CHAPTER - 2

NORMATIVE FRAMEWORK OF LABOUR RIGHTS

2.1 Introduction

This chapter lays down the normative framework against which the realization of labour rights in Special Economic Zones is assessed. It examines the standards, international as well as domestic with regard to the specific labour rights that constitute the focus of this study while livelihood rights constitute the focus of the third chapter. As mentioned in the introduction to this study the three categories of labour rights that determine the scope of this study and are therefore discussed in this chapter are as follows:

1. Collective Rights
   - Right to security of employment indicated through protection against unlawful termination of employment, limited to following kinds of terminations:
     - retrenchment
     - termination as a punishment inflicted by way of disciplinary action
     - termination on account of union activity
   - Right to freedom of association and collective bargaining

2. Individual Rights
   - Right to decent conditions of employment i.e.
     - right to minimum wages, bonus, decent working hours, including breaks and special payment for working overtime, access to canteen, social security in the form of health insurance, provident fund, gratuity, accident compensation

3. Right to an effective enforcement of the above stated collective and individual rights through labour inspections

Before embarking upon an analysis of the above mentioned rights the chapter delves the Constitutional approach towards labour and its relationship with capital. The of the above stated three categories of labour rights is undertaken in three corresponding sections of the chapter with each section commencing with the international standards with respect to the said right, followed by the legislative framework with respect to the
same. The congruence of the domestic labour standards with the international ones is undertaken only to provide a broader evaluation of domestic standards themselves. However, the assessment of realization of labour rights in SEZs in NCR is primarily based on the domestically posited standards. Further on account of the wide variance in the nature of employment of workers in India i.e. regular/permanent and non-regular which includes categories like contract, casual, temporary, fixed term, \textit{badli} workers and given the high percentage of contract workers employed in SEZs in NCR the discussion of normative framework specifically delves into the status of contract workers with respect to the above mentioned rights.

2.2 Constitutional Approach towards Labour

The Constitutional vision of development and within that the approach towards labour emerges from a combined reading of part III and part IV of the Constitution of India. Part III primarily imbibes the civil rights and these rights are enforceable in the court of law whereas part IV of the Constitution, primarily constituted by economic and social rights though held “fundamental to the governance of the country” and sought to be applied by the state in making laws\(^1\) are not enforceable in the court of law. As rightly pointed out by the First National Commission on Labour in its seminal report Part IV of the Constitution gives a “broad picture of the progressive philosophy on which the Indian Republic expects to function in social, economic, political and international matters.”\(^2\) Moreover over the years the Supreme Court through an expansive interpretation of the rights in part III has been heavily relying on part IV to ascertain the content of what seems to be included in the broad interpretation of part III. Freedom of trade and business is guaranteed under Article 19(1) (g) of part III of the Constitution of India. The freedom however, is subject to reasonable restrictions and definitely the obligations of those who carry on business with respect to the rights guaranteed to labour under various labour legislations constitute reasonable restrictions within the meaning of Article 19(6). Moreover generally, it is recognized that the directive principles of state policy constitute relevant consideration in deciding reasonableness of restrictions imposed on fundamental rights\(^3\) as their objective is to embody the concept of a welfare state.\(^4\) “What the Constitution therefore attempts to

\(^{1}\) The Constitution of India, 1950, Article 37.
do in declaring the rights of people is to strike a balance between individual liberty and social control."

With regard to labour the Directive Principles specifically enshrine the following goals:
1. Adequate means of livelihood
2. Operation of the economic system does not result in the concentration of wealth and means of production to the common detriment
3. Equal pay for equal work
4. No abuse of health and strength of workers
5. Right to work and public assistance in case of inter alia unemployment
6. Provision for just and humane conditions of work and maternity benefit
7. Provision for securing living wage for workers
8. Participation of workers in management of industries

Directive Principles of State Policy imbibed in part IV of the Constitution primarily securing ‘just and humane conditions of work’ constitute one of the vital factors that inform the understanding and application of Industrial jurisprudence in India. In the light of the goal of amelioration of conditions of workers, the Constitution is not viewed as taking a neutral stand between the labour and management but embodies “restraint on laissez faire and concern for the welfare of the weaker lot.” The Supreme Court had clearly enunciated this approach as early as 1962 in the following words:

The doctrine of the absolute freedom of contract has to yield to the higher claims of social justice . . . In the case of industrial adjudication the claims of the employer based on the freedom of contract have to be adjusted with the claims of industrial employees for social justice.

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7 Id., Article 39 (c).
8 Id., Article 39 (d).
9 Id., Article 39 (e).
10 Id., Article 41.
11 Id., Article 42.
12 Id., Article 43.
13 Id., Article 43 A.
In fact the edifice created by the Constitution had strong foundations in judicial precedent established after independence but before commencement of the Constitution. The Federal Court in *Western India Automobile Association v. Industrial Tribunal Bombay*,\(^{17}\) while determining the powers of the industrial tribunals recognised industrial jurisprudence as a branch distinct and not subservient to law of contract. While upholding the power of an industrial tribunal to reinstate a dismissed worker, the court said that adjudication by an industrial tribunal “does not in our opinion mean adjudication according to the strict law of master and servant” and further observed that “industrial arbitration may involve the extension of an existing agreement or making of a new one.” This approach was subsequently followed by the Supreme Court and in the context of the obligation to pay minimum wages\(^{18}\) it held that freedom of contract is subject to reasonable restrictions and payment of minimum wages being one such reasonable restriction. It was the recognition of the power of the Supreme Court to directly entertain appeals from the awards of industrial tribunals under Article 136\(^{19}\) and in appropriate cases interfere with them that enabled the Court to “shape the industrial jurisprudence of this country.”\(^{20}\)

