for the management to terminate their services. They say that the appointment orders issued to trainees contain a clause as per which they can be terminated from service at any time with one month's

notice or payment in lieu of notice without any reason being stated. While it is generally the case that they are terminated from service on the ground that their period of training has come to an end, in some cases they have been terminated from service on grounds such as the 'economic recession.'

The workers of Hyundai allege that in December 2008, more than 1500 trainees including those who had completed the third year of training were terminated from service. They received notices from the management on 23 December 2008 stating that the motor vehicles manufacturing business was hit by economic recession, sales had dropped and that the company could not meet the sales target. Therefore, their services would be terminated on 24 December 2008. They were given one day's notice and one month's stipend, and so ended their employment. The workers say that several of the trainees terminated from service in December 2008 had been re-inducted into service, some of them as fresh trainees. Some of the trainees terminated from service in December 2008 had raised Industrial Disputes against their termination from service. According to the workers interviewed, another round of large-scale terminations occurred in the factory in 2010 when about 500 trainees were let go simply on the ground that their period of training had come to an end. For trainees who unflinchingly carry on with the belief that they will be made permanent, being suddenly terminated from service comes as a deep shock. One of the trainees terminated from service remarked, *"All my dreams were shattered."*

The workers of Ford allege that not only are many of the trainees terminated from service on completion of the period of training but that similarly, many probationers are terminated from service on completion of the period of their probation when they are due to receive the order of confirmation. They allege that the usual ground on which the probationers are terminated from service is that their service has not been satisfactory. They allege that workers who ask the management questions at skip-level meetings regularly held are particularly targeted for early termination of service. The workers of Renault-Nissan similarly said that recently about 600 trainees were sent out from service on completion of the period of training.

Thus, it is very often the case that workers who have put in 3 years or more of service as apprentices/ learners/ trainees are sent out only to be replaced by a fresh batch of workers who go through the same cycle. It seems obvious that employers have resorted to such a strategy only to avoid conferring permanency on the workers and to have a workforce that largely consists of workers who can be fired at will. A trainee who was terminated from service observed: *"Companies use our labour when we are in our youth from the age of 18 to 26 and then throw us away."*

In the supplier factories, it is often the case that workers recruited as 'trainees,' 'leaners' and 'probationers' continue in employment for years after the period of completion of their so-called training or probation without being issued any orders in writing indicating their status or terms of employment. In the case of one supplier factory, workers recruited as 'probationers' have worked under that designation for over 10 years without being conferred permanency. Workers from one supplier unit in Maraimalarnagar where the majority of the workers are young women 'learners' said that their employer used the bus services to terminate the services of learners en masse or to effect artificial breaks in their service. The women working in that unit said that many of the company's workers were from towns like Vandavasi and Tindivanam that were over a 100 km away from Maraimalainagar, and the management operated buses to pick up and drop workers from these towns. It would be extremely difficult for them to commute to and from work each day without the management-operated buses. They said that whenever the management wanted to terminate the services of a batch of trainees en masse or effect artificial breaks in their service, it would simply stop operating buses to those areas.

The trainees and probationers who are terminated from the service of one company in the automobile sector often again work as trainees in one or more companies in the automobile sector. For instance, one of the workers the ICLR team interviewed had initially worked as an Act Apprentice in Hyundai, then as a contract worker in Mobis; thereafter, he worked as a trainee for some months in Hyundai, then as a trainee in Myoung India Private Ltd. after which he worked as a trainee in

For trainees who unflinchingly carry on with the belief that they will be made permanent, being suddenly terminated from service comes as a deep shock. One of the trainees terminated from service remarked, "All my dreams were shattered."

One of the trainees interviewed tellingly remarked, "We work as trainees in one company after another, year after year. Years go by. We then get age barred for better jobs." Yet another worker who was a 'trainee' in a supplier factory even after five years of service remarked, "Throughout our lives, we will be like this."

Secokomos. One of the trainees interviewed tellingly remarked, *"We work as trainees in one company after another, year after year. Years go by. We then get age barred for better jobs."* Yet another worker who was a 'trainee' in a supplier factory even after five years of service remarked, *"Throughout our lives, we will be like this."*

Thus, while all the apprentices/learners/trainees/probationers in the auto manufacturing and supplier factories aspire for permanency, the only permanent status that the majority of them unfortunately get is that of remaining *'permanently temporary.'*

Swimming between direct and indirect employment

In some cases, the trainees/apprentices/learners terminated from service have no option but to work as contract workers to earn a livelihood. The workers of one supplier company said that no appointment orders were issued to the trainees in the company nor were any orders issued to them in writing when they were terminated from service. When the trainees who were terminated from service requested management to issue them experience certificates to enable them to join another company, the management refused to do so and asked them to work under one of the 12 contractors of the company as 'contract labour.' Left with no option they began working as 'contract labour' in the same company.

The workers of an automobile manfacturer similarly cited examples of Act apprentices who, after completion of the statutory apprenticeship period, took up employment as contract workers in the same company and, subsequently on being recalled into service, began working as trainees in the company. Such examples indicate that trainees/apprentices/learners often swim between direct employment and employment through an intermediary contractor.

Stuck in the Same Situation — Contract Workers

Contract workers are often engaged through the same contractor for the same work in the same factory for years on end. However, the companies they work for disown them as their workers, claiming to have no employer-employee relationship with them as they are engaged through third-party contractors. They have little possibility of making any movement up the ladder or securing permanency in the user enterprise. In exceptional cases, they may be granted permanency by the intermediary contractor.

For instance, according to the workers interviewed, in TVS Logistics, a contractor in two of the automobile manufacturing factories covered by the study, the contract workers are on occasion promoted and even made permanent by that company. In the factory of one tyre manufacturing company, 'apprentices' are chosen from the pool of contract workers. In that factory, some of the contract workers go on to become 'apprentices' and, after the period of apprenticeship followed by a period of probation, go on to become confirmed workers. The two instances mentioned above are, however, exceptional cases. According to the workers interviewed, the majority of the contract workers always remain contract workers without any change in their employment status, although in some cases the companies they work for change.

Low Wages and Glaring Disparity in Wages

The wages of the various categories of precarious workers in the factories are low in comparison to that of the permanent workers. This would be evident from the following tables.

Table 8: Wages of workers in Hyundai according to the workers interviewed

Category of workers	Monthly wages
Apprentices (ITI & Diploma Apprentices)	INR 8000 – 9000*
Trainees (ITI & Diploma Trainees)	INR 9200 – 11500*
Contract Workers engaged through TVS Logistics	INR 8500 – 9500
Contract Workers engaged through other contractors	INR 5300 – 10000
Confirmed Workers	INR 33000 – 49000

**termed by the management as stipend.*

Table 9: Wages of the workers in Renault-Nissan, according to the workers interviewed

Category of workers	Monthly Wages
Basic level trainees	INR 6,000*
Advanced level trainees	INR 8,000*
Excellent level trainees	INR 10,000*
Confirmed workers	INR 22,000 and above
Contract workers	INR 8,000

**termed by the management as stipend.*

Table 10: Wages of the workers in Ford, according to the workers interviewed

Category of workers	Monthly wages
Company apprentices and trainees	INR 7,900 – 9,900*
Confirmed workers	INR 36,800 – 52,250
Contract Workers	INR 7,000 – 8,500

**termed by the management as stipend*

Table 11: Wages of workers in automobile component manufacturing factories, according to the workers interviewed

Category of workers	Monthly wages
Trainees	INR 3,500 – 8,500
Contract workers	INR 3,380 – 9,360
Confirmed workers	INR 9,200 – 27,000

The information contained in the tables above would indicate that there is a glaring disparity between the wages of permanent and precarious workers even when they do the same or similar kind of work. The precarious workers interviewed said that it was difficult for them to make both ends meet with such wages given the increasing cost of essential commodities and the high rate of house rent in and around Sriperumbudur, where many of the precarious workers live. According to them, the minimum rent for even a one-room accommodation in Sriperumbudur is INR 4500/- a month. On account of their inability to pay such rents individually, many of the intra- as well as inter-state migrant precarious workers live in groups with several persons sharing a single room. Women workers from one supplier factory designated as learners said that out of their monthly wage of INR 6000/-, a deduction of INR 1000/- was made every month from their wages towards bus transport charges, INR 200/- towards hostel charges, and INR 350/- towards canteen charges. The balance that they got as take-home pay was barely sufficient for them to meet their expenses.

Overtime Work Without Due Compensation

It is routine for precarious workers in the automobile manufacturing factories as well as automobile component factories to be assigned overtime work and to work beyond the shift timing of 8 hours a day. The apprentices, trainees and contract workers say that they have little choice or say in the matter as it could threaten their livelihood if they refused to work overtime. The workers of Ford said that as per the Standing Orders of the company, even for permanent workers, the refusal to work overtime would be treated as misconduct. Many of the workers, therefore, describe overtime work as 'compulsory overtime.'

Contract workers of one automobile manufacturer stated that they generally are required to do overtime work thrice a week and that overtime work was often for an entire additional eight-hour shift. Contract workers of another auto manufacturer said that they are required to do overtime work almost every day. The workers of two of the automobile manufacturing factories said that company apprentices and trainees are required to do overtime work of an hour every day. At times, they are asked to do two or two-and-a-half hours of overtime work. The trainees of one auto manufacturing factory said that apart from often being asked to do overtime work on weekdays, at times they are required to work on Sundays as well. They alleged that there had been some occasions in the past when the trainees in the factory have had to work for 16 hours at a stretch, that is, 8 hours of overtime in addition to the regular shift of 8 hours.

According to the workers of the supplier factories who were interviewed, trainees and contract workers are regularly and, in some cases, daily asked to do overtime work. They alleged that in a couple of factories, trainees and contract workers need to compulsorily work overtime for four hours every day, thus virtually extending their shift to 12 hours a day. The workers of one factory alleged that a few times every month, they had to work overtime for an entire shift in addition to their shift hours, that is, they have to work continuously for 16 hours. Women workers from a supplier factory said that they are also required to do overtime work. They said that they regularly work in the shift from 2:30 p.m. to 11 p.m. but could generally leave the factory every day only after doing overtime work until 1 a.m.

As per the Factories Act, workers are entitled to wages at twice the normal rate for overtime work.[73] However, almost all the precarious workers interviewed said that they were not paid wages at that rate for overtime work.

The workers of one factory alleged that a few times every month, they had to work overtime for an entire shift in addition to their shift hours … continuously for 16 hours. … As per the Factories Act, workers are entitled to wages at twice the normal rate for overtime work. However, almost all the precarious workers interviewed said that they were not paid wages at that rate for overtime work.

Workers from some of the supplier factories said that they were not paid any extra wages at all for overtime work. Some said that they were paid at the usual rate for overtime work while some others said that they were paid a stipulated extra amount such as INR 25/- per hour of overtime work.

Denial of Leave

The workers interviewed allege that, although trainees are entitled to some days of leave as per their appointment orders, in practice their requests for leave are generally denied. They allege that trainees are threatened with loss of jobs if they take leave even for a day for a genuine cause and so they generally do not ask for leave. A former trainee in an auto manufacturing factory alleged that he was terminated from service on account of taking two days' leave with the permission of his supervisor. One of the trainees of the company who was terminated from service alleged that in 2011 he had contracted typhoid and, therefore, took leave after seeking the permission of the concerned supervisor. He had produced a medical certificate to testify to the fact that he had been suffering from typhoid. However, he was subsequently terminated from service and orally informed that he was being terminated from service as he had taken leave when he got typhoid.

The contract workers allege that they have no leave entitlement in practice and could stand to lose their jobs if they availed themselves of leave. The workers interviewed alleged that if trainees take any leave—even for emergencies—they are terminated from service. One of the trainees told us that his requests for leave were met with a terse remark by the supervisor: "*You are a trainee and cannot be given leave.*"

The workers interviewed alleged that contract workers are also not given any leave in practice. One of the contract workers of the company alleged that he had suffered an injury at the workplace as a result of which he was required to undergo medical treatment for 6 months. When he returned to work, the concerned contractor asked him to join service afresh after giving a resignation letter. Having no other option, he accordingly gave a resignation letter and joined the service of the contracting company afresh. The examples cited above indicate that the livelihood of precarious workers could be jeopardized even when they avail themselves of leave on genuine grounds of ill-health.

The workers of the supplier factories also alleged that it is difficult for trainees and learners to get any leave. They also allege that contract workers do not get any leave at all except for one weekly off day. Women 'learners' from one supplier factory stated that in order to ensure that they do not take any leave, one-third of their monthly wage packet was linked to attendance. They explained that out of their monthly wage of Rs.6000/-, Rs.2000/- was paid as 'attendance bonus' and that they would be entitled to that payment only if they were present at work for 26 days a month. The workers of one supplier factory alleged that even when they are granted leave on any national or festival holiday, they are required to work on the following Sunday as a compensatory working day.

Strenuous Work

The precarious workers interviewed were of the view that their work is heavy and strenuous. The workers in one of the supplier factories said that but for a lunch break of 25 minutes, they were expected to work non-stop and that even when tea was served to the workers, they were expected to drink the tea standing while continuing to operate the machines. The permanent workers interviewed also stated that their work was heavy. The permanent workers of one of the manufacturing factories stated that it was tough for the workers to keep pace with the robots as a result of which the cycle time had been reduced. Several of the workers interviewed, including permanent workers, complained of back pain on account of the strenuous nature of their work.

The workers of one automobile manufacturer stated that the management officials had been insensitive to this issue. They allege that when they brought their problem to the notice of the management, they were told, "*The gates of the factory are wide open and you can leave if you wish to.*" Women workers from one of the supplier factories said that the management kept raising the machine speed and conveyor speed which made their work very difficult.

One of the trainees who was terminated from service remarked, *"Work used to be strenuous. We used to have just enough energy to come home and sleep. We have lost our youth without doing any of the things that youth normally do."*

The contract workers interviewed also said that their workload was heavy. One of the contract workers told us, *"Apart from work, we have no time for anything else."*

Lack of Adequate Safety Measures

Precarious workers from some of the factories in the sector complained about the lack of adequate safety measures and personal protective equipment. The workers of one component factory said that several of them had suffered finger injuries and that one of them had lost a finger on account of defective machines and the lack of proper safety measures. They alleged that they were not provided with gloves and, therefore, had to use paint shop tape to protect their fingers. A worker from another factory also said that he had lost a finger on account of a defective machine. The workers of a factory manufacturing brake pads alleged that while they are provided gloves, they are asked to use the same pair of gloves for 1 week although it is not possible to do so. They alleged that the face masks provided to them are also not in a usable condition.

Precarious workers from an automobile manufacturing factory alleged that there have been instances when their supervisors had made arrangements for safety sensors to be by-passed so that rapid production could be carried on and that they were exposed to risk as a result. Precarious workers from a couple of factories in the sector said that they were exposed to health hazards on account of excess heat in the section where they were assigned work, their exposure to chemicals and the lack of safety measures.

Contract workers from an automobile manufacturing factory complained about the poor quality of shoes supplied saying that they snap open once they get wet. One of the contract workers alleged that his shoes had been torn for over five months and, despite repeated requests, he had not been supplied a new pair of shoes. He said that this exposed him to the risk of injury to his feet as he was doing welding work. Contract workers from a couple of supplier factories said that they were not even provided shoes. Contract workers from an automobile manufacturing factory complained about not being provided earplugs despite decibel levels on the shop floor being high. The trainees of one supplier factory alleged that they were provided with face masks and gloves only when the factory had visitors.

Lack of Social Security Benefits

Some of the precarious workers interviewed had little or no knowledge of their social security entitlements, that is, EPF and ESI benefits.[74] On the other hand, there were many workers who were aware of these benefits and the fact that the workers' contribution was deducted from their wages on this account. According to the workers interviewed, in several cases, ESI identity cards were either not issued to the workers or were only belatedly issued after they had worked for several months or even years. The workers of one component manufacturing factory stated that although deductions towards ESI were made from their wages since 2009, they had not been issued identity cards as of June 2013. As a result, they cannot go to ESI hospitals for treatment. In effect, they are denied health care benefits despite deductions towards such benefits being made from their wages.

Some of the workers we interviewed complained that the EPF numbers issued to them did not appear to be correct numbers as upon verification they found that the numbers did not tally with their names. They also said that annual EPF statements had not been issued to them.

Poor Quality of Food in Canteens

Most of the precarious workers interviewed complained about the poor quality of food supplied to them in factory canteens and specifically requested that this issue be mentioned in the report. They also complained that they have no freedom to voice their grievances to the management regarding the quality of food provided to them. The workers of an automobile manufacturer narrated the story of one worker at the Learner I level who found oil in the juice served to him. According to them, because he complained about oil mixed in the juice, he had to spend an additional year at the Learner I level.

A Climate of Fear

The trainees, learners and probationers interviewed stated that they fear they will not be made permanent if they do anything that would displease the management. A trainee from an automobile manufacturing factory remarked: "*All the workers in the factory are scared. We are treated just like school boys. Even if we are late by 5 minutes, we are asked to wait outside for 15 minutes.*" A trainee from an automobile manufacturing factory feared that he would not be made permanent just because he was late by 5 minutes after lunch one day. Precarious workers from a couple of factories complained that the atmosphere in the factory was such that they had no freedom to talk to one another.

Women workers from the supplier factories spoke about the lack of proper and hygienic toilet facilities for women workers. Women workers from one supplier factory said that only one toilet had been provided for the 50 women workers in the factory and that water supply to the toilet was provided for altogether only for one hour during both the day and night shifts.

Skip-level Meetings — An Empty Formality?

The workers interviewed alleged that they feared victimization if they voiced any work-related grievances to the managers in the factories. The workers of an automobile manufacturing factory said that the Employees Relations Department (ER Department) holds weekly skip-level meetings in every department in which the trainees can participate.[75] Some of the trainees interviewed alleged that, in practice, the meetings have been reduced to a mere formality as the workers are dissuaded in advance by their department officials from bringing up their grievances or asking questions. They also voiced their fear that their appraisal may be affected if they ask the management officials any questions. Voicing a contrary view about the skip-level meetings, a couple of workers said that grievances such as the need for more pick-up points for the company buses had been raised by workers at the skip-level meetings and been satisfactorily addressed. They therefore found the meetings useful.

Workers engaged through a contractor of two of the automobile manufacturing factories spoke of weekly meetings with the management where the Deputy General Manager of the plant and supervisors from the company would be present. However, they allege that they really cannot raise any of their grievances at the meetings as they fear they would be asked to resign if they made any demands.

Discriminatory and Derogatory Treatment

As would be evident from the discussion above, when compared to the confirmed or permanent workers in the sector, precarious workers suffer discrimination on several counts:

- They are paid far lower wages than the permanent workers even when they do the same or similar kind of work.
- They have little choice in the matter of overtime work. They work longer hours than the permanent workers virtually every week.
- Moreover, they are not paid at the rate prescribed under the law for overtime work.
- They are not entitled to the health care benefits that permanent workers enjoy.
- They have virtually no entitlement to leave in practice.
- They do not enjoy social security benefits on par with permanent workers.
- They are often required to wear uniforms that mark them as distinct from the permanent workers. Unlike the permanent workers who are supplied with uniforms by the companies they work for, precarious workers in some cases had to bear the cost of the uniforms they are required to wear to work or the stitching charges for the uniforms.
- Above all, unlike the permanent workers, they can be fired anytime at the will of the employer. Apart from the aforesaid factors, precarious workers from some of the factories complained about the derogatory manner in which they were treated by the officials of the companies they worked for. Workers from a few factories said that their supervisors spoke to them in a disparaging manner at times simply because they were precarious workers. They said that they were poorly treated and looked down upon.

Additional Problems Faced by Women Workers

In addition to the aforementioned issues that both male and female workers face at the workplace, women workers are also exposed to gender-specific problems. Women workers from the supplier factories spoke about the lack of proper and hygienic toilet facilities for women workers. Women workers from one supplier factory said that only one toilet had been provided for the 50 women workers in the factory and that water supply to the toilet was provided for altogether only for one hour during both the day and night shifts, making it very difficult for them. Furthermore, women workers complained that managers are inconsiderate to them when they feel unwell and generally do not allow them to rest. Women trainees at one supplier factory alleged that they were earlier not allowed use of the crèche facility and only permanent workers were allowed to use the crèche. The management relented following their repeated requests and, at present, trainees

can also leave their children in the crèche in the factory. They say, however, that the crèche is too small in size.

Women workers of one component manufacturing factory cited an instance of an anti-union practice calculated to specifically harass women workers. They said that when they refused to comply with the management's demand that they leave the union they had joined, they were asked to report in the shift from 2.30 to 10.30 p.m. instead of the shift between 8.30 a.m. and 4.30 p.m. in which they were routinely assigned work. The management also withdrew the transport facilities made for them so that they would find it difficult to return to their homes at that time. They said that despite such harassment, the workers refused to leave the union.

Women workers from a component manufacturing factory said that one of the former managers in the factory used to speak with them in an indecent manner and also pinched some of them. Apparently, the manager was removed from service after the union they belonged to waged a struggle in respect of various issues including justice for the women workers in the factory.

Lack of Effective Inspection

For workplace inspection to be effective, labour inspectors would need to gather necessary information from different categories of workers. This would enable them to detect violations of the law that may not seem obvious to them in the first instance. All the precarious workers interviewed, however, uniformly said that no labour inspector had ever spoken with them. Most of them claimed that they had never even seen a labour inspector.

Endnotes

[61] Business Today, Strike hits production at Hyundai Motor India, October 31, 2012 online at http://businesstoday.intoday.in/story/strike-hits-production-at-hyundai-motor-india/1/189498.html

[62] Website of Hyundai Motor India, http://www.hyundai.com/in/en/AboutUs/HyundaiMotorIndia/WhoWeAre/index.html

[63] Ibid, HMIL Press Release, Hyundai maintains growth in Jan-Nov 2012 sales, December 1, 2012, available online at http://www.hyundai.com/in/en/NewsEvents/HyundaiMotorIndia/319851.html

[64] Business Line, Ford plant rising at Sanand 'fast and safe' March 17, 2013, http://www.thehindubusinessline.com/companies/ford-plant-rising-at-sanand-fast-and-safe/article4519195.ece

[65] The Hindu, Ford India to expand export base to 50 countries, October 6, 2011, http://www.thehindu.com/business/companies/ford-india-to-expand-export-base-to-50-countries/article2514456.ece and Thailand emerging threat to car exports from India, DNA, 9 June 2014, http://www.dnaindia.com/money/report-thailand-emerging-threat-to-car-exports-from-india-1994455

[66] Renault in India, http://renault.co.in/PressReleases/PressReleases.html

[67] Corporate information, Nissan India, online at http://www.nissan.in/en-IN/Corporate/Corporate.aspx

[68] Workers from Asahi India Glass Ltd., Bright Auto Plast Ltd., Caparo, Dae Chang India Pvt. Ltd., Daesung Autoparts India, Daewoo Automotive Seat Systems Ltd., Dong Sung Automotive Private Limited, Delphi-TVS, Gestamp Sungwoo Hitech (Chennai) Limited, HSI Automotive India Pvt. Ltd., KBI, KMF Automotive Pvt. Ltd., Mobis India Ltd., Motherson Automotive Pvt. Ltd., Myoung India Pvt. Ltd., Premium Steerings Pvt. Ltd., Sharda Motors Industries, Woosu Automotive India Pvt. Ltd, Ingkor Tech (P) Ltd., Yushin India Pvt. Ltd., Yaxaki, Grupo Antalino, Amalgamation Valeo Clutch (P) Ltd., Gates Unitta, JKM Automotive, JBM, UCAL Fuel and Comstar were interviewed.

[69] Diploma holders are those who have had technical education and training and have been awarded a diploma by the Directorate of Technical Education or its equivalent.

[70] ITI is the abbreviated form of Industrial Training Institute. ITIs are government-run technical training schools.

[71] The 'lean and dual' production model is one which offers employment security to a core labour force in exchange for cooperation, but at the same time creates a large buffer of less privileged workers without the same rights and benefits. The lean and mean model is one where no workers have employment security. See Silver, B.J, Forces of Labour, Workers' Movements and Globalization since 1870, Cambridge University Press, New York, 2003, p. 67.

[72] As per section 4(b) of the Employment Relationship Recommendation, 2006 (No. 198), a disguised employment relationship occurs when the employer treats the individual as other than an employee in a manner that hides his or her true legal status as an employee. In the report of the International Labour Conference on the scope of the employment relationship, a disguised employment relationship has been described as "one which is lent an appearance that is different from the underlying reality with the intention of nullifying or attenuating the protection afforded by the law. It is thus an attempt to cloak the employment relationship either by clothing it in another legal guise or by giving it another form in which the worker enjoys less protection. Disguised employment relationships may also involve masking the identity of the employer when the person designated as an employer is an intermediary with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers." (ILC, Report V-The scope of the employment relationship, 91st session, 2003).

[73] As per section 59(1) of the Factories Act, 1948, when a worker works in a factory for more than nine hours a day or 48 hours in any week, he or she shall, in respect of overtime work, be entitled to wages at twice the ordinary rate of his or her wages.

[74] EPF refers to Employees' Provident Fund and ESI to Employees' State Insurance. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and Employee State Insurance Act, 1948 are laws that provide for EPF and ESI benefits respectively. The ESI Act provides for health care and cash benefits in the case of sickness, disability and maternity. The EPF Act provides for payment of a lump sum amount to workers at the time of retirement from service or severance of service on account of resignation or retrenchment. Contract workers are entitled to benefits under both these Acts.

[75] Skip-level meetings are meetings organised by managers to get to know workers and understand their problems.

Photo: Suzanne Adely

Workers sign postcards addressed to Labor Commissioner demand the reinstatement of terminated workers, who were terminated for the ir union activity.

SECTION 3

Freedom of Association and Collective Bargaining Rights in the Chennai Auto Hub: Observations and Findings

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Freedom of Association and Collective Bargaining Rights in the Chennai Auto Hub: Observations and Findings

FACB Rights of Precarious Workers

The issues discussed in the previous section would indicate the pressing need for precarious workers in the Chennai auto hub to act collectively and have an effective voice to protect their rights and interests. However, precarious workers in the automobile manufacturing factories as well as the automobile component factories surveyed barely have any representation of any kind or any voice. For the most part, they are not unionized. In all three automobile manufacturing factories covered by the study, precarious workers described as apprentices, trainees, learners and probationers do not belong to any trade union.

In the factory of Hyundai, at the time of the worker interviews, it was found that only the contract workers engaged through TVS Logistics Pvt. Ltd. are represented by an INTUC-affiliated union. Contract workers engaged through other contractors in the factory are not represented by any trade union. In the factory of Renault-Nissan, there is no trade union representing either the permanent or the precarious workers in the factory. The only workers working for Renault-Nissan who are unionized are drivers engaged through Nippon Express (India) who makes auto parts deliveries to the factory. They had been unionized by the Bharatiya Employees Mazdoor Sangh affiliated to BMS. At present, they are represented by the AICCTU. In the factory of Ford too, precarious workers are not represented by any union. Thus, the majority of workers in all three factories are not represented by any union.

The majority of the precarious workers in the supplier factories also have not been unionized. In a few automobile component factories, precarious workers had formed and joined trade unions either by themselves or in conjunction with the permanent workers in the factory. Such instances, however, are rare and had met with hostile reactions from the management as the following case studies would show.

Case Study I: KMF Automotive Pvt. Ltd.

In the factory of KMF Automotive Pvt. Ltd. which produces injection-moulded products, a branch-level trade union of the ULF representing the six permanent and 59 workers allegedly employed through a contractor

in the factory, was formed in May 2010. It is alleged that soon after the workers joined the union, the management terminated the services of some of the union's executive committee members. It is also alleged that with a view to victimize the workers, the management asked some members of the union who had earlier been operating machines to instead do manual work such as that of unloading raw material from trucks, material mixing work and cleaning the factory. For other workers, the production targets were increased to levels that were impossible for them to achieve.

