CHAPTER - V

JUDICIAL APPROACH

The loom of the Government, and the Courts in India, has altered time to time, in the beginning, the infant republic tried to become a welfare state, for that purpose, the liberal approach and interpretation of the statutes in the background of socialist type of governance was done by the courts in India. This approach may be seen from some of the Judgments of the Honorable Supreme Court. The approach of the judiciary can be sufficiently introduced in the observation of Madan, J. in *Central Inland Water Transport Corporation v. B.N. Ganguli* as, “As society changes, the law cannot remain immutable. The law must march in tune with the changed ideas and ideologies, Legislature are, however not best fitted for adopting the law to the necessities of the time, for the legislature policy is too slow and the legislatures often divided by politics slowed down by periodic elections and overburdened by myriad other legislative activities. The process of amending a constitution is too cumbersome to meet the immediate needs. Their task must, therefore of necessity fall upon the courts because the courts can by process of judicial interpretation adopt the law to the needs of society.”

WORKERS RIGHT: A SOCIO-LEGAL ANALYSIS

In the premises of the above said observations, the interpretation of the labour and industrial law, in the background of the social background in the country, commenced. The socialist spirit was not only a principle, but it was the very soul of interpretation of any legal provision. The courts had the approach of protecting the interests of the workers class in this country, therefore, in *Peoples Union for Democratic Rights v. Union of India*.

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1. 1986 Lab IC 1312.
Supreme Court held that non-payment of minimum wages to the workers was a denial to them of their right to livelihood, and therefore, the same is violative of Article 21 of the Constitution. Bhagwati, J. (as he was then) held that the rights and benefits conferred on the workmen employed by contractor under various labour laws are clearly "intended to ensure basic human dignity to workmen and if the workmen are deprived of any of these rights and benefits, that would clearly, be violative of Article 21 which guarantees right of life".

The view adopted by Bhagwati J and Krishna Iyer J are contrast to the approach of what Gajendragadkar, J. (as he was then) observed: "...but on such occasions it should be necessary to remember that what is administered in courts is justice according to law, and consideration of fair play and equity, however important they may be must yield to clear and express provisions of law."

The role of social justice in the interpretation of the provisions relating to the labour and development of the industrial jurisprudence, in such a manner, as would promote the cause of the workmen, may be seen by the above observations, "Socio-economic justice, the cornerstone of industrial jurisprudence to be achieved by the process of give and take, concessions and judgments of conflicting claims would hardly advance, in the industrial dispute, involved in this appeal by special leave brought by the appellant...canvassing some technical legal nicety rendering the two employees jobless for more than seven years is encouraged" after these observations, two workmen were reinstated in their services.

The socialist approach adopted by the courts in India, was at its best in the Gujrat Steel Tubes case where Iyer J demonstrated the socialist approach in case of strike, and shown the approach to balance the conflicting

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3 Gujrat Steel Tubes v. GST Majdoor Sabha, AIR 1980 SC 1896.
interests, observing that, strike though may be illegal but still may be justified. Does it not tantamount to saying that the parliament has, through legislation, illegalized what is in fact just? It seems Iyer J. here gives precedence to his own reason than to the express and clear, intention of the legislature.

THE ENTRANCE OF CAPITALISM IN INDIA

Though, in the beginning courts in India, have adopted the socialist approach, and the interests of the working class in this country, was adopted by the courts, the capitalism has entered in India, by joining the hands with globalization, the privatization, along with other policies of governance, favouring the employer, in place of the workman, though the approach runs contrary, to what has been contemplated by the framers of constitution, and recognized by the legislators, by introducing the 42 nd constitutional amendment, in the year 1976, to insert the term "socialist" in the Preamble of the constitution. The intent has been rendered nugatory, by following observations of the courts, in various situations.

The approach of the government, to sign the international treaties, relating to the trade, and to bring home the issues of the globalisation, has made a huge impact on the economy, the impact may be seen, even from the response of the courts, and the courts in the country, which were considered as the protectors of the rights of individual in the country, have started adopting the capitalistic approach.

The first instance of the capitalistic approach was shown by the supreme court, in the case of T.S.Kelawala\(^4\) where the Sburt has held that, the workers are not entitled to the wages for strike period, on the principle of "No work no pay", which shows the capitalistic approach adopted by the judges. The Court observes.