Apart from Part IV, the preamble to the Constitution of India envisions India as a socialist, secular, democratic republic, where justice – social, political and economic is the goal to be secured for all the people of India. Therefore, social justice, with respect to all the social categories, has emerged as one of the basic organizing principles of the Indian democracy. Being so, it definitely constitutes “the source and strength of the industrial branch of third World Jurisprudence.”\(^{21}\) The foundation of labour jurisprudence in India as well as its stance with respect to capital and labour is finely captured in the following words of the Supreme Court:\(^{22}\)

> Indian Justice, beyond Atlantic liberalism, has a rule of law which runs to the aid of the rule of life. And life, in conditions of poverty aplenty, is livelihood and livelihood is work with wages. Raw societal realities, not fine-spun legal

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\(^{17}\) 1949 F.C.R. 321.


\(^{22}\) Ibid.
niceties, not competitive market economics but complex protective principles, shape the law when the weaker, working class sector needs succour for livelihood through labour.

Article 43A which mandates the state to take steps to “secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry,” transforms the vision about the role and status of labour merely as a factor of production to a partner in the process of production and the latter emerges as a “common venture in pursuit of desired goal.”23 In this context the Supreme Court of India has also dwelled upon the expected role and contribution of each of the partners in their common pursuit. The court has observed24:

Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and iniquitous to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be a unilateral action. It must be a two-way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater brunt making the shock of sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty.

This view has been reinforced by the Supreme Court in *Gujarat Steel Tubes Ltd. v Gujarat Steel Tubes Mazdoor Sabha*25, where the court held that “in our society, Capital shall be the brother and keeper of Labour and cannot disown this obligation, especially because social justice and Articles 43 and 43 A are constitutional mandates.”

Thus the Supreme Court has risen to the “occasion from time to time and played a role compatible and complementary to the social policy perceived by the framers of the

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24 *Ibid*.
Constitution and brought uniformity in the development of industrial law.26 It is 
through these remarkably consistent contributions of the Supreme Court that 
Constitutional approach towards labour epitomised by social and economic justice and 
partnership informed by fraternal attitude of capital towards labour got firmly 
established in the case law. However, despite robust Constitutional foundation of 
labour rights jurisprudence developed in the yesteryears by the Supreme Court, a 
different chord has been struck by the Court in recent years which many scholars have 
attributed to the sanctity that the process of liberalization, privatization and 
globalization has come to enjoy not only at the level of the executive but also the 
judiciary.27 The existence of a “disturbing trend” has also been noticed by Prof. 
B.T.Kaul while undertaking the appraisal of Supreme Court decisions specifically in 
the arena of “conceptual framework” and “scope and powers of industrial adjudicators 
in disciplinary matters.”28 The Supreme Court itself recognized this trend29 in 
following words

Of late, there has been a visible shift in the courts approach in dealing with 
the cases involving the interpretation of social welfare legislations. The 
attractive mantras of globalization and liberalisation are fast becoming the 
raison d’être of the judicial process and an impression has been created that 
the constitutional courts are no longer sympathetic towards the plight of 
industrial and unorganized workers. In large number of cases like the present 
one, relief has been denied to the employees falling in the category of 
workmen, who are illegally retrenched from service by creating by-lanes and 
side-lanes in the jurisprudence developed by this Court in three decades. . . It 
needs no emphasis that if a man is deprived of his livelihood, he is deprived 
of all his fundamental and constitutional rights and for him the goal of social 
and economic justice, equality of status and of opportunity, the freedoms 
enshrined in the Constitution remain illusory. Therefore, the approach of the 
courts must be compatible with the constitutional philosophy of which the 
Directive Principles of State Policy constitute an integral part and justice due

27 Generally see Gayatri Singh, “Judiciary Jettisons Working Class,” CL 24-33 (Nov-Dec 2008); 
Khaliduzzaman I Kiledar, “Not at Arms Length,”CL 99-101 (Nov-Dec 2008); K.S.Mohammed Hashim, 
“Not for the Labour,” CL 46-48 (2008); Jane Cox, “Judiciary Leaves Contract Labour in the Cold,” CL 68- 
71 (Nov-Dec 2008); Vijay Kumar, “Co-Opted by Globalisation,” CL 114-117 (Nov-Dec 2008); Sanjay 
to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private.

These words from the highest Court which is the upholder of the rights embodied in the Constitutional philosophy though soothing in the light of the current trend are not legally sufficient to undo the shift that is recently getting established in the form of legal principles laid down through case law. There is a long way to go from the recognition of shift in the approach of the court to really undoing it.

2.3 LABOUR RIGHTS

2.3.1 Locating Labour Rights within the Indian Labour Law Regime

The labour law in India is primarily collective in nature. The Trade Unions Act, 1926 recognises the rights of workers having organised themselves into a trade union. The Industrial Disputes Act, 1947 deals with the collective rights of workmen to strike, rights in case of lay off, lock out, retrenchment, closure. Besides these rights it deals with the mechanism in case of an industrial dispute which is defined in section 2(k) of the Industrial Disputes Act. The definition of industrial dispute necessarily refers to collective disputes. Even an individual dispute may ripen into an industrial dispute when there is a concerted demand by the employees for redress. However the amendment introduced in the year 1965 to the Industrial Disputes Act, 1947 brings within the fold of industrial disputes all the disputes between a workman and his employer pertaining to discharge, dismissal, retrenchment or termination of the workman irrespective of the fact that the workman’s cause is not espoused by any other workman or any union of workmen. Therefore unlike the position before the amendment when even a dispute relating to termination of an individual worker had to be espoused by workers collectively to avail the procedural and substantive protections embodied in the Industrial Disputes Act, after the amendment such a dispute even if not supported by workers collectively is deemed to be an industrial dispute. The amendment thus gives a de facto individual dispute a veneer of an industrial/collective dispute. Thus an industrial dispute is either any individual dispute