The members of the union went on strike in June 2010 protesting the management's unfair labour practices. The management then secured an order of injunction from a civil court that had the effect of preventing the union officials from assembling or protesting anywhere within a distance of 50 metres from the factory. The management also began engaging migrant workers from two other states in the place of the workers on strike. The replacement workers were brought each day to the factory with the help of the police. The union therefore moved the Madras High Court by way of a Writ Petition and secured an order of interim injunction restraining the

Many of the trainees and company apprentices interviewed feared that they would be terminated from service if they joined any trade union. … While on the one hand, some of the trainees voiced such fears, on the other, some trainees who had been terminated from the service were of the view that they would have never been terminated from service in the first place had there been a trade union to protect their interests.

concerned police officials from aiding the management in any manner to break the peaceful strike. On account of the interim order, the management was unable to utilize the services of the police to either bus in the replacement workers or to disperse the workers on strike. Faced with such a situation, with a view to ensure that there was no disruption of production in the factory, the management agreed that all the workers on strike would be allowed to work without any kind of penalty being imposed on them. It however insisted the workers should not be represented by any trade union but only by a workers' committee. Accordingly, the workers resumed work and formed a workers' committee.

It is alleged that soon thereafter, the management demanded that the committee also be dismantled. When the workers refused to do so, the management summarily dismissed two of the workers and suspended some others. The management also demanded that the remaining workers sign a statement accepting that they were all contract labourers, failing which they would not be allowed to work. The workers refused to sign such a statement and were thereafter not allowed to work. The workers interviewed allege that under these circumstances, they dissolved the committee and rejoined the union of which they were earlier members. They were then not allowed to resume work, and replacement workers were used in their place.

However, as the management could not meet supply targets without the workers, it finally agreed to take back all the workers, assuring that they would be gradually made permanent and that their wages would be immediately increased and that they would also be given back wages. It however insisted that the workers give up their membership of the union and agree to be represented by a workers' committee. Agreeing to those terms, the workers went back to work and were made permanent. They were represented by an elected workers' committee. According to the workers interviewed, from early 2014, even the workers' committee has not been functional.

Case Study II: Woosu Automotive India Private Limited

The workers of Woosu Automotive India Private Limited, a maker of pumps and other components, allege that after they announced to the management that they formed and joined a branch level union of ULF in December 2011, the management illegally locked out all the trainees from the factory. The probationers who joined the union were placed under suspension. The workers allege that to protest against the unfair actions of the management, they sat in protest in the factory premises. One of the management officials then hit a worker with a wooden crate. Following that incident, the workers then shifted their protest outside the premises. They allege that under the guise of implementing an order of injunction granted in favour of the management by the court restraining the workers from protesting near the factory premises, the management got the police to intervene. The police threatened to arrest the workers unless they moved themselves to some place well beyond the factory premises. The workers were thus forced to carry on their protest in a cemetery close to the factory.

The union raised an industrial dispute in respect of the issue of illegal lock-out of all the trainees in the factory. It is alleged that in the meanwhile, the management engaged fresh recruits in the place of the illegally locked out and suspended workers. According to the workers interviewed, subsequently, the management terminated the services of all the trainees and probationers who had joined the union after holding enquiries. They have since raised industrial disputes seeking reinstatement in service.

Factors accounting for the low incidence of unionization

Considering that the substantial majority of precarious workers in the Chennai auto hub are not unionized, researchers from the ICLR team had asked the precarious workers they interviewed about why they were not members of any trade union. The responses of the precarious workers in the three automobile manufacturing factories as well as supplier factories on the issue were divergent. Their responses were broadly as follows:

- their services would be immediately terminated if they joined any union
- trainees had no right to join a trade union until they were made permanent in service
- contract workers had no right to form and join trade unions
- they were not aware of trade unions

- no trade union had ever approached them for recruiting them as members

Many of the trainees and company apprentices interviewed feared that they would be terminated from service if they joined any trade union. Justifying their fears of termination from service, the trainees of Hyundai pointed to a clause in their appointment orders that reads: *"If you are found to be indulging in any activity either individually or collectively prejudicial to the interest of the company, your engagement would be terminated without any notice."*

Such a clause could dissuade trainees from joining any trade union or engaging in any union activity. Some of the trainees feared that the management would even refuse to issue them a certificate of satisfactory completion of training without which they would not be able to get a job elsewhere, if they joined a union. While on the one hand, some of the trainees voiced such fears, on the other, some trainees who had been terminated from the service were of the view that they would have never been terminated from service in the first place had there been a trade union to protect their interests. Several of the contract workers interviewed similarly feared that they would lose their jobs if they joined any union. A few of the contract workers of Ford said that a management official on one occasion had told them not to even collect and read the booklets relating to workers' rights that were being distributed by a workers' organization near the factory gate.

Several of the company apprentices, trainees, probationers and contract workers interviewed were under the impression that they had no right to form or join trade unions and that permanent workers exclusively enjoyed the right. It also came across from ICLR's interviews of the precarious workers that many of them were not sufficiently aware of trade unions and the benefits of joining unions. Some of the workers explicitly said that they did not know what a trade union was. A few workers said that they would join a union if the government set up one. Apprehensions about difficulties in registering trade unions on account of their precarious status is also a factor preventing the organization of precarious workers. The workers of one supplier factory informed us that they have not attempted to form a union as they have no appointment orders or other documents to establish that they are the company's workers which would make it difficult for them practically to have a trade union registered.

Most of the precarious workers interviewed said that no existing union had made any contact with them with a view to organize them. Some of the workers said that they would be willing to join a union but that no union had approached them. A few of the precarious workers interviewed were, however, categorical that they would not join any trade union even if they had an opportunity to do so. One of the workers remarked, *"Unions cheat workers and that is why I will never join a union."* Thus, lack of sufficient outreach and a negative perception of trade unions are also factors that inhibit the organization of precarious workers.

While such other factors also account for the low incidence of unionization of precarious workers in the Chennai auto hub, it is obvious that lack of security of employment and the ease with which precarious workers can be terminated from service is the main factor preventing the organization of precarious workers.

FACB Rights of Permanent Workers

Interviews with the permanent workers in the factories covered by the study revealed that it was difficult even for them to effectively exercise their freedom of association and collective bargaining rights. Although this report is focused on precarious workers, it would be useful to take a look at the experiences of permanent workers recorded in the case studies below to better appreciate the challenges that workers in the auto sector generally face in the exercise of their FACB rights. The first two case studies below relate to the factories of Hyundai and Ford where the workers have formed and joined trade unions.

In the factory of Renault-Nissan, the permanent workers have not formed or joined any trade union to date. Unlike the factories of Hyundai and Ford that have been in operation for over 15 years, the factory of Renault-Nissan has been in operation for just over four years. A few of the company's workers interviewed had in 2012 said that, in their view, the time was not ripe for union formation as most of the workers were trainees and there were barely any confirmed workers in the factory. Although the number of confirmed workers has substantially increased since then, they do not appear to have taken any initiative to form or join any trade union as of now. The workers interviewed said that the confirmed workers have begun acting collectively though. In April 2014, they held a meeting to discuss some issues and in June 2014, according to the workers interviewed, they had protested against the management's decision to summarily dismiss four confirmed workers by refusing to eat lunch for a day.

Case Study I: Hyundai

The permanent workers in the factory of Hyundai are unionized. Three unions of permanent workers —Hyundai Motor India Employees Union (HMIEU); United Union of Hyundai Employees

Photo: Suzanne Adely

Hyundai sit-in and arrest.

The members of HMIEU subsequently went on a sit-in strike in June 2010 demanding the reinstatement of the remaining 67 dismissed workers and recognition of the HMIEU. According to the workers interviewed, this led to the arrest of 250 workers …

(UUHE) and Hyundai Motor India Anna Thozhilalar Sangam (HMIATS) — affiliated to the ATP, operate in the factory. HMIEU was the first trade union formed by confirmed workers in the factory.

According to the workers interviewed, although a workers' committee existed in the factory, in 2007, the permanent workers decided that only a trade union could effectively protect their interests and this led to the formation of the HMIEU. They said that HMIEU is a CITU-led union with the Honorary President of the union being the General Secretary of the Tamil Nadu state wing of the CITU.

The permanent workers interviewed allege that the management was not happy with the formation of the union and resorted to various acts of anti-union discrimination. These include unjust transfers of the union's President and General Secretary and, subsequently, their summary dismissal from service. The workers further allege that more than 100 union members were placed under suspension. Disciplinary action is said to have been initiated by the management against many workers on unfounded charges, following which several union members were dismissed from service. The workers allege that the management also caused the union flag to be pulled down on three occasions. According to them, on the fourth occasion, on 1 May 2008, when the HMIEU attempted to hoist the union flag, some of the workers were beaten and a number of them were arrested by the police and remanded to custody. According to the workers interviewed, criminal cases were also lodged against the workers.

The workers interviewed state that in 2009, the HMIEU presented a charter of demands to the management. The management refused to grant recognition to the union, however, or engage in negotiations with it. The members of the HMIEU, therefore, went on strike in April 2009 to press for their demands, including that of recognition of the union by the management, reinstatement of the dismissed and suspended workers, and revocation of the transfer orders issued. About two months later, in July 2009, the members of HMIEU once again went on a strike protesting against the management's decision to enter into a settlement with the workers' committee, ignoring the union and suspending four more workers.

Pursuant to conciliation proceedings, the five-day strike ended after the management agreed to reinstate 20 of the dismissed workers. The members of HMIEU subsequently went on a sit-in strike in June 2010 demanding the reinstatement of the remaining 67 dismissed workers and recognition of the HMIEU. According to the workers interviewed, this led to the arrest of 250 workers on the basis that the strike was in violation of the orders of the District Munsif Court prohibiting any unlawful activity in the factory or within 100 metres of the factory premises. The strike ended after it was agreed that the cases of 67 dismissed workers would be reviewed by a six-member tripartite review committee that included representatives of the government, the workers and the

management. It was also agreed to revoke the suspension of four workers. Subsequently, the cases of 67 workers were reviewed and it was agreed that 35 of them would be taken back in service while the remaining 32 would be free to seek legal recourse. However, there was no agreement on the issue of recognition of the union.

Photo: Suzanne Adely

According to the workers belonging to the HMIEU, when elections were held in 2011 to elect the office bearers of HMIEU, 93% of the permanent workers cast their vote indicating that the union enjoys the support of the majority of the workers. They allege that, despite such overwhelming support for the union, the management refused to grant it recognition. They allege that instead, the management supported the formation of another union by name "United Union of Hyundai Employees (UUHE)." They allege that the UUHE was granted recognition by the management about a week after its registration in 2011 on the basis that it represented the majority of the permanent workers in the factory. According to the workers belonging to HMIEU, the union sought that a secret ballot be held to determine the real representative status of the respective unions. However, no secret ballot was held.

The workers belonging to the HMIEU allege that ignoring HMIEU, on 18 October 2012, the management entered into a three-year wage settlement with the UUHE to take effect from 1 April 2012. The workers belonging to the HMIEU say that they went on a strike on 28 October 2012 protesting against the settlement. They again demanded recognition of the union and sought that the management hold negotiations with it. In addition, they demanded the reinstatement of 27 dismissed workers. They allege that the the HMIATS affiliated to the ATP that was formed in December 2011 also initially voiced opposition to the settlement. They said that on 9 November 2012, the strike was withdrawn after an agreement was reached between the HMIEU and the management in conciliation proceedings before the Labour Commissioner on the issues of revocation of suspension of 20 workers and acceptance of the wage settlement. However, yet again, there was no agreement on the issue of recognition of the HMIEU. A member of the HMIEU claims that thus the FACB rights of its members have been stifled.

Case Study II: FORD

The permanent workers in the factory had established a union by name Ford India Employees Union (FIEU) in May 2010. The Honorary President of the FIEU is the General Secretary of the Tamil Nadu State Unit of the CITU. However, the union is not affiliated to the CITU. The FIEU has been seeking recognition by the management over the subsequent three years, but still has not been accorded recognition. According to the workers interviewed, the management is resistant to any union it perceives as an outsider union. It has instead preferred to deal with the workers' committee in the factory called the Ford Employees Workers' Committee (FEWC). The workers interviewed point out that all the eight elected worker members in FEWC are office bearers and members of the FIEU, and this very fact would clearly indicate that the union represents the majority of the workers in the factory.

The workers interviewed alleged that the management had been using promotions as a tool to break the workers' unity and to discriminate amongst the workers who belong to the union and those who do not, and thus weaken the union. They alleged that union officials who do not get promoted are made an example of by the management. The workers interviewed also cited the following incident to indicate how the FIEU office bearers had been victimised by the management in the past. According to them, in March 2012, nine permanent workers in the factory were dismissed on the charge of submitting bogus bills for reimbursement of medicine charges. The FIEU was of the view that the

action of the management in dismissing the workers was harsh and disproportionate to the allegations made against the nine workers. Its members therefore went on a strike on 27 March 2012 protesting against the dismissal of nine co-workers. Conciliation proceedings between the union and the management were held on 29 March 2012 during which it was agreed that the workers on strike would resume work.

The management assured that it would not take punitive action against any of the workers when they returned to work. According to the workers interviewed, however, contrary to the assurance given, on the very next day, that is, on 30 March 2012, the management placed seven members of the union under suspension. The suspended workers included the General Secretary, Treasurer and Vice-President of the FIEU and three members of the Executive Committee of the union. Four of the suspended workers were members of the Workers' Committee as well. The workers interviewed alleged that they had been placed under suspension on account of their union activities. As a result of intervention by the UAW which represents Ford workers in the United States, the suspended workers were subsequently restored to service in May 2013.

According to the workers interviewed, on account of the persistent refusal of the management to recognize the union in its present form, the FIEU and the management are presently holding negotiations with a view to re-charter the union.

Case Study III: GATES UNITTA

In November 2012, several operators and some trainees in the factory of Gates Unitta India Co. Pvt. Ltd., an auto component manufacturing company, formed and joined a branch-level union of the ULF. The workers interviewed alleged that the management refused to accord recognition to the union. They also alleged that the management had asked the workers to leave the union and form a workers' committee. They alleged that the management engaged in anti-union practices and to protest against that, the workers belonging to the union went on strike in December 2012.

During the strike the management brought in replacement workers with the aid of the police. The union then filed a Writ Petition before the Madras High Court seeking that the concerned police authorities be restrained from aiding the management to bring in outside workers and from interfering in the industrial dispute between the workers and the management. Before the Court, the management contended that the strike of the workers was illegal as the factory in question was a public utility service, relying on a notification dated 10 August 2012 declaring the automobile manufacturing industry as a 'public utility service' and that it was, therefore, permissible to bring in replacement workers.

The Court on 2 July 2013 pronounced orders in the Writ Petition. It held that the notification in question applied only to the automobile manufacturing industries and not industries manufacturing auto components. Consequently, the strike declared by the workers was not illegal. It also held that the management's action of utilizing the services of replacement workers was an unfair labour practice. The Court therefore directed the police not to interfere in any way in the dispute between the union and the management, and not to aid the management to bring in replacement workers. The judgment was upheld on appeal by a Division Bench of the Court and subsequently by the Supreme Court. Following that, in 2014, the management entered into a settlement with the ULF agreeing to grant recognition to the union and to permit the workers who had been on strike to resume work.

Preference for workers' committees/ insider unions

It appears from the case studies above that the managements of two of the automobile manufacturing factories covered by the study prefer dealing with workers' committees/enterprise unions that are not affiliated to any federation or led by "outsiders." It also appears that the supplier factories have followed suit and generally prefer to deal with worker committees. This would be evident from the case studies relating to the supplier factories of KMF and Gates Unitta. In such a situation, workers belonging to trade unions led by 'outsiders' have had to struggle for long even to simply secure management recognition of their unions. In the factory of MRF that manufactures automobile tyres, the workers belonging to the MRF United Workers Union claimed to be the majority union have been struggling to secure management recognition of the union since 2003! Similarly, in the factory Comstar (formerly Visteon), since 2004, the workers have been trying to secure management recognition for their union.

It needs to be pointed out, however, in a few supplier factories the management has granted recognition to unions affiliated to central trade union organizations or independent federations. For example, in the factory of Asian Paints, the union affiliated to AICCTU has been granted recognition. In the case of Gates Unitta, faced with successive court rulings in favour of the workers, the management eventually agreed to grant recognition to the union formed by the workers although it is affiliated to an 'outside' federation.

Photo: Suzanne Adely

Discussion of demands at Ford India Employees Union General Body Meeting.

SECTION 4

Special perspectives: Views of trade union leaders on the challenges to organization of precarious workers and measures to overcome them

The ICLR team was of the view that apart from interviewing the workers involved, it was also important to interview leaders of various trade union federations to ascertain their perspectives on the challenges to the organization of precarious workers and the ways to overcome them. It therefore interviewed national and state-level leaders from seven central trade union organizations and three other trade union federations. Drawing from their experiences, they identified the following factors as the major challenges to the unionization of precarious workers in industrial establishments in India.

1. **Lack of security of employment**
   The lack of security of employment was identified as the biggest obstacle to the organization of precarious workers. They pointed out that the fear of losing their jobs deters precarious workers from forming or joining trade unions.
2. **Lack of awareness**
   Many of the precarious workers recruited by industrial establishments are young persons who have barely completed their school education. They have little awareness of their rights and entitlements under the law. They may not even be aware of their own exploitation. By reason of their long working hours and their working for six to seven days a week, they may not have the time even to reflect on their own condition.
3. **Lack of access**
   In MNCs, it is difficult to organize not just precarious workers but also permanent workers. This is because workers are bussed in and bussed out from the factory up to their doorstep. It is therefore difficult to access them and assemble them at any one place such as the factory gate.
4. **Anti-union discrimination**
   It is very easy for employers to fire or victimize precarious workers when they form or join unions. Employers often threaten and intimidate workers when they are in the process of union formation. Casual and contract workers have barely any protection for their employment during the process of formation of trade unions.
5. **Inadequate enforcement of the law**
   There are various deficiencies in the process of labour law enforcement. It was pointed out that officials entrusted with enforcement themselves at times may not have sufficient knowledge about the provisions and objects of the labour laws.
6. **Difficulties in registering trade unions**
   Practical difficulties in registering trade unions was considered to be a limiting factor. The process of registering a trade union requires the members of the union to be named and identified. At times the process is long drawn out and the employer is given information about the membership of the union, in particular the founding members. This could result in precarious workers being thrown out of their jobs even before the registration of the union.
7. **Lack of solidarity**
   Permanent workers at times go by the management's nomenclature and do not treat the precarious workers as their co-workers. The bye-laws of enterprise unions of permanent workers generally do not allow for precarious workers in the same establishment to become members.

   Furthermore, there is competition within the category of wage labour. At times, permanent workers do not support the struggles of precarious workers for permanency and better wages as they fear that their wages would be reduced if the pie were expanded.
8. **Lack of immediate relief in cases of violation of freedom of association rights of workers**
   One of the trade union leaders interviewed stated that *"while violations of workers' rights are immediate, relief is remote."* Labour Courts and Industrial Tribunals in the state of Tamil Nadu cannot give any interim injunctive relief even in cases of serious violation of freedom of association rights of workers. Also, the justice delivery system is slow, resulting in a condition of 'justice delayed is justice denied.' He pointed out that while workers were not able to get any immediate relief, managements who petitioned the courts were able to secure immediate relief when they sought orders to prevent workers from striking or demonstrating in or near their premises, or when they sought police protection. Likewise, managements were able to get the immediate assistance of the police whenever they wanted it.

Union recommendations: Measures to overcome the challenges

The officials of the federations interviewed suggested the following measures to overcome the challenges to the organization of precarious workers.

1. **Awareness raising**
   There is a need to increase awareness among precarious workers about the need to form unions. Field-level trainings would need to be conducted for this purpose. It would not suffice to merely recruit precarious workers as members of trade unions without educating them. Precarious workers would

The artificial barriers between permanent and non-permanent workers need to be broken. Permanent workers need to be aware that they cannot effectively negotiate and get fair wages for themselves unless precariousness is removed. Permanent workers would need to educate precarious workers about their rights and be involved in organizing them and support them in their struggles.

first need to be educated about the role of trade unions and be politically educated as well.

2. **Need for solidarity among permanent and non-permanent workers**
The artificial barriers between permanent and non-permanent workers need to be broken. Permanent workers need to be aware that they cannot effectively negotiate and get fair wages for themselves unless precariousness is removed. Permanent workers would need to educate precarious workers about their rights and be involved in organizing them and support them in their struggles. Contract workers cannot be unionized unless permanent workers support their unionization efforts and their struggles. The bye-laws of trade unions of permanent workers should permit precarious workers also to join the trade unions.

3. **Need for better implementation of the law**
The law should be seriously implemented. The labour law enforcement machinery should be strengthened.

4. **Strengthening the law**
It was suggested that the law needs to be strengthened in the following ways:

- **Injunctive relief**
Workers can enjoy the freedom of association in practice only when the law provides for immediate injunctive relief when their freedom of association rights are violated. The right to equality before the law and equal protection of the laws should be interpreted to mean that workers are entitled as much to immediate protection against the employer's unfair labour practices and should equally be in a position to secure immediate relief as employers do when they petition the courts for interim orders against workers or seek police intervention.
- **Enhancement of monetary penalties**
Monetary penalties for violation of labour laws would need to be enhanced.

5. **Adoption of new strategies**
New strategies need to be adopted for organizing precarious workers. For instance, unions may need to first take up general issues of concern to precarious workers and then proceed to organize them.

6. **Need for international solidarity**
There is a need for solidarity among workers of the same company and also the same industry in different countries. Workers' organizations would need to think globally while acting locally. When capital has been globalised and is acting globally, trade unions also need to fight globally.

7. **Ratification of ILO Conventions Nos. 87 and 98**
All the Central Trade Union Organizations (CTUOs) have been pressing for the ratification by the Government of India of ILO Conventions Nos. 87 and 98. It was pointed out, however, that just ratification would not be the solution and that it is the implementation of the principles contained in the Conventions which really matters.

8. **Need for a new ILO instrument**
One of the trade union leaders interviewed said that employers and contractors frustrate the rights of precarious workers to organize in ways that no ILO instrument addresses, and that a new instrument focused on precarious workers should be adopted. Such a new instrument should specifically address the triangular relationship between the principal employer, the intermediary contractor and contract workers as well.

Supreme Court of India

Constitution illumination/ornamentation by Beohar Rammanohar Sinha, calligraphy by Prem Behari Narain Raizada. wikipedia.com • Supreme Court photo: Legaleagle86, wkipedia.com

SECTION 5

Briefing Book: Indian Law — Potential and Problems

SECTION 5:

Briefing Book: Indian Law — Potential and Problems

This section examines the legality of the employment practices described in this report in the light of applicable national and state laws of India. It discusses constitutional provisions protecting labour rights and key aspects of other labour laws that are relevant from the point of view of examining the legality of the use of precarious workers in the automobile sector.

The laws reviewed are of the following three kinds:

(a) special laws relating to different categories of precarious workers,

(b) laws relating to permanency and

(c) laws relating to the freedom of association and collective bargaining rights of workers. Taking into consideration the focus of this section, other labour laws applicable to precarious workers in industrial establishments, such as laws relating to wages, social security and occupational safety and health, etc. have not been touched upon in this section. Apart from the provisions of law, the manner in which the courts have interpreted the law has also been discussed.

The section also discusses the remedies available to precarious workers to address violations of their rights. In addition, certain issues for legal reform have been highlighted in the section. Although this section may appeal more to lawyers and trade unionists representing workers' causes, an effort has been made to discuss the laws in a way that is easy for everyone to understand.

Constitutional Protection of Labour Rights

The Indian Constitution contains a strong framework for the protection of labour rights. Part III contains what is known as the "fundamental rights" under Indian law.[76] Part IV contains the "directive principles of state policy," that are "fundamental in the governance of the country" and, therefore, are required to be implemented by the state through its laws.[77] The directive principles together with the fundamental rights have been described as the 'conscience' [78] and the 'life-force' [79] of the Constitution. The constitutional values spelt out in Part IV are important to improve the conditions of precarious workers.[80] The fundamental rights and directive principles that are particularly relevant in the context of protection of labour rights of precarious workers in the auto sector are highlighted below.

Fundamental Rights

Freedom of association and related rights

Article 19(1)(c) guarantees to workers in India the fundamental right to form and join associations and trade unions. Other civil liberties that are vital to the exercise of the freedom of association by workers, in particular, freedom of speech and expression, freedom of assembly and freedom of movement are, likewise, protected as fundamental rights under Part III.[81] Reading the rights together, the Supreme Court of India has held that the right of workers to participate in peaceful and orderly demonstrations flows from Articles 19(1)(a) and (b) protecting the freedom of speech and expression and freedom of assembly respectively.[82] Likewise, the right of citizens to engage in public processions and hold public meetings has been held to flow from Article 19(1)(b) guaranteeing the freedom of assembly read together with Article 19(1)(d) guaranteeing the freedom of movement throughout the territory of India.[83] The right to freedom of association guaranteed under Article 19(1)(c) has, however, been interpreted in a restrictive manner by the Supreme Court. The Court has held that the right guaranteed by Article 19(1)(c) would not be inclusive of the rights of collective bargaining and right to strike.[84] While the rights to collective bargaining and to strike are not considered as fundamental rights under the Constitution, the Supreme Court has nevertheless stressed the importance of these rights.[85]

Right to life

Article 21 guarantees the right to life and liberty. The right to life under Article 21 has been interpreted to mean the right to live with human dignity.[86] The Supreme Court has ruled that Article 21 imposes a duty on the state to take positive steps to promote human dignity.[87] Fair wages and fair conditions of labour would be necessary for workers to live with human dignity.[88] In the landmark ruling in *People's Union for Democratic Rights v. Union of India*, the Supreme Court held that non-observance of the provisions of the Contract Labour (Regulation and Abolition) Act, 1971 and the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 would amount to violation of the right to life protected under Article 21 as those laws were framed to protect the dignity of workers.[89]

The right to life has been held to include the right to livelihood.[90] Article 19(1)(g) of the Constitution also

protects the right to livelihood. In *Maneka Gandhi v. Union of India,* [91] the Supreme Court held that any procedure for the deprivation of either the right to life or the right to personal liberty should be just, fair and reasonable. [92] By extension of this principle, the Court has held that any procedure for the deprivation of livelihood that is encompassed in the right to life should also be just, fair and reasonable. The right to health of workers, as in complete physical and mental well-being and not just the absence of disease, has also been held to be an integral facet of the right to life protected under Article 21.[93] In addition, the right to just and humane conditions of work has been held to be protected by Article 21.[94]

Right to equality

Article 14 guarantees the right to equality and equal protection of the laws.[95] It thus affords a safeguard against unfair discrimination by the state and its agencies. The guarantee of Article 14 has also been interpreted as a safeguard against any arbitrary state action.[96] Article 15 prohibits discrimination on the grounds of religion, race, caste, sex and place of birth. However, it leaves open room for the State to make any special provision for women and children. The Supreme Court has held that sexual harassment of women at the workplace results in violation of their right to equality protected under Articles 14 and 15 and also their right to life protected under Article 21.[97]

Right against exploitation

Article 23 prohibits forced labour. The Supreme Court has held that when a worker is paid a wage less than the prescribed minimum wage, the labour or service provided by him or her would amount to forced labour which is prohibited under Article 23.[98] Article 24 prohibits the employment of children below the age of fourteen years in any factory or any kind of hazardous employment. The rights under Articles 23 and 24 have been held to be enforceable not just against the state but also against any other person indulging in such practices.[99]

Directive Principles of State Policy

The directive principles emphasize the need for just and humane conditions of work,[100] a living wage for all workers,[101] equal pay for equal work,[102] and protection of the health of workers.[103] Furthermore, with a view to achieve distributive justice, the directive principles require the state to develop policies to ensure that the ownership and control of material resources are distributed in a manner best to serve the common good,[104] and that the operation of the economic system does not result in the concentration of wealth and the means of production.[105]

In a nutshell

The Indian Constitution requires that:

- All workers in India work in just and humane conditions in a manner consistent with their dignity;
- All workers be treated in a fair and equitable manner by their employers;
- All workers be paid fair wages;
- Workers receive equal pay for work of equal value;
- The fundamental rights to freedom of association, freedom of expression and freedom of association of all workers be respected and protected;
- Workers work in safe conditions and that their health is protected.

When any of the aforesaid rights of the workers are violated, it would amount to a violation of their constitutional rights. The violation of these rights by any employer, be it in the public or private sector, must therefore be viewed seriously. The systematic engagement of workers in a precarious manner so as to defeat these rights would obviously be illegal.