\(^4\) 1990(4) SSC. 744.
POST RANGARAJAN ERA: JUSTIFICATION OF THE PROBLEM

The ratio laid down in the Rangarajan Case, has created huge controversy in India, the premises of uncertainty of the right to strike has widened, and in the era when the machinery is replacing the human being, for the purpose of completion of work, the capitalist thoughts of the multinational companies have been boosted, and there exists a belief in the employer class, that, the right to strike would stand abolished in passage of time.

The demands of pensioners benefits to the workmen was the issue in controversy, where on the one hand the employees were demanding the pension, at a higher length, as they have contributed from the date of inception in service, while the management was ready to settle with partial increase, the government was not ready for such increase, on the ground that, the other employees will demand for the same.

Now, it is interesting to see, whether the court will apply the same formula of justified and unjustified strike. Or the ration of the Division Bench of the Supreme Court, in the case of T.K. Rangarajan would be followed, for the purpose of considering the entitlement of the workers for the wages for strike period, is an interesting question, which may decide the fate of the right to strike of the workmen. But, huge moral victory of not only the workmen, but also the right to strike has been witnessed by the country, when, At last, on 9-04-2006, the country has witnessed, one of the biggest compromises made by the Central Government, wherein, the government was made to bend its back, and accept to the demands of the strikers.

Which shows that, the Strike is still a weapon, which may be utilized for the purpose of negotiations, and setting the negotiations, on the basis of equality in bargaining. But, the said strike was from a work class, which has
earned substantial deal of money, and who have the funds to subsist for the bargaining by resorting to strike, for fairly long period. But, what would be the situation of a workman, who has the hand to mouth situation, who has to work for the entire day, to earn his living, the problem of deciding the right to strike, still subsists. The right of the working class—and the apprehension of its abolition, still subsists, even after witnessing, successful strike.

Though, the right to strike is not a fundamental right granted by the Constitution, it is a marked portal emerging out of right to the expression and freedom of speech. The fundamental right freedom of speech and expression is not absolute; it is subjected to some restrictions on par with the all other fundamental rights. It does not mean that the citizens should not express their dissent. They may adopt any mode of expression to represent their dissent, which is not against the public policy. Therefore, considering the socialist pattern of the Indian legal system, the Right to strike, should be elevated to the high pedestal, or fundamental right, under Article 19 (1) (c), on which the reasonable restrictions may be imposed, including, the restrictions on use of force etc. In every industry, an industrial relation committee should be constituted, which would consist of equal representatives on each side, who will try to reconcile the debatable issues, so as to avoid the strikes.

THE EMPLOYEES' QUEST FOR MEDICAL RECORD PRIVACY

The passage of the Family and Medical Leave Act (FMLA)\(^5\) was a boon to many workers as it afforded them the opportunity to take up to twelve weeks of unpaid work leave to address serious personal and family medical situations. In order to exercise the right to personal medical leave, however, the FMLA requires an employee to reveal to the employer sensitive personal medical record information. The release of this personal

\(^5\) www.judicialview.com/law_review/employment/…/4565.
medical information invades the employee's privacy and subjects the employee to a risk of unauthorized disclosure to third parties, without materially assisting the employer in making a leave request decision. Consequently, Congress should amend the FMLA to only call for a statement from a medical doctor verifying that the employee has a "serious medical condition" as a condition of leave, thereby abandoning the current additional requirement that a physician provide the employer with the medical facts underlying the medical condition.

The ease with which strangers may access personal information about others through the internet and other electronic sources has resulted in the conclusion that meaningful individual privacy no longer exists. This is felt nowhere more acutely than with personal medical records as well as on right of workers. Indeed, according to a 1999 Harris Equifax survey, “over 80% of public respondents felt they had 'lost all control' over their personal [medical] information.” This problem has led important players in the health care industry to conclude medical record privacy protection⁶ is "non-existent." In response to this concern, fifteen percent of Americans engage in privacy-protective behavior to shield themselves from unwanted disclosure of health information, including giving healthcare providers inaccurate information, paying out-of-pocket for medical care normally covered by insurance, doctor-hopping to avoid consolidation of records, or even avoiding healthcare altogether.

