Economic & Political WEEKLY

The Legal Eye
Author(s): Dunu Roy
Reviewed work(s):
Source: *Economic and Political Weekly*, Vol. 25, No. 50 (Dec. 15, 1990), pp. 2709-2712
Published by: Economic and Political Weekly
Stable URL: http://www.jstor.org/stable/4397091
Accessed: 02/09/2012 17:51

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Economic and Political Weekly is collaborating with JSTOR to digitize, preserve and extend access to *Economic and Political Weekly.*

http://www.jstor.org

tion of 110 lakh tonnes coupled with timely and adequate release of sugar by authorities for public distribution. The edible oils prices rose by 18.3 per cent during the review period mainly due to increase in the prices of ground nut oil. Rise in ground nut oil is attributed to lower crop prospects and restricted import of edible oils by State Trading Corporation on account of tight balance of payment position. Production during 1989-90 oil year has been estimated to be 42.2 lakh tonnes.

Mark up in the prices of petroleum products, following the situation created by Gulf crisis, contributed to about 75 per cent of the increase in the administered commodity prices which increased by 7.5 per cent during the year as compared to 2.4 per cent last year. In other miscellaneous commodity groups, the prices of jute textile dropped by 4.7 per cent in contrast to a rise of 20.0 per cent last year. This decline to some extent can be attributed to the withdrawal of demand from Punjab and Haryana for packing of paddy and rice and also the declining buying support from sugar mills.

The Legal Eye

Dunu Roy

All fact may not be stranger than fiction, but most fiction is based on some fact. This piece in two parts has borrowed heavily from the experiences of an activists' group working in four industrial towns of Madhya Pradesh. (First part appeared last week.)

III

BHADRALWES had taken time off to ruffle through a few pages of one of the volumes on his desk, but he was now obviously ready for, he self-consciously cleared his throat.

"As my senior colleague has already hinted, ma'am, you have little to worry about from the official agencies. Your real concern has obviously to do with what the workers might do. And that *is* your problem, isn't it?" He was busy underlining again. "Now there are a number of laws to which these trouble-making workers could turn to for relief. Firstly, there is the Fatal Accidents Act, under which a claim for compensation may be made whenever the death of a person is caused by a wrongful act, neglect, or default. The compensation is available to the spouse or the parent or child of the deceased and the Court has the discretion to decide on a 'just' compensation. Both monetary as well as non-monetary damages may be claimed. However, I doubt very much that workers' families in general would avail of relief under this law."

Amlai rattled his notes, "Particularly, madame, since the person claiming for compensation has to *prove* that the accident was due to neglect or default, and *that* proof is likely to be quite complex in a court of law!"

I nodded at Bhadralwes to show I was still listening. His glasses flashed momentarily as he bent to take up his theme again, "Somewhat similar, ma'am, is the case with the Motor Vehicles Act, under which compensation may be claimed for death resulting from a motor accident. Here, too, *proof* of negligence is required and this proof has to be furnished by the legal representatives of the deceased. The case is decided by a tribunal which can award a 'just' compensation on the basis of both pecuniary as well as non-pecuniary issues. By and large, industrial workers do not claim relief under this act. So now we come to the Workman's Compensation Act, which is likely to be your major headache, ma'am." He flipped through another volume.

"Under this act, ma'am, a workman who is injured in the course of work can approach the labour court and his employer is *liable* for compensation. The workman *does not* have to prove default or negligence on the part of the employer. *All* he has to show is that he was injured during the *course* of employment. And *employment* has been interpreted quite widely by the courts to *include* rest periods, time on errands, contract work, or even for commuting to and from work, and the strain of work itself, and so on. The workman can claim for death, or partial or total disablement—within a period of two years from the date of the accident. *Any* medical practitioner can certify to the injury and degree of disablement. There is a table given in the act which specifies the multiplier or factor which is used to compute the amount of compensation. This factor is based on the age and the wage of the worker. In other words the compensation is being given for *loss in earning capacity* because of the accident. There is a schedule in the act itself which gives the percentage of loss or disablement because of injury to the different parts of the body. Hence, the labour judge no longer has to use his discretion but can award the minimum compensation based on the rates given in the act. And this compensation can be given to a whole range of beneficiaries or dependents who are listed. So you see, ma'am, this is a dangerous bit of legislation which you have to be very alert about!"