While the fundamental rights guaranteed under the Constitution are enforceable rights, the Directive Principles of State Policy are not enforceable.[106] The Supreme Court has, however, held that the fundamental rights must be construed in the light of the directive principles.[107] On this basis, the Court has expanded the content of the fundamental rights. For instance, in *Randhir Singh's* case,[108] the court employed a directive principle, Article 39(d) (equal pay for equal work) to find that right within Articles 14 and 16 of the Constitution.

Constitutional obligation of the Indian state to protect the rights of precarious workers both under the law and in practice

The Indian state has the constitutional obligation to ensure that the aforesaid rights of workers are protected both under the law and in practice. Strict enforcement of the laws framed to protect workers' rights would clearly flow from this obligation. This would mean that the state has a duty to strictly enforce the law both in the case of multinational and domestic employers. Laxity on the part of the state in enforcing labour laws would, therefore, amount to abdication of its constitutional responsibilities.

That being the case, the state is acting contrary to its constitutional obligations if it permits the massive

engagement of precarious workers in industrial establishments for work of a perennial or regular nature while they are paid merely a small fraction of the wages of confirmed workers doing the same or similar work. Likewise, if the state permits employers to trample upon the freedom of association rights of any category of workers, it would be acting contrary to its constitutional obligations.

Statutory Protection of Labour Rights

Under the Indian Constitution, both the central or federal government and the governments of states in the country are empowered to legislate on labour-related subjects.[109] Thus, India has a number of central as well as state laws relating to labour-related issues. While central laws generally have application all over India, the application of state laws is confined to the territories of the respective states concerned. Legislation on labour-related issues in India is fragmented. There are separate laws relating to subjects such as freedom of association, wages, occupational safety and health, and social security benefits. The coverage of the various labour enactments is generally based on the definitions of the terms 'workman/worker/person employed' and 'employer' under the legislation in question.

As stated in the introduction to this section, the laws reviewed in this sub-section are of three kinds: (a) special laws relating to different categories of precarious workers, (b) laws relating to permanency and (c) laws relating to the freedom of association and collective bargaining rights of workers. This sub-section begins with a note on the legal framework for the protection of the freedom of association and collective bargaining rights of workers in India, including the right to strike.

This is followed by a discussion relating to the Contract Labour (Regulation and Abolition) Act, 1970, a unique legislation recognizing the triangular relationship between the employer, contractor and contract worker.

Next is a discussion on the laws relating to permanency and the conditions of employment of workers. This is followed by a look at the rights flowing to workers under the provisions of the Industrial Disputes Act upon completion of 240 days of service. The provisions of the Apprentices Act, a special legislation relating to apprentices, are then discussed. Considering that a substantial number of migrant workers from various states in India work in the Chennai auto hub, the section also takes a brief look at the provisions of the Inter-State Migrant Workers Act, a special law relating to inter-state migrant workers. The section concludes with a brief look at the provisions of the Factories Act relating to hours of work and overtime work.

Freedom of Association and Collective Bargaining Rights

As mentioned in the sub-section on constitutional protection of labour rights, the right of workers to form and join trade unions is guaranteed by Article 19(1)(c) of the Constitution of India. The Trade Unions Act, 1926 and the Industrial Disputes Act, 1947 are the two principal pieces of central or federal legislation concerning the freedom of association and collective bargaining rights of workers in India.

Trade Unions Act, 1926

The Trade Unions Act enables workers to register trade

CFA, Case No. 2991(India), Report No. 368

The Garment and Allied Workers Union had made a complaint to the Committee on Freedom of Association in October 2012 alleging inaction by the authorities on its application for registration of the union. According to the Government, the union did not fulfil the minimum membership requirement specified in the Trade Unions Act.

Taking note of the minimum membership requirement under section 4 of the Act, the Committee observed as follows:

"The Committee, therefore, believes that section 4(1) of the Trade Unions Act, 1926, as amended in 2001, imposes an excessively high minimum number of members for the formation of unions, at both enterprise level and industry level. Bearing in mind that the failure to meet the minimum membership requirement can only give rise to the refusal of a union's registration, if such a requirement is itself in conformity with the principles of freedom of association, the Committee considers that the refusal of GAWU's registration cannot be justified on the purported ground of the union membership having fallen below 100 workers (which is being disputed by the complainant)."

The Committee therefore requested the Government to take the necessary measures to modify the minimum union membership requirement in section 4(1) of the Trade Union Act, 1926, as amended in 2001, so that the establishment of organizations is not unduly hindered. It also requested the Government to take steps to ensure that the period necessary for registration of workers' organizations is not excessively long.

unions. It prescribes the requirements to be met for the registration of a trade union.[110] The Act prescribes a minimum membership requirement for the registration of trade unions of workers. A trade union can be registered only if it has a membership of at least ten per cent of the workers or one hundred workers, whichever is less, subject to a minimum of seven workers engaged or employed in the establishment or industry with which the union is connected.[111] Even after its registration, a trade union is required to meet this minimum membership requirement at all times else it may stand to lose its registration.[112] The ILO Governing Body's Committee on Freedom of Association had recently expressed the view that the minimum membership requirement under the Trade Unions Act is excessively high. (see box, opposite page)

The Committee therefore requested the Government to take the necessary measures to modify the minimum union membership requirement in section 4(1) of the Trade Union Act, 1926, as amended in 2001, so that the establishment of organizations is not unduly hindered. It also requested the Government to take steps to ensure that the period necessary for registration of workers' organizations is not excessively long.

The Act also regulates the constitution of the executive of trade unions. A maximum of one-third of the total number of office bearers of a union or five, whichever is less, may be outsiders who are not employed in the establishment or industry in question.[113]

The Act contains provisions relating to the rights and responsibilities of registered trade unions. It also regulates the utilization of funds of the union. Apart from this, it contains provisions to protect unions and their members in the exercise of legitimate trade union activities. Office bearers and members of trade unions may not be prosecuted for the offence of criminal conspiracy, in respect of any legal act done in furtherance of the objects of the trade union.[114] The Act also affords immunity to trade unions as well as their office bearers and members from civil proceedings in respect of acts done to further trade union rights.[115] Thus, office bearers and members of trade unions are protected against being prosecuted for criminal conspiracy if they go on strike. They would also be protected from civil suits for damages for the mere act of participation in a strike.

Industrial Disputes Act, 1947

The Industrial Disputes Act establishes the right of industrial workers[116] and trade unions to bargain collectively. It recognizes the right to strike of workers and the corresponding right of employers to resort to lock outs. In addition, it protects union members and leaders from acts of anti-union discrimination and interference. The Act also has other facets. This sub-section of the report, however, focuses only on the protection afforded by the Act for the freedom of association and collective bargaining rights of workers.

Protection against anti-union discrimination and acts of interference

The Act prohibits the commission of unfair labour practices.[117] The prohibited unfair labour practices include unjust dismissals, bad faith transfers and denial of promotion on account of workers' participation in trade union activities. Acts of interference such as the establishment of employer-sponsored trade unions and partiality on the part of the employer towards non-recognized trade unions are considered as unfair labour practices under the Act.[118] The Act provides for the prosecution of those who commit unfair labour practices on the basis of a complaint made by or under the authority of the Government.[119] It penalizes the commission of such practices with imprisonment or fine or both.[120]

Aside from prosecution for unfair labour practices, the Act affords other remedies to workers who consider that they have been prejudiced in their employment on account of their trade union membership or activities.[121] They may raise either individual or collective industrial disputes to seek justice. An individual worker can access the grievance redressal machinery established under the Act by raising an individual industrial dispute only in the event of severance of his or her service.[122] In all other cases, collective industrial disputes have to be raised. Collective industrial disputes may be raised either by the trade union that the concerned worker or workers belong to or a body of workers.[123] Such disputes are initially taken up for conciliation and subsequently for adjudication or arbitration if the parties to the dispute are unable to arrive at any agreement during the conciliation proceedings.

The Act affords protection to workers during the pendency of conciliation or adjudicatory or arbitration proceedings under the Act in respect of any industrial dispute concerning them. Officials of trade unions recognised as 'protected workers' are granted special protection under the Act. The employer is required to obtain the permission of the concerned authority before which any industrial dispute concerning them is pending for either changing any condition of service of the protected worker or dismissing him or her.[124]

The Labour Court or Industrial Tribunal as the case may be, has the discretion to grant the relief of reinstatement to workers unjustly dismissed on account of their trade

union activities. The court or tribunal may do so either when it finds that there are no valid grounds for the dismissal or when it finds that the penalty is excessive and disproportionate.[125]

Collective bargaining rights

The Industrial Disputes Act recognizes the right of workers and their unions to collectively bargain with employers and enter into collective agreements with them.[126] Employers and recognized trade unions are required to engage in collective bargaining in good faith.[127] The refusal of the employer to bargain in good faith with a recognized trade union is considered an unfair labour practice under the Act.[128] It may therefore be argued that there is an implicit requirement under the Act for grant of recognition by employers to representative trade unions as collective bargaining agents because without such recognition, the collective bargaining rights granted to workers under the Act would be frustrated. However, the Act does not contain any provisions mandating such recognition. An employer who fails to hold negotiations with a recognised trade union may be prosecuted and punished under the Act for commission of an unfair labour practice.

Apart from that, in the case of refusal of the employer to bargain collectively with a representative trade union or the failure of bilateral negotiations between the employer and trade union to bring about any agreement, the concerned trade union may raise an industrial dispute. Such a dispute is usually taken up for conciliation initially. Any collective agreement reached between the employer and the workers/trade union (referred to as a "settlement" in the Act) in the presence of the Conciliation Officer would be binding upon the entire class of concerned workers in the establishment and not just the workers who are members of the trade union that signed the settlement. In contrast, when a settlement is arrived at through bilateral negotiations with a union representing a section of workers in the establishment, it would be binding only upon the workers who are members of that particular union.[129]

Recognizing the sanctity of settlements entered into by the parties, the Act provides that the failure of an employer or organization of employers to implement any settlement amounts to an unfair labour practice that is punishable under the Act.[130] Similarly, a breach of any term of any settlement is punishable under the Act.[131]

Workers and employers are required to refrain from resorting to strikes and lock outs respectively during any period in which a settlement is in operation, in respect of any of the matters covered by the settlement.[132] When parties to the dispute are unable to arrive at any agreement or 'settlement' during the conciliation proceedings, the matter may be referred for adjudication by the Government to the Industrial Tribunal.[133]

Access to justice — the reference requirement

In the case of any collective industrial dispute raised under the Act including those concerning acts of anti-union discrimination or violation of collective bargaining rights, a reference from the Government is needed for adjudication of the dispute if no agreement or settlement is arrived at between the parties to the dispute during conciliation proceedings.[134] This requirement can be a serious stumbling block for workers seeking justice both on account of the time involved in obtaining a reference and the possibility of arbitrary refusal to refer disputes for adjudication.[135]

The need to afford fuller access to justice

Taking note of the reference requirement, the ILO Governing Body's Committee on Freedom of Association had as far back as in 1967 recommended that the Government consider amending the Act with a view to afford to workers and trade unions a fuller right to access to statutory procedures for the settlement of disputes by conciliation and if conciliation, fails by adjudication. (CFA, Case No. 420(India), 93rd report, paras. 156, 161). In two subsequent cases, while taking note of the amendments to the law in the States of Andhra Pradesh and Tamil Nadu that permitted workers terminated from service to directly move the Labour Court without the need for a reference, the CFA recommended that the Government take all necessary measures including the amendment of the Act so as to ensure that even suspended workers and trade unions could approach the court directly without the need for a reference. (CFA, Case No. 2228 (India), 338th report, para. 200 and CFA, Case No. 2512 (India), 348th Report, paras. 900 and 906).

Legislative vacuum in respect of the issue of recognition of representative trade unions

There is no central statutory enactment in India regarding employer recognition of representative trade unions as collective bargaining agents. Neither the Trade Unions Act, 1926 nor the Industrial Disputes Act, 1947 contain any provisions mandating that an employer grant recognition to a representative trade union for purposes of collective bargaining. Only some states in India such as Andhra Pradesh, Gujarat, Madhya Pradesh, Maharashtra, Rajasthan and West Bengal have state laws in place relating to

the recognition of trade unions. Tamil Nadu is one among the states that have not passed any state legislation regarding recognition by employers of representative trade unions.

There is thus a legislative vacuum in Tamil Nadu on the crucial subject of recognition of trade unions. As a result, employers in the state are not statutorily bound to grant recognition to trade unions representing the majority of the workers. In practice, this has resulted in employers often ignoring or by-passing representative unions and choosing to enter into "settlements" with employer-established trade unions or even individual workers. As pointed out by the ILO Governing Body's Committee on Freedom of Association, such practices seriously undermine collective bargaining rights.[136] Such practices also threaten industrial peace because they deny workers a meaningful voice in the workplace to protect their interests, and render meaningless the universally recognized right of workers to form and join trade unions of their own choosing. The resulting frustration of the workers could lead to repeated strikes and other disruptions of work.

Recommendation made by the ILO Governing Body's Committee on Freedom of Association to the Government regarding the framing of rules for recognition of representative unions.

MRF United Workers Union, a trade union representing the confirmed workers in the Arakonam factory of M.R.F Limited, a tyre major that is a supplier to Ford and Hyundai, had made a complaint to the ILO Governing Body's Committee on Freedom of Association (CFA) claiming to be the only genuine trade union in the factory. It alleged that the management had failed to grant it recognition although it was the majority union. The complainant had pointed out that there is no central law nor any law in Tamil Nadu governing the subject of recognition of the representative trade union by the employer for collective bargaining purposes.

The CFA in its conclusions in the case emphasized that employers should recognize for collective bargaining purposes the organization's representative of the workers employed by them. It pointed out the two criteria that should be applied to determine whether an organization has the capacity to be the sole signatory to collective agreements are representativeness and independence. It recommended that the Government consider laying down objective rules for the designation of the most representative union for collective bargaining purposes, when it is not clear by which union the workers wish to be represented. (CFA, Case No. 2512 (India), 348th Report, paras. 904-906).

Code of Discipline

While there is no central statute in India on the subject, there is a non-statutory Code of Discipline adopted in 1958 by central employers' and workers' organizations that prescribes procedures for the recognition of trade unions. A union that satisfies the conditions for recognition prescribed under the Code may seek the assistance of the concerned central or state labour machinery when its request for recognition is not accepted by the management of the concerned establishment.[138] As per the Code, the verification of membership is to be done principally on the basis of records.

The Code is of a voluntary and recommendatory nature and does not prescribe any legal sanctions for failure to observe a recommendation for recognition made by the central or state implementation machinery under the Code. In practice, this has meant whether a representative trade union is recognized for purposes of collective bargaining is left to the discretion of the employer. In such a situation, many trade unions that represent the majority of workers do not have any remedy to enforce their right to collective bargaining.

Right to strike

The Industrial Disputes Act recognizes the right to strike of workers covered by the Act.[139] However, the Act places certain restrictions on this right. The Act makes a distinction between legal strikes and illegal strikes. Illegal strikes include strikes in industries notified as public utility services that do not comply with the requirement of prior notice as prescribed under the Act, strikes during the pendency of proceedings in industrial disputes, strikes relating to any matter covered by a settlement during the period of validity of settlement, and strikes held in violation of Government Orders specifically prohibiting the strike.[140]

The Act affords protection for workers who participate in legal strikes in the following ways:

- It prohibits employers from dismissing workers for participating in legal strikes.[141]
- It prohibits employers from insisting upon good conduct bonds as a pre-condition for workers on a legal strike to resume work.[142] For example, if an employer urges workers to sign a declaration stating that they would "not resort to strike, go-slow, intermittent stoppage of work, stay-in-strike, work-to-rule, or any conduct which would hamper normal production in the factory," and threatens that they would not be allowed into the factory unless they sign the declaration as demanded, it would amount to insistence upon a good conduct bond as a pre-condition to resume work.
- It prohibits employers from recruiting workers to break legal strikes.[143]

On the other hand, participation in illegal strikes is punishable under the Act. Instigating or inciting other workers to take part in or act in furtherance of an illegal strike is also punishable. Likewise, financially supporting an illegal strike is punishable under the Act.[144]

Restrictions on the right to strike of workers in public utility services

The Government may declare any industry specified in the first schedule to the Industrial Disputes Act as a public utility service if it is satisfied that it is necessary in the public interest. A wide range of industries have been enumerated in the first schedule to the Act. These include banking, cotton textiles and cement industries. State Governments have expanded the list of industries that may be declared 'public utility services.' In the state of Tamil Nadu, leather, synthetic fibre, electric goods manufacturing industries, newsprint manufacturing, export-oriented industrial units, industries in special economic zones, information technology and software establishments are among the list of industries that may be notified as public utility services.[145]

Workers in establishments defined as 'public utility services' under the Act are required to give a minimum of 14 days' prior notice to the employer and the concerned labour authorities before resorting to strike. The notice should be given within a period of six weeks prior to the commencement of the strike.[146] Upon the workers of a public utility service giving prior notice of a proposed strike as required under the Act, it is mandatory for conciliation proceedings to be commenced by the Conciliation Officer.[147] It is also open to the Government to refer the dispute for adjudication.[148] In practice, the time taken for such proceedings to be completed is considerable. During the pendency of either conciliation or adjudicatory proceedings, any strike by workers would be considered illegal as per the provisions of the Act.[149] Thus, it is virtually impossible for workers of industries designated as public utility services to go on a legal strike.[150]

Declaration of the automobile manufacturing industry as a public utility service

The Government of Tamil Nadu had in September 2012 notified the automobile manufacturing industry as a public utility service under the Industrial Disputes Act for a period of 6 months.[151] The reference in the notification to a letter written by the Managing Director of Hyundai Motor India Ltd indicates that the company had petitioned the Government of Tamil Nadu to issue such a notification. The MOU that the Government of Tamil Nadu had earlier entered into with the company contained a clause that the Government would declare the project a public utility service "to prevent labour indiscipline, if any."[152] The notification of the automobile manufacturing industry by the Government of Tamil Nadu is, however, not a first of its kind. In the neighbouring state of Karnataka, automobile and auto parts manufacturing industries had been declared as public utility services as far back as in 2001.[153] Under its new Auto Policy, the Government of Tamil Nadu has decided to continue with this practice. It has annountced in the policy that the automobile industry will be declared as a 'public utility service' under the Industrial Disputes Act to prevent flash strikes.[154]

The designation of the automobile manufacturing

In a nutshell

By reason of the fundamental right to freedom of association protected under the Constitution of India and the provisions of the Trade Unions Act, precarious workers in industrial establishments (with the exception of statutory apprentices) may form, join and register trade unions. Precarious workers in industrial establishments (with the exception of statutory apprentices) would also be entitled to the rights and remedies under the Industrial Disputes Act discussed above in this section. In practice, however, it would be difficult for precarious workers to exercise these rights given the fact that they can be easily terminated from service at any time. In the case of contract workers, the difficulty of establishing the employer-employee relationship between themselves and the user enterprise or the principal employer presents an additional obstacle to realize these rights and seek the remedies discussed above in practice. In other words, precarious work severely restricts the ability of workers to exercise their freedom of association and collective bargaining rights.

Any employment practice that is either aimed at or has the effect of defeating the right of workers to form and join trade unions, a fundamental right that is also protected under the aforesaid statutes, cannot be considered legal. Likewise, any employment practice that has the effect of defeating the collective bargaining rights of workers and depriving them of the ability to protect their interests cannot be considered legal. Viewed in this light, the employment practice of engaging workers on a precarious basis in large numbers cannot be considered legal.

industry as a public utility service would severely restrict the right to strike of workers in the industry. As stated before, in practice it is virtually impossible for workers in a public utility service to go on a legal strike. The designation of the industry as a public utility service is, therefore, contrary to the principles developed by the ILO supervisory bodies concerning the right to strike.[155] The supervisory bodies have held that the right to strike may be restricted or prohibited only: (1) in the case of public servants exercising authority in the name of the State; (2) in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population,[156] or (3) in the case of acute national emergency for a limited period of time.[157]

Special legislation relating to contract workers: Contract Labour (Regulation and Abolition) Act, 1970

The Contract Labour (Regulation and Abolition) Act, 1970 is a central or federal law governing the engagement of one crucial subset of precarious workers in India—contract workers. The Act is concerned with contract labour arrangements involving the user enterprise (termed in the Act as 'the principal employer'), intermediary contractors and workers engaged through the contractors (termed in the Act as 'contract labour').[158] As the title of the Act suggests, it contains provisions to prohibit as well as regulate the employment of contract workers. In *Gammon India Ltd. v. Union of India*,[159] the Supreme Court of India explained the objects of the Act in the following terms:

> *"The Act was passed to prevent the exploitation of contract labour and also to introduce better conditions of work. The Act provides for regulation and abolition of contract labour. The underlying policy of the Act is to abolish contract labour, wherever possible and practicable, and where it cannot be abolished altogether, the policy of the Act is that the working conditions of the contract labour should be so regulated as to ensure payment of wages and provision of essential amenities. That is why the Act provides for regulated conditions of work and contemplates progressive abolition to the extent contemplated by section 10 of the Act."*

The Act applies to establishments in which a minimum of 20 contract workers are employed and to contractors employing 20 or more workers. The government could, however, choose to extend the application of the Act to any establishment or contractor employing fewer than 20 workers as well. The Act does not apply to establishments in which only work of an intermittent or casual nature is performed, that is, establishments where work was performed for fewer than 120 days in the previous year or where work of a seasonal character is performed for fewer than 60 days in a year.[160] The main features of the Act and the Rules framed by the government of Tamil Nadu to give effect to its provisions are discussed below.

Prohibition of employment of contract labour

Section 10, the pivotal provision of the enactment, empowers the central as well as state governments to prohibit the employment of contract labour in any process, operation or other work in any establishment by the issue of a notification. The government has to consult the appropriate tripartite advisory board constituted under the Act, that is, the central or concerned state advisory board as the case may be, before issuing any such notification. It is required to consider the following factors while deciding on the issue of abolition of contract labour in any work, process or operation:

- Whether the process, operation or work is incidental to or necessary for the industry
- Whether the process, operation or work is of a perennial nature
- Whether it is ordinarily done through regular workers in the establishment in question or other establishments carrying on similar activities
- Whether it is sufficient to employ a considerable number of whole-time workers
- What the conditions of work are in the establishment in question and
- What benefits are provided for the contract workers in the establishment.

The government has the power under section 10 to prohibit contract labour in any process or work in accordance with the aforesaid guidelines regardless of whether or not it is actual manufacturing work and regardless of whether it is termed by the employer as core work or non-core work.[161] While the central Act makes no such distinction, the Government of the State of Andhra Pradesh has made an amendment to the Contract Labour Act drawing a distinction between core and non-core activities. In that state, the use of contract workers is prohibited in core activities except under certain circumstances. On the other hand, the use of contract workers in non-core activities is freely allowed.[162]

On the basis of the guidelines contained in section 10, the central government and state governments have issued notifications prohibiting the employment of contract workers in different kinds of work in various

establishments.

Registration and licensing

The Act makes it mandatory for the principal employer, that is, the user enterprise engaging contract workers, to obtain a certificate of registration from the concerned authorities.[163] Contractors are required to obtain licences for the purpose of employing contract workers.[164] While applying for a certificate of registration, the employer is required to disclose information about the total number of workers directly employed in the establishment, the nature of the work in which contract workers are to be employed, and the maximum number of contract workers to be employed.[165] Similarly, for the purpose of obtaining a licence, a contractor is required to disclose particulars of the nature of work in which contract workers are to be employed, duration of the proposed contract work and maximum number of contract workers proposed to be employed in the establishment.[166]

The maximum number of workers who may be employed as contract workers in the establishment is required to be specified in the registration certificate.[167] The maximum number of contract workers who may be engaged in the establishment in question through the concerned contractor is required to be specified in the licence. In addition, the licence may contain conditions relating to hours of work, fixation of wages and essential amenities.[168] Contract workers must be engaged in accordance with the conditions specified in the licence.

The concerned authorities may revoke a registration certificate or licence issued under the Act if it is found that it has been obtained by misrepresentation or suppression of any material fact.[169] A licence may also be suspended or revoked if the conditions on which it has been granted are not complied with or if the licence holder acts in violation of any provision of the Act or Rules.[170]

Payment of wages

Contract workers are required to be paid wages every month at a rate not below the prescribed minimum wage rate.[171] The responsibility for payment of wages to contract workers primarily vests with the concerned contractor. The Act fastens liability on the principal employer to pay wages to the contract workers if the contractor either fails to make payment or makes short payment. In such a case, the principal employer may subsequently recover the amount from the contractor.[172]

Wage parity

As per the Tamil Nadu Rules, when contract workers perform the same or similar kind of work as the directly employed workers in an establishment, they should be paid the wages at the same rate as applicable to the workers directly employed by the principal employer of the establishment. Furthermore, the contract workers would in such a case have the same hours of work and be entitled to holidays and other conditions of work on par with the directly employed workers.[173] The Contract Labour (Regulation and Abolition) Central Rules, 1971 contain a similar provision.[174]

Amenities

The Act requires the provision of amenities such as canteens, drinking water, toilets, and rest rooms for contract workers.[175] The principal employer is required to provide the prescribed amenities in the event of the contractor failing to do so within the stipulated time.[176]

Inspection

The Act provides for inspection of premises where contract workers are employed. As part of the process, the Inspector may make enquiries with the workers and examine necessary registers and records.[177]

Prosecution and penalties

Contravention of the provisions of the Act is an offence punishable with imprisonment and/or fine. Prosecution for an offence under the Act may be initiated on a complaint made by the Inspector or with his or her sanction.[178]

Unlawful practices of employers: rights and remedies

This sub-section now goes on to discuss the remedies available to workers facing the following kinds of unlawful practices adopted by employers that are widespread:

- Sham contracts
- Engagement of contract workers for work of a regular nature
- Failure of the employer/contractor to abide by the principle of 'equal pay for work of equal value' and pay contract workers the same wages as direct workers who do the same or similar kind of work.

A. Sham contracts

With a view to camouflage the employer-employee relationship between themselves and their workers and avoid giving the workers the wages and benefits they rightfully deserve, employers at times make it appear that workers directly employed by them are 'contract workers' engaged through a third-party intermediary contractor.

A combined reading of the landmark judgments of the Court in *Gujarat Electricity Board, Thermal Power Station v. Hind Mazdoor Sabha*[179] and the famed *Steel Authority*

of India v. National Union Waterfront Workers case (SAIL case)[180] indicates the following:

In cases where the so-called contract between the principal employer and intermediary contractor is nothing but a sham, the contract workers concerned can raise a collective industrial dispute under section 2(k) of the Industrial Disputes Act claiming that they have in fact always been the workers of the principal employer and are entitled to the same benefits as the direct workers of the establishment. When it is the case of the workers that the contract is only a sham, it would be open for them to raise such a dispute irrespective of whether or not an abolition notification has been issued under section 10 of the Act. The Industrial Tribunal would have the jurisdiction to adjudicate upon such a dispute. If the Industrial Tribunal finds that the so-called contract is indeed a sham, it can grant necessary relief to the workers by holding that they are direct employees of the principal employer.

SHAM CONTRACTS —
A subterfuge adopted by employers to deny workers their rights —

OBSERVATIONS OF THE SUPREME COURT

In *Bhilwara Dugdh Utpadak Sahakaris Ltd. v. Vinod Kumar Sharma*, the Supreme Court observed as follows:

"In order to avoid their liability under various labour statutes employers are very often resorting to subterfuge by trying to show that their employees are, in fact, the employees of a contractor. It is high time that this subterfuge must come to an end. Labour statutes were meant to protect the employees/workmen because it was realised that the employers and the employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited. However, this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their employees but are the employees/workmen of a contractor, or that they are merely daily wage or short term or casual employees when in fact they are doing the work of regular employees. This Court cannot countenance such practices any more. Globalization/liberalization in the name of growth cannot be at the human cost of exploitation of workers."