While this may work for some, federal and state statutes often compel employees to disclose personal medical records to an employer in order to exercise the right to a statutory benefit. This is true under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). While these statutes provide for protection of medical privacy in

the workplace, public confidence in the security of the medical records disclosed by employees to employers is low. Employees are justified in this disillusionment because once personal medical information is given to an employer, it is often released to third parties, and an employee may suffer negative personal consequences, which financial remedies do not adequately redress.

The case of *Doe v. United States Postal Service*[^7] illustrates this problem. John Doe, a maintenance worker for the United States Postal Service, missed several weeks of work due to an AIDS-related illness. Doe's supervisor informed him that he would need to submit a medical certification form, filled out by his health care provider, certifying that he suffered from a "serious health condition" and "describing the medical facts which support the condition." When Doe subsequently returned to work, he found that his previously unknown HIV status was known among his co-workers.

In order to protect his job, John Doe had to disclose personal medical records to his employer. The FMLA mandates that in order for an employee to obtain medical leave due to a serious health condition, the employee must reveal the "appropriate medical facts regarding the condition". Congress designed the requirement with the intent of protecting an employer from potential abuse of leave by an employee not worthy of leave.

This Article argues that the requirement under 2613(b)(3) that an employee disclose specific facts underlying medical conditions to an employer as a condition of obtaining FMLA leave goes too far and should be removed from the regulations for the following reasons. First, providing an employer with the personal medical facts that underlie a serious medical condition for FMLA leave is unnecessary because it serves no legitimate business purpose of the employer. Second, the medical information

[^7]: 1984 US 49.
disclosure requirement of the FMLA places employees at unnecessary risk of adverse employment actions. Third, the benefits. The history of the Social Justice Summer Retreat is still evolving as we continue to expand our reach and clarify how we can achieve our objectives.

Events like this have been organized before. The progressive intellectuals and activists of the 1930s, 40’s and 50’s used to gather at the National YMCA Camp at Geneva Park on Koochiching near Orillia. That's where they helped combine the Christian social gospel tradition and the social democratic ideas of the CCF (the Cooperative Commonwealth Federation, fore-runner of the NDP) -- and the League for Social Reconstruction (that was the brains trust behind the CCF) into the social safety net that we have today. The Koochiching gatherings were referred to as Thinkers Conferences and were rather elitist. They are carried on today but with a more liberal orientation - featuring speakers like Paul Martin and other members of the Liberal Cabinet.

There were other camps and leadership training schools organized between the 1920's and the 1970's -by groups such as the United Jewish Peoples Order, the Union of Mine, Mill and Smelter Workers, and the Grindstone Island Cooperative. They left a rich tradition of organizing by those firmly on the left-wing of Canadian politics, whether socialist, communist, or simply peace-loving. It is wonderful to hear these old activists reminisce about all the fun they had when like-minded people -those who shared a commitment to social justice⁸ - got together with their families in a wonderful Northern setting. We wanted to resurrect these traditions.

The idea for such a retreat was hatched in late 80's when some activists from churches, unions and other social movements gathered at Emmanuel College to discuss running a leadership development program for

⁸ www.socialjustice.org/inder.php?page=background
our younger activists. Talked turned to the history of progressive summer camps in this province.

Soon after that, the Atkinson Charitable Foundation brought together activists from about 35 social movement organizations to discuss what we were doing, what we might have in common and how we might work more closely together to achieve a greater impact. It was proposed that we continue the networking over a longer period in the summer, and bring along our families, so that we could establish deeper relationships and more collaboration.

A small group gathered in January of 1998 to plan our first retreat - Debbie Field, Sam Gindin, Josephine Grey, David Langille, Lee McKenna du Charme, Susan McMurray, Judy Rebick, and Ted Reeve. We agreed that our purpose was to help build and strengthen the social movements of Ontario. The Atkinson Foundation gave us $12,000 to help organize and subsidize the first retreat. We checked out the facilities of the Geneva Park YMCA Camp at Couchiching and the CAW's Family Education Centre at Port Elgin - and found that they would cost too much for our crowd. So we began looking at summer camps and Arowhon quickly emerged as a natural choice - it offered wonderful facilities in a beautiful wilderness setting, and the owners, Joanne Kates and Leon Muzinski, were sympathetic to the cause. Algonquin Park is roughly of equal distance from the major cities of the province.