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30 Industrial Dispute means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any persons.
32 The Industrial Disputes Act, 1947, section 2A, Uttar Pradesh Industrial Disputes Act, 1947, section 2-A.
pertaining to discharge, dismissal, retrenchment or termination of a worker or any other dispute connected with the employment, non-employment, terms of employment and conditions of labour raised by workers collectively. The collective rights examined in this study are right to security of employment, freedom of association and collective bargaining.

The individual rights analysed in this study pertain to conditions of work, like wages, working hours, intermittent breaks, special payment for overtime, access to canteen and social security protections in the form of provident fund, health insurance, accident compensation and gratuity. The disputes between individual worker and employer pertaining to above mentioned matters, unless espoused by workers collectively retain the character of individual dispute between worker and employer subject to be dealt within individual labour law pertaining to employer-employee relationship in the ordinary courts of law. However, once a dispute falls within the definition of industrial dispute under the Industrial Disputes Act, the dispute is susceptible to be dealt with in the prescribed manner by the machinery for the settlement of industrial disputes comprising of conciliation, arbitration and adjudication. Thus the labour rights discussed in the following section of the chapter must be viewed not merely as rights of individuals but also of workers as a class depending on whether they meet the above mentioned requirement for being designated as collective dispute and the remedies therefore in case of violation of these rights has both individual as well as collective aspect. The redress or entitlements of individuals with respect to each category of rights are discussed in the detail in the following sections. However, contrivances collectively available to the workers, being susceptible to be adopted by the workers irrespective of the category of right claimed, are discussed hereunder. The latter consists of primarily the contrivance of strike which may be resorted to by the workers to coerce the employer to concede to their demands which may pertain to any of the rights discussed in this chapter. The contrivance of voluntary collective bargaining which may also be resorted to by the workers is discussed in the section dealing with unionisation and collective bargaining. Since the chapter is concerned with labour rights the discussion of the contrivances does not extend to a device available to the employers in the form of lock-out to coerce the workers to concede to the employer’s point of view. As the right to security of employment in this study is limited to permanent severance of employer-workman relationship therefore rights in case of lay off are not discussed in this
chapter. Similarly the three categories of terminations to which this study pertains makes discussion with respect to collective rights available to workers in case of closure redundant.

ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) as well as Convention on the Right to Organise and Collective bargaining, 1949, (No. 98) do not specifically embody the right to strike however, the Committee of Experts on the Application of Conventions and Recommendations (hereinafter referred to as CEACR) has viewed right to strike as an “intrinsic corollary” of Convention No. 87 to be read into Article 3 of the Convention while recognising that it can be subject to restrictions. As early as 1952 the Committee on Freedom of Association of the Governing Body of ILO held that “the right to strike is one of the essential and legitimate means through which workers and their organisations may further and defend their social and economic interests . . . including those seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.” Thus despite the absence of any explicit provision, the right to strike has been recognised as a part of international labour rights jurisprudence as a component of freedom of association.

On a line parallel to the explicit international norms, domestically, law in India does not explicitly embody the right to strike. However, the Constitution of India recognises the right to form associations and unions, the Trade unions Act, 1926 confers certain immunities to trade unions especially with respect to any act done in contemplation or furtherance of trade dispute and the Industrial Disputes Act, 1947 differentiates between legal and illegal strikes on the basis of whether the strike has ensued following the prescribed procedure. The Industrial Disputes Act defines strike as “cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of

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35 Article 19(1)(c).
36 The Trade Unions Act, 1926, section 18.
37 The Industrial Disputes Act, 1947, sections 22, 23; Uttar Pradesh Industrial Disputes Act, 1947, sections 6S, 6T.
any number of persons who are or have been so employed to continue to work or to accept employment.”

Unlike the approach of the Committee on Freedom of Association, the Supreme Court of India has desisted from holding that the trade unions have a fundamental right to effective collective bargaining or to strike. The court reasoned that reading the rights guaranteed in Part III of the Constitution as including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of these rights will result in series of ever-expanding concentric circles in the shape of rights concomitant to concomitant rights leading to a grotesque result. It is neither a positive right since it is not explicitly posited in any legislation but it emerges implicitly through a system of immunities granted to the act of strike or acts pursued there under by a trade union in pursuance of a trade dispute. Within the Hohfeldian conception of rights immunity is recognised as a form of right among others like claim, freedom, power in which a right may be clothed. The right however is limited to legal strikes only. The legality of strike and the procedure laid down in the Industrial Disputes Act, 1947 distinguishing between legal and illegal strikes assumes significance in the context of SEZs. This is especially because the units in SEZs have been en masse declared to be “public utility” and embarking upon a legal strike in an industrial establishment declared as public utility is almost impossible.