(Bhilwara Dugdh Utpadak Sahakaris Ltd. v. Vinod Kumar Sharma, (2011) 10 SCR 819)

Determination of sham contracts

The Supreme Court has held that the doctrine of piercing or lifting the veil could be applied in order to determine the real relationship between the principal employer and the contract workers.[181] It has held that the issue of whether the contract is genuine or a camouflage is essentially a question of fact to be determined on the basis of

- the features of the relationship,
- the written terms of employment, if any, and
- the actual nature of the employment.[182]

The Court has indicated that a consideration of the following issues could determine whether the so-called contract workers are in fact the direct employees of the principal employer:

- Who pays the wages?
- Who can tell the employee the way in which the work should be done, in short, who controls and supervises the work of the employee?
- Who has the power to remove the worker from service or initiate disciplinary action against him or her?[183]

Apart from the aforementioned factors, judgments of the Court on the subject indicate that other significant factors that have weighed with the courts are:

- Whether the principal employer has a certificate of registration and whether the contractor has a licence issued under the Contract Labour Act?
- Whether there was a labour supply contract between the principal employer and the contractor?
- Whether it is the principal employer or the so-called contractor who maintains records in relation to the workers in question, such as attendance records?

The courts have in recent times made a distinction between *primary control* and *secondary control* to assess whether a contract is a sham.[184] Explaining the distinction, the Supreme Court has observed as follows:

"….if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the

contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labourer, when such labour is assigned/allotted/sent to him. But it is the contractor as employer who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor." [185]

This could make it more difficult for contract workers to establish the existence of a sham contract.

B. Engagement of contract workers for work of a permanent nature in violation of the guidelines laid down in section 10 of the Act

The practice of engagement of contract workers for work of a permanent nature in violation of the guidelines laid down in section 10 of the Act is widespread.

In cases where contract workers are engaged for work of a regular or permanent nature but the contract between the principal employer and the contractor through whom the workers are supplied as such is not a sham, the government would first need to take a decision regarding the abolition of the engagement of contract labour in the concerned process, operation or work in the establishment on the basis of the guidelines contained in section 10 of the Act that have been referred to earlier in this section. The Court has emphasized that the authority to abolish the contract labour system in any process vests exclusively with the government and that the courts cannot decide on the issue.[186] If the government considers that the engagement of contract workers must be prohibited in the process, operation or work in question, it should issue a notification to that effect under section 10 of the Act.

The issue of absorption consequent upon abolition

The Contract Labour Act is silent on the issue of whether or not the concerned contract workers would be entitled to absorption in the service of the principal employer after the issue of such a notification. In the *SAIL* case, the

Engagement of contract workers in violation of the guidelines laid down in Section 10 of the Contract Labour Act

OBSERVATIONS OF THE SUPREME COURT

Expressing concern at the practice of engagement of contract workers in violation of the guidelines contained in section 10, the Supreme Court of India made the following observations in the judgment in *Gujarat Electricity Board, Thermal Power Station v. Hind Mazdoor Sabha:*

"…..we cannot help expressing our dismay over the fact that even the undertakings in the public sector have been indulging in unfair labour practice by engaging contract labour when workmen can be employed directly even according to the tests laid down by Section 10(2) of the Act. The only ostensible purpose in engaging the contract labour instead of the direct employees is the monetary advantage by reducing the expenditure. Apart from the fact that it is an unfair labour practice, it is also an economically short-sighted and unsound policy, both from the point of view of the undertaking concerned and the country as a whole. The economic growth is not to be measured only in terms of production and profits. It has to be gauged primarily in terms of employment and earnings of the people. Man has to be the focal point of development. The attitude adopted by the undertakings is inconsistent with the need to reduce unemployment and the Government policy declared from time to time, to give jobs to the unemployed. This is apart from the mandate of the directive principles contained in Articles 38, 39, 41, 42, 43 and 47 of our Constitution. We, therefore, recommend that—(a) all undertakings which are employing the contract labour system in any process, operation or work which satisfies the factors mentioned in clauses (a) to (d) of Section 10(2) of the Act, should on their own, discontinue the contract labour and absorb as many of the labour as is feasible as their direct employees;

(b) both the Central and the State Governments should appoint a Committee to investigate the establishments in which the contract labour is engaged and where on the basis of the criteria laid down in clauses (a) to (d) of Section 10(2) of the Act, the contract labour system can be abolished and direct employment can be given to the contract labour. The appropriate Government on its own should take the initiative to abolish the labour contracts in the establishments concerned by following the procedure laid down under the Act."

(Gujarat Electricity Board, Thermal Power Station v. Hind Mazdoor Sabha, (1995) 5 SCC 27, 74-75)

Court held that it could not read in a remedy not specified in the Act. Consequently, it held that the principal employer cannot be required to absorb the contract labour working in the establishment concerned. However, if the principal employer intends to employ regular workers in the concerned process, operation or work, preference should be given to the erstwhile contract workers if they are suitable for the work.[187]

Thus, the issues of continued employment of the concerned workers in the establishment in question and their absorption in service are left to the discretion of the employer. Furthermore, it would not be open to the erstwhile contract workers to directly raise any industrial dispute against the principal employer. Only the direct workers of the principal employer can raise an industrial dispute espousing their cause if they choose to do so.[188]

C. Failure to pay contract workers the same wages as direct workers who do the same or similar kind of work

Contract workers are entitled to the same wages, hours of work, conditions of service and holidays as workers

In a nutshell

- Clearly, the spirit of the Contract Labour Act is to prevent the engagement of contract workers for work of a regular or permanent nature. The Act does not make any distinction between the engagement of workers for core production work and other kinds of work. Thus, compliance with the Act in letter and spirit would mean that contract workers should not be engaged by industrial employers in Tamil Nadu for any kind of work of a regular or permanent nature. It follows that the engagement of contract workers for any work of a regular or permanent nature would be contrary to the scheme of the Act and should not be permitted.
- As per the Rules framed under the Act, contract workers ought to be paid the same wages, hours of work, conditions of service and holidays when they perform the same or similar kind of work as direct workers of the user enterprise. When employers fail to do so, they are acting in violation of the Rules framed under the Act.
- While the Act and the Rules framed under the Act aim at ensuring that contract workers are not exploited, some rulings of the Supreme Court in the neo-liberal economic era, particularly on the issues of absorption of contract workers in the service of the principal employer and wage parity for contract workers doing the same or similar work as direct workers, dilute the letter and spirit of the Act and the Rules framed to give effect to the Act. The approach of the Court to such issues concerning the rights of contract workers has therefore come in for sharp criticism by trade unionists and others.[191] The restrictive interpretation of the Act by the Supreme Court in the *SAIL* case is seen as part of a larger trend of decisions in the post-liberalization era that have been harsh on workers, including decisions relating to regularization of workers who have worked for long periods in the public sector, payment of back wages to wrongfully terminated workers, the right to strike, etc.[192] In an introspective vein, a Division Bench of the Supreme Court had in the judgment rendered in January 2010 in *Harjinder Singh v. Punjab State Warehousing Corporation*[193] acknowledged that there was indeed a shift in the Court's approach. The Court observed:

  "Of late, there has been a visible shift in the courts' approach in dealing with cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers.

  The Court also emphasised the need for judges to *"uphold the constitutional focus on social justice, without being in any way misled by the glitz and glare of globalization."*
- Vigorous workplace activism and policy advocacy may be necessary to defend what meagre protections exist today. The central trade unions in the country have been pressing for the following amendments to the Act to strengthen the protection for contract workers: absorption of contract workers when the engagement of contract labour is abolished under section 10 of the Act, removal of the threshold limit of 20 workers for applicability of the Act and inclusion in the Act of a provision requiring contract workers to be paid the same wages as workers directly employed by the principal employer when they perform the same or similar kind of work.[194]

directly employed by the principal employer who do the same or similar kind of work as per the Rules framed under the Contract Labour Act. However, of late, the Supreme Court has interpreted this right more restrictively. In *Uttar Pradesh Rajya Vidyut Utpadan Board v. Uttar Pradesh Vidyut Mazdoor Sangh*,[189] the Supreme Court considered the application of Rule 25(v)(a) of the U.P rules which is similar to the corresponding Rule in the Tamil Nadu Rules on the issue of equal pay for contract workers doing work of the same or similar nature as the employer's direct workers, and held as follows:

> *"Nature of work, duties and responsibilities attached thereto are relevant in comparing and evaluating as to whether the workmen employed through contractor perform the same or similar kind of work as the workmen directly employed by the principal employer. Degree of skill and various dimensions of a given job have to be gone into to reach a conclusion that the nature of duties of the staff in two categories are on a par or otherwise. Often the difference may be of a degree. It is well settled that nature of work cannot be judged by mere volume of work; there may be qualitative difference as regards reliability and responsibility."*

On the related issue of the liability of the principal employer to ensure wage parity for contract workers when they perform work of the same or similar nature as the regular workers in an establishment by reason of section 21(4) of the Act, again, the Supreme Court in *Hindustan Steelworks Construction Ltd. v. Commr. of Labour*,[190] took a restricted view and held that the principal employer would not be liable to make up for the short payment.

State law relating to permanency: 480 days to permanency

Tamil Nadu Industrial Establishments (Conferment of Permanent Status) Act, 1981

The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, was enacted in 1981 with the object of curbing unfair labour practices aimed at denying permanency to workers in industrial establishments and granting permanency to workers who have worked for a minimum of 480 days in 24 months. It applies to industrial establishments that have been in existence for at least two years where a minimum of 20 workers were employed in the previous year.[195] It does not apply to establishments of a seasonal character and establishments in which work is only intermittently performed.

The Act mandates that every worker who has worked continuously for 480 days in a period of 24 months in an industrial establishment shall be made permanent. Interruptions of work during that period on account of sickness, maternity leave, authorized leave, a legal strike, etc. will not be held against the worker in computing the period of 480 days.[196] In *Mamundiraj N. and others v. Bharat Heavy Electricals Ltd., Trichy and another*,[197] the Madras High Court held that interruption in service caused by artificial breaks effected by the employer could not be allowed to defeat workers' claim for permanency.

As per the Rules framed under the Act, employers are required to maintain a register containing the names of the workers employed, their designation and the date on which they completed 480 days of service. On that basis, an updated list is required to be prepared twice a year and exhibited prominently in the establishment. It is also required to be sent to the concerned Inspector.[198] The Act provides for inspection of relevant records and registers.[199] It also provides for the imposition of the penalty of fine for contravention of the provisions of the Act.

Remedy for workers not made permanent

A worker who has worked for 480 days in a period of two years but not been made permanent may make an application to the concerned Inspector entrusted with the enforcement of the provisions of the Act. After making necessary enquiries, the Inspector may direct the concerned employer to issue an order conferring permanent status on the workman concerned.[201] The Madras High Court has held that once the concerned worker has established before the authority that he or she has the requisite length of service, the Act makes permanency automatic without scope for any further enquiry.[202]

Different categories of precarious workers, including workers termed by the employer as 'contract workers,' can seek permanency as per the provisions of the Act.[203] However, it would not be open for statutory apprentices and *badli* workers to seek permanency under the Act.[204]

Workers may seek relief under the Act only during the subsistence of the employment relationship. The Madras High Court has held that unless there is a continued employer-employee relationship between the worker concerned and the employer on the date of making of the application, he or she cannot seek permanency as per the Act. If the worker has been terminated from service, he or she cannot seek permanency until the order of termination is set aside by the competent court.[205] In a case concerning Hanil Tubes India Private Limited,[206] an automobile component manufacturer, the Madras High Court held that the Act pre-supposes that the workers concerned should not only be in employment on the date of filing the application but should continue to be in employment during the pendency of the application.

In a recent judgment concerning a claim for pension and

In a nutshell

- Workers in industrial establishments in the State of Tamil Nadu who are covered by the Act ought to be made permanent on the completion of 480 days of continuous service in a period of 24 calendar months.
- The engagement of workers on a precarious basis for prolonged periods without any regard for the provisions of the Act would obviously be illegal.

other terminal benefits of a deceased contract worker who had worked in the Tamil Nadu Electricity Board, a public service establishment, the Madras High Court held that a worker who had completed 480 days of service in a period of 24 calendar months would be deemed a permanent employee even if the employer concerned had not conferred him or her with permanent status and even if no direction were issued by the competent authority under the Act.[207]

Prolonged precarious employment: Unfair labour practice under the Industrial Disputes Act

The Industrial Disputes Act, 1947 categorises the prolonged engagement of workers as '*badlis*,' casuals, or temporaries with the object of depriving them of the status and privileges of permanent workers as an unfair labour practice.[208] Unfair labour practices are prohibited under the Act. Employers committing unfair labour practices may be prosecuted and punished. The Supreme Court of India has disapproved of such practices in several cases. A few examples of such judgments are briefly discussed below.[209] In *Trambak Rubber Industries Ltd. v. Nashik Workers Union*,[210] concerning workers in a factory manufacturing automotive butyl tubes, it was the case of the union that the management had resorted to unfair labour practices by engaging workers for production work as trainees and arbitrarily terminating their service. Holding that the management had engaged in unfair labour practice, the Supreme Court observed as follows:

> *"It is pertinent to note the statement of the management's witness that in June-July 1989, the Company did not have any permanent workmen and all the persons employed were trainees. It would be impossible to believe that the entire production activity was being carried on with none other than the so-called trainees. If there were trainees, there should have been trainers too. The management evidently came forward with a false plea dubbing the employees/workmen as trainees so as to resort to summary termination and deny them legitimate benefits. On the facts and evidence brought on record, the conclusion was inescapable that the appellant employer resorted to unfair labour practice."*

The Supreme Court has also held that creating artificial breaks in the service of workers would not allow the employer to avoid the charge of the unfair labour practice. In *Regional Manager, State Bank of India v. Raja Ram*,[211] the Court had observed as follows: *"…when an employee is appointed temporarily for successive fixed tenures with artificial breaks in between so as to deny the employee the right to claim permanent appointment. This action would be an unfair labour practice within the meaning of the phrase in Section 2(ra) of the Act."*

Earlier, in *H.D. Singh v. Reserve Bank of India*,[212] the employer's action in advising the engagement of workers on rotation basis as 'badli workers' was held to be an unfair labour practice.

In *Bajaj Auto Ltd. v. Rajendra Kumar Jagannatha Kathar*,[213] workers engaged as welders, fitters, turners, etc. in the two-wheeler and three-wheeler manufacturing factories of Bajaj Auto Ltd. alleged that the management had committed an unfair labour practice prohibited under the Mahararashtra Registration of Trade Unions and Prevention of Unfair Labour Practices Act by employing them for only seven months a year so as to ensure that they would not be employed continuously for more than 240 days at a stretch. The Court held that the management had committed the unfair labour practice of employing workers as casuals or temporaries and continuing them as such for years, with the objective of depriving them of the status and privileges of permanent employees.

In a nutshell

The practice of employment of workers for prolonged periods under the designation of 'trainees,' 'learners,' 'probationers' or 'company apprentices' would amount to an unfair labour practice under the Act. Engaging workers for successive fixed terms with artificial breaks in between would also amount to an unfair labour practice. Employers adopting such practices are clearly acting in violation of the prohibition on unfair labour practices imposed by the Industrial Disputes Act.

Industrial Employment (Standing Orders) Act, 1946

This national legislation requires employers *"to make the terms and conditions of employment of industrial employees well settled and known to the employees before they*

accept employment." [214] The Act applies to all industrial establishments in which 100 or more workers are employed.[215] The government could choose to extend the application of the Act to any other industrial establishment as well.[216] It could also exempt any establishment from the application of the provisions of the Act.[217]

The Act makes it mandatory for employers to frame standing orders defining the conditions of employment under them.[218] The schedule to the Act sets out the matters to be covered by the standing orders. The subjects specified in the schedule include classification of workers, hours of work, wage rates, leave, acts and omissions which constitute misconduct and termination of employment. All the matters specified in the schedule should be covered by the orders. As far as practicable, the standing orders should be in conformity with the model standing orders applicable.[219]

The standing orders are required to be certified by the designated Certifying Officer. The Certifying Officer is required to examine the fairness and reasonableness of the standing orders.[220] Prior to certification, the Certification Officer is also required to ascertain whether the workers in the establishment or the trade union representing them have any objections to the draft standing orders.[221] In the state of Tamil Nadu, as per the Tamil Nadu Industrial Employment (Standing Orders) Rules, when there is no trade union operating in an establishment, the draft standing orders are required to be circulated to three representatives of the workers elected at a meeting convened for the purpose. Upon certification, the employer is obliged to display the standing orders prominently in the language understood by the majority of the workers in all departments where the workers are employed.[222] The Supreme Court has held that the certified standing orders framed under the Act are statutorily imposed conditions of service and are binding upon the employer and the employees.[223] Until the standing orders are certified, the model standing orders will be applicable in the establishment.[224]

As per the definition clauses in the model standing orders applicable in the state of Tamil Nadu,[225] the period of probation should be three months in the case of unskilled workers and six months for skilled workers. The period of apprenticeship for learning any skilled work should be one year for those with the prescribed technical qualification and three years for others. As per clause 14 of the model standing orders, no employer shall dispense with the service of any worker having at a minimum continuous service for one year, except for a reasonable cause and after giving at least one month's notice or wages in lieu of the notice. However, such notice shall not be necessary in the case of apprentices.

Any violation of the standing orders would entitle the workers concerned to move the forums created under the Industrial Disputes Act for appropriate relief.

Proposed amendment to the law

Efforts to amend the law so as to restrict the number of precarious workers who can be employed in factories have waxed and waned. For example, on 14 May 2008, a Bill to amend the Industrial Employment (Standing Orders) Act, 1946 was introduced in the Legislative Assembly of the State of Tamil Nadu by fixation of the number/percentage of apprentices, probationers, *badlis*, temporary or casual workmen with reference to the total number of workmen employed in that industrial establishment "so as to overcome the long periodicity of apprenticeship and unfair labour practices," and passed by the assembly. The amendment, however, could not be made for want of approval from the central government.

In a nutshell

Employers are expected to adhere to the standing orders of the company. Engagement of workers on a precarious basis for prolonged periods in violation of company standing orders would be in violation of the law.

Rights of workers upon completion of 240 days of service

Concept of 240 days

As per the provisions of the Industrial Disputes Act, a worker is considered to be in continuous service under an employer for a year if he or she has actually worked for 240 days.[226] It has been clarified in several judgments that the completion of 240 days of service does not confer any legal right on a worker to be regularised in service or be made permanent.[227] However, after working for a minimum of 240 days, workers would be entitled to protection against arbitrary termination and to rights in the case of termination.

The Act defines termination from service as "retrenchment," subject to a few exceptions. The non-renewal of a fixed-term contract between an employer and a worker is one such exception. Judgments of the Supreme Court indicate that an employer cannot take shelter under that exception when he or she adopts unfair practices with a view to defeat the objects of the Act. For instance, in *Haryana State Electronics Development Corporation v. Mamni*,[228] referring to the practice of the corporation in terminating the services of a worker every 89 days and re-appointing her after a gap of a day

In a nutshell

- Employers are required to follow the procedure prescribed under the Industrial Disputes Act before retrenching any worker who has worked for a minimum of 240 days.
- In the case of factories where 100 or more workers were employed in the previous year, governmental permission is required before retrenching workers who have worked for a minimum of 240 days.
- Employers cannot take shelter under the exception of non-renewal of a fixed-term contract when the very engagement of workers under such contracts is an unfair labour practice designed to defeat the protection granted under the Act.
- Any retrenchment effected in violation of the provisions of the Act would obviously be illegal.

or two, the Court observed that such a practice was adopted to defeat the rights available to her under the Industrial Disputes Act and would, therefore, not be covered by the exception relating to non-renewal of a fixed-term contract.

A worker who has worked for 240 days or more in the previous year cannot be terminated from service by the employer without being informed of the reasons for the termination and being given one month's notice or wage in lieu of the notice. In the case of industries employing 100 workers or more, the requirement extends to three months' notice. In such a case, the employer is also required to obtain the permission of the government before effecting any retrenchment. Apart from giving such notice or paying wages in lieu of the notice, employers retrenching workers are required to pay them compensation at the rate of 15 days of average pay for every completed year of service.

As per the Act, employers are usually required to follow the rule of 'last come, first go' while effecting any retrenchment. This would mean that the employer should retrench workers on the basis of their seniority and first retrench the worker who was the last to be recruited to that category. The Act also requires the employer to give preference to retrenched workers over other persons while recruiting persons afresh for the work.[229] The Supreme Court has observed that the Act casts a statutory obligation on the employer to give an opportunity to the retrenched worker to offer himself or herself for re-employment.[230] The Court has also held that this obligation would extend to all retrenched workers and not merely those who had worked for 240 days or more.[231]

Relief granted in cases of violation of the prescribed conditions

Earlier, the view taken by the Supreme Court was that, if a termination were effected in violation of the procedure prescribed under the Act, it would be invalid and that the concerned worker would be entitled to the relief of reinstatement with back wages.[232] In the recent past, however, the Court has taken the view that the relief to be granted to the concerned worker would depend upon various factors such as the method of selection and appointment, nature of appointment, length of service of the worker and whether the industry is sick or not.[233] The Court has held that a distinction must be drawn between a daily wager and a person holding a regular post and, that in the case of wrongful termination of service of a daily wager, compensation may be awarded as relief.[234]

Special legislation relating to apprentices

Apprentices Act, 1961

The Apprentices Act, 1961 is a central Act that regulates and controls the training of apprentices in industries. It applies to industries in the public as well as private sectors notified by the central government.[235] Establishments engaged in the manufacture of motor cars are among the industries to which the Act is applicable.[236] As noted earlier in this report, the companies studied engage both 'statutory or Act apprentices' and 'company apprentices' or other workers termed as 'apprentices.' The Act applies only to apprentices specifically engaged under the Act and not to all workers described as 'apprentices' by employers. The Act defines the term 'apprentice' to mean "a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship." [237] Employers are required to enter into 'contracts of apprenticeship' with apprentices spelling out the terms and conditions of apprenticeship including the period of apprenticeship training.[238] The Act prohibits apprentices from being engaged overtime without the approval of the Apprenticeship Adviser.[239]

During the period of apprenticeship, apprentices are entitled to a stipend at the prescribed rate.[240] Expenses towards the stipend for the categories of graduate, technician and technician (vocational) apprentices are shared equally between the employer and the government. Expenses towards stipend for trade apprentices are to be borne by the employer.[241] It is not obligatory for the employer to offer any employment to an apprentice on completion of the period of training[242] unless there is a condition to that effect in the contract of apprenticeship.[243]

Making a distinction between apprentices and other workers, the Act emphasizes that Apprentices are trainees and not workers.[244] It states that the provisions of labour laws shall not apply to apprentices.[245]

Right to freedom of association

As statutory apprentices are not considered workers and as the provisions of the labour laws do not apply to them, it appears that they cannot register trade unions under the Trade Unions Act and will not be entitled to the protection against anti-union discrimination under the Industrial Disputes Act. In effect, they are denied the protection of labour laws concerning the freedom of association. Any denial to Act apprentices or statutory apprentices of the right to form and join unions is in direct conflict with ILO jurisprudence on the subject. The ILO Governing Body's Committee on Freedom of Association (CFA) has held that apprentices under training arrangements covered by special legislation should also have the right to join workers' organizations and participate in their activities. In its conclusions in Case No. 2757 relating to Peru contained in its 360th Report, the Committee made the following observations:

Observations of the CFA in Case No. 2757 (Peru), 360th Report

990. *Workers covered by training arrangements. … The Committee … draws the Government's attention to the fact that, in accordance with Article 2 of Convention No. 87, ratified by Peru, all workers — with the sole exception of members of the armed forces and the police — should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers and self-employed workers in general, who should nevertheless enjoy the right to organize. …* ***In the Committee's opinion, persons hired under training agreements should have the right to organize. The status under which workers are engaged with the employer, as apprentices or otherwise, should not have any effect on their right to join workers' organizations and participate in their activities.***

Thus, in accordance with international labour standards, statutory apprentices in India should also have the right to form and join trade unions to protect their interests.

Law relating to inter-state migrant workers

The Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979

The Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979, a national law, applies to 'inter-state migrant workers' defined as "persons recruited by or through a contractor in one state under an agreement or other arrangement for employment in an establishment in another state.[246] The Act makes it mandatory for employers of establishments employing five or more inter-state migrant workers to obtain a certificate of registration.[247] Contractors through whom five or more inter-state migrant workers are recruited for employment in another state are also required to obtain a licence under the Act.[248] The Act requires inter-state migrant workers to be paid the same wages as other workers in the establishment performing the same or similar work. Their hours of work, holidays, and other conditions of service similarly should also be on par with that of other workers in the establishment performing the same or similar work.[249]

Contractors are required to furnish details of the inter-state migrant workers employed through them to the concerned authority within a period of 15 days of the date of employment.[250] Furthermore, the Act imposes an obligation on contractors to issue passbooks to every inter-state migrant worker employed through them containing details of the name of the establishment where the worker is employed, the period of employment, proposed payment and other particulars.[251] At the time of their recruitment, the contractor is required to pay the migrant workers a displacement allowance.[252] A journey allowance is also required to be paid to the workers both for their outward and return journeys.[253]

When the work performed by migrant workers is not of the same or similar nature as that of other workers in the establishment, the migrant workers are required to be paid wages at the same rate as that of the lowest category of workers directly employed by the principal employer or the prescribed minimum wage, whichever is higher.[254] The responsibility for payment of wages primarily lies with the concerned contractor.[255] Inter-state migrant

In a nutshell

Statutory apprentices are only to be accorded practical training in accordance with the provisions of the Act. They cannot be used as substitutes for regular workers and cannot be required to work overtime without the approval of the Apprenticeship Adviser. Any use of statutory apprentices in violation of the provisions of the Act would be illegal.

workers are also entitled to the necessary protective clothing, residential accommodation and medical facilities. These benefits are required to be provided by the concerned contractor.[256]

The Act provides for inspection of premises where inter-state migrant workers are employed.[257] Contravention of the provisions of the Act is an offence punishable with imprisonment and/or fine.[258]

In a nutshell

When inter-state migrant workers to whom the Act is applicable perform work of the same kind as the permanent or regular workers in an establishment or work of a similar kind, they are entitled to be paid wages at the same rate. They would also be entitled to parity in the matter of hours of work, other conditions of service and holidays. Non-compliance with these requirements in the case of inter-state migrant workers covered by the Act would be unlawful.

Hours of work and permissible overtime work: The Factories Act, 1948

The Factories Act, 1948 applies to establishments employing 10 or more workers where a manufacturing process is carried on using power, and establishments employing 20 or more workers where a manufacturing process is carried on without the aid of power.[259] It contains a number of provisions to ensure the health, safety and welfare of workers. This sub-section discusses only a few aspects of the Act relating to working hours, spread over of work, overtime work and leave.

Working hours

As per the Act, workers should not be required to work for more than nine hours a day or 48 hours a week.[260] Inclusive of overtime, the number of hours of work in a day should not exceed 10.[261] Workers should ordinarily not be required to work for more than five hours at a stretch without a rest interval of at least half an hour.[262] Inclusive of such rest intervals, the periods of work should ordinarily not exceed ten-and-a-half hours a day.

The Chief Inspector has the discretion to increase the spread over up to 12 hours for reasons to be specified in writing.[263] The State Government may issue an order exempting a factory from these requirements in order to enable a factory to deal with an exceptional pressure of work.[264] However, even in such a case, the total number of hours of work in a day should not exceed 12 and the total number of hours of work in a week, including overtime work, should not exceed 60.[265] The Act prohibits employers from requiring workers to work overtime for more than seven days at a stretch and for more than 75 hours in any quarter.[266]

Extra wages for overtime work

The Act requires workers to be paid wages at twice the normal rate for the period of overtime work.[267]

Weekly holiday

The Act requires workers to be given at least one weekly holiday.[268]

Entitlement to leave

Workers who have worked for 240 days or more in a factory shall be entitled to earned leave of 1 day for every 20 days of work.[269] The entitlement to other kinds of leave would flow from the applicable Standing Orders, if any.

Proposed amendments for more flexibility

The Ministry of Labour and Employment, Government of India has now proposed to amend the Factories Act. With a view to afford more flexibility to employers, the maximum number of hours of permissible overtime work in any quarter is proposed to be increased to 115 in the place of 75. It may further be enhanced to 125 hours in the public interest. It is also proposed to empower state governments to increase the period of spread over up to 12 hours in a factory or a group of factories by issuing a notification in the official gazette.[270]

Conclusion

The widespread practices in the automotive sector of engaging precarious workers in large numbers to do work of a perennial nature, keeping them precarious for prolonged periods, paying them a fraction of the wages of the permanent workers and requiring them to regularly work overtime beyond the maximum permissible hours are clearly not permissible under the law and are,

In a nutshell

When employers require precarious workers to perform overtime work in excess of the number of permissible hours of work under the Act or when they do not pay the workers wages at twice the normal rate for the period of overtime work, they would clearly be acting in violation of the law. When employers refuse to allow precarious workers to enjoy any earned leave, they would again be acting in violation of the law.

therefore, illegal. Keeping workers precarious for prolonged periods undoubtedly undermines their freedom of association and collective bargaining rights. It in fact virtually nullifies those rights. This is because it would be extremely difficult for workers to effectively exercise their right to freedom of association and collective bargaining rights while they are precarious on account of several factors including the relative ease with which they could be removed from service and the difficulties of establishing an employer-employee relationship between themselves and the principal employer. Practices that virtually nullify the constitutional right to freedom of association —indeed, a universal human right — cannot be viewed as 'legal.'