We try to offer a rich program but we want to avoid organizing a conference in the countryside. So we structure some free time in the program and we encourage you to take a break when you feel the need - so you can find the right mix of listening, talking and recreation.

Consistent with our commitment to social justice, we want to avoid this being an elitist event so we seek a mix of leaders and grass-roots
activists. Everyone who attends is a full participant and capable of contributing to a panel, workshop or discussion.

Various groups have chosen to hold their meetings in conjunction with the Retreat — such as the OCASI youth program, the Ontario Environmental Network's youth program, the Ontario Young Peoples’ Alliance, and the Ontario Coalition for Social Justice. In order to better reflect the diversity of Ontario, each year we have extended our outreach to sectors of the social justice community that we felt were missing or under-represented. Organizing and financing the Retreat became an ongoing process involving a broad partnership of groups - including the Atkinson Foundation, Catalyst Centre, Canadian Autoworkers, Conservation Council of Ontario, Canadian Energy and Paper Workers Union, Canadian Federation of Students, Canadian Labour Congress, Council of Canadians, Canadian Union of Public Employees, Canadian Postal Workers Union, Interpares, Ontario Council of Agencies Serving Immigrants, Ontario Coalition for Social Justice, Ontario Federation of Labour, Ontario Young Peoples Alliance, Phoenix Community Works Foundation, United Food and Commercial Workers, and the United Steelworkers. The Centre for Social Justice continues to take responsibility for financing and coordinating the Retreat.

We welcome you to Arowhon, and invite you to join us in our ongoing debates about how to build and strengthen the social movements of Ontario. We also invite you to get involved in helping to organize next year's Retreat. This is now a year-long process which begins at the Retreat where you can help identify emerging issues, give us your feedback, and join the working group.

**LANGUAGE ARTS, LIBRARY / TECHNOLOGY AND PHILANTHROPY**

Prior to this lesson, the learners will have studied racial intolerance
from a historical perspective and have researched and reported on contemporary examples of social injustice/needs. In this lesson, the learners will put their knowledge and understanding into action by planning and completing a service project to right a social injustice/social need that promotes the common good. They will do this by helping to plan as well as participate in one of three projects identified in Lesson Four. They will then be expected to complete a journal reflecting on their service project experience. One Fifty-Minute Class Period (students will continue to work on projects outside of school)

**THE LEARNER WILL**

- elect to participate in one of three identified social needs service projects
- work collaboratively in a group to develop a plan to address the social need
- participate in a service project designed to address the social need
- complete a series of reflective journal entries analyzing their service experience

In the prior lessons of this Unit, the learners, through research and inquiry, have already identified many genuine social needs. In this lesson, small groups will develop service proposals (student voice) to meet these social needs and will complete a series of journal entries analyzing their experiences while doing so (reflection).

Service Project Proposal a few for each of the three groups assigned (Attachment one)

**TEACHER NOTE**

During the oral presentations of Lesson Four, the learners were to
have completed the Reflective Log, including the Speaker's Name, Topic, Notes and an interest ranking of the presentation of their peers. This interest ranking is intended to answer the question, "Who did the best job of persuading me to personally become involved in their identified social injustice/need?" Compiling these rankings, the top three social injustices/needs were to have been identified prior to the start of this lesson.

Anticipatory Set.

Begin the class by reminding the learners of the top three social injustices/needs they, as a class, identified based upon the speeches and rankings completed in Lesson Four. Having had some time to think about these three possibilities, they are now to take a minute to decide in which of the three identified social injustice/needs areas they wish to involve themselves. Pass out slips of paper and have the learners place their name and the name of the area they have elected to become involved with and collect these slips from the learners.

Identify three areas in the classroom giving each location a social need designation and then have the learners move to the area they selected on their slip of paper. Allow a few moments for the groups to identify with each other. Provide each group with large sheets of chart paper and markers (or a display board area) and pose the following prompt to the groups, "Brainstorm at least 10 things your group could do to combat your group's social need." The group's recorder writes this information on large sheets of chart paper/display.