2.3A COLLECTIVE RIGHTS

2.3.A1 Right to Security of Employment

The significance of security of employment in India must be assessed from the standpoint of the interface between the prevailing labour market conditions (primarily the ratio between employed and unemployed), the high incidence of poverty in India and the economic growth (measured in terms of GDP) that the country is experiencing. Firstly, the labour force in India has been growing at a faster rate than...
the rate of growth of employment.\textsuperscript{44} Therefore unemployment has been increasing. The rate of unemployment increased from 6.1\% in 1993–94 to 7.3\% in 1999–2000, and further to 8.3\% in 2004–05.\textsuperscript{45} Secondly, fairly healthy GDP growth is not matched by the growth of formal employment in the organized sector. The rate of growth declined from 1.53\% during 1980-1994 in the public sector to -0.65\% during 1994-2008, whereas correspondingly there has been an increase in the growth of employment in the private sector during the same period from 0.44\% to 1.75\%.\textsuperscript{46} However the trend in the growth of employment in private sector is also marked by increasing informalisation of labour. The unorganized or informal workers constitute 92\% of the workforce in India.\textsuperscript{47} The category of workers in informal employment is not limited to the informal sector in India but extends to the formal sector as well, constituted by regular workers without social security benefits, or casual or contract workers employed in the formal sector. From 397 million in 1999-00 the number of people employed increased to 457 million in 2004-05.\textsuperscript{48} However, the increase of 61 million in the total employment is attributable to the “increase of an informal kind” whereas the “change in formal employment has been nil or marginally negative.”\textsuperscript{49} In 1999-2000 out of 54.1 million people working in the formal sector 20.5 million were informal workers, however after five years i.e. 2000-05 while the number of formal workers remained constant, the number of informal workers in formal sector enterprises increased by 8.68 million to 29.1 million.\textsuperscript{50} Rather than formalisation of the informal sector the trend is towards informalisation of the formal sector. Further Himanshu, in his insightful analysis of employment trends in India since 1972-73 points out that on account of vulnerability created by large scale poverty and distress in India, the “participation in labour market (entry and exit) is not out of choice but is governed by changes in the income level,”\textsuperscript{51} and the household income is in turn dependent on “macroeconomic policies and sectoral pattern of growth.”\textsuperscript{52}

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\textsuperscript{44} Govt. of India, \textit{11th Five Year Plan}, 2 (The Planning Commission of India 2007-2012).
\textsuperscript{45} \textit{Id.}, at p. 63.
\textsuperscript{46} Government of India, \textit{The Economic Survey} 299 (Ministry of Finance 2010-2011).
\textsuperscript{47} \textit{Id.}, p. 1.
\textsuperscript{48} National Sample Survey Statistics from 61\textsuperscript{st} and 55\textsuperscript{th} round, cited in Government of India, Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector, 4 (National Commission for Enterprises in the Unorganised Sector, 2007).
\textsuperscript{50} National Sample Survey Statistics from 61\textsuperscript{st} and 55\textsuperscript{th} round, cited in Government of India, Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector, 4 (National Commission for Enterprises in the Unorganised Sector, 2007).
\textsuperscript{51} Himanshu, “Employment Trends in India: A Reexamination” XLVI 37 \textit{EPW} 57 (Sept’10 2011).
\textsuperscript{52} \textit{Ibid.}
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“Employment is not responding to longer run opportunities ought to be created by a growing economy but is responding to the vulnerabilities imposed by any short-term shrinkage of income.”

2.3.A1.1 International Standards

Right to work and rights at work are integral to human life, liberty and dignity. Both, international labour law and international human rights law, offer “complementary dimensions for the protection of work related rights in modern international law.”

Article 6 of International Covenant on Economic Social and Cultural Rights, 1966 recognises the right of a human being to “the opportunity to gain his living by work which he freely chooses or accepts” and the States Parties have undertaken to “take appropriate steps to safeguard this right.” Further, International Labour Organisation (hereinafter referred to as ILO) Termination of Employment Convention, 1982 (No. 158) recognizes security of employment by prohibiting termination of employment unless there is a valid reason for such termination connected with the following:

1) capacity or conduct of the worker
2) Operational requirements of the undertaking, establishment or service

The Convention also specifically enumerates reasons that do not constitute valid reasons for the purposes of termination. They are as follows:

1) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
2) seeking office as, or acting or having acted in the capacity of, a workers' representative;
3) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
4) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
5) absence from work during maternity leave

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53 Id., at p. 58.
55 As per Article 3 of the Convention ‘termination of employment’ means termination of employment at the initiative of the employer.
56 Termination of Employment Convention, 1982 (No. 158), Article 4.
57 Id., Articles 5, 6.
6) Temporary absence from work because of illness or injury

The contours of the right to security of employment in terms of protection against invalid termination of employment are also determined by the categories of employees which the convention allows to be exempted from the purview of its application. The categories which can be excluded are as follows:

1) workers engaged under a fixed term contract or contract for a specified task\(^{58}\)
2) workers on probation of reasonable duration or duration determined in advance\(^{59}\)
3) Casual workers engaged for a short period\(^{60}\)
4) Workers whose conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention\(^ {61}\)
5) employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them\(^ {62}\)

Further the Convention requires provision to be made for adequate safeguards against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention\(^ {63}\)

The substantive right to security of employment is also sought to be secured through procedural safeguards provided in the convention like reasonable period of notice or compensation in lieu thereof, unless the worker is guilty of serious misconduct,\(^ {64}\) opportunity to the worker to defend himself in case of termination related to worker’s conduct or performance unless the employer cannot reasonably be expected to provide this opportunity,\(^ {65}\) right of the worker to appeal to an impartial body against unjustifiable termination,\(^ {66}\) recognition of the power of such impartial body to examine the reasons given for the termination and the other circumstances relating to

\(^{58}\) Id., Article 2 (2) a.
\(^{59}\) Id., Article 2 (2) b.
\(^{60}\) Id., Article 2 (2) c.
\(^{61}\) Id., Article 2 (4).
\(^{62}\) Id., Article 2 (5).
\(^{63}\) Id., Article 2 (3).
\(^{64}\) Id., Article 11; Termination of Employment Recommendation, 1963, Paragraph 7.
\(^{65}\) Id., Article 7.
\(^{66}\) Id., Article 8.
the case and to render a decision on whether the termination was justified, the burden of proving the existence of a valid reason for the termination to rest on the employer.