Endnotes

[76] In *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111, 124, the Supreme Court observed: "The various articles in Part III have placed responsibilities and obligations on the state vis-à-vis the individual to ensure constitutional protection of the individual's rights against the state."

[77] Art 37.

[78] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, 408.

[79] *Ajay Hasia v. Khalid Mujib Sohrawadi* (1981) 1 SCC 722, 781.

[80] People's Union for Democratic Rights v Union of India (1982) 3 SCC 235, 253.

[81] These are rights protected under Articles 19(1)(a), 19(1)(b) and 19(1)(d) respectively.

[82] *Kameshwar Prasad v. State of Bihar*, AIR 1962 SC 1166, 1168.

[83] *Himatlal K. Shah v. Commissioner of Police* (1973) 1 SCC 227, 240.

[84] *All India Bank Employees Association v. The National Industrial Tribunal (Bank Disputes) Bombay, AIR* (1962) SC 171, 180-182

[85] For example, see *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCC 593, 640, *Food Corporation of India Staff Union v. Food Corporation of India and another, AIR* (1995) SC 1344 and *B.R. Singh v. Union of India* (1989) 4 SCC 710, 720.

[86] Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608, 618-619.

[87] *M. Nagaraj v Union of India* (2006) 8 SCC 212, 244.

[88] See *A.K. Bindal v. Union of India*, (2003) 5 SCC 163, at page 177 and *People's Union for Democratic Rights v. Union of India*.

[89] (1982) 3 SCC 235, 252.

[90] *Olga Tellis v. Bombay Municipal Corporation* (1983) 3 SCC 545, 572.

[91] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, 281-284 .

[92] *D.K.Yadav v. JMA Industries Ltd.* (1993) 3 SCC 259, 269; *Delhi Transport Corporation v. DTC Mazdoor Congress* (1991) Supp. (1) SCC 600, 651

[93] *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42, 70.

[94] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, 183.

[95] *Motor General Traders v. State of Andhra Pradesh* (1984) 1 SCC 222, 229.

[96] *E.P. Royappa v. State of Tamil Nadu* (1974)4 SCC 3,38.

[97] *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, 246.

[98] *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235, 258-260.

[99] *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235, 260.

[100] Art 42.

[101] Art 43.

[102] Art 39(d).

[103] Art 39(e).

[104] Art 39(b).

[105] Art 39(c).

[106] Art 37.

[107] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, 730.

[108] *Randhir Singh v. Union of India* (1982) 1 SCC 618, 623.

[109] They have concurrent legislative powers in respect of subjects such as trade unions, industrial and labour disputes, social security, labour welfare, workmen's compensation and maternity benefits. Apart from this, the central government has exclusive legislative powers in respect of subjects such as the regulation of labour and safety in mines and oilfields, and industrial disputes concerning employees of the union. In addition, the central government may make any law for implementing any treaty, agreement or convention or any decision made at any international conference or association or other body.

[110] Section 6.

[1111] Proviso to section 4(1)

[112] Section 10 c empowers the Registrar to withdraw or cancel the certificate of registration if he or she is satisfied that a registered trade union ceases to have the requisite minimum number of members.

[113] Section 22. In the case of trade unions representing workers in the unorganised sector, sub-section (1) of section 22 prescribes that at least half of the office bearers of every registered trade union in an unorganised sector shall be persons actually engaged or employed in an industry with which the trade union is connected.

[114] Section 17.

[115] Section 18.

[116] The term 'workman' has been defined under section 2(s) of the Act to mean 'a person employed in any industry to do any manual, skilled, unskilled, operational, clerical or supervisory work.' Persons employed mainly in a managerial or administrative capacity are excluded from the scope of the definition and so also those employed in a supervisory capacity performing functions mainly of a managerial nature or drawing wages of more than Rs.10,000/- per month.

[117] Section 25-T.

[118] Part I of the Fifth Schedule to the Act.

[119] Section 34.

[120] Section 25-U.

[121] Sections 2(k) and 2-A.

[122] Section 2-A.

[123] Section 2(k).

[124] Section 33(3).

[125] This power flows from section 11-A of the Act.

[126] This right is evident from sections 2(p), 18 and 19 of the Act and also the fifth schedule to the Industrial Disputes Act which sets out the acts described as 'unfair labour practices' under the Act.

[127] As per item 15 in Part I of the fifth schedule, any refusal on the part of the employer to bargain collectively in good faith with the recognised trade union is an unfair labour practice. Likewise, under item 3 of Part II of fifth schedule which lists out unfair labour practices on the part of trade unions, any refusal on the part of a recognised trade union to bargain collectively in good faith with the employer is an unfair labour practice.

[128] Ibid.

[129] Section 18(1).

[130] Item 13 of of Part I of the Fifth Schedule to the Act.

[131] Section 29.

[132] Section 23.

[133] Section 10(1).

[134] Section 10(1).

[135] Gopalakrishnan and Tortell, Access to Justice, Trade Union Rights and the Indian Industrial Disputes Act, International Journal of Comparative Labour Law and Industrial Relations, Vol. 22 (2006), Issue 4 pp. 529-562.

[136] See Digest of principles and decisions of the Freedom of Association Committee of the Governing Body of the ILO Fifth (revised edition), ILO, Geneva, 2006, para. 945.

[137] Appendix III.

[138] Rule 10.

[139] This is evident from a combined reading of sections 22 to 24 and items 4 (b), 8 and 12 of Part I of the Fifth Schedule to the Industrial Disputes Act, 1947.

[140] Sections 22, 23 and 24.

[141] Item 4(b) of Part I of the Fifth Schedule to the Act

[142] Item 8 of Part I of the Fifth Schedule to the Act

[143] Item 12 of Part I of the Fifth Schedule to the Act.

[144] Sections 25, 26-28 and Item 1 in Part II of Schedule V read with sections 25-T and 25-U.

[145] Section 2(n) read with the First Schedule to the Act.

[146] Section 22.

[147] Section 12(1).

[148] Section 10(1)

[149] Section 22 read with section 24.

[150] Sankaran, Kamala, Freedom of association in India and international labour standards, Lexis Nexis Butterworths Wadhwa, Gurgaon, First edition, 2009, p. 191.

[151] G.O Ms. No. 122, Labour and Employment (D2) Department dated 10 August 2012 was issued adding the automobile manufacturing industry to the first schedule to the Industrial Disputes Act. G.O Rt. No. 256, Labour and Employment (D2) Department was also issued on 10 August 2012 declaring the automobile manufacturing industry as a public utility service under the Act for a period of six months from the date of publication of the notification.

[152] See judgment of the Madras High Court dated 2 July 2013 in W.P No. 33142 of 2012, online at http://www.indiankanoon.org/doc/192546148/?type=print

[153] See Das, KSL and George, S., Labour Practices and Working Conditions in TNCs: The Case of Toyota Kirloskar in India in Labour in Globalising Asian Corporations: A Portrait of Struggle, Asian TNC Monitoring Network Series, Asia Monitoring Resource Centre, Hong Kong, 2006, pp.279, 286, 296 online at http://www.amrc.org.hk/system/files/Labour%20in%20Globalising%20Asian%20Corps%20-%20Chap%209-10.pdf

[154] Tamil Nadu Automobile and Auto Components Policy, 2014, Industries Department, Government of Tamil Nadu, p.17, online at cms.tn.gov.in/sites/default/files//documents/Automobile_Policy.pdf

[155] Sankaran, note 150 above.

[156] Freedom of Association, Digest of Principles and Decisions of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, ILO, Geneva, 2006, para. 576.

[157] Ibid.

[158] Section 2(1)(c)(g) of the Act defines the term 'contractor'as follows: " 'contractor', in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor." As per section 2(1)(b), a workman shall be deemed to be employed as 'contract labour' in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. As per section 2 1 g , the term 'principal employer' refers to the owner or occupier of a factory or any person responsible for the supervision and control of the establishment.

[159] (1974) 1 SCC 596, 601.

[160] Section 1.

[161] See judgment of the Supreme Court in *Barat Fritz Werner Ltd v. State of Karnataka*, (2001) 4 SCC 498, 513-514.

[162] Shyam Sundar, K.R., The Contract Labour in India, in Shyam Sundar, K.R (ed.), Contract Labour in India, Issues and Perspectives, p.11 at p.50.

[163] Section 7.

[164] Section 12.

[165] Rule 17 of the Tamil Nadu Rules read with Form I.

[166] Per section 13(1) of the Act and Rule 21 of the Tamil Nadu Rules read with Form IV.

[167] Rule 18(2) of the Tamil Nadu Rules.

[168] Section 12(2).

[169] Sections 8 and 14(1)(a).

[170] Section 14(1)(b).

[171] Rules 63 and 64 read with Rule 25(2)(iv).

[172] Sub-section (4) of section 21.

[173] Rule 25 (2)(v) (a).

[174] Rule 25(v)(a).

[175] Chapter V of the Act and Chapter V of the Rules.

[176] Section 20.

[177] Section 28.

[178] Sections 24 to 27.

[179] (1995) 5 SCC 27.

[180] (2001) 7 SCC 1.

[181] *Secretary, Haryana State Electricity Board v. Suresh* reported in 1999 3 SCC 601; *General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers Union* (2008) 12 SCC 275; *Bharat Heavy Electricals Limited v. State of Uttar Pradesh* (2003) 6 SCC 528 .

[182] *Ram Singh v. Union Territory, Chandigarh* (2004) 1 SCC 126, 131 .

[183] *International Airport Authority of India v. International Air Cargo Workers' Union* 2009 13 SCC 374, 387; *General Manager OSD , Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and another* (2011) 1 LLN 368 SC , 369.

[184] *International Airport Authority of India v. International Air Cargo Workers' Union* (2009) 13 SCC 374 followed by the Calcutta High Court in its judgment dated 22 February 2011 in *M/s Indian Iron and Steel Company Ltd. (Burnpur Works, Burnpur) v. State of West Bengal* referred to in Raghavan, Ajay, Determination of Control and Supervision over Contract Labour, 21 November 2011, published online on the website of Employment Alliance at (last accessed in December 2012).

[185] *International Airport Authority of India v. International Air Cargo Workers' Union* (2009) 13 SCC 374, 387-388).

[186] *Dena Nath v. National Fertilizers Ltd.* (1992) 1 SCC 695, 706; *Gujarat Electricity Board, Thermal Power Station v. Hind Mazdoor Sabha*, (1995) 5 SCC 27, 47, 51, 56. While the decision of the government is final, it may of course be subject to judicial review.

[187] *Steel Authority of India Ltd. v. National Union Waterfront Workers* (2001) 7 SCC 1, 42-63. The judgment in the *SAIL* case overruled the judgment in the *Air India Statutory Corporation v. United Labour Union*, AIR (1997) SC 645 where the Supreme Court held that consequent upon the issue of a notification under section 10, a direct relationship is established between the principal employer and the contract workers and that the contract workers are then entitled to be absorbed in the service of the principal employer.

[188] *Gujarat Electricity Board, Thermal Power Station v. Hind Mazdoor Sabha* 1995 5 SCC 27, 58 .

[189] (2009) 17 SCC 318, 320.

[190] (1996) 10 SCC 599, 607).

[191] For example, see Singh, Gayatri, Judiciary jettisons working class, Combat Law, Volume 7, Issue No.6, November-December 2008, p. 24, and Cox, Jane, 'With Eyes Wide Open,' Recent Trends in Supreme Court Labour and Industrial Judgments in Shyam Sundar, K.R. (ed.) , Contract Labour in India, Issues and Perspectives, Daanish Books, 2012, p. 109.

[192] See Singh, Combat Law, ibid; Prasad, NGR, Combat Law, ibid p. 86; Cox, Jane, Judiciary leaves contract labour in the cold, Combat Law, ibid. p. 68.

[193] *Harjinder Singh v. Punjab State Warehousing Corporation* (2010) 3 SCC 192, 209, 214.

[194] See Summary record of discussions of the 43rd session of the Indian Labour Conference held on 23-24 November 2010, Vigyan Bhavan, Annexure-II, Conference Committee on Problems of Contract Labour, Social Security, Wages and Amendments in the Contract Labour Legislation, available online at http://labour.gov.in/upload/uploadfiles/files/Divisions/LC&ILAS/43rd%20ILC.pdf

[195] The definition of the term 'workman' under the Act excludes persons employed in a supervisory or managerial capacity drawing wages of over Rs. 3500/- per month. Workers employed in industrial establishments engaged in construction work and persons employed in the police and prison service are also excluded. While section 2(3) of the Act relating to application of the Act refers to a minimum of 50 workmen, under G.O No. 2043, Labour and Employment, 24 September 1982, the application of the Act was extended to all industrial establishments employing more than 20 workers in which not fewer than 20 workers were employed on any day in the preceding year with the exception of seasonal establishments and those in which work is performed only intermittently.

[196] Section 3.

[197] 1999-I-LLJ-622.

[198] Rule 6.

[199] Section 5.

[200] Section 6.

[201] Section 3(1) read together with Rule 6(4).

[202] Judgment dated 23 February 2007 in W.A No. 1186 of 2006, The Lakshmi Mills Ltd. v. The Deputy Chief Inspector of Factories and another.

[203] The judgments of the *Madras High Court in Superintending Engineer, Vellore Electricity Distribution Circle, Vellore and others v. Inspector of Labour, Perambalur and others* (2004) 3 LLN 598 (Mad.) and R. Lakshmi v. The Chief Engineer (Personnel), Tamil Nadu Electricity Board (2012) 3 LLN 681 (DB) (Mad.) indicate that contract workers can seek permanency under the Act.

[204] *Metal Powder Company Limited v. State of Tamil Nadu and another* (1985) II LLJ 376.

[205] *S. Sivakumar v. The Deputy Inspector of Factories and another* (2007) 1 LLN 302.

[206] Judgment dated 1 February 2012 in *The management of Hanil Tubes India Private Limited v. Workmen*, W.P No. 24208 of 2011.

[207] *R. Lakshmi v. The Chief Engineer (Personnel), Tamil Nadu Electricity Board* (2012) 3 LLN 681.

[208] Item 10 of Part I of the V schedule to the Act.

[209] Judgments of the Supreme Court relating to the use of sham contracts have been discussed in the sub-section on the Contract Labour Act. Cases where the Tamil Nadu Industrial Establishments Conferment of Permanent Status to Workmen Act, 1981 has been invoked have been discussed under the sub-section relating to the Act.

[210] (2003) 6 SCC 416, 420.

[211] (2004) 8 SCC 164, 167.

[212] (1985) 4 SCC 201, 210.

[213] (2013) 5 SCC 691.

[214] *Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union* (1999) 1 SCC 626, 631.

[215] Section 1(3). It, however, will not apply to the establishments specified in Section 13-B of the Act.

[216] Proviso to Section 1(3).

[217] Section 14.

[218] Section 3(1).

[219] Section 3(2).

[220] Section 4.

[221] Section 5.

[222] Section 9.

[223] *Rajasthan State Road Transport Corporation v. Deen Dayal Sharma* (2010) 6 SCC 697, 704. The certified orders cannot be modified except by an agreement between the employer and the trade union representing the workers. This can be done only after six months from the date of which they came into operation (Section 10(1)).

[224] Section 12-A.

[225] Schedule I of the Tamil Nadu Indstrial Employment Standing Orders Rules, 1947 sets out the model standing orders applicable in the state of Tamil Nadu.

[226] Section 25-B.

[227] *M.P. Housing Board v. Manoj Shrivastava* (2006) 2 SCC 702, 709; *Madhyamik Shiksha Parishad v. Anil Kumar Mishra.*

[228] (2006) 9 SCC 434, 437.

[229] Section 25-H .

[230] (2006) 1 SCC 530, 538.

[231] (1996) 5 SCC 419, 427.

[232] *Mohan Lal v. Bharat Electronics Limited*, (1981) 3 SCC 225, 238).

[233] *G.M, Haryana Roadways v. Rudhan Singh* (2005) 5 SCC 591, *Jagbir Singh v. Haryana State Agricultural Marketing Board and another* (2009) 15 SCC 327, *BSNL v. Man Singh* (2012) 1 SCC 558

[234] *Rajasthan Development Corporation v. Gitam Singh* (2013) 5 SCC 136 .

[235] Section 1(4)(a).

[236] List of the group of industries covered under the Apprentices Act, 1961, Directorate General of Employment and Training, Ministry of Labour, Government of India, online at http://dget.nic.in. The Act makes it obligatory for employers of notified industries to engage apprentices for imparting practical training to them in accordance with the Act. The number of apprentices to be engaged is based on the ratio prescribed by the government of trade apprentices to workers other than unskilled workers in the trade. It is, however, open to the employer to engage apprentices in excess of the prescribed ratio. (Section 8(1)).

[237] Section 2 (aa).

[238] Section 4(3) read with Section 6.

[239] Section 15(2).

[240] Section 13(1).

[241] An overview of the Apprenticeship Training Scheme, Directorate General of Employment and Training, Ministry of Labour, Government of India, online at http://dget.nic.in/schemes/ats/ATSOverview.htm

[242] Section 22(1).

[243] Section 21(2).

[244] Section 18(a) and section 2(r).

[245] Section 18 b However, the provisions contained in Chapters III, IV and V of the Factories Act relating to health, safety and welfare will be applicable to apprentices.

[246] Section 2(e).

[247] Sections 4 and 6.

[248] Section 8(1)(a).

[249] Section 13(1)(a).

[250] Section 12(1)(a).

[251] Section 12(1)(b).

[252] Section 14.

[253] Section 15.

[254] Rule 25 of the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) (Tamil Nadu) Rules, 1983.

[255] Section 17.

[256] Section 16.

[257] Section 20.

[258] Sections 25 and 26.

[259] Section 2(m)

[260] Sections 54 and 51

[261] Section 64(4)

[262] Section 55

[263] Section 56

[264] Section 65(1)

[265] Section 64

[266] Section 65(3)

[267] Section 59

[268] Section 52

[269] Section 79

[270] The Factories (Amendment) Bill, 2014, available online at http://labour.nic.in/upload/uploadfiles/files/latest_update/what_new/53994ae87860bBriefforNIC.pd

Photo: Suzanne Adely

Police gather to monitor worker march and rally before making arrests.

SECTION 6
Gaps Between Law and Practice

SECTION 6: Gaps Between Law and Practice

> *In the last 63 years, Parliament and the State Legislatures have enacted several laws for achieving the goals set out in the Preamble but their implementation has been extremely inadequate and tardy and the benefit of welfare measures enshrined in those legislations has not reached millions of poor, downtrodden and disadvantaged sections of the society and the efforts to bridge the gap between the haves and have-nots have not yielded the desired result.* [271]

The wide gaps between the letter of the labour laws and their implementation in practice would be evident from the case studies and findings and a reading of the section on Indian law. This section looks at enforcement gaps and contributory factors from a broader perspective. It begins with a discussion of the implementation gaps in relation to the Contract Labour Act and the factors contributing to the gaps. This is followed by a look at the enforcement gaps in relation to the Conferment of Permanent Status Act. The section concludes with a brief discussion of the shortcomings in the implementation of the labour laws of the country more generally.

Implementation of the Contract Labour (Regulation and Abolition) Act, 1970

As stated earlier in this report, the number of workers engaged as 'contract workers' in the manufacturing sector in India has swelled over the years. In spite of the clear guidelines laid down in section 10 of the Contract Labour Act, the incidence of contract workers performing work of a regular or perennial nature has increased. A recent study estimates that about 36% of the 6 million contract workers in the country engaged through contractors licensed under the Contract Labour Act perform the same or similar kind of work as directly appointed workers of the principal employer.[273] These trends have been found in various sectors.[274] In the auto sector across the country too, contract workers have been found to be engaged in large numbers for performing work of a perennial nature including production work.[275]

The engagement of contract workers in large numbers is often in violation of the numbers specified in the licences issued under the Act.[276] Furthermore, in violation of the Rules framed under the Contract Labour Act and the licence conditions, contract workers doing the same or similar work as the directly appointed workers of the principal employer are not paid wages at the same rate.[277] Much worse, at times contract workers are not even paid the stipulated minimum wage.[278]

The aforementioned facts indicate a lax attitude towards implementation of the Act by the concerned authorities. Data compiled by the central as well as state governments, however, indicates that inspections are regularly conducted under the Act and that prosecutions have also been launched for violation of the provisions of the Act.

Table 12: Data regarding the enforcement of the Contract Labour (Regulation and Abolition) Act, 1970 in Tamil Nadu

Period	No. of inspections done	Cases disposed of by courts
2007	3309	details not available
01-Jan-08 31-Mar-09	3400	details not available
01-Jan-09 31-Mar-10	3202	144
01-Apr-10 31-Mar-11	2320	8
01-Apr-11 31-Mar-12	2188	10

Source: Policy Notes on Labour, Factories, Employment and Training of the Government of Tamil Nadu for the years 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013

A performance audit conducted by the office of the Comptroller and Auditor General (CAG) to assess the efficacy of the implementation of the Contract Labour Act by the Ministry of Labour and Employment of the

Cumulatively, all the shortcomings in the implementation of the Act have meant that contract workers could be engaged for years on end for work of a perennial nature in industrial establishments with barely any prospects of absorption in the service of the principal employer.

central government and the labour departments of the state governments in Chennai, Delhi, Kolkata, Mumbai and their suburbs in the period from 2001-2006 found several shortcomings in the enforcement of the law.[279] It found that the enforcement of the Act was weak on account of the inadequate number of inspections, check inspections and re-inspections vis-à-vis the number of registered establishments and contractors.[280] It observed that in the state sphere in Chennai, there was no exclusive inspection under the Contract Labour Act. Inspection under various Acts was conducted simultaneously.[281] In addition, there was no system of re-inspection to verify whether the irregularities found in an inspection were rectified.[282] It also found that there was a delay in filing cases under the Act.[283] The report recommended that the system of inspection be strengthened by fixing norms for inspection, conducting check inspections and giving greater emphasis to re-inspection or follow-up inspection.[284]

The audit found flaws in the system of registration and licensing under the Act.[285] The failure of the Labour Department to independently identify establishments/contractors engaging contract labour was identified as a factor that contributed to the weak enforcement of the Act.[286] It found that no survey was conducted to ascertain the number of unregistered establishments and unlicensed contractors[287] nor was there any mechanism in place to identify such establishments and contractors. The report recommended that priority be accorded to setting up a mechanism for *suo motu* identification of establishments/contractors employing contract workers as it would help track down defaulting contractors.[288] In respect of the requirement of filing of returns under the Act, the audit found that in the state sphere in Chennai, no monitoring was done to ensure that all the contractors and registered establishments submit their annual and half yearly returns.[289]

Apart from the factors mentioned in the Report referred to above, the tardy implementation of the law has been attributed to other causes, too. Trade unions allege that the issue of registration certificates and licences under the Act is done without any proper scrutiny in the first place.[290] Collusion among principal employers, contractors and the state authorities, particularly inspectors, has also been identified as a major factor contributing to the weak enforcement of the Act.[291]

The underutilisation of the state's powers under section 10 of the Act is another obvious factor leading to the widespread use of contract workers to perform work of a regular or perennial nature. The number of abolition notifications issued by the central and state governments in exercise of the power under section 10 is low.[292] The Central Government has reportedly until now issued only a total of 82 notifications prohibiting the use of contract labour for work of a perennial nature.[293] The Advisory Boards that could recommend abolition seem not to be even functional in some states.[294] The frequency of meetings of the Board also appears to be low in some cases. The number of meetings of the Contract Labour Advisory Board in the state of Tamil Nadu during the period from 1995 to 2007 was minimal, and in the years 1996, 2000, 2001, 2003, 2005 and 2007, the Board held no meetings whatsoever.[295]

Cumulatively, all the shortcomings in the implementation of the Act have meant that contract workers could be engaged for years on end for work of a perennial nature in industrial establishments with barely any prospects of absorption in the service of the principal employer.

Adding to the implementation woes are other practical difficulties faced by workers seeking to enforce the provisions of the Act. Contract workers are often terminated from service when they petition the authorities seeking abolition of the contract labour system in a particular process.[296] Abolition notifications when issued are often challenged by employers in the courts and are at times struck down by the courts. Moreover, as a result of the judgment in the *SAIL* case referred to above, contract workers may not automatically gain entry into permanent employment even pursuant to the issue of an abolition notification. Instances of unions of permanent workers espousing the cause of contract workers for absorption are also few and far between.[297]

Trade unions in the country have been pressing for better implementation of the Act. At the 43rd session of the Indian Labour Conference (the apex tripartite body in the country that discusses labour-related issues) held in November 2010, the Conference Committee on Problems of Contract Labour unanimously resolved that all efforts should be made to ensure that the provisions of the Act are implemented in letter and spirit and that the labour enforcement machinery at the central and state levels should be strengthened.[298]

As a result of such systemic flaws and lackadaisical implementation of the laws, exploitative and unfair practices of employers abound and labour rights, including the fundamental right to freedom of association, are infringed with impunity.

Implementation of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981

The Government of Tamil Nadu has compiled statistics to indicate that a number of workers have been conferred permanency under the Act in recent years.[299] However, there is no disaggregation of data to indicate the category of workers who have been conferred permanency, whether they were engaged in the public or private sectors, the kind of industry they were engaged in, the number of years after which they were made permanent and whether they were made permanent only after petitioning the concerned authorities under the Act. In the absence of such disaggregated data, it would be difficult to assess the impact that the Act has had on establishments in the private sector in general, and whether it has had any impact at all on the auto sector, in particular multinational companies in the sector.

Moreover, as the Act does not contain provisions for enforcement of the orders passed under the Act conferring permanency, workers who have orders issued in their favour under the Act are often driven to the High Court to seek the enforcement of the orders, adding to the delays in the process of being conferred permanency. Moreover, the Act does not contain any provisions to protect the employment of workers during the pendency of petitions filed by them before the designated authorities seeking conferment of permanency. Hence, they stand the risk of termination of their services upon filing such petitions. If terminated from service, they would need to first go through the long-winded proceedings under the Industrial Disputes Act to be restored to service before seeking permanency under the Act. These shortcomings in the law add to the challenges of its enforcement.

Enforcement of labour laws

The story of enforcement of other labour laws is similar. The pronounced emphasis in policies of the central and state governments on creating a facilitating business environment has reduced the pro-active enforcement of labour laws through inspection as it is seen to discourage an industrial climate.[300]

The lack of effective labour inspection has also been ascribed to other factors, including lack of sufficient personnel, heavy workload, lack of proper training,[301] shortage of infrastructure,[302] lack of cooperation with trade unions,[303] and the unethical conduct of inspectors.[304] While this is the case, heeding to the demands of the industry, the central government has indicated that it intends to re-examine the labour laws "in order to reduce the interference of the inspecting staff" and "ensure a hassle-free industrial environment." It has also indicated that it has taken steps to make the system of inspection "mostly complaint-driven." It has, however, assured that this would not mean that application of the labour laws would not be monitored, or that there would be any internal instructions to the states preventing inspections.[305]

Apart from provisions relating to inspection, most Indian labour laws also contain provisions for prosecution of defaulting employers and imposition of penalties on them. However, the incidence of prosecutions and convictions has been low.[306] The monetary penalties prescribed for violation of the law are generally low[307] and, according to trade unions, insufficient to discourage violations.[308] Although most labour laws provide for imprisonment of defaulting employers, such powers are seldom used.[309]

While labour laws in India generally allow for aggrieved workers and the unions representing them to petition the concerned authorities and the courts seeking compliance with the law, the entire process is often long-drawn-out and delay-ridden. The CAG performance audit referred to above also assessed the efficacy of the implementation of the Industrial Disputes Act. It found that there were substantial delays in completion of conciliation proceedings, submission of failure of conciliation reports, undue delay in referring disputes for adjudication, delay in publication of awards in the gazette, and delay in implementation of awards — in short, delays at every stage. Disputes raised under the Act were found to be pending at times for more than two decades![310]

As a result of such systemic flaws and lackadaisical implementation of the laws, exploitative and unfair practices of employers abound and labour rights, including the fundamental right to freedom of association, are infringed with impunity.