"O dear, . . .—"

"Wait ma'am, let me finish. One way around this act is to take the assistance of the clause which provides for a 'direct relationship' between the employee and employer—that is, immediate benefits should accrue to the employer because of the work of the employee. In other words, if the employee is a casual or contract worker without a direct relationship to the employer, then he is not entitled to compensation. There are many ways in which the technical process of production can be organised so as to be able to contract out work on a casual basis. As a matter of fact, this is a practice now widely followed in industry because, as statistics show, the unorganised sector is growing much faster than the organised one.

"There are several other advantages," he continued myopically, "of employing contract and casual labour. You can pay much lower wages, no permanent jobs need be given, no extra facilities are required, and since such workers have no job security they are willing to do all the hazardous jobs—from which you can then remove the permanent workers! So overall it is a very good cost-cutting measure.

"However, I should caution you that the legislature has also passed the Contract Labour Act to abolish and regulate contract labour. Under this act, industries are required to abolish the contract labour system if the contract work is essential for or connected to the main work. If the system is not done away with, then the employer is required to pay the contract labour the same wages with the same facilities as would be given to permanent workers for doing the same or similar work. You see, the principle of equal pay for equal work is guaranteed under the Constitution, ma'am, and there is nothing we can do about it." He looked at me apologetically for a moment and then continued, "There is also a further twist to this which you should be aware of, ma'am. Any worker or unionist or social activist or other organisation can write to the secretary of the concerned ministry and the labour commissioner reporting

the existence of the contract labour system and the government is obliged to investigate and regulate."

"Goodness gracious, these acts seem to leave no room for an employer to function in freedom!"

Amlai tapped his notes to show that it was now his turn, "Oh, I wouldn't quite say that, madame. As usual, there are several loopholes in the law. Let us take the Workman's Compensation Act first. You see, madame, while the worker does not have to prove the negligence of the employer, nevertheless he has to prove that the injury occurred during work. For most injuries, luckily, the symptoms manifest themselves somewhat later than the actual time of injury itself. This is even more true for occupational diseases. So this can be quite a major hurdle for the worker.

"Secondly, if the employer can show that the workman wilfully disobeyed an order and thus got injured, then the worker is not allowed compensation. Considering that all the supervisors and managers who give the orders are on the company payroll and wanting to retain their jobs and their perks, proving disobedience is not normally much of a problem!

"Thirdly, the schedule does not cover all possible injuries and diseases and so fixing the rates for those can be quite problematic for the court. Moreover, while any medical practitioner is entitled to certify disablement under the act, evidence in the courts has to be given by medical boards appointed for the purpose by the government. These boards have to have specialists who can give their expert opinions. By and large, I am happy to say, these Boards favour the employer because the doctors know where their interests lie! Which specialist wants to get involved in the courts?—that too, on behalf of a worker who hardly has the capacity to pay a doctor's normal fees?

"Fourthly, while the table of factors in the act never makes this clear, there is, in fact, a falling rate of compensation. That is, a worker earning a higher wage gets a lower compensation than one with a lower wage for the same injury.

"Fifthly—and this is particularly true in your state of Madhya Pradesh—labour judges have not been appointed to many courts for as long as three years. That cuts away the ground from under the provision for speedy relief for loss of earning. And since the compensation—if and when awarded—is in a lumpsum, it tends to get immediately eaten away to pay for the debts incurred during the delay.

"All these factors make workers—*and unions*—extremely unwilling to file for compensation—except, of course, in the case of death. If you look at the statistics you will see what I mean. In one company, hospital records showed 510 injured and 82 dead but only 4 persons get compensation. In another company, 8771 injured, 65 dead, and only 50 compensated. In a third company, 1001 injured and 29 dead, but no compensation. So you see, madame, you need not necessarily be concerned about the Workman's Compensation Act. It still works out to be an economic proposition!"