After groups have brainstormed, each group presents their brainstormed list to the class. Post the chart papers/display board where all the learners can see them. Now that the groups have generated many possible ideas, tell the class that they will shortly select an action to serve the common good. Hand out Service Learning Proposal, the Service Learning
Commitment, the Service Learning Due Dates, the Journal Expectations, and the Journal Rubric (Attachments One - Five). Go through these handouts with the class.

Service Learning Proposal: Remind the learners that they must answer "yes" to each question in the Solution Proposal Checklist on the Service Learning Proposal. If they answer "no" to any of the questions, they must rewrite/revise their proposed Action. (Have extra copies of this handout to allow for messy revisions and the rewriting of a clean copy). Service Project Commitment Remind the learners that they must all sign the Service Project Commitment. They must also have this form signed by their parents/guardians. Only after obtaining all necessary signatures can the group approaches the teacher for project approval and his/her signature.

Service Project Due Dates: Inform the learners that, when they have the teacher's approval and signature for their Service Project Proposal, the group can complete the Due Dates form with the teacher. As each group may be completing their service learning project on different days, the journal due dates will need to vary between groups.

- Journal Expectations and Journal Rubric: Review these forms and field any questions. Remind the learners that this is the graded portion of the lesson.

- Establish a date by which everything is to be completed and submitted.

**TEACHER NOTE**

It is difficult to judge how long the completion of these forms will take. Some groups may quickly generate a viable idea and complete the

9 Earning to give.org/lessons/unit232/lesson 5.html.
form. However, other groups may need to contact community groups or other organizations to determine the practicality of their proposal. At this point, it would be advisable to allow the learners to use the remaining class time to select an idea and begin to research the viability of their proposal. Over the next couple days, they can continue to research and obtain parental signatures. The entire class can be given the same approval due date in 3-5 school days. By that set date, each group should have completed the Proposal, obtained all parental signatures and met with the teacher to establish that group's journal due dates. After Day 1 of this lesson, the class may move on to another unit, as the service learning project and accompanying journals are completed outside of class.

It is important that grades not be used to reward the service rendered; rather, the learners will be assessed on their involvement/teamwork in the group planning and helping to carry out the plan as well as their Journaling. Journals will be assessed using the Journal Rubric.

For some groups, parental involvement may determine the nature of their service learning proposal. For instance, if a group decides to mentor youth after school, or if they propose to volunteer at a soup kitchen that serves in a neighboring community, the group members may need to rely on parents for transportation. For this reason, parents must be informed of the groups intentions to serve. Requiring parents and guardians to sign the Service Commitment form ensures that parents are aware of their learner's service proposal.

When all the groups have completed their service learning projects and final journals have been submitted, allow some class time to have the three groups briefly report to the rest of the class, what it is that they did as a group to address their selected social need, their individual involvement in the project, and how they felt individually about their involvement in it.
Another extension for this unit can be done in partnership with the school newspaper or local newspaper. The learners can write newspaper articles about their recently completed service projects and the academic study that proceeded. Depending on the preferences of the newspaper editor, each group may report on their own project, or the class may collaborate on one larger article that summarizes all projects. Related class discussion can revolve around the necessity of publication. Discussion questions: What are the benefits of publicizing the class's actions? Are there negative consequences to publication? Is newspaper publication an effective way of informing a readership of community need? How can publication be an effective way to inspire others to care about an issue and to take action?

**JUDICIAL REVIEW AND WORKING CONDITIONS**

Several existing studies point to the significant contribution domestic workers' wages make to family income. Their wages are low but constitute a steady income in the household, as the husbands generally have unsteady income as workers in the informal economy. A recent study conducted by the Institute of Social Studies Trust showed that the variables which influence wages are location, socio-economic profile of employers, tasks performed and combination of tasks. Several States have notified minimum wages for domestic work but have no norms for implementation or monitoring. A discussion took place to unpack the questions on wage calculation - and the varied norms and principles for the part-timers and full-timers.