Endnotes

[271] *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers* (2011) 8 SCC 568, 586

[272] Data collected under the ASI for the period 1993-1994 to 2006-2007 about the share of contract workers in relation to the total number of workers in the organised factory sector indicates that their share increased from 13.24 percent in 1993-94 to 30 percent in 2006-2007. See Shyam Sundar, K.R, Non-regular workers in India, International Labour Office, Geneva, 2011, p.11.

[273] V.V. Giri National Labour Institute Study of Assessment of Economic Impact and Financial Implications of Amendment Proposals to the Contract Labour Act, 1970 cited in a Press Release of the Press Information Bureau, Ministry of Labour and Employment, Government of India, 30 August 2012, online at pib.nic. in/newsite/PrintRelease.aspx?relid=80272.

[274] For example, see Society for Labour and Development, A study of the contract labour system in the garment industry in Gurgaon, New Delhi, 2012, pp. 17-18.

[275] This has been indicated by empirical studies. For example, see Annavajhula, JCB, Surendra Pratap, Worker Voices in an Auto Production Chain, Economic and Political Weekly, Vol. XLVII, No. 33, August 18, 2012, pp.52-53. It has been estimated that between 10 and 30 percent of all production workers in the auto industry are contract workers. See Tecknikforetagen-Association of Swedish Engineering Industries, 2008, 26 cited from D'Costa, Anthony, Globalisation, crisis and industrial relations in the Indian auto industry, Int. J. of Automotive Technology and Management, Vol. 11, No. 2, 2011, pp.114, 122. Also see People's Union for Democratic Rights (Delhi), Driving Force, Delhi, 2013, pp. 6, 19, 20.

[276] For example, see A study of the contract labour system in the garment industry in Gurgaon, note 274 above, p. 18.

[277] Press release relating to V.V. Giri National Labour Institute study, note 273 above; Sharma, Omkar, Rationalisation of Labour Laws: Contemporary Issues, Awards Digest, Vol. XXXVII-11-12, November-December 2011, 165, 171. Also see People's Union for Democratic Rights (Delhi), Driving Force, Delhi, 2013, p. 20.

[278] See A study of the contract labour system in the garment industry in Gurgaon, New Delhi, note 274 above, pp. 29-30 and Rajeev, Meenakshi, Contract Labour in India: A Pragmatic View, p. 5.

[279] Ministry of Labour and Employment, Report No. 15 of 2007, online at http://www.cag.gov.in/html/reports/civil/2007_15_peraud/introduction.pdf. Also, available online at http://www.prsindia.org/uploads/media/1237548159/CAG%20report.pdf

[280] Ibid, p. vii.

[281] Ibid, p. 21.

[282] Ibid, p. 23. However, the report records that according to the state labour department, verification was conducted in the subsequent inspection and in the case of persistent violations, show cause notices were issued to the concerned principal employer/contractor.

[283] Ibid, p. vii.

[284] Ibid, p. 23.

[285] Ibid, p. vii.

[286] Ibid, p. vi.

[287] Ibid, p. 19.

[288] Ibid, p. 20.

[289] Ibid, p. vi.

[290] Shyam Sundar, K.R., Contract Labour in India, The battle between flexibility and fairness in Shyam Sundar, K.R. (ed), Contract Labour in India: Issues and Perspectives, Daanish Books, 2012, p.1 at p.29.

[291] Rajeev, Meenakshi, Contract Labour in India: A Pragmatic View and Society for Labour and Development, A Study of the Contract Labour System in the Garment Industry in Gurgaon, New Delhi, 2012, pp. 17 and 45.

[292] Papola, T.S., Contract Labour: An Academic Perspective, in Contract Labour in India, note 278 (left), p. 77 at p. 81.

[293] Business Line, 82 notifications issued for use of contract labour for perennial jobs: Kharge, 4 May 2012, available online at http://www.thehindubusinessline.com/industry-and-economy/82-notifications-issued-for-use-of-contract-labour-for-perennial-jobs-kharge/article3383910.ece

[294] See Shyam Sundar, K.R, Non-regular workers in India: Social dialogue and organizational and bargaining strategies and practices, International Labour Office, Geneva, 2011, pp.18, 39.

[295] Data collected from the Office of the Commissioner of Labour, Chennai cited in Shyam Sundar, K.R (ed.) The Current State of Industrial Relations in Tamil Nadu, ILO, Sub-Regional Office for South Asia, New Delhi, 2010, p. 72.

[296] Monteiro V.C, Trade Unions and Contract Labour in Shyam Sundar, K.R (ed.), Contract Labour in India: Issues and Perspectives, Daanish Books, 2012, p. 147 at p.152.

[297] Hittanagi, V.N, The Debate on Contract Labour in India in Contract Labour in India: Issues and Perspectives, note 285 above, p. 125 at p.129.

[298] Summary record of discussions of the Indian Labour Conference held on 23-24 November 2010, available online at http://labour.nic.in/upload/uploadfiles/files/Divisions/LC&ILAS/43rd%20ILC.pdf

[299] See Policy Notes on Labour, Factories, Employment and Training of the Government of Tamil Nadu for the years 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013.

[300] National Commission for Enterprises in the Unorganized sector, Report on conditions of work and promotion of livelihoods in the unorganized sector, New Delhi, 2007, p. 167 online at https://docs.google.com/file/d/0B9w08mnxUvF9U2JSOWFtUi1US2VkSm0xR3BacFhUZw/edit?pli=1

[301] See Venkata Ratnam C.S and Shyam Sundar, K.R, 'Labour administration in India' in Venkata Ratnam et al, Labour administration in selected Asian countries, ILO Regional Office for Asia and the Pacific, Bangkok, 2008, p. 84 at p. 95 and George, E., Strengthening the Labour Inspection System in Kerala in A. Sivananthiran and C.S. Venkata Ratnam (eds), Prevention and Settlement of Disputes in India, New Delhi, International Labour Organization, 2003, p. 155.

[302] Report on conditions of work and promotion of livelihoods in the unorganized sector, note 300 above, p. 166.

[303] Observations of the CITU referred to in the ILO Committee of Experts on the Application of Conventions and Recommendations, Individual Observation concerning Convention No. 81, Labour Inspection, 1947, India (2005).

[304] Mathew, B., A Brief Note on Labour legislation in India, (Jan-March 2003), p. 46, Asian Labour Update, http://www.amrc.org.hk/alu_article/labour_law/a_brief_note_on_labour_legislation_in_india

[305] Observations of the central government recorded in Individual Observation concerning ILO Convention No. 81, Labour Inspection, 1947, India (2010).

[306] Mathew, B., note 304 above. Moreover, according to Shyam Sundar: "The number of inspections, prosecutions, and convictions under various labour laws has shown a decline in the post-liberalization period." Shyam Sundar, note 294 above, p.15.

[307] Government of India, Ministry of Labour and Employment, Report of the Second National Commission on Labour, New Delhi, 2002, para 11.33.

[308] Venkata, Ratnam and Shyam Sundar, K. R., note 301 above.

[309] See Mathew, B., note 304 above and Venkata Ratnam and Shyam Sundar, note 301 above.

[310] Report No. 15 of 2007, note 279 above, pp. 7-10, 13-18.

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United Nations building in Geneva, Switzerland

SECTION 7
International Law

In this section of the report, ICLR submits that precarious work as described in this report is illegal under international law by virtue of its very nature. Its arguments are based both on human rights law and international labour conventions of the International Labour Organization (ILO).

The Right of Workers to Form and Join Trade Unions to "Protect Their Interests"

A. Universal Acceptance of the Rights to Freedom of Association and Collective Bargaining under ILO Conventions Nos. 87 and 98

1. The International Labour Organization: Tripartism and Universality of these Conventions

The International Labour Organization (ILO) was founded in 1919 as part of the Treaty of Versailles to address the injustices faced by workers which were recognized as destabilizing and a leading cause of unrest. The ILO Constitution ties improvements in workers' rights and conditions to peace. Its preamble reads:

"Whereas universal and lasting peace can be established only if it is based on social justice; and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by … recognition of the principles of freedom of association…"

The Preamble to the Constitution thus declares recognition of the principle of freedom of association as a means of improving conditions of labour and of establishing peace.

The ILO Constitution also recognized the need for universality and uniformity of laws promoting social justice stating:

"...the failure of any nation to adopt humane conditions of labour is an obstacle to the way of other nations which desire to improve conditions in their own countries…" [311]

Conventions, Recommendations and other instruments adopted by the ILO share two fundamental characteristics: Tripartism and Universality.[312] Tripartism means that the instruments adopted by the ILO are the result of ongoing social dialogue between governments, employers' and workers' organizations. This social dialogue is built into all ILO structures. A two-thirds vote of the tripartite International Labour Conference (ILC) is necessary to issue an instrument making the vast majority of the conventions, recommendations and other instruments the result of tripartite consensus.[313] The consensus among the three constituents underlies the universality principle. Once a consensus has been reached on an instrument, its applicability is universal.

The ILO Constitution does not allow for regional bodies to make their own rules, nor does it allow any country which ratifies the instrument to ratify it with "reservations." [314] ILO Conventions and other instruments arising out of consensus among workers, employers and governments of member states guarantee workers a minimum level of protection, with the ILO Constitution allowing for Member states to provide more favourable conditions for workers in their domestic legislation.[315]

2. The Rights to Freedom of Association and Collective Bargaining are Fundamental Rights and Universally Accepted

ILO Conventions Nos. 87 and 98 respectively protect the rights of freedom of association and collective bargaining. Convention No. 87 guarantees to workers the right to form and join organizations of their own choosing without restriction. It further guarantees, *inter alia,* the right of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The purpose of the Convention is the creation of organizations through which it is possible for workers to further and defend their interests. Convention No. 98 affords protection to workers against acts of anti-union discrimination such as unjust dismissals, suspension, transfer and demotion of workers by reason of their trade union membership. It affords protection to workers' and employers' organizations from acts of interference against each other. In addition, it recognizes the collective bargaining rights of workers. The Convention requires member states to take appropriate measures to encourage and promote collective bargaining between workers' organizations and employers or employers' organizations in order to regulate the terms and conditions of employment by means of collective agreements.

These Conventions have been ratified by the overwhelming majority of countries. Even in those countries which have not ratified them, most have passed national legislation which adopt these principles.[316] Convention No. 87 is integrated into two key human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Sub-clause 3 of Article 22 of the ICCPR and sub-clause 3 of Article 8 of the ICESCR respectively provide that State Parties may not pass legislation or apply laws in such a way as to prejudice the rights in Convention No. 87.[317]

In 1998, the ILC adopted the Declaration of Fundamental Principles and Rights at Work (FPRW). This Declaration identifies four "core" categories of rights set out in eight

conventions which are considered fundamental. These include the rights to freedom of association and collective bargaining in Conventions Nos. 87 and 98. The Declaration is based on the acceptance by all ILO member states of the content of the ILO Constitution arising out of membership in the Organization. It records that

"all Member States, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership of the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions …."

Declarations of the ILC, the highest body of the ILO, stand out because they are issued so infrequently,[318] and "always with the aim of expressing or reiterating the Organization's fundamental principles.[319] Conference declarations are, therefore, of a very solemn nature. Thus, even though Declarations are not open for ratification, they may be perceived as an expression of customary international law[320] or of *jus cogens*, i.e. peremptory norms of international law." [321]

As customary international law or *jus cogens*, the rights to freedom of association and collective bargaining are binding on all States (and therefore indirectly on all employers in those states) regardless of ratification of the Conventions. This point has been made in Court opinions throughout the world.

For example, on 12 November 2008 a decision in the case of *Demir and Bakayra v. Turkey*[322] was issued by the European Court of Human Rights, the most important European judicial authority concerning workers' fundamental freedoms and the role of international law in defining the scope of those freedoms. This decision, in which all eighteen judges of the Court's Grand Chamber concurred, is binding upon all states that are parties to the *European Convention on Human Rights and Fundamental Freedoms.* This Convention, which governs 800 million people, provides in Article 11 that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." In this case, the Court overturned the decision by a Turkish Court which had allowed a public employer to repudiate a collective agreement with a public sector union. The Turkish court had relied, in part, on Turkey's non-ratification of sections 5 and 6 of the European Social Charter, on the right to organize and to bargain collectively. In overturning the ruling of the Turkish Court, the European Court of Human Rights considered interpretations of the rights of freedom of association and collective bargaining issued by the ILO. Particularly significant in the European Court's decision are the following findings:

1. In determining the meaning of freedom of association, the Court must take into account "relevant rules and principles of international law" (para. 67), "relevant international treaties" (para. 69), "the interpretation of such elements by competent organs" (para. 85) and "the consensus emerging from specialized international instruments and from the practice of contracting states" (para. 85);
2. "It is not necessary that a state had ratified the entire collection of applicable instruments; it is sufficient if relevant international instruments denote evolution in the norms and principles applied in international law" (para. 86);
3. The object of a guarantee of freedom of association is "to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected" (para. 110);
4. It is a violation of freedom of association to refuse to recognize the legal personality of a union (paras. 113 and 116);
5. Any restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance, are unacceptable (para. 144); and
6. "Limitations to human rights must be construed constructively, in a manner which gives practical and effective protection to human rights" (para. 146).

A similar ruling from the Supreme Court of Canada applied ILO Convention No. 87, and the rulings of the ILO Committee on Freedom of Association, in determining the scope of the guarantee of freedom of association in Article 2(d) of the *Canadian Charter of Rights and Freedoms*, part of Canada's *Constitution.* In that case, *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[323] decided in June 2007, the Canadian Supreme Court nullified legislation which allowed British Columbia to abrogate collective agreement protections against contracting out bargaining unit work. The Court stated that "*the Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

In this regard, the Supreme Court of Canada noted that, despite having not ratified Convention No. 98 (protecting collective bargaining), "Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of

Courts throughout the world have adopted International Labour Law jurisprudence as elaborated by the ILO under Conventions Nos. 87 and 98, regardless of ratification. The undeniable conclusion is that all countries, and therefore all employers who are bound by domestic law, must respect and enforce the rights of workers to organize unions and collectively bargain as a matter of law.

Experts, and Commissions of Inquiry. These interpretations, which find the right to collective bargaining to be an essential element of freedom of association, have been described as the 'cornerstone of the international law on trade union freedom and collective bargaining'…" [324]

The United States has ratified neither Convention No. 87 nor Convention No. 98. Nonetheless, a federal District Court, in *Estate of Rodriguez v. Drummond*,[325] in 2003, found Conventions Nos. 87 and 98 to be customary international law and, therefore, a basis on which the union plaintiff could claim that the murder of its union officers by Colombian paramilitaries allegedly working in conjunction with the mining company interfered with the union's freedom of association and right to collective bargaining. This case was brought by a Colombian trade union and the estates of the murdered unionists against Drummond Mining Company, a United States-based multinational enterprise, under the Alien Tort Statute. The Alien Tort Statute allows aliens to sue in United States Courts for violations of the laws of nations or treaties.[326] The Court, by finding the plaintiff union had met the standard to make a claim under the Alien Tort Statute, found ILO Conventions Nos. 87 and 98 to have attained the status of customary international law.

Therefore, considering:

1. the requirement that all member states of the ILO respect, promote and realize in good faith the principles concerning fundamental rights, whether they have ratified the Conventions in question or not;
2. the binding nature of these rights under customary international law and/or *jus cogens* based on the solemn nature of the 1998 Declaration of FPRW, which has been reiterated in the ILO 2008 Declaration on Social Justice and a Fair Globalization and other Declarations, Guidelines, and Frameworks;
3. the fact that the overwhelming majority of countries have ratified both Conventions Nos. 87 and 98 and, except for two countries, all others recognize the right to form and join unions in domestic legislation; and
4. that Courts throughout the world have adopted International Labour Law jurisprudence as elaborated by the ILO under Conventions Nos. 87 and 98, regardless of ratification, the undeniable conclusion is that all countries, and therefore all employers who are bound by domestic law, must respect and enforce the rights of workers to organize unions and collectively bargain as a matter of law.

B. The Fundamental Purpose of the Rights of Freedom of Association and Collective Bargaining is to Enable Workers to Protect Their Interests.

1. ILO Convention No. 87 and International Human Rights Instruments Confirm the Protective Purpose of the Right to Form and Join Trade Unions

ILO Convention No. 87 provides workers with the right to form and join trade unions for the purpose of furthering and defending their interests. The ICCPR and the ICESCR[327] reaffirm and particularize the nature of the rights contained in the UDHR. They set forth the operative principles and mechanisms for their realization.

With respect to workers' rights, the ICCPR and ICESCR repeat the operative words in Article 23(4) of the UDHR that the purpose of the right to form and join trade unions is for the protection of workers' interests. For purposes of this report, Article 23 of the UDHR is most relevant:

Article 23:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.[328]

The right to freedom of association is protected under Article 22 of the ICCPR which recognizes the right of workers to form and join trade unions. Sub-clause 1 of Article 22 of the ICCPR states: Everyone shall have the

right to freedom of association with others, including the right to form and join trade unions **for the protection of his interests.** Sub-clause 2 limits the restrictions which can be placed on these rights, and sub-clause 3 harmonizes its provisions and integrates this provision with Convention No. 87 of the International Labour Organization, entitled "Freedom of Association and Protection of the Right to Organize." Sub-clause 3 specifically states that countries which are State Parties to this ILO Convention *"may not take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."*

Similarly, Article 8 of the ICESCR requires State Parties to "undertake to ensure the right of everyone to form trade unions and join the trade union of his choice, **for the promotion and protection of his economic and social interests.**" This Article further protects the rights of trade unions to establish national federations and international trade unions and the right to strike. Sub-clause 3 of this Article similarly prohibits State Parties to this Covenant from taking legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in ILO Convention No. 87.

Thus, these human rights treaties, which are integrated with ILO Convention 87,[329] in Article 22 of the ICCPR and Article 8 of the ICESCR, recognize that the right to form and join trade unions has a clear purpose: It is **"the protection of the workers' interests."** The linkage of these provisions of the ICCPR and ICESCR to ILO Convention No. 87, which has attained the status of customary international law, confers that same binding status of these provisions of the ICCPR and ICESCR on all states.[330]

2. The Rights of Workers to Protect their Interests

The "protect their interests" language in Convention No. 87 and these human rights instruments has substantive meaning.[331] The "protect their interests" language in the UDHR, the ICCPR and the ICESCR requires that workers' rights to form and join unions and collectively bargain must not be so hollow or illusory that their interests cannot be protected, even if they are able to form a union. The right to form and join trade unions applies only to workers. This is because of the obvious power imbalance between employers and workers. Although employers cannot function without workers, employers own and control the enterprises and have superior power to determine the numbers of employees and conditions of work. The primary way workers can effectively protect their interests against unchecked employer power and unfavourable working conditions is through their own organization of trade unions and collective bargaining. But if through the use of many forms of precarious work and the hiring of so many workers in precarious positions, the ability of workers to form and join trade unions to protect their interests becomes blocked, the use of precarious workers must be considered illegal. That is, when workers' rights to form and join trade unions and collectively bargain to protect their interests are so burdened by various forms of precariousness that these rights become devoid of substance, it is as unacceptable as the European Court of Human Rights found in *Demir and Bakayra* that, "*any* restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance, are unacceptable." (para. 144)

If access to trade unions is blocked because workers are called trainees or hired as contract workers or otherwise as precarious workers, their right to protect their interests through organizing and bargaining becomes meaningless. Thus, not only is the right to form and join trade unions protected under international labour law, the ability of workers to join trade unions which have the bargaining power to actually protect their interests is also protected. As recognized in these human rights instruments, the ILO Conventions and the FPRW, workers themselves must have a real, not illusory right to form and join trade unions and adequate strength or bargaining power to protect their interests as a counterbalance to employer power. That is, it is primarily through workers' unimpeded rights to form and join trade unions and to collective bargaining that workers realize their rights to the favourable conditions of work and dignity as set forth in the UDHR, the ICESCR and the ICCPR.

3. Precarious work impairs the ability of workers to effectively exercise their right to form and join trade unions and protect their interests.

As stated above, the use of short-term contracts and other forms of precarious work could render the right to form and join trade unions and the right to collective bargaining illusory. Recognising this fact, the ILO supervisory bodies have drawn attention to the need to ensure that such practices do not deprive workers of access to trade union rights.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR), the main supervisory body of the ILO concerned with the monitoring of the application of standards, in 2012 noted that one of the main concerns indicated by trade unions is the negative impact of precarious forms of employment on trade union rights, notably short-term contracts repeat-

edly renewed and sub-contracting. It observed that

"Some of these modalities often deprive workers' access to freedom of association and collective bargaining rights, particularly when they hide a real and permanent employment relationship. Some forms of precariousness can dissuade workers from trade union membership." (para. 935).

The ILO Governing Body's Committee on Freedom of Association (CFA), a tripartite body that examines complaints of violation of freedom of association and collective bargaining rights, has drawn attention to the need to ensure that the systematic use of short-term temporary contracts does not in practice become an obstacle to the exercise of trade union rights. A complaint regarding the effect of short-term contracts on trade union rights was brought before the CFA in Case No. 2675 concerning Peru. Although the workers in that case had the right to form and join unions under the law, it was the case of the complainant that the use of short-term contracts of the kind described in the complaint restricts the right to organise, collectively bargaining and strike, in practice. A brief synopsis of the case follows:

CFA, Case No. 2675 (Peru), 357th Report

Case No. 2675 regarding Peru concerns a complaint made by the General Confederation of Workers of Peru (CGTP) to the CFA in October 2008. The complainant objected to a legislation applicable to industrial companies subject to the non-traditional export scheme, which authorized them to conclude very short-term casual contracts which are renewed indefinitely for years, keeping the workers indefinitely in the position of casual workers. It alleged that such short-term contracts in practice have prejudicial effects on the exercise of trade union rights because workers are afraid that their contracts will not be renewed. The Government stated that, in general, in the sector in question, "temporary contracts have been used repeatedly as a means of discouraging trade union membership," and that it had generated "negative effects on the level of social protection."

The CFA invited the Government to examine, with the most representative workers' and employers' organizations, *"a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice* an obstacle to the exercise of trade union rights."

Obligation of Multinational Enterprises to Respect Workers Rights' Including the Freedom of Association

In this sub-section of the report, ICLR submits that the use of precarious workers to perform work of a regular or perennial nature, as opposed to work of a sporadic nature, is illegal under international law by virtue of its very nature and practice as revealed in the case studies. These arguments are bolstered by the long and sustained history of the international community and its organizations such as the ILO, the United Nations and the Organization for Economic Co-operation and Development (OECD) acting to ensure that business, and in particular multinational enterprises (MNEs), comply with international human rights and labour standards, most notably the rights to form and join trade unions (freedom of association) and collective bargaining. ICLR will first address the obligations of MNEs to respect workers' human rights including the freedom of association.

A. 1976 OECD Guidelines on Multinational Enterprises, as amended in 2011

The OECD Guidelines for Multinational Enterprises (MNEs) are recommendations to enterprises made by the Governments of OECD Member and adhering countries. Their original aim is to ensure that MNEs operate in harmony both with the policies of the countries where they operate and internationally recognized standards including labour standards. The Guidelines cover the full range of MNEs' operations with respect to labour standards. Enterprises are encouraged to respect employees' rights to representation, refrain from unfair influence in labour negotiations or during organising campaigns, and to negotiate constructively on employment conditions. In particular, enterprises should:

- respect the right of their employees to be represented by trade unions and other bona fide organisations and engage in constructive negotiations with them on employment conditions;
- provide assistance and information to employee representatives;
- provide information for a true and fair view of the performance of the enterprise;
- observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;
- utilise, train and prepare for upgrading their labour force;

- provide reasonable prior notice of changes in operations, in particular on intended closures and collective layoffs;
- refrain from discriminatory practices in their employment policies;
- not exercise unfair influence over bona fide negotiations with employees' representatives;
- enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour-management relations with management representatives authorised to take decisions on the matters at hand.

The OECD Guidelines have been amended on several occasions, most recently in 2011, influenced by the UN Framework and Guiding Principles (see below). The labour rights provisions are closely aligned with the core ILO Conventions including the Conventions on the right of freedom of association and the right to collective bargaining (see below).

Complaints regarding violations of the Guidelines may be made to National Contact Points (NCP) in each OECD or adhering country. The NCPs may try to mediate disputes brought to their attention, but any findings by the NCPs are in the nature of recommendations.

The three main enterprises covered by the study are subsidiaries of MNEs in Korea, France, Japan and the USA that are OECD member states. They are therefore bound to act in accordance with the OECD guidelines wherever they operate.

B. ILO's Tripartite Principles Concerning Multinational Enterprises and Social Policy of 1977 (amended in 2000 and 2006 incorporating the 1998 ILO Declaration of FPRW)

The ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was negotiated between workers' and employers' organizations and Governments, and adopted by the Governing body of the ILO on 16 November 1977. It was amended in November 2000 and in March 2006. The Preamble of the Declaration notes that [m]ultinational enterprises can … make an important contribution … to the enjoyment of basic human rights.

Thus, protecting fundamental human rights is placed in the foreground of Declaration's aims. The Declaration has a wide reach as it applies not only to corporations, but also to States and employers' and workers' organizations. These guidelines are to be implemented within the ILO member states which include India.[332]

The Tripartite Declaration addresses not only MNEs but also national enterprises specifically. The Principles encourage governments, MNEs and national enterprises alike to adopt social policies and good practices.[333] Although the Declaration of Principles is to be observed on a voluntary basis, it is considered an authoritative document.

The first paragraph of the amended Declaration states that [a]ll the parties . . . should contribute to the realization of the ILO Declaration of FPRW and its follow-up, adopted in 1998. In other words, the ILO Tripartite Declaration on MNEs and Social Policy incorporates fundamental labour rights set forth in the FPRW. The 1998 Declaration of FPRW includes most importantly, Conventions Nos. 87 and 98.

Addendum II to the Tripartite Declaration suggests that corporations' contribution to implementation of the ILO Declaration of FPRW[334] can prove to be an important element in the attainment of its objectives. This denotes that the ILO Declaration of FPRW applies also to corporations. In a similar vein, it suggests that all the parties covered by this Declaration ... should respect the UDHR and the implementing International Covenants adopted by the General Assembly of the United Nations.[335]

The Tripartite Declaration on MNEs and Social Policy acknowledges that there are binding obligations, where corporations are already bound to respect certain legal obligations under national law and other international documents (such as the OECD Guidelines), and their inclusion is therefore declaratory and a reminder of those existing obligations. The Tripartite Declaration notes that all the parties concerned by the Declaration should obey national laws, respect international standards, honour voluntary commitments, and harmonize their operations with the social aims and structure of countries in which they operate. The Tripartite Declaration addresses work conditions, discrimination, freedom of association of workers and adequate wages.

The Tripartite Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises. The Tripartite Declaration offers an additional and supplementary source of law requiring corporations to comply with fundamental labour rights obligations.

The ILO sub-committee on MNEs is charged with implementation of the Declaration. The sub-committee has three activities it can undertake: periodic surveys, interpretation of provisions of the Declaration based on requests, and promotion and studies. Because the ILO monitoring bodies do not function as quasi-judicial

While UNCTAD does not want to hinder foreign direct investment, the UN has observed that many TNCs [Transnational Corporations] have become very powerful and were exploiting that power in manners which did not protect the human and other rights of the people in the host countries.

bodies but confine themselves to clarification and interpretation of instruments, ILO does not issue findings as to any type of violation.

C. The ILO 2008 Declaration on Social Justice for a Fair Globalization

In 2008, when the world was experiencing a major downturn in economic activity, the ILO unanimously adopted the "Declaration on Social Justice for a Fair Globalization." This Declaration reaffirmed the ILO's commitment to promotion of its goals in the context of globalization. While recognizing a number of countries had benefited from globalization with high rates of economic growth and employment creation, the ILO also stated that globalization had caused many countries and sectors to face major challenges of income inequality, continuing high levels of unemployment and poverty, with the result that they had increased vulnerability to external economic shocks.