He smiled ingratiatingly at me and then turned back to his notes, "Now let us come to the Contract Labour Act. While Mr Bhadralwes is quite right in saying that the law requires the abolition of contract labour, the *practice* is quite different. There is, firstly, the almost impossible task faced by the government agencies in monitoring and implementing the act. Secondly, given the essential job insecurity of contract workers they hardly have the ability to form organised unions nor do they have much awareness of or access to the law. Thirdly, even if the law were to take its proper course, the major hurdle to be faced is that the contract workers have to *prove* that their work is of a permanent and continuous nature and connected to the main activity of the firm. How to avoid this state is something I am sure your managers will know better than us, madame!" He sat back victoriously, then turned towards his junior partner, "But don't you think you should tell madame about the ESI Act?"

As if on cue, the fan suddenly whimpered and then breezed into life. Thank heavens, I thought, I won't have to walk down these blasted stairs.

"Oh yes, I'd forgetten about that." Bhadralwes got out of his chair and moved to a shelf from which he pulled out another legal tome. He remained standing while he waved it at me. "This is the Employees' State Insurance Act, ma'am. It unites the benefits under the Workman's Compensation Act with those under the Maternity Benefits Act and also makes provision for sickness. It is actually the first scheme of social insurance in this country." I could see he was quite excited by the thought. "The benefits for injury are much more liberal under this act because the rate is fixed at half of the wage, unlike the falling rate in the case of the Workman's Compensation Act. In addition the amount is payable for life and even dependents are entitled to it." He glanced expectantly at Amlai.

Amlai was ready with his scribbles, "Ah, but there is—as usual—a catch to it, madame! Under this act the employers are now paying for *only* one-third of the cost of compensation! The remaining is paid equally by the government and the workers! Even the government's share is actually passed on to the tax-payer. So, in effect, the workers are paying for their own compensation! The cost to the owner is minimal. And that, madame, is what I call a brilliant feat of legal engineering!" He looked really pleased with himself. "I would strongly recommend that your companies adopt this scheme, madame, if they haven't done so already."

"And finally, ma'am," Bhadralwes broke into Amlai's moment of triumph, "we come to the last piece of legislation that need concern you—the Environment Protection Act. This act was passed for the prevention, control, and abatement of environmental pollution. Under it, the central government has acquired powers to monitor and prosecute for pollution. It is mandatory for a factory to co-operate with the government and the emissions have to be kept below the standards as specified by the government. In case of violation, punishment can be imprisonment up to seven years."

"Please don't look as alarmed, madame," Amlai once again adopted a soothing posture, "There are several possibilities in this one, too. Let me enumerate them. Firstly, monitoring and assessment of pollution is a gargantuan task. The Pollution (Prevention and Control) Boards set up by the government are hopelessly inadequate for this effort. Secondly, there is a lot of confusion about the standards that have to be followed. For example, there is one set for effluents discharged into a river, and another one for the river itself, and the two do not match at all. Similarly, there are different air quality standards for residential, hospital, and industrial areas. Furthermore, the water quality standards have more to do with biological pollutants than chemical ones. So you see, madame, there are many holes through which an intelligent manager may pass!

"Thirdly, Pollution Boards regard their domain to lie outside the factory. But control of pollution cannot be outside, it has to be inside the plant. Consequently, the boards miss out on the vital link between internal hazards and external pollution. This, of course, is most favourable for factory managers who can claim, with justification, that there is, for instance, no evidence that cattle have died because of drinking effluents released by the factory.

"Fourthly, the new Environment Act provides that only the central government can prosecute offenders under the act. There is a clause, of course, saying that any person can also go to court but only after giving 60 days notice to the government—and the government has laid down a very laborious procedure for that. Thus, earlier provisions available to the

ordinary citizen to move the courts have been now taken away.

"However—and this is really interesting, madame—the new act has provided that the offender has to be punished under the provisions of the *earlier* laws! In other words, there is greater leniency for punishment and stricter clauses for prosecution. That is *most* favourable for managers. In any case, real owners and shareholders are not going to be ever prosecuted. Even if, by accident, a case ever does come to court you may rest assured that convictions will rarely result. Mainly because the boards do not have their own lawyers and neither do they have the resources to engage good ones.