An important point made was that wages were self-regulated (based on the variables mentioned above) and most workers were aware of the prevailing rate in the localities and were prepared not to accept less. However workers who for one reason or another were not part of any
(informal) social networks did not have access to such information find they were the ones who accepted lower rates due to ignorance Many were aware of location based differences in rates however could not travel the distance due to their own child care responsibilities, etc These were important inputs to confirm the positive impact of organizing workers and to make such "floors" also present in issues such as medical fees, overtime, annual leave and bonuses.

The focus of the discussion was on how to set minimum wages. Majority was of the view that "minimum wages" should be based on consideration of a living wage and establish the floor which all domestic workers (applicable by locality, etc) should receive. Furthermore it should be time rated rather than piece rated that would make calculation of overtime simpler. Many voiced that employers income should also be reflected in the calculation of minimum wages, possibly by establishing by decentralized "boards" which can consider location specific wage and other issues which can be topped up on the basic minimum wage. In terms of in-kind payment, there were no agreements on the percentage of in-kind payment permissible (ILO Convention mentions not more than 50 percent). It was however pointed out that minimum wage should be in monetary terms Moreover, items considered "in-kind" should be specified so as not to confuse them with "incentives" such as clothing on demand.

In terms of accommodation, there are several different arrangements: quarter, room and living in the house in the same space as the family. Accommodation can be a great support as well as a source of exploitation Cost of accommodation should be only considered "in-kind" if it is a separate living quarter where the worker can be granted privacy and for example be able to live with her family. A space in the house should not be considered as accommodation worth)" of in-kind payment Moreover,
automatic deduction should be avoided, and workers should receive their pay in full in cash to bring dignity. Food should be automatically provided if the worker lives in the house of the employer.

Wages should also take into account the skills of the worker. Thus may be taken up by a decentralized board, or be based on negotiation between the worker and employer (above the minimum wage). Norms must be fixed to ensure that no wages are deducted when workers take paid leave, when employers go out. Furthermore, many supported that they should be paid 10 per cent increment annually, one month bonus also. The workers must be paid every month, and written account of the payments due and the amounts paid to be given to this end, most participants supported the development of a model contract that is legally binding.

**WORKING CONDITIONS**

The following issues were covered in this session working time:

- Weekly hours, hours worked at night and weekly rest periods
- Stand by, freedom to leave the house

Living conditions

- Accommodation/privacy, food and water.

Social Security/OSH

- Sickness, injury, maternity, invalidity.
- Safety at work, sexual harassment
- Unemployment and pensions
- Leave
- Maternity
- Privilege, casual and sick leave
An important point for discussion—bearing in mind the specificity of domestic work—whether policies and legislations were to ensure that domestic workers are treated "not less favourably" as other wage workers, in such a case, the issue is who pays for the benefits and associated costs, the extent of coverage to be provided and to what extent the provisions should be statutory as opposed to a more flexible arrangement of individually negotiated contracts? All agreed that domestic workers should not be treated less favourably compared to other wage earners. This means not less favourably than workers covered under the factories Act and other similar acts.

**WORKING TIME**

The maximum number of working hours for an adult worker should not exceed 48 hours in a week and nine hours in a day. Any worker working for more than the maximum prescribed time is entitled to wages in respect of such overtime work at twice the ordinary rate of wages. Every worker must be allowed one holiday a week, on any day. Whenever a worker is required, to work on a weekly holiday, he is to be allowed a compensatory holiday for each holiday lost, within the same month or within two months immediately following that month are such examples. In terms of rest period, many suggested 10 hours of consecutive rest period where overtime should be prohibited. Meal intervals should be provided after five hours of consecutive work for live-in workers.

Regulating working time can be conceived for full-tune (live-in) workers but it would be difficult to place any regulation on part-time workers. For part-time workers, the wages will automatically work as a self-regulating mechanism. Others considered that a setting up of a "tripartite board" could help in monitoring and regulating for part-time workers. There were different suggestions on the extent of notice period that
should be provided, ranging from one month to up to two months, but all participants agreed that a notice period or an equivalent compensation in salary was required.

Living conditions: As mentioned in the previous section on wages, accommodation can range from a separate staff quarter, room and living in the house in the same space as the family. Of key concern was the issue of privacy and how to define it. It was agreed that if a family cannot offer "reasonable" degree of privacy and accommodation that is safe and decent, respects the worker's privacy and provides meals of good, quality and sufficient quantity, they should not be permitted to have live-in domestic workers.