The Convention as well as Termination of Employment Recommendation, 1963, (No. 119) recognizes the right of worker to compensation in case of unjustified termination, while also recognizing the right to declaration of termination as invalid as well as reinstatement with back wages in accordance with national law and practice. The consequences envisaged in the Convention in case of termination of employment are as follows:

1) Severance allowance or separation benefits, or
2) Unemployment insurance, assistance or other forms of social security, or
3) A combination of such allowance or benefits

In view of the recent practice of collective redundancies being affected by the employers, the Convention makes special provision recognizing the right of workers to information and consultation in case of termination of employment for reasons of economic, technological, structural or similar nature. Consultation with workers is envisaged as a measure to be taken with a view to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The Convention also recognizes the need to notify such terminations to competent authority. Further Termination of Employment Recommendation, 1963 provides that the workers whose employment has been terminated owing to a reduction of workforce should be given priority of re-engagement by the employer when he again engages workers.

2.3.A1.2 Domestic Legal Framework for Security of Employment

The right to security of employment encompassing protection from unlawful termination of employment is a statutory right emanating from the Industrial Disputes

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67 Id., Article 9 (1).
68 Id., Article 9 (2) a.
72 Id., Article 13 (1) b.
73 Id., Article 14.
74 Termination of Employment Recommendation, 1963, Paragraph 16 (1).
Act (central or state as the case may be) and the Industrial Employment (Standing Orders) Act, 1946 read with the standing orders approved under the Act or the Model Standing Orders as the case may be. Prohibition of termination of employment on account of union activity is also protected under Article 19(1)(c) of the Constitution of India. Certain aspects of right to security of employment have got established as a norm through the common law for instance obligation to follow principles of natural justice in case of termination as a punishment inflicted by way of disciplinary action. Thus the discussion with respect to this right encompasses the above stated norms.

Since the primary data with respect to labour rights of workers in multiproduct SEZ units has been collected from the state of Uttar Pradesh and with respect to IT or ITES workers has been collected from the state of Haryana the discussion of domestic legal framework which includes the law relating to industrial disputes apart from other legislations, encompasses within its fold reference to both the central Industrial Disputes Act, 1947 (applicable to workers in Haryana) and Uttar Pradesh Industrial Disputes Act, 1947 (applicable to workers in Uttar Pradesh).

Employer-employee relationship may be severed through a variety of means within the domestic normative framework dealing with employment of workers:

I. Predetermined terminations i.e. where the severance of relationship is absolutely determined at the time when employer-employee relationship is entered into for instance
   a) specification of age of superannuation in the contract of employment
   b) Contract of employment being a contract for a fixed term (hereinafter referred to as FTC)

II. Negotiated terminations can be of two kinds
   a) where the severance of relationship is partially/contingently determined at the time when employer-employee relationship is entered into for instance where termination of employment is in accordance with a stipulation in a contract. This is also known as termination/discharge simpliciter
   b) terminations which are completely negotiated afresh during subsistence of employment for instance voluntary retirement.

III. Non-negotiated terminations may be any of the following:
a) Termination on the ground of continued ill health unless included in the terms and conditions of employment
b) Termination on account of closure of place of employment or any part of it
c) Termination as a punishment inflicted by way of disciplinary action
d) Retrenchment [except those falling under I(b) (FTC)]
e) Termination \textit{simpliciter} as a camouflage for unfair labour practice

\textbf{Chart No. 2.1 – Classification of Terminations}

Whereas the third category i.e. non-negotiated terminations are completely at the instance of the employer, at times even the contingently negotiated terminations also known as termination \textit{simpliciter} may be a camouflage for unfair labour practice for instance:

\footnotesize{\textsuperscript{75} Applicable only in case of workers governed by the central legislation on industrial disputes i.e. The Industrial Disputes Act, 1947.}
• Discharging a workman because he urged other workman to join or organize a trade union
• Discharging or dismissing a workman for taking part in any strike (not being an illegal strike)
• Discharging office bearers or active members of the trade union on account of their trade union activity
• Discharging or dismissing a workman
  o by way of victimisation
  o not in good faith but in colourable exercise of employer’s rights
  o by falsely implicating a workman in a criminal case on false evidence or on concocted evidence
  o for patently false reasons
  o on untrue or trumped up allegations for absence without leave
  o in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste
  o for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment
• To discharge any workman for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute

All the above stated practices have been explicitly recognized as unfair labour practices under the central Industrial Disputes Act. On the other hand though there is no specific provision in the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as UPID Act) with respect to unfair labour practice yet, most of those practices are illegal being in violation of the right to form associations and unions guaranteed under the Constitution as well as the Trade Union’s Act, 1926 or in colourable exercise of power of termination or termination (as a punishment) without following principles of natural justice in domestic inquiry for instance:

• Discharging a workman because he urged other workman to join or organize a trade union
• Discharging office bearers or active members of the trade union on account of their trade union activity

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76 The Industrial Disputes Act, 1947, section 25T, Fifth Schedule.
• Discharging or dismissing a workman for taking part in any strike (not being an illegal strike under the Uttar Pradesh Industrial Disputes Act, 1947)
• Discharging or dismissing a workman
  o not in good faith but in colourable exercise of employer’s rights
  o on untrue or trumped up allegations for absence without leave
  o in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste

