DR. RAMANATHAM MEMORIAL MEETING 2008

Judicial Assault on Workers' Rights

The last twenty years have witnessed a sustained attack on the working class and workers' rights in India by both capital and the state. Certain practices and tendencies became more obvious by the 1990s. Most of them were not new, but the fact is they have been increasing, intensifying, happening together at one time, and gaining legitimacy. In their gaining legitimacy, the judiciary has played a dubious part. It is in the broader context of this class attack on workers and workers rights that the role of the judiciary is being played out.

The contrast between the positions taken by the Supreme Court in the *Asiad* case (*PUDR vs. Union of India*: 1982) and subsequent judgements on labour (eg. *Air India Statutory Corporation vs. United Labour Union*, (1996), *Balco Employees Union vs. Union of India* (2001), *Umadevi and Others vs. Secretary State of Karnataka* (2006), mark the shift in attitudes that have followed. In the *Asiad* case whereby the Supreme Court extended the scope of the meaning of article 21 of the Constitution (right to life) to include the right to livelihood along with the 'right to live with basic human dignity'; in the 1990s the judiciary refrained from making any direct connections between a worker's right to employment and the right to life.

In an economy where 93 percent of workers are engaged in the informal sector, the role of the judiciary along with the executive and the legislature in systematically delegitimizing the hard- won guarantees offered to labour, raises serious questions on the nature of the state and its democratic credentials**.**

A. The Broader Context

a. **Greater contractualization of labour**: Though much older, contractualization intensified in India in the mid-1980s with the freeze in public sector employment, VRS, and the outsourcing of work. Job contracts and labour contracts became far more commonplace, as permanent workers and work were replaced by workers on contract - as we witnessed among security guards and mess karamcharis in JNU. One also found - in the course of work in JNU itself or while investigating the working conditions of jewellery workers in Karol Bagh - ambiguities in who constitutes the principal employer in job or even labour contracts, making it that much more difficult for workers to organize and fight for their rights. Contractualization of work has meant for workers lower wages for the same work, insecurity of tenure, reduced benefits, the pressure to work more intensively and more barriers in their capacity to organize themselves. By being able to hire more workers at lower wage levels, and also making them work more or faster, industry managed to extract greater surplus. There was consequently an enormous increase in turnover, production and profitability in the 1990s, in the private sector in particular.

b. **Outsourcing**: Partly linked to contractualization of labour, there has been a tendency, in India and worldwide, for large companies to reduce involvement in manufacturing and to source components to smaller workplaces. In many cities in India, various municipal services such as sweeping, electrical work, cleaning drains, etc have also been handed over to small companies with extremely harmful consequences for workers employed by the latter. The major motive in all this is to reduce production costs as a proportion of total costs as much as possible. The breaking down of manufacture into each tiny part has spawned, in Delhi and elsewhere, innumerable tiny workplaces of the kind we often encounter in our work in PUDR.

This tendency led to a heated debate, from the mid-1990s onwards, about what constitutes the 'core activity' of an enterprise, and what can or cannot be contracted out. In general, outsourcing reduces the effectiveness of workers organization and struggle, for the most significant decisions that have a bearing on their work are being taken at a place that is distant and over which they have little control.

c. **Mobility of Capital**: The tendency of capital to look for the cheapest labour markets or cheapest input costs has resulted in some manufacturing or services moving to India. But they can - as in the case of call centre or IT companies - easily move on in the constant drive to cut costs. Migration of capital can also occur as a strategy to break a unionized workforce, as we were told by workers of Honda Gensets in Rudrapur, or used as a threat, as we learnt from leather workers in Delhi. Related to this, competition between different states to locate a more mobile industry within them has meant they try all sorts of measures, including extreme repression - as we have repeatedly investigated in neighbouring Haryana - to ensure labour is not a 'problem' for industry. In more recent times, sections of industry have attempted to relocate and move into Special Economic Zones, to avail of cheap land, tax breaks, duty exemptions, and non-existent labour laws.