In addition to living condition, it was mentioned that the use of toilets in the house was an important issue where many households denied access of toilets to their domestic workers due to caste based discrimination. Access to toilets during work was essential. A special emphasis needs to be placed on prevention and punishment of sexual harassment. Furthermore, policy efforts need to be strengthened to develop working women's hostels that can be used by domestic workers as many would like to be able to live out or at least have a place to go for their weekly day off.

SOCIAL SECURITY

All agreed that domestic workers should be entitled to social security, maternity benefits and leave that are no less favourable than wage workers. Thus leaves the question of who pays for the associated costs. Several welfare board models have been suggested (including those already in place) but it was pointed out that these boards are not functioning very effectively. The benefits also need to be offered based on sound actuarial calculations of the costs and contributions required for sickness, injury, education grant and maternity protection. In terms of contribution to the welfare boards, it should
be state, workers and employers Many participants expressed the need to study existing welfare models with a view to analyzing then challenges and how they could be implemented effectively.

**LEAVE**

There are largely four categories of leave, maternity leave, privilege, casual and sick leave. Many strongly emphasized the need to offer fully paid, or at least at 50 per cent of the original salary, maternity leave of no less than 14 weeks The worker should be able to go back to the original employment at the end of the leave The worker should be entitled to paid sick leave (wages not to be cut) for 12 days a year as well as benefits to be provided in the event of long term illness Both live in and live out workers should receive one month privilege leave and when the employer goes on leave the wages should not be cut Although some voiced the need to be realistic when advocating for paid maternity leave employment protection, many believed this could be worked out through a welfare board.

**ENFORCEMENT**

Labour inspection requires access to the household, which may come in conflict with principle of privacy within the family home An important enforcement mechanism is also in developing grievance mechanisms. Some of the welfare board models that are being discussed by various organizations working on domestic workers have considered a grievance mechanism/cell within the board. Also important is to strengthen organizations of domestic workers, particularly through trade unions. Expanding the scope of existing laws-often through the change in definition on "workmen" or "workplace"- to extend application to domestic workers is important This is especially the case in regulating the so called "placement agencies" A recent study indicates that at present, there are no laws to regulate the functioning of domestic workers placement agencies, though
there are laws to regulate employment and placement of migrant and contract workers. None of the present laws recognize households or homes as workplaces but are treated as private spheres which are beyond the reach of any labour laws. Thus, domestic workers do not come under the definition of 'workmen's which places placement agencies safely outside the existing regulatory framework.

In regulating placement agencies, it is important to re-conceptualize what is meant by domestic worker placement agencies. All participants agreed that if an agency is to be considered a "placement agency", it needs to have certain positive qualifying criteria, such as being a "service provider" who places domestic workers in households for a fee., find operate with the principle of promoting the welfare of domestic workers and uphold their rights, that these providers will not have any role in salary collection or payment, etc. In order to weed out unscrupulous operators driven purely by profit and practicing exploitative tactics, it was suggested that those not conforming to the "positive criteria" shall not be authorized. A separate registration for domestic workers placement agencies may therefore be required to ensure that they comply with the criteria. A contract will assist in establishing employment relationships between a domestic worker and employer in addition to making the terms of employment clearer. Model contracts can be promoted and placed., for example in welfare boards, websites, trade unions, RWA offices., and so on.

The consultation served its purpose which was to provide a forum for civil society organizations already active in domestic workers' rights to discuss elements of the questionnaire based on existing initiatives both in law and practice. Drafting Committees for certain sections have been formed and they will coordinate and own the responses. The responses will be sent to the ILO directly and also to ILO constituents for inclusion in then' responses.
Parallel to the ILC process, the organizations present suggested the following ground, level action to be pursued together:

- Compilation of welfare board challenges and successes to identify a good model for domestic workers.
- Consolidated action to demand inclusion of domestic worker in the Minimum Wages Act and the development of a welfare board in every State.
- Developing an effective social security system for domestic workers.
- Facilitate linkages between Labour Departments and civil society organizations, particularly Unions, NGOs and Resident Welfare Organizations.