Further despite this lacuna in the UPID Act the law regarding the power of the industrial tribunals and the redress available to workmen especially in case of their dismissal by the employer on account of unfair practice stands well recognized in the law in force on account of the judicial precedents. As early as 1962 the High Court of Allahabad\textsuperscript{77} observed as follows:

Any systematic attempt by the employer to use his powers of management to disrupt the trade union of his employees will be condemned by the Court as unfair labour practice. . . What is unfair labour practice or victimisation is a question of fact to be decided by a labour Tribunal upon the circumstances of each case. Unjust dismissal, unmerited promotion, partiality towards one set of workers regardless of merits, are illustrations of unfair labour practice. If an employer deliberately uses his power of promoting employees in a manner calculated to sow discord among his workmen or to undermine the strength of their union, he is guilty of unfair labour practice.

Further in Eveready Flashlight Co. v. Labour Court\textsuperscript{78} the Allahabad High Court observed as follows:

It is not possible to lay down any exhaustive test of unfair labour practice, but as a working principle, I would hold that any practice which violates the principles of Article 43 of the Constitution and other articles declaring decent wages and living conditions for workmen and which if allowed to become normal would tend to lead to industrial strife should be condemned as unfair labour practice.

\textsuperscript{77} L.H. Sugar Factories and Oil Mills (Private) Ltd. v. State of Uttar Pradesh, A.I.R. 1962 All 70.
\textsuperscript{78} A.I.R. 1962 All 497.
In case of discharge *simpliciter* the industrial tribunal has the power to examine “whether the discharge is *malafide* or whether it amounts to victimization or an unfair labour practice, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in bona fide exercise of the power conferred by the contract.” 79 Where the power is conferred on the employer to terminate the services of the worker after a month’s notice or subject to some other condition, it is open to the employer to terminate the service of the worker in pursuance of such power however exercise of the power has to be bona fide and not a mere camouflage for an order of dismissal for misconduct. 80

As mentioned in the introduction for the purposes of this study the right against unlawful termination of employment is limited to the following

I. Rights in case of retrenchment

II. Rights in case of termination as a punishment inflicted by way of disciplinary action

III. Rights against termination on account of union activity

### 2.3.A1.2a CONTENT OF THE RIGHTS

I. Rights in case of Retrenchment

For determining the scope of rights in case of retrenchment it is necessary to refer to the definition of the term in the two legislations. Section 2(oo) of the central Industrial Disputes Act, 1947 defines retrenchment 81 which is not *pari materia* with the

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80 *Chartered Bank v. Chartered Bank Employees Union* (1960) 2 LLJ 222.
81 ‘Retrenchment’ means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include—

(i) voluntary retirement of the workman; or

(ii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf; or
The entitlement of rights in case of retrenchment is limited by law only to those employees who have been in continuous service for not less than one year. The term continuous service is defined in section 25B of the central Industrial Disputes Act, 1947 while section 6N of UPID defines the term continuous service. The primary

(iii) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(iv) termination of the service of a workman on the ground of continued ill-health

The Industrial Disputes Act, 1947, section 25 B; Uttar Pradesh Industrial Disputes Act, 1947, section 6N.

Definition of continuous service. — For the purposes of this Chapter,—

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) Two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.
distinction between the two definitions is that while the central Industrial Disputes Act, 1947 requires the rendering of two hundred and forty days of service in the year “preceding the date with reference to which calculation is to be made” i.e. the date of retrenchment, in case of UPID the requirement of continuous service is fulfilled provided two hundred and forty days of service has been rendered in any twelve calendar months.85

The rights enumerated below must be read as completely excluding workers with fixed term contracts under the central legislation. In other words the workers in Haryana in the present study employed under fixed term contracts are not at all entitled to any right with respect to retrenchment as they are excluded from the definition of retrenchment as mentioned above. However, the rights in case of

Explaination.—For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which—

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

Continuous service’ means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman, and a workman, who during a period of twelve calendar months has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry.

Explaination.—In computing the number of days on which a workman has actually worked in an industry, the days on which—

(i) he has been laid off under the agreement or as permitted by standing order made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been so laid off being taken into account for the purposes of this clause,

(ii) he has been on leave with full wages, earned in the previous year, and

(iii) in the case of a female, she has been on maternity leave; so however that the total period of such maternity leave shall not exceed twelve weeks, shall be included.
retrenchment of workers having fixed term contracts in the state of Uttar Pradesh are restricted as they are not excluded from the definition of retrenchment under UPID.

The rights in case of retrenchment are as follows:

(i) Right to one month prior notice to the workman indicating the reasons for retrenchment (except in cases of FTC) 

(ii) Right to salary in lieu of the notice mentioned above (except in cases of FTC)

(iii) Right to the notice to the state government of the same in the prescribed manner

(iv) Right to retrenchment compensation equivalent to fifteen days’ average pay for every completed year of service or any part thereof in excess of six months

(v) Last come first go within the concerned category of workers

(vi) Right to an opportunity and preference to the retrenched employees to offer themselves for re-employment

Right to be compensated in case of retrenchment assumes special significance in India primarily on account of conspicuous absence of social security measures to meet such an eventuality. In UK Lord Denning traced the entitlement to redundancy pay to job security and job property concept and observed that “a worker of long standing is now recognised as having accrued right to his job, and his right gains in value with the years. So much so if the job is shut down, he is entitled to compensation for loss of job. . . It is, in a real sense, compensation for long service.”