"So, in conclusion, madame, what Bhadralwes and I are both saying is that if you take the adequate minimum precautions which we have already outlined then you have very little to worry about and the profits from your various companies shall remain undisturbed." He settled back confidently. But suddenly a worried look appeared, "But I am sure our esteemed senior colleague will have more to say on this matter." We all looked in various degrees of trepidation towards the lady in question.

"Yes indeed, I do!" I have, of course, read of it before but it was the first time I actually saw a person snort! Amlai and Bhadralwes wilted in their chairs. She had a very clear gaze too. I could see that—because she was looking directly at me.

"Ms Bharatiya—," she waved me down impatiently, "yes, yes, I know you don't want names mentioned, but there's no need to be worried so in this room—we are burdened enough with secrecy as it is. Ms Bharatiya, I should make it clear here and now that as lawyers we are obliged to operate within the structure of the law as it is given to us. Consequently we undeavour to do our best to interpret the law to benefit the client. And since your interest is clearly to sustain the rate of profits—(O, don't interrupt me; let's not labour under any false illusions!)—that is the context within which my colleagues have attempted to advise you.

"However, there is another point of view which you should be aware of—particularly since there is now a growing number of lawyers and others who are putting it forward. I share this view. Put simply it is as follows: that the *structure* of the law itself is faulty. The basis on which the law operates is irrational, unscientific, and—in the last analysis—unjust!" She dominated the little room with her presence. "This may sound rather harsh, but let me illustrate my point with a few examples.

"For instance, take the ministries of industry and labour. It is they who have been entrusted with the task of inspection. But this is absurd! These departments were set up to encourage the growth of industry and control the movement of labour. Merely by a terminological sleight of hand they can hardly be expected to suddenly begin controlling industry and encourage the movement of labour!

"In any case, what can these departments function on? They are given norms which they are supposed to implement. But who makes these norms and on what basis?" She directed her questions at me in rapid-fire sequence while I sat helplessly unprepared for the onslaught. "What, for instance, is the logic given for establishing the rates of compensation? Why are air passengers entitled to higher rates than, say, rail passengers? Where is the principle of equality in this? Even the Workman's Compensation Act—which bases itself on loss of earning capacity—is a big farce. If you compute the actual amounts that, say, a totally disabled person would have otherwise earned, and compare it with the compensation that he or she is entitled to receive for loss of earning, then the compensation ranges between one-fifth to one-half of the actual loss! What is the logic for this?" she thundered.

I listened, totally absorbed in the personality of the woman before me. "Or take the standards set for pollution. Most of them are far more liberal than what has been set internationally. Why? Is the Indian healthier, stronger, more capable, more resistant, than the average European? It's all a load of rubbish! The actual basis for setting the standards is the minimum cost to the industry. There are industry representatives on those select committees that formulate the standards, but none from public interest bodies. Isn't it, therefore, 'logical' that the pollution boards are protecting private interests rather than public health? Is this logic 'just' even under our Constitution?"

She was in full flow now. "Furthermore, what is evident to any intelligent observer, but not yet admitted by any official agency, is that pollution and hazards are moving ahead much faster than controls. New dangers in drugs, pesticides, chemicals, foodstuff preservatives, nuclear energy, electronics, plastics, machines that are enormously heavier and faster than ever before—you name any sector of the economy and there's a new danger there—and those hazards are growing. While regulatory agencies are still grouping along in the technology of the last century! Work is becoming more dangerous for everyday," her voice was low but extraordinarily emphatic, "and the law has yet to catch up with this basic fact!"

She reflected awhile. "It is not that all lawyers, or law-makers, are blind to these developments. For instance, the Law Commission—that was fifteen years ago!—had stated that the Compensation Act was too complex for the workman (or woman) for whom it was intended. They had recommended, amongst other things, that compensation should be given even if the worker was negligent—after all, compensation is supposed to be for 'loss of earning capacity', isn't it? They said the burden of proof should be borne totally by the employer; that the workman should have a *right* to notice of accident; that it should be the commissioner's *duty* to serve such notice on learning of an accident through *any* source. But the government rejected all these recommendations. Why? On what basis of natural justice?