d. **Lean Production**: Increasingly a practice in large factories, lean production refers to practices in the production process aimed at getting rid of anything perceived as excess, be they raw material stocks, other inputs, or workers. Workers[1] physical movements are monitored to such a degree that every movement is accounted for to cut down on labour time. It results in a significantly intensified workload and speeded-up work process. For instance, in the engine department of India[1]s largest car manufacturer, Maruti, we were told that work has been speeded up to ensure that a worker does 18 tasks in two minutes. Not just does this have a toll on workers health and well-being, it leads over time to fewer workers being hired. This is particularly true for the private manufacturing, in which there has been minimal addition of workforce since 1991, while its output has increased massively. This data sheds obvious light on issues of mechanization, intensification, productivity, speeding-up, and inequality. Because it is by making workers work more and faster that profits are being sucked out.

e. **SEZs**: One of the most significant policy measures in recent years that will affect workers adversely is the explosion in the number of SEZs. As of December 2007, India had 173 functioning and/ or notified SEZs, and another 500 in the offing (Perspectives, Abandoned: Development and Displacement, January 2008, p. 83). Besides various sops such as cheap large tracts of land, exemptions from duties, income tax exemptions, service tax, 100% FDI through automatic route, etc, SEZs incorporate a series of rules that in practice hamper workers[1] capacity to organize and agitate - disputes are to be decided by the SEZs Development Commissioner; 'outsiders' are barred from becoming union bearers; individual states, in their desire to compete with one another and provide the best conditions for capital, have said they would 'simplify' labour laws; health and safety inspections and standards are compromised. These have become 'foreign' enclaves in which many rules of the land do not apply, compromising workers rights, wages, working conditions and the capacity to organize.

f. **Neoliberal Economic Reforms**: Whereas the five issues mentioned above pertain more directly to workers rights, a broader and obvious context in which the judiciary operates is the economic reforms that were pushed through by successive governments in the 1990s on. Among the significant policy changes are: the entry of foreign investment in many areas of the economy; reforms in trade and the reduction in quantitative restrictions on imports; reforms in urban areas and the JNUURM; reduction in many areas of public expenditure; disinvestment and privatization, of PSUs (as we will discuss below), privatization of the commons, and of commodities and public services. Many of these have had direct and adverse impacts on workers. Some other neoliberal reforms had indirect impacts on workers but were not any less harmful: changes in food policy removed millions from the provisions of the public distribution system. Financial sector reforms meant a reduction in public sector lending. And above all else, the crisis into which agriculture has been pushed into, which contributes to increased migration, which in turn leads to depressed wage or employment conditions for workers. The parallel crackdown in urban areas following urban reforms effectively means a catastrophic strangling of the poor from both sides: pushed out of agriculture and pushed out of cities. This two-pronged attack means that tens of millions of poor adivasis, dalits and others are being dumped on the city's margins with little urban resources. A section of them will provide labour power to the city - in factories and in houses - at what is below minimum wage, let alone a living wage.

B. The Judicial Attack

The judiciary in independent India has been an institution that has played a significant role in preserving elite dominance, be it in the area of private property in land, or nationalization of banks and economic policy, or civil liberties including the constitutional validity of AFSPA, TADA, etc. Having said that, it must be said that the Court in earlier years delivered some significant judgements regarding preserving workers' rights, which possibly reflected broader concerns (which has dissolved in the last 15 years). For instance, in 1960, in *Standard Vacuum Refining Co.*

Ltd. Vs. Its Workmen, the Court characterized the contract labour system as "archaic", "primitive", and of "a baneful nature". In *Catering Cleaners of Southern Railway, etc. Vs. Union of India & Ors.* (1987), the Court observed: "It is a matter of surprise that employment of contract labour is steadily on the increase including in the public sector which one expects to function as a model employer." In 1989, another bench of the Court called the contract system "nothing but an improved version of bonded labour". By the 1990s, the courts had changed character, certainly where the question of workers' rights are concerned. Given below are a few significant areas or issues on which the courts pronounced, to the detriment of workers:

1. The Right to Strike or declare a bandh: Strikes by workers in different parts of the country, sometimes in specific units or industries, and at other times collectively as a bandh, has been one of the most crucial areasof judicial pronouncements. In July 1997, a full bench of the Kerala High Court declared the calling of a bandh by any organization or party to be illegal and unconstitutional. It directed the state government to enforce its order. And that any organization that called for a bandh should compensate the government and the public for any destruction of property during bandhs. Perversely, the court held that a bandh violated people's fundamental rights by interfering with free movement of people and their right to practise any profession! Later, a full bench of the court, in response to petitions filed by the Associated Chamber of Commerce, Thrissur and Institute of Social Welfare, Kochi, said that if the state government was unable to give protection to those not participating in the strike, it should request the central government to deploy paramilitary forces or the Army.