II. Rights in case of Termination as a Punishment Inflicted by way of Disciplinary Action

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86 The Industrial Disputes Act, 1947, section 25 F (a); Uttar Pradesh Industrial Disputes Act, 1947, section 6N (a).
87 Uttar Pradesh Industrial Disputes Act, 1947, section 6N (a) proviso.
88 The Industrial Disputes Act, 1947, section 25 F (a); Uttar Pradesh Industrial Disputes Act, 1947, section 6N (a).
89 Uttar Pradesh Industrial Disputes Act, 1947, section 6N (a) proviso.
90 The Industrial Disputes Act, 1947, section 25 F (c); Uttar Pradesh Industrial Disputes Act, 1947, section 6N (c).
91 The Industrial Disputes Act, 1947, section 25 F (b); Uttar Pradesh Industrial Disputes Act, 1947, section 6N (b).
92 The Industrial Disputes Act, 1947, section 25 G; Uttar Pradesh Industrial Disputes Act, 1947, section 6P.
93 The Industrial Disputes Act, 1947, section 25 H; Uttar Pradesh Industrial Disputes Act, 1947, section 6Q.
Since the empirical study with respect to labour rights within SEZs sought to investigate into the instances of dismissals therefore the rights of workers discussed in this part are restricted to those in case of dismissals. Rights in case of termination as a punishment inflicted by way of disciplinary action extend to the following requirements:

- Specification of acts and omissions which constitute misconduct in the standing orders
- Termination to be in accordance with the rules laid down in the standing orders
- Principles of natural justice should be followed
- Payment of wages and other dues before the expiry of the second working day from the date of termination

In the light of the insusceptibility of the term misconduct to a precise definition and the need for the same keeping in view the civil consequences that visit the employee in case misconduct is proved, the court has on the one hand emphasised defining the term with precision and clarity in the standing orders and on the other it has left on the industrial adjudicator to decide in each case whether the alleged act in the facts and circumstances of the case would amount to misconduct. As mentioned above the Industrial Employment (Standing Orders) Act, 1946 requires the employers to prescribe the procedure for taking disciplinary action. Paragraph 14 of the Model Standing Orders lay down the broad contours of the procedure. One of the essential ingredients of the procedure is adherence to the principles of natural justice. However, Prof. Kaul points out that “in the interest of administrative expediency” the settled legal position both in public as well as private employment envisage situations where “employer can altogether dispense with the enquiry and summarily dismiss its
employees,” though such an order remains subject to be set aside in the exercise of power of judicial review.102

III. Rights Against Termination on account of Union Activity

Workmen on account of freedom of association and union under Article 19 (1)(c) of the Constitution and the Trade Unions Act, 1926 have a right to form unions and dismissal of a workman on account of his union activity is therefore violative of the above stated right. With respect to this right writ remedy is available under Articles 32 and 226 of the Constitution. The dismissal on account of union activity, as mentioned above also constitutes an unfair labour practice under the Industrial Disputes Act, 1947 as well as the law as laid down by judicial precedents by the Supreme Court.

Remedies: Evolution, Nature and Scope

At the outset it must be recognised that under the common law the employer has a right to discipline his employees, including the prerogative to dismiss the employee for misconduct, on account of the contract of employment between the employer and the employee.103 However inroads have been made into this managerial prerogative and now the same stands restricted. These restrictions emerge as rights of workers in case of wrongful dismissals. Remedies in case of violation of the rights discussed above, especially when they give rise to an industrial dispute are specifically provided in law through the recognition of the power of the industrial tribunals in this regard. The central Industrial Disputes Act, 1947 as well as UPID Act104 recognize the following powers of the authority making an award in the dispute arising from discharge or dismissal of a workman:

- Setting aside discharge or dismissal
- Reinstatement
- Any other relief that the authority deems fit (Back wages)

Even before the incorporation of these remedies in UPID Act105 or even the central Industrial Disputes Act, 1947106 the grounds for grant of these remedies by industrial

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102 Id., at p. 361.
103 Id., at p. 311.
104 The Industrial Disputes Act, 1947, section 11A; Uttar Pradesh Industrial Disputes Act, 1947, section 6(2-A).
tribunals had been affirmed by the Supreme Court in *Indian Iron and Steel Co. v. Their Workmen*.\(^{107}\) In the said case the court recognized that industrial tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief and further delineated the grounds on which the tribunal had the power to interfere with the order of termination\(^{108}\):

(i) when there is a want of good faith  
(ii) when there is victimisation or unfair labour practice  
(iii) when the management has been guilty of a basic error or violation of a principle of natural justice  
(iv) when on the materials the finding is completely baseless or perverse.

Apart from the recognition of the above mentioned grounds, prior to 1971/1978 with respect to the central Industrial Disputes Act and UPID respectively, the legal position with respect to disciplinary action by the employer was summarised by the Supreme Court in *Workmen of Firestone Tyre and Rubber co. of India Pvt. Ltd. v. Management*\(^ {109}\) thus:

- Conduct of enquiry in accordance with standing orders and principles of natural justice before imposition of punishment  
- Interference of tribunal with the decision of the employer is justified only where findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or *malafide*  
- In case of absence of or defective nature of enquiry evidence could be adduced before the tribunal by the employer and the employee for the first time and tribunal could pass appropriate order of reinstatement etc only after considering the evidence adduced. In such cases there is no managerial prerogative  
- The opportunity to adduce evidence for the first time has to be asked for by the employer at appropriate stage of proceedings before the tribunal  
- Where misconduct is proved whether on the basis of enquiry by the employer or evidence adduced before the tribunal, the said tribunal could interfere with the punishment only where the same was so harsh as to suggest victimisation

\(^{107}\) A.I.R.1958 SC 130.  
\(^{108}\) Ibid.  
\(^{109}\) (1973) 1 SCC 813, at pp. 827-829.
However, after 1971 with the amendment introduced in the central Industrial Disputes Act and that inserted in UPID in 1978 the tribunal was conferred the power to not only interfere with the finding of misconduct arrived at by the employer but also the quantum of punishment imposed by him. “The tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the evidence relied upon by the employer established the misconduct alleged against a workman. . . What was earlier largely in the realm of satisfaction of the employer, ceased to be so and now it is the satisfaction of the tribunal that finally decides the matter.”