"Actually, contrary principles of so-called justice have been upheld. For instance, when the Employees State Insurance Bill was before the legislature, suggestions had come in from the provinces and responsible organisations that there should be *no* contribution from the workers. After all, they were not equal partners in the setting up of the industry. But the government ignored these suggestions. One member even made a statement in the house that 'labour must also realise the responsibility of saving money and make their own contribution. . .' And the justification for this? I quote: 'It is up to the labourers to realise their responsibility and increase production and not play into the hands of those who want to engage in subversive activities in order to change the order by violence.' Not a word about those who are subversively changing the order anyway! Ridiculous!"

The door opened to admit the lad from the outer office with four glasses of tea. Bhadralwes took it upon himself to place a glass before each of us. After a couple of appreciative sips, Birsinh continued meditatively, "There's much talk of abolishing contract labour and so on. But *justice* has to take into account the fact that so long as people are poor and unemployed, they are going to willy-nilly seek any work that may be offered to them—whether within the law or outside it. Why, then, is there no legal guarantee for employment? For everybody. Why only the protection to property and profits?"

The fan whirred away a few moments of silence. Amlai rubbed his scalp slowly while the junior partner fidgeted uncomfortably near the bookcase. I wondered what Birsinh was getting at. For the first time I noticed that she was wearing a really lovely sari, a creamy Dhakai with a fine border in dark blue. She was steadily looking at me, "The reason I am saying all this is that while we, as lawyers, have to work within the framework of the law, the law itself rests on shaky foundations. These

are not just my questions, they are questions that are being raised by unionists and some of these 'activists' of yours. You must remember, dear lady, that we are ostensibly supposed to be functioning as a 'socialist republic'. So socialist principles of justice must not only be seen to be pronounced but eventually prevail in the body of jurisprudence. A new jurisprudence, if necessary. And it will probably be the activity of these few unionists and activists which will spur it on.

"So—and this is the point that might interest you—if you wish to retain your profits within the present structure of law, then you will clearly have to do something about these activists who are in your area. 'What?' is your obvious question. I can only offer you a few pointers based on what I see happening around me." Her voice had taken on a dead but wistful quality.

"You can, of course, begin by harassing them. That is what most plant managers do. By filing complaints with the police. Nothing false, but anything to keep them busy. You can tell your security staff to keep an eye on them. If one of them has a camera, your security could surround them and accuse them of espionage. You could file an FIR saying they are inciting your workers to violence.

"You can attack their reputation. Use the local newspapers for this. Most of them are already probably dependent on your factories. For advertising revenue and donations. So articles could be published against them. The most common charge these days is of CIA agents. A common enough argument runs as follows. They are raising environmental issues to stop production. If the factory closes, India will have to import the goods. From America. So clearly they must be CIA agents. Or they may be said to be smuggling drugs. Or be accused of being outlandish in their sexual relationships. Anything to make them appear suspicious and promiscuous and morally degraded. So that the workers and the local population want to keep them at arm's distance." For a moment there was a little spark in her voice, "Believe me, this kind of press campaign can be quite effective."

The spark died out, "Of course, you cannot do all this yourself. It has to be done through others. Who cannot be directly linked to your companies. A good choice would be a member of some progressive organisation. Even better would be a unionist. They have their own fears. That the activist group will steal their thunder and their mass base. So it makes them amenable to joint in this kind of campaign.

"All this is bound to have an effect on the workers. As well as many of the local boys and girls who might otherwise help such a group. But if some worker or youth does collaborate with the activists, then there has to be a plan for that too. A worker can be warned that he stands to lose his job. Or even charge-sheeted. Pressure can be brought to bear on the young people's parents. You can also attack the funding sources. The bogey of foreign funding has immediate acceptability these days. If they say they are taking government funds, then you can spread word around of misappropriation. Bring pressure to bear on official agencies. Have the activists investigated. By the CBI, the CID, the local police. It's an old, old strategy." She sounded tired now. "It's called—Divide and Rule."