In 2002, the Tamil Nadu legislature promulgated the TN Essential Services Maintenance Act (TN ESMA) and amended it in 2003 - to permit mass dismissals. In July 2003, nearly 2 lakh government employees and teachers went on a strike opposing the TN ESMA and the drastic curtailment of benefits including gratuity, pension and dearness allowance. The government summarily dismissed 1.65 lakh employees, perhaps the biggest dismissal of workers in independent India. The Madras High Court ordered the release of the arrested workers but ruled that it did not have powers under the TN ESMA to intervene beyond that. An appeal filed in the Supreme Court resulted in the immediate reinstatement of all workers on 24 July except those who had been named in FIRs. However, two weeks later, the Court, in a shocking final order, held that government employees had "no fundamental, legal, moral or equitable right" to strike work.

Another instance is the suo moto ban by the Calcutta High Court in September 2003 on public rallies or meetings in the city between 8 am and 8 pm on working days. Considerable public protest followed and a Division Bench of the court was forced to subsequently stay this ban. But the issue came alive controversially again most recently when on 26 August 2008 the chief minister Buddhadev Bhattacharya, speaking in the shadow of the Singur dispute, proclaimed, "It is unfortunate that the party I belong to supports strikes. I do not support any bandh".

The judiciary has completely missed two issues: one, illegal lockouts and closures by companies - as in the case of Maruti and Honda, both investigated by PUDR - and not strikes, have become in recent years the major reason for "loss of mandays". Two, the right to strike is a fundamental political right, the collective action of the working class against capital, without which it becomes that much more difficult for other rights of workers to be secured.

2. The Contract Labour System and the Issue of Automatic Absorption: One of the biggest lacunae in the Contract Labour (Regulation and Abolition) Act 1970 is the question of automatic absorption. Section 10 of the Act does not specify that, on the abolition of contract labour system in a workplace, the specific contract workers who have struggled against the contract system will become permanent workers. This weakness in the Act was upheld by two 2-judge benches - in the *Denanath vs National Fertilizers and Others and Gujarat Electricity Board vs Hind Mazdoor Sabha* cases - in the early 1990s. In *Denanath*, the Court said that there is no provision in the Act for automatic absorption. In the latter, it said that on abolition, the concerned contract workers would have to file another case before the industrial court under the Industrial Disputes Act.

In one of the most significant judgements in the 1990s, these two anti-worker rulings were overturned, in the *Air India* case. Following a 8-year struggle by workers in the Bombay airport and other airports, the Supreme Court in November 1996 abolished the contract labour system in all airports for sweeping, security guards and cleaning staff and directed the airport authorities to absorb the roughly 2,000 workers in these categories in Bombay, and also potentially benefiting the thousands of workers in these categories in dozens of airports in the country. It also, in a correct and broad reading of the Contract Labour Act, upheld the right of contract workers to be absorbed directly as permanent workers on the abolition of the contract labour system (Lalkaar: A Quarterly Bulletin for Union Activists,Jan-Mar 1997). This had huge implications for contract workers everywhere in the country.

However, on 30 August 2001, in *Steel Authority of India Ltd. & Others. Vs. National Union Water Front Workers & Others.*, a constitution bench of the Supreme Court clubbed together several existing cases and overturned the landmark Air India judgement. The five judge bench - comprising Justices B.N. Kirpal, S.M. Quadri, M.B. Shah, Ruma Pal, and K.G. Balakrishnan - said: "Neither S.10 of the CLRA Act, nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour. Consequently, the principal employer cannot be required to order absorption of the contract labour working in the concerned establishment." The Court was essentially reading something that had not been legislated. The judgement also revealed its class bias when it said.
"It was clear to the Joint Committee [of Parliament] that by abolition of contract labour, the principal employer would be compelled to employ permanent workers for all types of work which would result in incurring high cost by him. This could well be yet another reason for not providing automatic absorption."The judgement also dealt with the question as to whether a central government notification of 9

December 1976, which prohibited the employment of contract workers in sweeping, cleaning, dusting and security in central government establishments, was valid. The bench said that the criteria mentioned in the Act for abolition of contract labour would have to be determined in each case and not through such an "omnibus" notification. The notification was thus declared invalid.