**EXPANSION OF JUDICIAL REVIEW**

The expansion of 'judicial review' (which is often described as 'judicial activism') has of course raised the popular profile of the higher judiciary in India. However, arguments are routinely made against the accommodation of 'aspirational' directive principles within the ambit of judicial enforcement. There are two conceptual objections against the justice ability to these positive obligations. The first is that if judges devise strategies to enforce the directive principles, it amounts to an intrusion into the legislative and executive domain. It is reasoned that the articulation of newer fundamental rights is the legislature's task and that the judiciary should refrain from the same. Furthermore, it is posed that executive agencies are unfairly burdened by the costs associated with these positive obligations, especially keeping in mind that these obligations were enumerated as directive principles by the framers on account of practical considerations. This criticism mirrors the familiar philosophy of 'judicial restraint' when it comes to constitutional adjudication.
However, the second objection to the reading in of positive obligations raises some scope for introspection amongst judges. It can be argued that the expansion of justice ability to include rights that are difficult to enforce takes away from the credibility of the judiciary in the long-run. The judicial inclusion of socio-economic objectives as fundamental rights can be criticized as an unviable textual exercise, which may have no bearing on ground-level conditions. In turn the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary.\textsuperscript{10}

The prescription of normative rights always carries the risk of poor enforcement. However, the question we must ask ourselves is whether poor enforcement is a sufficient reason to abandon the pursuit of rights whose fulfillment enhances social and economic welfare. At this point, one can recount Roscoe Pound's thesis on law as an agent of social change. The express inclusion of legal rights is an effective strategy to counter-act social problems in the long-run. At the level of constitutional protection, such rights have an inherent symbolic value which goes beyond empirical considerations about their actual enforcement.\textsuperscript{11} The colonial regime in the Indian subcontinent periodically made legislative interventions to discourage retrograde and exploitative social practices such as Sati (immolation of widows), prohibition of widow-remarriage and child marriage. Even though there have been persistent problems in the enforcement of these legislations, in the long run they have played an important part in reducing the incidence of these unjust customs. It is evident that in the short run even the coercive

\textsuperscript{10} The following article encapsulates the arguments offered against the constitutional prescription of aspirational rights, such as directive principles: Jeffrey Usman, “Non-justiciable Directive Principles: A Constitutional Design Defect”, 15 \textit{Michigan State Journal of International Law} 643 (2007).

authority of law may not be enough of a deterrent, but in the long run the very fact of the continued existence of such authority helps in creating public opinion against the same practices.\textsuperscript{12}

In the same way the framers of our Constitution sought to depart from the inequities of the past by enumerating a whole spectrum of rights and entitlements. While the understanding of ideas such as 'social equality' and 'religious freedom' is keenly contested in the legislative as well as judicial domains, there is no doubt that constitutional rights have been an important tool of social transformation in India. The enumeration of the various civil liberties and protections against arbitrary actions by the state are now identified as core elements of citizenship and violations provoke a high standard of scrutiny both by the judiciary as well as civil society groups. The inclusion of entitlements such as universal adult franchise have greatly reduced the coercive power of casteist and feudal social structures and empowered political parties that represent historically disadvantaged sections such as the Scheduled Castes (SC) and Scheduled Tribes (ST).

Even though practices such as untouchability, forced labour and child labour have not been totally eradicated, our constitutional provisions prohibiting the same are the bedrock behind legal as well as socio-political strategies to curb the same. The Supreme Court of India has further internalized the importance of laying down clear normative standards which drive social transformation. Its interventions through strategies such as the expansion of Article 21 and the use of innovative remedies in Public Interest Litigation (PIL) cases has actually expanded the scope and efficacy of constitutional rights by applying them in previously unremunerated settings. Furthermore, the Courts allow groups and interests with unequal bargaining power in the political sphere to present their case in an environment of due

deliberation. The dilution of the rules of standing among other features has allowed the Courts to recognize and enforce rights for the most disadvantaged sections in society through an expanded notion of 'judicial review'. Even though the framers of our Constitution may not have thought of these innovations on the floor of the constituent assembly, most of them would have certainly agreed with the spirit of these judicial interventions. With these words, I would like to thank all of you for being patient listeners.