This time the silence tensioned out. Amlai had turned sideways to look blankly out of the window. Bhadralwes was doodling on a pad he'd picked up. I kept looking at Birsinh, trying to go beyond her words into the windows she was opening on to a very real world. Her own eyes had gone inwards, into a place where none of us dared enter. She gave a little sigh, shook herself briskly, her posture returning to command.

"So these are the pointers I can offer you. There is nothing new in them. They have been used time and again—and quite successfully, I might add. However, as I have cautioned you earlier, these are all short-term measures designed to protect short-term interests—which is what profit-making is really all about! Eventually, this system is self-contradicting. And that includes the law. So no matter what you or people like you do, you cannot put an end to the challenges which—in my view—must ultimately prevail."

IV

Clearly, this was the end. It was all I could do to retain my calm. This woman! Keeping my voice steady, I slowly said, "Yes. Yes, I see what you mean. Your exposition has really been most... illuminating. I must thank you—all of you. You have been most helpful. I am not sure if I've understood all the details, but I think... I hope, I have got the gist of it. I suppose now I shall have to tell my advisers and colleagues all about it. O dear... Thank you. Thank you all very much indeed."

Birsinh was silent. But Amlai rose, beaming, and gave a little bow. "We have been delighted to be of help, madame! And I speak on behalf of all my colleagues. Please do not hesitate to call on us again if you ever need our assistance. It's been a pleasure, a real pleasure. Now," he became very businesslike, "I am sorry to—or—introduce a pecuniary note into this delightful conversation, but where should we send our bill, madame? Not that there is any pressing need for an urgent settlement. We all have full confidence in the ability of your business house to pay our trivial charges, but still we are obliged to keep our records in good order. I do hope you understand that, madame." There was a little nervous tic at the corner of his mouth.

"O yes, of course. How stupid of me. I am ever so sorry. I should have thought of it, shouldn't I?" I searched in my bag for a scrap of paper. "Could you possible, send the bill to this address?"

Amlai took the paper with something approaching deference and carelessly glanced at it. "Trade Union Centre?" He had a puzzled crease in the middle of his forehead. "But... But, but madame surely you would want to have the bill sent to your head office at Calcutta?"

"Calcutta? Head Office? I'm sorry, I don't understand... O dear, has there been some kind of misunderstanding...?"

Bhadralwes had snatched the scrap out of Amlai's hand. "But we looked up the Who's Who," he wailed. "And you're clearly listed as one of the directors! We checked and cross-checked! You are a daughter of one of the largest business houses in India, Mrs Bharatiya! Surely, you are making some kind of ghastly mistake..."

"Tut, tut, young man," (I'd always wanted to say Tut, tut!) "I do believe it is you who has made mistake. You really shouldn't be so impetuous! Ah, the folly of youth..." I gathered up my handbag, "Now I really must be going. It has been so pleasant talking to you that I have quite lost track of the time. I have to attend a workshop on Social Movements, Human Rights, and the Law in India, and if I hurry I should just make it to the final session and the coffee break! Thank you once again for your time and very valuable advice. And good day to you."

I could not resist a backward glance from the door. Bhadralwes was pink again—but of a very different shade this time. Amlai was sitting open-mouthed, blue handkerchief in hand. As for Birsinh... well, I could almost swear that there was a twinkle in her eye!

(Concluded)

[Birsinghpur Pali, Amlai, and Bhadra are industrial township in Madhya Pradesh. I am also deeply indebted to Shobha Aggarwal, Vrinda Grover, Atul Talwar, Amar Kanwar, and Harihar Chaturvedi for their pioneering work on the Workman's Compensation Act and other related acts; to Rakesh Shukla for his excellent summary of the provisions of the Contract Labour Abolition Act; and to Pradeep Saxena and Sa'ad Saidullah for their valuable critique of the work of the Central Board for the Control and Prevention of Water Pollution.]