This judgement is based on an extremely narrow and conservative interpretation of the Act and only serves to highlight and strengthen the Act's loopholes. It papers over the fact that the First Labour Commission had endorsed automatic absorption in 1969, a measure that was omitted in the Act that was to follow some months later. Though the judgement did not affect cases already decided, numerous cases had been kept on hold waiting for the judgement in this landmark case. The process of abolition actually becomes detrimental to those contract workers who apply for permanence. In *Air India*, the Court itself had stated that in the absence of automatic absorption, abolition of the system would mean the abolition of contract workers' employment. Hence, no worker would file cases for abolition. Because even if notification for abolition is issued after the long-drawn out process of abolition, there is no guarantee that all workers will get jobs. Other workers could be employed. A few of them could be employed but not all. It ignored the point that several weighty factors are met before contract labour can be abolished in an establishment, and absorption happens. And most of all, it ignored the widespread reality for countless contract workers, who work for years in the hope of being made permanent.

3. Disinvestment and Privatization of Public Enterprises, Workers' Jobs and the Right to be Heard (The BALCO Case): Following the New Mining Policy of 1993, the private sector was allowed entry in most areas of mining. And with the government pushing for disinvestment in and the privatization of public sector enterprises, one of those privatized was Bharat Aluminium Company (BALCO). Following a struggle against this process, the BALCO Employees Union submitted in court that due to disinvestment the workers had lost their rights under articles 14 (Equality before law) and 16 (Equality of opportunity in matters of public employment) of the Indian constitution. The union argued that, as those potentially affected by the disinvestment decision the workers had a right to be heard before and during the process of disinvestment. They said, rightly, that there was no effective protection of the workers' interests in the process of disinvestment.
While dismissing the workers' petition, the three-judge bench comprising Justices B.N. Kirpal, Shivaraj Patil and P. Venkatarama Reddi on 10 December 2001 said that notwithstanding articles 14 and 16, a government servant has no absolute right to remain in service; that despite these articles, it does not mean that the government has "to give the workers prior notice of hearing before deciding to disinvest".

While rightly observing that it was not in the ambit of the court to determine public policy, the judges gratuitously approved of an earlier judgement of the Karnataka High Court - *Prof. Babu Mathew and Ors vs Union of India and Ors*, also pertaining to disinvestment - which said, "Any economic reforms, including disinvestment in

PSEs is intended to shake the system for public good. The intention of disinvestment is to make the PSEs more efficient and competitive and perform better." The order went on to say, "We are satisfied that the workers' interests are adequately protected in the process of disinvestment." The plight of permanent workers in Modern Foods in Delhi itself would prove their trust misplaced, for soon after the takeover by Hindustan Lever, production lines in the Delhi factory were closed down, the work contracted out and union activists summarily dismissed. In general, notwithstanding provisions in the agreement that workers would not be thrown out for one year (as in the Balco agreement of disinvestment), the reality is otherwise and what is to stop a company from dismissing its workers? In fact, as we have seen when hospitals were effectively privatized in Delhi, the process of dismissal precedes the process of disinvestment in order to make the entity more attractive to private capital.

4. The Closure of Industries and Workers' Rights: The right of workers to be heard also came up in the infamous case of closure of industries in Delhi. These closures happened because the Supreme Court in related cases pertaining to factories in 'non-conforming' areas under Delhi's Master Plan, to industrial pollution and to the Yamuna river (what was known as the *Yamuna Maily* case) ordered the closures of a number of polluting industries and of a large number of industries in 'non-conforming' areas as per the Master Plan. The court's pronouncements led to the closure of thousands of small industrial units in Delhi; tens of thousands of workers and their families were affected. In fact, in many cases, the closures had an impact even before official closures began in many non-conforming areas where factory owners were closing down their units and taking machinery out. Besides the workers,small establishments were soon affected: chai shops, redi, those who transport material and finished goods. Closures affected a lot of people and workers outside industrial units who are not taken into account when those affected by closure are considered: workers in chai shops, small shopkeepers, cycle-rickshaw pullers, etc.