This Declaration enshrined the goals of the Decent Work Agenda which the ILO had been promoting since the late 1990s. Decent work refers to opportunities for men and women to engage in productive work in conditions of freedom, equity, security and human dignity. The Declaration sets forth four objectives: creating jobs, guaranteeing rights at work, extending social protection and promoting social dialogue.[336] While the Declaration is aimed at member states, it reiterates and re-affirms the 1977 Tripartite Declaration on Multinational Enterprises and the Fundamental Principles and Rights at Work, and calls for the ILO to partner with enterprises where possible to promote the goals of the Declaration.

The Declaration underscores the particular significance of the Fundamental Principles and Rights at Work as enabling conditions for the realization of the ILO's strategic objectives. The right to organize is a key enabling right and the gateway to the exercise of a range of other rights at work. In other words, organizing is the entry point to the achievement of decent work.

The Declaration includes a follow-up mechanism to ensure the means by which the Organization will assist the Members in their efforts to promote the Decent Work Agenda, including a review of the ILO's institutional practices and governance; regular discussion by the ILC responding to realities and needs in member States and assessing the results of ILO activities; voluntary country reviews, technical assistance and advisory services; and strengthening research capacities, information collection and sharing.

D. UN Initiatives

1. UN Commission on Trade and Development (UNCTAD)

In addition to the ILO, which is a UN Agency, the United Nations itself has attempted over the years to address concerns raised by States and others as to the power of Transnational Corporations (TNCs, also known as MNEs) and to impose various responsibilities on TNCs for their actions in host countries. In 1972 Chilean President Salvadore Allende addressed the UN regarding the role of the TNC International Telephone and Telegraph (ITT) and alleged it was interfering in Chile's domestic affairs. As a result, ECOSOC commissioned a study of MNCs and World Development. This study led to the appointment of a Committee of Eminent Persons to advise the UN on the nature of TNCs and their influence on development. In 1974 the UN established the UN Commission on Transnational Corporations (UNCTC) as a permanent intergovernmental forum. The Commission evaluated data on Foreign Direct Investment by TNCs and attempted to develop codes of conduct. In the early 1990s the UNCTC was eliminated and its functions transferred to the UN Commission on Trade and Development (UNCTAD). In the intervening years the attitude of many developing countries changed from thinking that TNCs threatened their sovereignty and needed to be controlled, to seeing the benefits of Foreign Direct Investment from TNCs. While UNCTAD does not want to hinder foreign direct investment, the UN has observed that many TNCs have become very powerful and were exploiting that power in manners which did not protect the human and other rights of the people in the host countries. The growing power of TNCs, in part, motivated the ILO to issue the Tripartite Declaration in 1977 and to amend it in 2000 and 2006 to specifically incorporate the 1998 ILO Declaration of FPRW.

2. The UN Global Compact: 1999

The Global Compact was initiated in 1999 by former UN Secretary-General Kofi Annan based on a proposal he

made at the World Economic Forum. The Compact is a voluntary network of companies who agree to be committed to the 10 principles of the Compact. The companies are networked with UN agencies and NGOs. The 10 Principles are taken from existing human rights instruments with those relating to labour being taken from the core labour standards set forth in the Declaration of FPRW. Principle 3 protects freedom of association and the right of collective bargaining; principle 4 calls for the elimination of forced labour; principle 5 calls for the effective elimination of child labour; and principle 6 calls for the elimination of discrimination in employment.

TNCs which join the Compact commit to report on their progress under the Communication on Progress (COP) program. Those who do not provide communication are listed as "non-communicators" on the website of the Compact. Although the obligations are not binding, the view expressed by many TNCs is that participation in the Compact is good for their reputation as good "corporate citizens" who may see an increase in profits from their activities. None of the companies studied in this report have seen fit to join the Compact.

3. 2003 UN Draft Norms on Responsibilities of TNCs and other Business Entities

The 2003 Draft Norms on Responsibilities of TNCs and other Business Entities were drafted by a working group of the Sub-Commission on the Promotion and Protection of Human Rights, which was a Sub-Commission of the former Commission on Human Rights, now the Human Rights Council.

The working group had been given a three-year mandate in 1999 to write a Code of Conduct for TNCs based on Human Rights Standards. The Code of Conduct and Draft Norms were adopted by the Sub-Commission and submitted to the Commission on Human Rights. Rather than adopting them the Commission passed them to the Office of the High Commissioner for Human Rights (OHCHR) for consultation with various stakeholders.

The Draft Norms were controversial in part because, while the norms held States responsible for their implementation, the norms also claimed Corporations had direct responsibilities to secure their fulfilment to ensure respect for human rights. Corporations were positively required to provide the necessary legal and administrative framework to ensure that the norms and other national and international human rights laws were implemented. With respect to labour rights the norms called for corporations to provide sufficient remuneration to workers to ensure they have an adequate standard of living, and for protection of the rights to freedom of association and collective bargaining. Corporations were to develop procedures for the implementation of these rights in countries which do not fully implement these rights. Corporations were also to adopt internal rules of operation to promote these human rights, train their managers, and be subject to periodic monitoring by the UN or others. While States had the primary responsibilities for establishing the mechanisms and administrative frameworks for implementing the norms, the obligations placed on corporations and businesses were positive obligations.

While these norms were supported by many states and NGOs and some business leaders such as the Business Leadership Initiative for Human Rights (BLIHR), they were opposed by the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE).

The norms were viewed by these latter groups as putting Corporations on par with States in their obligations to enforce human rights. In the end the High Commissioner for Human Rights did not clearly recommend the norms to the Commission on Human Rights, although the norms were described as having merit and being useful. Rather than pass the norms, the Commission on Human Rights in 2004 called for the appointment of a Special Representative on Business and Human Rights. Professor John Ruggie was appointed in 2005 for a period of two years which was extended another year. He was reappointed in 2008 and presented his findings and proposals that year to the Human Rights Council (HRC). His mandate was extended to operationalize his proposals. These were submitted to the HRC in 2011 and unanimously adopted.

4. UN Protect, Respect, Remedy Framework for Business and Human Rights, and the Guiding Principles

As noted above, the proposals put forth by Professor Ruggie were first presented to the HRC in 2008. They contained a conceptual and policy framework "intended to anchor the business and human rights debate." The framework rested on three pillars:

- first, the State's duty to protect against human rights abuses by third parties (including business);
- second, the corporate (business) responsibility to respect human rights; and
- third, the need for more effective remedies.

This became known as the UN Protect, Respect, and Remedy Framework for Business and Human Rights, also known as the UN Framework.

The Framework was adopted by the HRC and Professor

> … the [UN] Guidelines are also clear that failure of a government to protect human rights does not relieve business of its independent duty to respect human rights as a "global standard of expected conduct for all businesses wherever they operate. It exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations."

Ruggie's mandate was extended another three years in which he was charged with "operationalizing" the Framework. In March 2011 Professor Ruggie presented his report to the HRC containing the "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework." The Guiding Principles were unanimously endorsed by the HRC in June 2011.

Thus, in addition to the OECD Guidelines on Multinational Enterprises, and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the Guiding Principles and Framework represent a third authoritative international instrument addressing the behaviour of business with respect to their human rights obligations and which reaffirm the obligations of businesses to respect workers' human rights and, in particular, the rights of freedom of association and collective bargaining.

Although technically non-binding, the Office of the High Commissioner of Human Rights, in the introduction to the principles called "The Corporate Responsibility to Protect Human Rights–an Interpretive Guide" states:

"The Guiding Principles are … the global standard of practice that is now expected of all governments and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for states and businesses which include points covered variously in international law and practice."

The ITUC states in its background note for trade unionists on the Guiding Principles that roles for government and business are, they believe, properly spelled out:

"They relate to the real responsibilities of the real actors and do not confuse what they are, at times complementary and, at times conflicting roles. Governments are not permitted to avoid obligations by transferring them to business or arguing that business is 'too powerful.' Businesses cannot avoid their responsibilities to rights-holders because a government fails in its duty to protect." [337]

While companies opposed Draft UN Norms because they were perceived to place the same obligations for respecting human rights on businesses and States, the Guidelines are clear that the duty to protect is with the State, while the duty to respect is with the business entities. The duties of all states are in the first instance to enforce their own laws aimed at requiring businesses to protect human rights and to periodically assess the adequacy of the laws and any gaps. The duties also include ensuring that other laws do not constrain but enable protection of human rights by companies.

Nonetheless, the Guidelines are also clear that failure of a government to protect human rights does not relieve business of its independent duty to respect human rights as a "global standard of expected conduct for all businesses wherever they operate. It exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations." [338]

The first Foundational Principle of the second pillar (business obligations) states that business should respect human rights by:

1. avoiding infringing on human rights of others and
2. should address adverse human rights impacts with which they are involved. The Guiding Principles make clear that the responsibility is to protect all human rights. The human rights specifically included in the principles are those in the UDHR, ICCPR, ICESCR, the ILO Declaration of FPRW, and the ILO 2008 Declaration on Social Justice and Fair globalization.[339]

The responsibility of business to respect human rights exists "over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations." The responsibility exists independently of whatever Corporate Social Responsibility (CSR) declarations the company has imposed on itself or self-defined. Although businesses should not choose which human rights to respect because human rights are considered indivisible and interdependent, they may prioritize and concentrate on those most likely at risk because of the activities and relationships of the company. These are referred to as "salient human rights."

ITUC posits that the scope of the obligations on business

can apply to ending forms of precarious work. "The Guiding Principles state that enterprises have responsibilities not only for adverse human rights impacts they cause or contribute to through their own activities but also for the adverse human rights impacts that are directly linked to their operations, products or services, by their business relationships even, if they have not contributed to those impacts (Principle No. 13).[340] Where a business is directly linked to an adverse impact, its responsibility is to remediate the impacts. Where the adverse impact is caused by others linked to the business through their business relationship, the responsibility of the business is to prevent or mitigate the adverse impacts.

Principle 17 refers to a company being complicit or an accomplice in human rights abuses. Principle 15 addresses three policies and processes that business enterprises should have "appropriate to their size and circumstances." They are:

1. a policy commitment;
2. human rights due diligence processes and
3. remediation processes.

Due diligence is considered an ongoing process undertaken by a business to identify, prevent, mitigate and account for how it addresses actual and potential adverse Human Rights impacts.[341] To the extent businesses either in their home countries or in their overseas operations and supply chains engage in practices which violate human rights norms, they have a duty to use due diligence to find and remediate their own actions.[342]

The duty to remedy human rights abuses is with the States, but the operational principles encourage appropriate state-based non-judicial grievance mechanisms and other legitimate dispute resolution mechanisms.

Conclusion

What all these Guidelines, Declarations and Guiding Principles have in common is an acknowledgment that the world has recognized the primacy of certain fundamental rights including the rights of workers to protect their interests through the rights to freedom of association and collective bargaining. The legal significance of the universal recognition of these rights contributes to the conclusion that these rights have achieved the status of either customary international law or *jus cogens*.

Precarious Work Under International Law

A. Recommendation No. 198
B. Convention No. 181

ILO Instruments Relating to Precarious Work

As noted above, the next portion of this section will be devoted to two instruments of the ILO that are connected to precarious work. The first is Recommendation 198 which addresses the employment relationship and is designed to give guidance as to the efficacy of the use of contractors or attempts to hide employer-employee relationships under the guise of contractor or independent contractor relationships. The other is Convention No. 181 which is designed to both allow and to regulate private for-profit employment agencies.

A. The Employment Relationship Recommendation, 2006 (No. 198)

The topic of the "employment relationship" was on the agenda of the ILC for approximately ten years until 2006, when the ILC adopted ILO Recommendation 198. Specifically, the ILC noted that worldwide it had become tremendously difficult to establish when an employment relationship exists and, in turn, what rights and protections flow from the status of having an employee relationship.[343] Identifying employment relationships and the rights and protections due to workers becomes especially difficult "in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application." [344]

In the typical employment relationship, an employee performs work for the employer in return for remuneration.[345] Through this "employment relationship, however defined, reciprocal rights and obligations are created between the employee and the employer." It is through this relationship that "workers gain access to the rights and benefits associated with employment in the areas of labour law and social security," [346] and in turn the scope of the employer's rights and obligations towards their workers is established.[347] However, from a legal standpoint, contractual labour arrangements tend to lie outside the traditional "framework of the employment relationship." [348]

Taking note that contractual arrangements potentially deprive workers of the protections they are due, with vulnerable workers seeming to suffer the most,[349] the ILC asserted that "there is a role for international guidance to Member States regarding the means of achieving protection through national law and practice." [350] Because we are operating in a world economy, there is an increasing need to protect workers against the "circumvention of national laws by contractual and/or other legal arrangements." [351] Establishing "who is considered a worker in an employment relationship, what rights the workers has, and who the employer is" become necessary in order to

. . . in what the ILC refers to as the "triangular" employer relationship, the identity of the employer becomes less clear to the employee and, in turn, the employee "frequently faces difficulties in establishing who their employer is, what their rights are and who is responsible for them."

achieve the "protection through national law and practice — protection that should be accessible to all women and men." [352]

On June 15, 2006, the ILC adopted ILO Recommendation 198: Employment Relationship Recommendation, 2006, which recommends:

- the formulation and application of a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship;
- the determination, via a listing of pertinent criteria, of the existence of such a relationship, relying on the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement that may have been agreed between the parties, and;
- the establishment of an appropriate mechanism, or the use of an existing one, for monitoring developments in the labour market and the organization of work so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship.[353]

Along with Recommendation No. 198, the ILC adopted a resolution inviting the "Governing Body of the ILO to instruct the Director-General to assist constituents in developing national policies and setting up monitoring and implementing mechanisms as well as to promote good practices at the national and international levels concerning the determination and use of employment relationships." [354]

Existence of an Employment Relationship

Given that "the determination of the existence of an employment relationship should be guided by the *facts*, and not by the name or form given to it by the parties; […] the existence of an employment relationship depends on certain objective conditions being met and not on how either or both of the parties describe the relationship. This is known in law as the principle of the *primacy of fact*, which is explicitly enshrined in some national legal systems. This principle is also frequently applied by judges in the absence of an express rule." [355]

In order to determine the existence of an employment relationship, some legal systems look to "the extent of integration in an organization, who controls the conditions of work, the provision of tools, materials or machinery, the provision of training and whether the remuneration is paid periodically and constitutes a significant proportion of the income of the worker." [356] However, "in common law countries, judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality, who bears the financial risk, and mutuality of obligation. In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship." [357]

In the traditional employment relationship, there is little to no confusion as to who the actual employer is. The employer and the workers deal directly with each other and the employer (or supervisor acting on the behalf of the employer) is the one who hires and fires workers or "performs the normal functions of an employer: assigning tasks, providing the means to perform them, giving instructions and supervising their performance, paying wages, assuming risks, making profits and terminating the employment relationship." [358]

However, in what the ILC refers to as the "triangular" employer relationship, the identity of the employer becomes less clear to the employee and, in turn, the employee "frequently faces difficulties in establishing who their employer is, what their rights are and who is responsible for them." A "triangular" employment relationship exists when workers are employed by a contractor or employment agency that then contracts out workers to perform labour for a third party. Examples of this type of employment relationship include the "use of various kinds of contract [labour], the decentralization of activities to subcontractors or self-employed workers, or the use of temporary employment agencies." [359] As discussed above, from a legal standpoint, such contracts may "present a technical difficulty as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer." [360]

Presenting even more of a problem is the case of a disguised employment relationship,

"… one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers." [361]

Executing a contract to give off the appearance that a worker is actually self-employed, as an independent contractor, is one example of the many ways in which employers may try to disguise the employment relationship. Another way to disguise the employment relationship and in turn deny certain workers the rights and benefits they are due, is to intentionally misrepresent the nature of the employment relationship. An example of such a relationship is "when a contract is concluded for a fixed term, or for a specific task, but which is then repeatedly renewed, with or without a break. The most visible effect of this type of contract manipulation is that the worker does not acquire the rights and obtain the benefits provided to employees by labour legislation or collective bargaining." [362]

It does not appear that the Indian authorities have heeded the admonitions in Recommendation No. 198. The workers in the companies studied fell into the above categories of employment relationship where, by virtue of control and integration, contract workers are more likely the workers of the user enterprise but a fiction is maintained that they are the employees of a contractor which is some form of private employment agency. In addition, the engagement of workers in the guise of trainees or apprentices with multiple years of renewed fixed-term contracts also amounts to disguising the employment relationship.

The CFA has had the occasion to consider the issue of disguised employment in a case brought by the Korean Metalworkers Federation and others regarding practices by Hyundai and other companies, and has ruled consistently with Recommendation No. 198 (see synopsis below).

CFA, Case No. 2602 (Republic of Korea), 350th Report

In October 2007, a complaint was made to the ILO Governing Body's Committee on Freedom of Association (CFA) by the Korean Metal Workers' Federation (KMWF), the Korean Confederation of Trade Unions (KCTU) and the International Metalworkers' Federation (IMF) against the Government of the Republic of Korea regarding the violation of the freedom of association and collective bargaining rights of contract workers called "illegal dispatch" workers in the factories of 4 companies in Korea including Hyundai Motor Corporation. The complainants alleged that employers resort to acts of anti-union discrimination against illegal dispatch workers. They also alleged violation of the collective bargaining rights of the subcontracted workers. According to them, the subcontracted workers find themselves caught in a "catch 22" situation where the principal employer refuses to negotiate with the workers, claiming that it has no employment relationship with them, while the subcontractors also refuse to negotiate with them, claiming that they do not control the terms and conditions of employment in the plant.

In its conclusions in the case, the CFA emphasized that contract workers like other workers should have the right to establish and join organizations of their own choosing. The CFA recommended that the Government take appropriate measures to ensure that subcontracting is not used as a way to evade the application of the freedom of association guarantees of the Trade Union and Labour Relations Adjustment Act (TULRAA) and to ensure that trade unions representing subcontracted workers may effectively seek to improve the living and working conditions of those whom they represent. The CFA also urged that the Government take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers.

B. Private Employment Agencies Convention, 1997 (No. 181)

Consistent with the ILO Constitution and belief that labour is not a commodity, the ILO for many years abolished private profit-making employment agencies in favour of State monopoly though Convention No. 34 of 1935. While Convention No. 96 in 1949 authorized limited exceptions to Convention No. 34 for fee-charging employment agencies, in 1997 the ILO stated in the preamble to Convention No. 181:

"Being aware of the importance of flexibility in the functioning of labour markets, and

It is very likely that if the contract workers want to form a union and want to negotiate with the principal employer, he or she will be told the contractor is the employer. If the contractor has no control over terms and conditions of work as they are set by the principal employer, the principal employer can frustrate a worker's desire to exercise his or her right to freedom of association because the worker has no access to the principal employer's assets for purpose of collective bargaining.

Recalling that the International Labour Conference at its 81st Session, 1994, held the view that the ILO should proceed to revise the Fee-Charging Employment Agencies Convention (Revised), 1949, and

Considering the very different environment in which private employment agencies operate, when compared to the conditions prevailing when the above-mentioned Convention was adopted, and

Recognizing the role which private employment agencies may play in a well-functioning labour market, and

Recalling the need to protect workers against abuses, and

Recognizing the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system; and …,

the ILO adopted Convention 181.[363]

The private employment agencies referred to in Convention No.181 are all agencies which provide one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers' and workers' organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment …"

This Convention allows Members states to

(a) prohibit, under specific circumstances, private employment agencies from operating in respect of certain categories of workers or branches of economic activity in the provision of one or more of the services referred to in Article 1, paragraph 1;

(b) exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned.

Although Convention No. 181 requires the private employment agencies to take measures to ensure that workers recruited by private employment agencies are afforded the rights to freedom of association and collective bargaining, as well as all other legal obligations such as minimum wage, the Convention reflected intense lobbying effort by the International Confederation of Private Employment Agencies (CIETT)[364] and efforts by the workers' group to minimize the impact of recognizing private employment agencies' role in labour markets by requiring private employment agencies to respect workers' rights.[365] India has not ratified Convention No. 181 but has its own contract labour law which has been discussed. Nonetheless, the existence of Convention 181 should not be viewed as condoning the use of workers from contractors to do jobs normally assigned to regular workers in jobs regularly performed by the enterprise.

Illegality of Precarious Work Under International Law

I. Because Precarious Work in the Auto Sector Interferes with the Ability of Auto Workers to Protect their Interests Through Free Exercise of Their Rights to Freedom of Association and Collective Bargaining, ICLR finds Precarious Work to be Illegal.

As revealed by the case studies, the overwhelming majority of the workforce is made up of 'precarious workers' including various levels of 'trainees,' 'apprentices,' 'probationers' or contract workers. In one case, there are over 400 different companies which provide contract workers to the principal employer. As noted in the discussion of Recommendation No. 198, there is often confusion when dealing with 'contract workers' as to who is the actual principal employer. As noted in the case studies, the contract workers are placed in the principal

employer's place of business, doing work under the direction of the principal employer side by side with permanent workers, yet earning a small fraction of the wages of the permanent employees. It is very likely that if the contract workers want to form a union and want to negotiate with the principal employer, he or she will be told the contractor is the employer. If the contractor has no control over terms and conditions of work as they are set by the principal employer, the principal employer can frustrate a worker's desire to exercise his or her right to freedom of association because the worker has no access to the principal employer's assets for purpose of collective bargaining.

As regards so-called 'trainees,' 'company apprentices' and 'probationers,' these precarious workers have both low pay and no job security. With the exception of the statutory apprentices, other workers who are specified as apprentices or trainees are not actually being trained or in any specific apprenticeship program, such that these employment arrangements are as fraudulent in much the same way as contract workers who are hired under "sham" contracts. These workers have all the hallmarks of permanent employees, as described in the ILO Employment Relationship Recommendation of 2006 (No. 198).[366]At present, company apprentices and trainees have only a small chance of being absorbed as permanent workers even after several years of doing the same jobs as the permanent workers. Their fear that they will not be made permanent or that they will lose their jobs if they try to unionize also illegally interferes with their right to form and join trade unions. Such labour practices make it virtually impossible for the concerned workers to exercise the internationally guaranteed rights to form and join unions and collectively bargain to protect their interests. By interfering with workers' rights to freedom of association, to form and join unions and to collectively bargain and thereby protect their interests, precarious work as documented in this report is illegal under International Labour and Human Rights Law.[367]

Conclusion

The right of workers to form and join unions and bargain collectively is universally recognized and binding on all States and by law on employers. These rights were created to have a substantive meaning, allowing workers to protect their interests and gain just and favourable remuneration and conditions of work. Precarious work by its very nature interferes with the ability of workers to form and join trade unions and bargain collectively, and violates these universally accepted and binding rights. Employers' use of precarious work, especially for jobs of a regular and perennial nature, and the State's failure not just in law but in practice to prevent or stop it are, ICLR submits, illegal under international labour law.

Endnotes

[311] Although the right of collective bargaining was not specifically referenced in the ILO Constitution, it was specifically referenced in the 1944 Declaration of Philadelphia where the International Labour Conference adopted a declaration that re-phrased and broadened the "aims and purposes" of the ILO and "the principles which should inspire the policy of its members." President Franklin Roosevelt stated that the Philadelphia Declaration summed up the aspirations of an epoch that had known two world wars. The Conference reaffirmed the fundamental principles on which the Organization is based and, in particular, that (a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare. The Declaration also reaffirmed the relationship between achieving peace and promoting social justice affirming that (a) all human beings, irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity; (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy; (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only insofar as they may be held to promote and not to hinder the achievement of this fundamental objective; (d) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective; (e) in discharging the tasks entrusted to it the International Labour Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate. The Declaration also committed the Organization to further among the nations of the world programmes which will achieve, *inter alia*, the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and of social and economic measures.

[312] See ILO International Training Center: "International Labour Law and Domestic Law, A Training Manual for Lawyers, Judges and Legal Educators, Edited by Xavier Beaudonnet (2010), p 47.

[313] Id. p. 47.

[314] Id. p. 47-48.

[315] See, ILO Constitution Article 19(8).

[316] The vast majority of nations — 148 — have ratified both ILO Conventions 87 and 98. Three countries have ratified only Convention 87 and thirteen have ratified only Convention 98. The countries which have ratified one of the two Conventions have enacted laws which guarantee the right to freedom of association and the right to form and join unions. Only 20 nations have ratified neither Convention. Industrialized and industrializing countries — the U.S., China, India and South Korea — which have not ratified either Convention have domestic legislation which to some degree guarantees the rights of freedom of association and to join unions and collective bargaining. Of the developing countries not ratifying the Conventions, eleven have laws guaranteeing these core labour rights (Afghanistan, Bahrain, Brunei, Darussalam, Iran, Lao People's Democratic Republic, Oman, Qatar, Somalia, South Sudan, Tuvalu and Viet Nam), three have laws indicating a limited level of recognition of core labour rights (Maldives, Marshall Islands and United Arab Emirates) and only two, Palau and Saudi Arabia, lack any reference to internationally recognized labour rights and standards in their laws.

Endnotes

[317] See argument in next section

[318] Prior to the Declaration on the Fundamental Principles and Rights at Work being adopted in 1998, the International Labour Conference (ILC) had issued only three declarations: The Philadelphia Declaration in 1944; the Declaration on Action Against Apartheid in South Africa, 1964; and the Declaration on Equality of Opportunity and Treatment for Women Workers, 1975.

[319] The Fundamental Principles are reiterated in the ILO 2008 Declaration on Social Justice and a Fair Globalization. This Declaration reaffirms the commitment to the Fundamental Principles and Rights at Work, in the broader context of Globalization and the Decent Work Agenda, in which rights at work are described as an integral part. Also referenced in the 2008 Declaration is the 1977 Declaration of the Governing Body of the Tripartite Principles Concerning Multinational Enterprises and Social Policy (as updated in 2000 and 2006). The 1977 Declaration furthermore includes as one of its general principles that all parties should respect the Universal Declaration of Human Rights and the corresponding international Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress.

[320] Article 38 of the Statute of the International Court of Justice (ICJ Statute), to which all members of the United Nations are parties, identifies the authorities that provide "competent proof of the content of customary international law." These sources consist of:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

The rights to freedom of association and collective bargaining fall into all of these categories. As noted above with respect to the overwhelming number of states which have ratified Conventions 87 and 98 and states whose laws embrace these principles even in the absence of ratification, along with the continuing reference to these norms as part of the Fundamental Principles of Rights at Work in numerous declarations including the Global Compact, the OECD Guidelines on Multinational Enterprises (both the original and updated) as well as the unanimously adopted UN Framework and Guiding Principles of Business and Human Rights reaffirms their universal acceptance as customary international law at the least. The cases cited herein as well as the training Manual of the ILO reinforce these norms as binding customary international law at the very least.

[321] Training Manual p. 45. A *jus cogens* norm, also known as a "peremptory norm of general international law," can be defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention on the Law of Treaties* art. 53, May 23, 1969, 1155 U.N.T.S. 331. For the reasons stated above ICLR believes the international community as a whole, through their actions of ratification, legislation, judicial opinions, International Declarations and adoption of the UN Framework shows the international community as a whole believes these norms are non-derogable.

[322] 2008 ECHR 1345.

[323] [2007] 2 S.C.R. 391.

[324] There are numerous decisions of the Committee on Freedom of Association, (CFA), one of the supervisory bodies of the ILO, which was established in 1951 holding to receive complaints that the right to bargain collectively is an essential element of the right of freedom of association. See, e.g. 344th Report of the Committee on Freedom of Association, Case No. 2460 para. 995 (2007). "The Committee emphasizes that the right to bargain freely with employers, including the government in its quality of employer, with respect to conditions of work of public employees, constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining … to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof."

[325] 256 F. Supp 2d 1250 (N.D. Ala. 2003).

[326] Laws of nations are synonymous with customary international law.

[327] Both treaties were adopted and opened for signature and ratification through General Assembly Resolution 2200A (XXI) on December 16, 1966. They entered into force in 1976 after the requisite number of ratifications had been received.

[328] Although the rights are individual and apply to "everyone," it is recognized from the context of the provision that it is referring to workers as they are the ones who need these rights to protect their interests.