These closures raised many issues for workers' rights. For a start, workers were denied even the basic right to be heard in the second round of closures in 2000 despite repeatedly asking to be heard. Two, in reality barring one odd public sector industrial unit, few workers received any kind of compensation since most were contract workers and were merely pushed off the rolls by the factory owners. Three, whereas pollution is undoubtedly a serious issue in a large city like Delhi, the Courts were blind to the fact that workers tend to be the first to be affected by industrial pollution, since it is they who work in polluting factories and are forced by circumstance to live in jhuggis near industrial areas. Hence, any public order that deals with industrial pollution needs to take them first into consideration. But they - in this and all cases of closure in India - have been merely the victims of a class attack veiled in a blinkered environmentalism that declasses pollution. Nor does the government - nor did the courts in these cases - have the will to make industry pay for the pollution it caused in the first place.

There have been numerous other cases of closure of industries with little attention to workers' rights. In *World Saviours vs Union of India and Ors*, the Supreme Court directed 26 industries to close down. No directions were given for payment of compensation to workers. In *Hariram Patidar vs MP Pollution Control Board and Ors, M/s Staller Drugs Ltd, Ratlam* was ordered to be closed down until valid consent from the Madhya Pradesh Pollution Control Board was obtained. In *DP Bhattacharya & Others vs West Bengal Pollution Control Board*, five hazardous industries were ordered to be relocated outside Calcutta. In all cases, the workers were adversely affected but not heard (Shobha Aggarwal/ PIL Watch Group, The PIL Hoax: Truth Before the Nation, 2005).

5. Equal Pay for Equal Work: This principle in work - which is premised on the principle of equality - is that a worker, whether on contract or temporary, would get the same wage as a permanent worker doing the same work in that workplace. This principle had, in earlier times, been upheld by the Courts. It took the Indian judiciary about thirty years to recognize equal pay for equal work in the *Randhir Singh* case in 1982. However, as early as 1989, judgments started proclaiming that the quantity of the work may be the same but quality may be different and this could not be determined through affidavits in a writ petition. The trend of hairsplitting and effectively denying equal pay for equal work has accelerated since then and continues. Even where work is similar, judgements proclaim that the qualifications are different and refuse to direct the payment of equal wages. Thus by 2002 we have judgments declaring that equal pay for equal work is not a fundamental right of any employee though it is a constitutional goal. The current crop of judgments follow a "hands-off" policy and refuse to go into the matter for equal pay for equal work holding that the matter should be sent to an expert committee appointed by the Government instead of the court granting the higher pay scale even where there is complete and wholesale identity between the two groups.

The question of the recruitment process and equality came up in the case of *Umadevi versus the Government of Karnataka*, In past judgements, the courts had been ordering the regularization of employees who had put in years of service even if the said employees had not been hired through the regular recruitment process. But in Umadevi's case, the Court held that if the said employee had not been recruited under prescribed rules relating to recruitment, she would not be entitled to regularization irrespective of how many years she had worked! And in the *Sushmita Basu* case, the Supreme Court provided a cunning logic denying teachers in West Bengal who were asking for wages at par with government employees. Teachers, the Court sanctimoniously said, have a sense of duty and dedication to the welfare of the nation. If teachers were to claim higher salaries and perquisites, the burden would be passed on to the students in the form of higher fees. The principle of equal pay for equal work was also undermined in *T.K.Ghosh vs State of West Bengal.* Again these judgements have enormous adverse implications for thousands of contract and othernon-permanent workers in the country making very elementary demands.

6. Jhuggi Demoliltions: One of the most significant issues - which also very

much pertains to workers' lives in the urban landscape - has been jhuggi demolitions and the question of workers' housing. It needs to be remembered that the Bombay High Court in the context of planned slum evictions in Bombay had said in 1985, "An important facet of [the right to life] is the right to livelihood, because no person can live without means of living". However, starting the mid-1990s, we witnessed the most brutal and widespread evictions and jhuggi demolitions in our country's history unfolding in many cities at once. It has been estimated that one million people have been affected in Delhi alone. In Bombay, following Manmohan Singh's expressing a desire for the city to be turned into another Shanghai, three lakh people were thrown out of their homes in 2005. Demolitions have also been faced by the poor in Surat, Calcutta, Bangalore, Baroda, Bhubaneshwar and numerous other cities. The courts in response have not merely been largely silent to this massive violation of people[1]s rights and to this attack on their livelihood, they also have in a series of pronouncements approved of it. They did this most infamously when the Supreme Court said that people staying in slums have no right to notice before evictions and that rehabilitating these Œencroachers[1] on public land is like "giving a reward to a pickpocket". Their recent pronouncements on the matter gave the process enormous legitimacy in some eyes. When we went around meeting officials during a campaign in Delhi, we used to be told that "even the courts have allowed it".

7. Hampering Dharnas at Workplaces: During several industrial disputes in Delhi - too numerous to spell out - in nearly every small dharna and gate meeting in industrial areas, the judiciary is acting as a saviour of the interests of private capital. As it is, large parts of Delhi that house state institutions are notified under section 144 CrPC - which prohibits the assembly of more than five persons. A provision in law that was first legislated as a short-term arrangement to be applied only in special circumstances is now used routinely to hamper political protests. Courts however have gone beyond Sec 144, by preventing protest gatherings even at factory gates, historically a traditional site for workers' protest. In numerous instances of workers' protest investigated by PUDR, the High Court provided factory managements with a stay order preventing protests by workers within a specified distance of the factory. The same applied to dharnas by workers of Apollo Hospital, Hyatt Regency, Moolchand Hospital, JNU, and other worksites that are not factories. Managements benefit immensely; they can easily let replacement staff enter, and freely move raw materials and finished goods. This weakens the impact of the strike and delays, if not entirely absolves, managements, from being pushed to present themselves before conciliation authorities. This is how the courts, by undermining the role of a strike as the action of last resort by workers, make the workers more vulnerable to attacks by capital.

C. Why did this judicial shift happen?

For one, in the 1990s, there was an unprecedented and sustained assault by private capital and the public sector to amend labour laws in their favour. In 1993, the Omkar Goswami Committee Report on Industrial Sickness and Corporate Restructuring suggested that sections 25N and 25O (pertaining to Workers' rights in

the case of retrenchment and closure respectively) be deleted from the Industrial Disputes Act 1947. The Standing Committee of Public Enterprises (SCOPE) held conferences demanding that the minimum number of workers in a unit to qualify for protection under the ID Act be increased to 1,000 (Delhi Janwadi Adhikar Manch, Badalte Shram Kanoon, May 2002). Consequently, more recently, the Second Labour Commisson said that "prior permission is not necessary in respect of lay-off and retrenchment in an establishment of any employment size". It recommended that the sectionsof chapter VB pertaining to permission in the cases of closure be now applicable only to a minimum of 300 workers (up from 100); that it be incorporated in VA, and that VB "should be repealed" (Report, Vol II, page 44).It needs to be recognized though, as PUDR's report on Maruti's workers discusses, a lot of retrenchment happens through the backdoor. Companies evade the limiting restrictions of the Industrial Disputes Act by forcing VRS down workers' throats. In the Maruti case itself, hundreds of 'permanent' workers were forcibly made to leave the company after the illegal lockout imposed by the company in October 2001. VRS has often become a way of avoiding the restraints of the ID Act.

Two, as we said in the beginning of the note, the judiciary was operating in a changed context by the 1980s. Outsourcing, contractualization, changed production processes, and other aspects of the attack by capital intensified in India, and was happening on nearly a world scale as capital in the 1980s attempted to push the burden of reduced profits on to the backs of workers everywhere. Part of that attack was on the fundamental right to association and the recognition of trade unions. (For instance, recognition of its union was one of the issues that catalysed the industrial dispute leading to the brutal attack on Honda's workers).

Three, the judiciary in the 1990s was operating in a situation of weakened working class power. From the late 1980s on, unions were unable to come up with new strategies to cope with changed tactics by capital mentioned above.Or indeed to cope with attacks such as VRS or freeze in public sector employment. They were not helped by their own fragmented nature of working class politics, in particular the fractured nature of working class parties in urban areas. Additionally, the incapacity of permanent workers to reach out and support their contract worker compatriots in specific situations of struggle weakens both the struggle and worker unity. This shift in the judiciary has particularl disturbing implications for democracy in India because the judiciary, not being an elected body, lacks all accountability whatsoever to the people.