[329] The phrase 'protecting and defending their interests' appears in many decisions of the Committee on Freedom of Association, particularly with respect to the right to strike. The Committee has observed: The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. See the 1996 *Digest*, para. 475; Also see 299th Report, Case No. 1687, para. 457; 300th Report, Case No. 1799, para. 207; 306th Report, Case No. 1884, para. 695; 308th Report, Case No. 1934, para. 131; 310th Report, Case No. 1928, para. 176; 316th Report, Case No. 1930, para. 365; 327th Report, Case No. 1581, para. 111; 330th Report, Case No. 2196, para. 304; 335th Report, Case No. 2257, para. 466; 36th Report, Case No. 2340, para. 645; and 337th Report, Case No. 2365, para. 1665.

[330] The ICCPR has 167 state parties and 74 signatories. The ICESCR similarly has 160 state parties and 70 signatories. The Covenants are based on the Universal Declaration of Human Rights which is also considered to have the status of Customary International Law.

[331] The dictionary definition of the word protect is "to cover or shield from exposure, damage or injury." It also is used to mean "to foster or shield from infringement or restriction." (Merriam-Webster Dictionary) "Interest" used in this context is an interest which derives from a legally protected right.

[332] See Miskolc Journal of International Law, Jernej Letnar Černič1: Corporate responsibility for human rights: … www.mjil.hu - 33 -

[333] Id.

[334] The ILO Declaration of Fundamental Principles and Rights at Work was adopted by the ILO in 1998.

[335] Id.

[336] For more information, see http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm

[337] Id. p. 5.

[338] Id. p. 7.

[339] Id. pp. 7-8.

[340] Id. p. 9.

[341] Id. pp. 9-11.

[342] The next section of this report addresses the illegality of precarious work under international human rights and labour law. The UN Framework supports the argument of illegality and also places a burden on the companies which extensively use it to refrain from using it independent of the State's obligation to remedy these illegal work arrangements.

[343] The Employment Relationship: An Annotated guide to the ILO Recommendation No. 198 (2007) at 3. http://www.ilo.org/ifpdial/areas-of-work/industrial-and-employment-relations/WCMS_172417/lang--en/index.htm

[344] Id.

[345] The employment relationship, Report V(1), International Labour Conference, 95th Session (2006) at 3. http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf

[346] Id. at 3.

[347] Id.

[348] Id. at 7.

[349] Id.

[350] Id. at 19.

[351] Id. at 3.

[352] Id. at 4.

Endnotes

[353] Id.

[354] Id.

[355] The Employment Relationship: An Annotated guide to the ILO Recommendation No. 198, note 343 above at 7.

[356] Id. at 8.

[357] Id.

[358] Id. at 13.

[359] The employment relationship, Report V(1), International Labour Conference, 95th Session (2006) at 9.

[360] Id. at 12.

[361] Id. at 12.

[362] Id. at 13.

[363] The ILO also adopted Recommendation 188 which is a guide to the implementation of Convention 181.

[364] CIETT issued a public statement to the effect that it had worked closely with the ILO to get this Convention passed.

[365] There is some disagreement among unions regarding this convention as in many states there have been efforts to prohibit the use of contact labour altogether. Most unions oppose the approved use of private agency hires because of its inevitable slicing and dicing of the workforce into smaller contractor-based units which dilutes solidarity and the ability of workers to protect their interests through forming trade unions at the principal employer, while some unions argue that certain groups of workers should be considered to be in a different unit such as security guards. See, e.g. The Triangular Trap: Unions take action against agency labour issued by IndustriALL Global Union, October 2012. http://www.industriall-union.org/sites/default/files/uploads/documents/Triangular_Trap/agency_work_final.pdf. ICLR takes no position on this question other than to point out the issue of solidarity which could be undermined by different categories of workers being in separate bargaining units.

[366] See the discussion of ILO Recommendation 198 in the previous section. Also, while India has not ratified ILO Convention 181 regarding for-profit employment agencies, there were no facts stated in the worker interviews which suggested that the contract workers knew of their rights to freedom of association.

[367] In addition to the protection of the right to collective bargaining, Convention No. 98 also protects workers against acts of anti-union discrimination. The right of workers to form and join organizations of their choice and freely engage in trade union activities is severely curtailed when employers resort to acts of anti-union discrimination in violation of Convention 98. Unjust dismissal, suspension, transfer and demotion of workers by reason of their trade union membership are examples of such acts. The Convention requires workers to be afforded adequate protection against acts of anti-union discrimination. It requires such protection to be afforded particularly against (a) any act of the employer calculated to make the employment of a worker conditional on his or her not joining a trade union or relinquishing membership of a trade union and (b) any act of the employer calculated to cause the dismissal or prejudice a worker by reason of his or her trade union membership or participation in trade union activities.

The ILO supervisory bodies have considered that such protection is particularly desirable in the case of trade union officials in order for them to be able to perform their trade union duties in full independence. The ILO supervisory bodies have also emphasized that legislation should explicitly and through adequate sanctions protect all workers against all acts of anti-union discrimination at the time of recruitment and during the employment relationship. They have also stressed the need for rapid and effective legal procedures to ensure such protection in practice.

Broadly speaking, Convention 98 is an anti-discrimination Convention which like one of the other anti-discrimination conventions, Convention 111, is part of the Fundamental Principles and Rights at Work. Convention 111, entitled the Discrimination in Respect of Employment and Occupation Convention, has the fundamental aim of promoting equality of opportunity and treatment by asserting that States pursue a national policy aimed at eliminating all forms of discrimination in respect of employment and occupation. The discrimination or distinction specifically referenced in Convention 111 is any distinction, exclusion or preference based on race, color, sex, religion, political opinion, national extraction or social origin (or any other motive determined by the State Concerned) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The bases for discrimination in Convention 111, however, are not exhaustive. The anti-union discrimination provisions of Convention 98 should be read as part of the anti-discrimination Convention 111.

The 2012 Report of the CEACR entitled "Giving Globalization a Human Face" described the broad reach of Convention 111, which was adopted in 1958 as follows:

> "The 1958 instruments were designed to promote the application, in all spheres of employment and occupation, of the general principles of equality, dignity and freedom. In providing a specific but broad definition of what constitutes discrimination, Convention No. 111 places the general principle of equality and non-discrimination in the context of the world of work, addressing all forms of discrimination in employment and occupation on the basis of at least seven grounds, namely race, colour, sex, religion, political opinion, national extraction and social origin, with the possibility of extending protection to address discrimination on the basis of other criteria. Additional grounds that have been added by a number of countries include age, health, disability, HIV and AIDS, employment status, nationality and sexual orientation."

The Committee of Experts, by referencing with approval efforts by States to add discrimination based on employment status to the list of prohibited bases for discrimination under Convention 111, is another basis on which to establish precarious work as an illegal form of employment discrimination, in cases where, as is typical, contract workers, trainees, etc. receive lesser pay than permanent workers even while doing the same or similar work.

Peter Rossman of the Uniting Food, Farm and Hotel Workers World Wide (IUF) recently published an article in the International Journal of Labour Research (2013 Vol. 5, Issue 1) entitled "Meeting the challenge of precarious work: A workers' agenda," in which he posited some of the same arguments as set forth in this section regarding the illegality of precarious work by arguing that "employment practices which dilute that right (of freedom of association and collective bargaining) by fragmenting collective bargaining coverage by inserting a third party — the agency — between the worker and the real employer which organizes that collective labour of the enterprise violate the human rights foundations of collective bargaining" (p. 36). Mr. Rossman also adopts a human rights model on the issue of non-discrimination, referring not only to Convention 111 but also to Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 provides all workers with the right "to the enjoyment of just and favourable conditions of work" as well as the right to fair wages and equal remuneration for work of equal value without distinction of any kind. This Article also provides the right for everyone to be promoted in his employment to an appropriately higher level, subject to no conditions other than seniority and competence" (p. 37). Rossman argues and the authors herein agree that "on the basis of Article 7, inequality of treatment between permanent and non-permanent employees violates international human rights commitments…." (p. 37).

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Madras High Court

SECTION 8

Obligation of the Government of India and Courts in India to Follow International Law

SECTION 8:

Obligation of the Government of India and Courts in India to follow international law

Article 51(c) of the Constitution of India requires the Government to foster respect for international law and treaty obligations. However, provisions of an international treaty or Convention that India enters into are not automatically enforceable in the country.[368] An international treaty or convention to which India is a party could be implemented either by the framing of legislation by Parliament as per Article 253 read with Entry 14, List VII of the Constitution, or by the exercise of executive power under Article 53 of the Constitution.

The language used in Article 51(c) is broad in scope and encompasses both customary international law and ratified treaties and Conventions. Although India has not ratified ILO Conventions Nos. 87 and 98, it is bound to respect, promote and realize the rights contained in these Conventions, both under the law and in practice, by virtue of

(a) its very membership of the ILO and, consequently, its being bound by the Constitution of the ILO and the Declaration of Philadelphia;

(b) the ILO Declaration on Fundamental Principles and Rights at Work; and

(c) the principles contained in the Conventions having attained the status of customary international law.

India's obligation to ensure that all workers in the country have the freedom to form and join trade unions to protect their interests, under the law and in practice flows from the UDHR, ICCPR and ICESCR as well.

The Courts in India have played an important part in fostering respect for international law. On various occasions, the Courts have relied on international treaties to interpret domestic law. These include the human rights instruments referred to above and also Conventions of the ILO. In the landmark judgment in *Vishaka v. State of Rajasthan*[369] the Court held as follows:

"Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for

implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution."

In the judgment in *Entertainment Network (India) Limited v. Super Cassette Industries Limited*,[370] the Court made the following observation:

"In interpreting the domestic/municipal laws, this Court has extensively made use of international law inter alia for the following purposes:

- *As a means of interpretation;*
- *Justification or fortification of a stance taken;*
- *To fulfil spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;*

… India by virtue of its membership in the ILO is bound by those core labour standards articulated in the ILO Declaration of Fundamental Principles of Rights at Work of 1998 as customary international law. Under Indian law, therefore, the rights which give meaning to the right to form and join trade unions, i.e. the right to recognition, the right to collective bargaining, and the right to strike should be considered fundamental Constitutional Rights …

- *To reflect international changes and reflect the wider civilisation;*
- *To provide a relief contained in a covenant, but not in a national law;*
- *To fill gaps in law."*

In addition, the Indian Supreme Court has held on multiple occasions that rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law.[371]

Although the Supreme Court in 1962 held in the *All India Bank Employees' Association* case[372] that the fundamental right to freedom of association, including the right to form and join trade unions protected under Article 19(1)(c) does not include the right to collective bargaining and the right to strike, in light of the development of the law since 1962, and especially in light of various judgments in later cases, beginning with the landmark judgment in *Maneka Gandhi v. Union of India*[373] where the Court has interpreted the fundamental rights expansively, and held the right to life to include the right to live with human dignity, the right to livelihood, etc., it may be argued that it is time for the Supreme Court to re-interpret its narrow reading of Article 19(1)(c).

Further, in light of India's ratification of the ICCPR and the ICESCR in 1979,[374] which describe the purpose of workers' forming or joining trade unions as being 'to protect their interests,' (and in the case of ICESCR the right to strike), Article 19(1)(c) should now be interpreted consistently with the labour provisions of these treaties as required by Article 51(c) so that the fundamental right to form and join trade unions includes the right to collective bargaining and other concomitant rights, notwithstanding any reservation that the Government of India may have made while ratifying those treaties.

Most importantly, as stated before, in light of the discussion of international law in the previous section of this report, the rights enshrined in ILO Conventions Nos. 87 and 98 on the rights to form and join unions and to collective bargaining are now so universal that they have obtained the status of customary law.

Despite non-ratification of these Conventions, India by virtue of its membership in the ILO is bound by those core labour standards articulated in the ILO Declaration of Fundamental Principles and Rights at Work of 1998 as customary international law. Under Indian law, therefore, the rights which give meaning to the right to form and join trade unions, i.e. the right to recognition, the right to collective bargaining, and the right to strike should be considered fundamental Constitutional Rights under Article 19(1)(c). This position is supported by the fact that there is no contradictory domestic law. In fact, the Industrial Disputes Act prohibits interference with the right of workers to organize for their mutual aid and protection by classifying such acts as unfair labour practices, and recognizes the right of representative trade unions to recognition by employers, the right to collective bargaining and the right to strike.

In line with the arguments made in the section on international law with respect to precarious work, impeding workers in their ability to protect their interests by joining and forming trade unions, precarious work must be seen to be just as illegal under the Indian Constitution as it is under international labour law.

Endnotes

[368] *Jolly Verghese v. Bank of Cochin* (1980) (2) SCC 360, 367.

[369] (1997) 6 SCC 241, 249.

[370] (2008) 13 SCC 30, 62.

[371] *Vellore Citizens' Welfare Forum v. Union of India,* (1996) 5 SCC 647, at page 659; and *People's Union for Civil Liberties (PUCL) v. Union of India,* (1997) 1 SCC 301 , at page 311.

[372] *All India Bank Employees' Association v. The National Industrial Tribunal (Bank Disputes), Bombay and others* AIR (1962) SC 171, 180-182.

[373] (1978) 1 SCC 248.

[374] As stated by Lejo Sibbel in his 2001 report for the Friedrich-Ebert-Stiftung Department for Development Policy entitled the "ILO Conventions and the Covenant on Economic, Social and Cultural Rights: One Goal, Two Systems, Dialogue and Cooperation,"under international law, there is no difference in rank between the Covenant and ILO conventions; consistency is an important issue. It is generally considered that such consistency exists between the Covenant and the relevant ILO conventions. The difference is that, whereas the Covenant contains relatively broad statements of principles, ILO conventions on the same subjects are considerably more detailed and contain more guidance on means of implementation" (p. 51).

SECTION 9:
Conclusion & Recommendations

The majority of the workers in the automobile manufacturing factories as well as supplier factories in the Chennai automobile hub are precarious workers who are paid low wages and denied other benefits afforded to permanent workers in the sector. They are engaged as 'trainees,' 'contract labour,' etc., disguising the real nature of the employment relationship between the companies that utilize their services and the workers. The adoption of such nomenclature masks the kind of work they really do which includes production work and production-related work. Although much of the precarious workforce in the sector is engaged in work of a regular or perennial nature, the prospects of their being made permanent are bleak. Consequently, a large section of the precarious workforce remains permanently precarious.

Violations of labour laws are widespread in the hub. The engagement of precarious workers for performing work of a regular or perennial nature is in violation of the law. The engagement of workers on a precarious basis for prolonged periods is in violation of the state law requiring conferment of permanency on workers upon completion of 480 days of continuous service, and is an unfair labour practice under the law. Other violations of labour laws that are rampant are that of the requirement to pay contract workers the same wages as the permanent workers for performance of the same or similar kind of work, and non-adherence to the mandates of the Factories Act in respect of working hours and the payment of extra wages for overtime work.

The rampant exploitation of precarious workers in the sector suggests that, by and large, employers do not view them as human beings with aspirations and desires of their own and as workers with rights under the law. Instead, they seem to be seen only as cogs in the wheel of the assembly line mass production process who must simply do as told.

The free exercise of the right to organize and collective bargaining rights would empower precarious workers in the auto sector to negotiate for better wages and working conditions and enable them to assert their right to permanent employment. The overwhelming majority of the precarious workers in the Chennai automobile hub are, however, not unionized and lack any kind of representative voice. Their precarious situation undoubtedly undermines their ability to exercise their right to freedom of association and related rights to protect their interests. The hostile attitude of employers towards trade unions, particularly "outsider" unions, is of course another major obstacle to the exercise by workers in the sector of these rights. Thus, even while precarious workers have the right to organize themselves under the law, in practice they are denied the fundamental human right to form and join trade unions to protect their interests.

The aforesaid facts would indicate that there is a huge decent work deficit in the sector in the Chennai auto hub. The adoption by employers of the practices mentioned above, however, is by no means confined to the Chennai auto hub alone. Nor is the case with employer hostility towards and repression of trade unions. Studies indicate that such practices have been adopted by employers in the auto sector in other places in India and also in other countries in the world over the years. Indeed, one of the reasons behind the expansion of global auto industries and the relocation of production from one site to another appears to have been the emergence of labour movements that have resisted such practices. The fact that similar unfair practices have been adopted by employers in the sector in other production sites, either in the past or at present, however, ought not to be an excuse to overlook the rights' violations and unjust employer practices in the Chennai auto hub. It also ought not to be an excuse to postpone the adoption of measures necessary to curb such practices. The pursuit of economic growth cannot be at the expense of workers' rights. Moreover, all sections of workers should be able to benefit from economic growth.

There is a pressing need to address the decent work deficit in the Chennai auto hub in order to ensure that all categories of workers in the sector can work in conditions of freedom, equity and dignity. Employers as well as the state need to recognize that precarious workers as much as other workers are entitled to decent wages, fair working conditions, health and safety measures, social security and liveable housing. Strict adherence to the requirements of the law in letter as well as in spirit is necessary to ensure that these basic rights of precarious workers are protected and that they do not languish in a permanently precarious state. It needs to be emphasized that multinational employers, as much as other employers, have a duty both under international and national laws to comply with national labour standards, including those relating to freedom of association and collective bargaining rights.

The state in its eagerness to attract foreign investment and spur economic growth ought not to overlook its constitutional obligations towards all sections of workers and its

obligation to promote decent work. The state needs to look at growth and development from an inclusive, broader and long-term perspective. It would need to appreciate that employers' claims about the need for greater flexibility to remain competitive in the globalized economic environment cannot be a justification for exploitation of the workers and denial of their basic rights. It also needs to recognize that while there may be a need to generate and increase employment opportunities; low quality, insecure jobs are not the solution. Furthermore, allowing the exploitation of workers out of a fear of flight of foreign investment to other competing states in the country or other nations would only lead to a race to the bottom.

Considering the scale of workers' rights violations in the sector and the constitutional obligation of the state to protect the rights of all sections of workers, the state ought to make the protection of the rights of workers in the sector a matter of priority. Rigorous implementation of the law in letter as well as in spirit would be necessary to ensure that the constitutional and statutory rights of precarious workers are protected and that their exploitation is prevented. The state should have the political will to enforce the law in respect of MNCs as well as domestic industries. The labour law inspection and enforcement machinery would need to act effectively to protect workers' rights and also should be suitably strengthened and equipped for the purpose. Ratification by the Government of India of ILO Conventions Nos. 87 and 98 would also help improve compliance with laws relating to the freedom of association and collective bargaining rights of workers, in letter as well as in spirit.

Aside from the fact that employers have the obligation to respect the freedom of association and collective bargaining rights of workers under the law, employers would need to recognize that they also stand to gain by respecting the freedom of association and collective bargaining rights of their workers. When workers are treated fairly and have a voice in the workplace, they are more productive and less likely to leave. Cooperation between trade unions and employers can boost business performance and competitiveness. On the other hand, refusal to allow unionization of workers and to grant recognition to representative unions of workers leads to worker alienation and industrial unrest. Instead of adopting union avoidance strategies and promoting management-friendly unions, employers in the sector would rather need to work towards establishing industrial relations systems where the freedom of association and collective bargaining rights of their workers are truly respected.

The basic rights guaranteed to all workers under Article 23 of the UDHR would become a reality for precarious workers in the Chennai auto hub only when the state acts in a pro-active manner making the protection of the human rights and labour rights of all sections of workers in the sector a matter of priority.

Lastly, the importance of solidarity among all sections of workers in the auto sector and also transnational solidarity among workers of the same companies in different countries and, more generally, among workers in the sector in different countries cannot be overemphasized. Only by such solidarity and collective action can the illegal practices of employers be effectively countered and the basic rights of all workers be protected.

Recommendations

Based on the study and its conclusions, the ICLR makes the following recommendations to employers in the sector including multinational enterprises, to the Government of India and the Government of Tamil Nadu.

Recommendations to Employers:

1. Recognize that all categories of workers are entitled to just, humane and equitable conditions at work and fair wages.
2. Respect the freedom of association and collective bargaining rights of all categories of workers.
3. Recognize that precarious work prevents workers from protecting their interests by causing impediments to their exercising their rights to freedom of association and collective bargaining and as such violates international labour law.
4. Respect and comply with national and international labour standards both in letter and spirit.
5. Refrain from hiring contract workers, trainees, apprentices, learners, probationers and other categories of precarious workers for jobs of a perennial nature.
6. Respect and comply with the requirement of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 to confer permanency on workers on completion of 480 days of continuous service in a period of two years.
7. Respect and comply with the principle of equal pay for work of equal value.
8. Refrain from adopting unfair practices aimed at circumventing the applicable labour laws.
9. Refrain from acts of anti-union discrimination and acts of interference.
10. Recognize that workers' committees cannot be a substitute for trade unions and refrain from using workers' committees to undermine representative trade unions.

11. Grant recognition to and negotiate with representative trade unions.

Recommendations to the Government of India:

Based on the findings of the study, the ICLR makes the following recommendations to the Government of India:

1. Recognize that employer appeals for greater flexibility under the law and in practice in the name of competitiveness only create jobs which are low paying and exploitative and do not enhance the purchasing power of the workers. Also recognize that this only furthers inequality in society, and not real growth and that such appeals and practices will only lead to a self-defeating race to the bottom.
2. Strengthen the laws for protection of workers' rights in consultation with workers' organizations, in particular by (a) explicitly prohibiting the engagement of precarious workers in any kind for work of a regular and perennial nature in industrial establishments; and (b) ensuring that the laws protecting freedom of association and collective bargaining rights in the country are in conformity with the international labour standards of the ILO.
3. Re-consider proposals to effect amendments to the law so as to afford greater flexibility to employers in the manufacturing sector.
4. Recognize that ILO Conventions Nos. 87 and 98 are binding as customary international law and at the same time demonstrate India's commitment to respecting international law by ratifying these conventions.
5. Reaffirm the commitment made to improving the lives of workers by respecting their rights to protect their interests and develop an adequate standard of living through self-organization of trade unions.
6. Take necessary measures to ensure that all categories of industrial workers are in a position to exercise in practice their universal rights to freedom of association and collective bargaining.
7. Recognize that the full-employment policy incorporated in ILO Convention 122, which India has ratified, is necessary to promote the goals of Article 23 of the Universal Declaration of Human Rights which speaks in terms of fair and just conditions of work, fair and just remuneration consistent with human dignity.

Recommendations to the Government of Tamil Nadu:

Considering that labour laws in respect of the factories covered by the study are enforced by the Labour Department of the State of Tamil Nadu and also the fact that the State of Tamil Nadu has concurrent jurisdiction under the Constitution of India on labour-related subjects, the ICLR makes the following recommendations to the Government of Tamil Nadu:

1. Take appropriate measures to ensure that all employers in the automobile sector including multinational companies respect and comply with Indian labour laws in letter as well as in spirit.
2. Take necessary measures to strictly enforce labour laws in the automobile sector and thereby protect the rights of precarious workers in the sector including their freedom of association and collective bargaining rights.
3. Take necessary measures to ensure that precarious workers are not engaged for work of a regular and perennial nature in the sector.
4. Take necessary measures to ensure that the principle of equal pay for equal value is respected and followed in the sector.
5. Strengthen the labour administration and labour inspection system by taking appropriate measures including increasing the number of labour inspectors and giving labour inspectors thorough training on all aspects of labour laws as well as the spirit of the labour laws so as to effectively prevent employers from adopting practices aimed at evading and circumventing the laws.
6. Enact a law relating to the recognition of trade unions in consultation with representative workers' and employers' organizations.
7. Strengthen labour laws relating to precarious workers in consultation with representative workers' organizations.
8. Re-consider proposals to effect amendments to the law so as to afford greater flexibility to employers in the manufacturing sector.

Endnotes

[375] As per sections 51 and 54, the Factories Act, workers should not be required to work for more than nine hours a day or 48 hours a week. Section 65(1) of the Act empowers the state government to issue orders exempting any factory from these requirements in order to deal with the exceptional pressure of work. However, even in such a case, the total number of hours of work in a week including overtime work should not exceed 60 hours. Section 59 of the Act requires that workers be paid wages at twice the normal rate when they work for more than nine hours a day or 48 hours a week.

[376] For example, see Worker voices in an auto production chain, Annavajhula, JCB, Surendra Pratap, EPW, August 18, 2012, Vol. 47, No.33, p.46. Das, KSL and George, S., Labour practices and working conditions in TNCs: The case of Toyota Kirloskar in India, Asia Monitor Resource Centre online at http://www.amrc.org.hk/system/files/Labour%20in%20Globalising%20Asian%20Corps%20-%20Chap%209-10.pdf and Silver, Beverly J., Forces of Labor: Workers' Movements and Globalization since 1870, Cambridge University Press, New York, 2003.

[377] Workers' Movements and Globalization since 1870, see note above.

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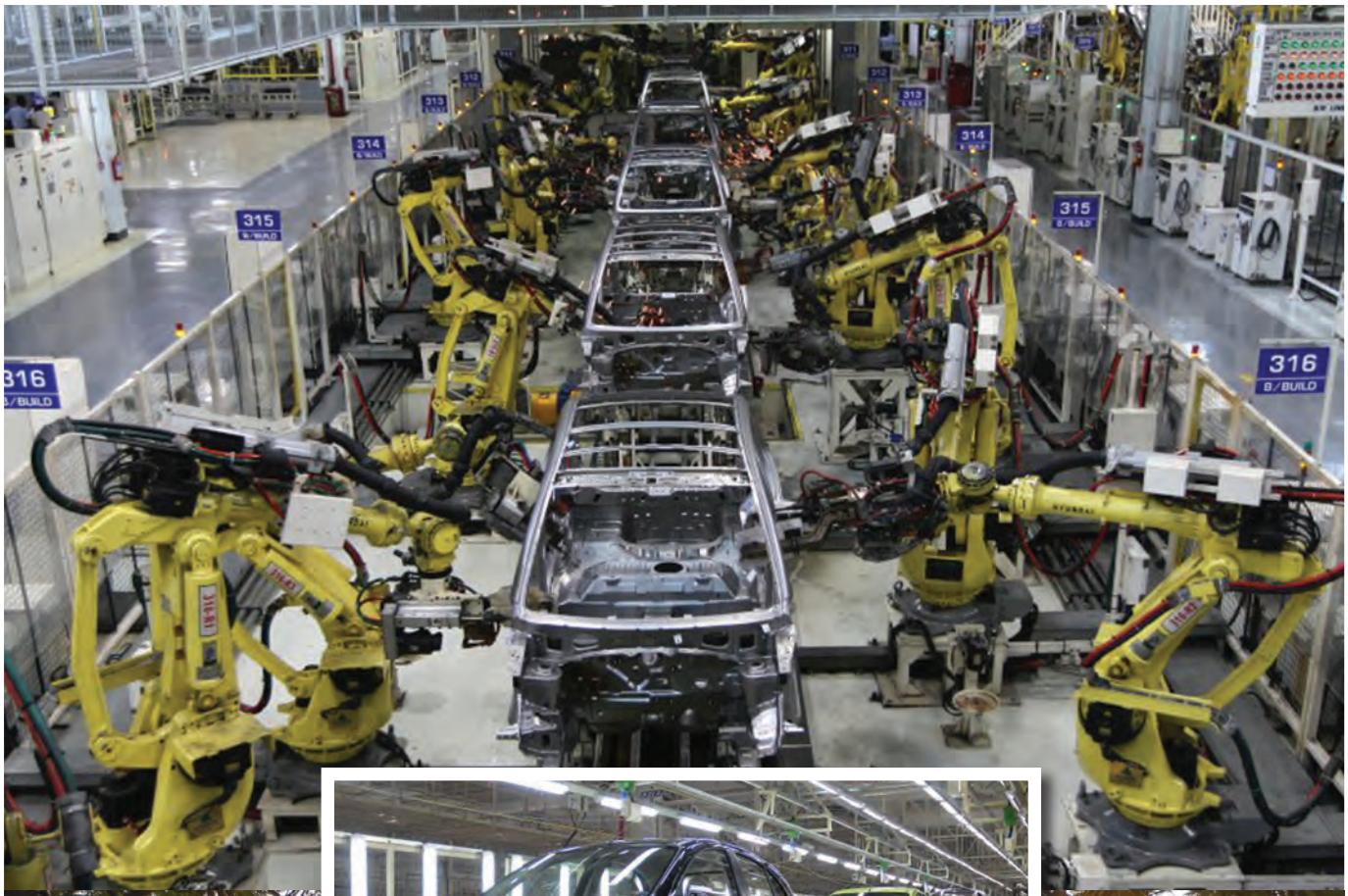

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