Further the tribunal may also hold that misconduct is proved but the order of discharge or dismissal for said misconduct is not justified. In the Management of Panitole Tea Estate v. The Workmen the court added that the determination of remedy in case the tribunal set aside the order of dismissal fell within the discretion of the tribunal.

On the basis of in depth analysis of a number of cases, Professor B.T. Kaul has observed that in the earlier years after the amendment the court adopted a “reformatory approach while dealing with disciplinary matters” and held that it was within the power of the industrial adjudicator under section 11A not only to differ with the findings of the enquiry officer in a disciplinary proceeding but also to award lesser punishment than that awarded after the departmental enquiry or that imposed by the industrial adjudicator in reference under section 10 of the Industrial Disputes Act, but in recent years the approach has been deterrent in order to bring discipline in the industrial workforce. However, in the process Prof. Kaul observes that the “court has, unfortunately, circumscribed the powers of the industrial adjudicators to interfere with the quantum of punishment even in the face of clear language of the statute (s.11A) empowering them to do so in appropriate cases.”

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111 (1971) 1 SCC 742.
2.3.A1.2 b COVERAGE

Workplaces Covered

Rights in case of retrenchment emanating from the legislations pertaining to industrial disputes are available to workmen working in industries. The definition of the term industry in UPID which is *pari materia* with the definition under the central Industrial Disputes Act\(^{116}\) is as follows:

Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen.

The test for determination of whether an establishment is industry or not was authoritatively laid down by the decision of seven judge bench of the Supreme Court in *Bangalore Water Supply and Sewage Board v. A. Rajappa*.\(^{117}\) The three requirements to be fulfilled for being covered under the definition of industry are as follows:

- Systematic activity
- Cooperation between employer and employee
- Production of goods and services calculated to satisfy human wants and wishes

Further it clarified that absence of profit motive or gainful objective, the nature of the venture i.e. public, joint, private or other sector are irrelevant. The nature of the activity with special emphasis on the employer-employee relations is the decisive factor irrespective of whether philanthropy animates the trade or business carried on by the organization.\(^{118}\)

After this decision there was an attempt by the legislature to clearly lay down the definition in through an amendment to the Industrial Disputes Act, 1947 and the same was achieved through the Industrial Disputes (Amendment) Act, 1982. However, this amendment has not been brought into force. Further the late 1990s witnessed expression of reluctance on the part of judges to follow the wide interpretation given to the term industry in the Bangalore water supply case. Finally in the *State of U.P. v.*

\(^{115}\) Ibid.

\(^{116}\) The Industrial Disputes Act, 1947 section 2(j); Uttar Pradesh Industrial Disputes Act, 1947, section 2(k).

\(^{117}\) (1978)2 SCC 213, at p. 282.

\(^{118}\) Ibid.
Jai Bir Singh\textsuperscript{119} the Supreme Court referred the matter to the Chief Justice of India for constituting a suitable larger bench for reconsideration of the judgment in Bangalore water supply case. Calling upon the Court to perform a function which is essentially entrusted to the Parliament and which it has failed to perform due to its lack of will has been denounced.\textsuperscript{120}

However in the light of present state of the law relating to the term industry and the application of the triple test to the information technology (hereinafter referred to as IT) units manufacturing computer hardware or creating software or even those providing information technology enabled services (hereinafter referred to as ITES) it is clear that all these units very well fall within the scope of the term industry under the Industrial Disputes Act, 1947. Therefore workers working in these units are entitled to the rights emanating from the said legislation.

Rights in case of termination as a punishment inflicted by way of disciplinary action can be traced from the Industrial Employment Standing Orders issued by an establishment in pursuance of the Industrial Employment (Standing Orders) Act, 1946. The standing orders are required to provide for rules regarding termination of employment,\textsuperscript{121} suspension or dismissal for misconduct,\textsuperscript{122} acts or omissions that constitute misconduct,\textsuperscript{123} notice to be given in case of termination,\textsuperscript{124} means of redress for workmen against unfair treatment\textsuperscript{125} etc. Termination of employment may be automatic on certain grounds mentioned in the standing orders or discharge on notice may be provided for by the standing orders or there may be a provision for dismissal on misconduct. The Act is applicable to industrial establishments wherein hundred or more workmen are employed or were employed on any day of the preceding twelve months.\textsuperscript{126} The Industrial Employment (Standing Orders) Act, 1946 also confers the power on the appropriate government to notify the application of the provision of the Act also to industrial establishments employing less than hundred workmen.\textsuperscript{127}

\textsuperscript{119} (2005)5 SCC 1.
\textsuperscript{121} The Industrial Employment (Standing Orders) Act, 1946, Schedule, paragraph 8.
\textsuperscript{122} Id., paragraph 9.
\textsuperscript{123} Ibid.
\textsuperscript{124} Id., paragraph 8.
\textsuperscript{125} Id., paragraph 10.
\textsuperscript{126} The Industrial Employment (Standing Orders) Act, 1946, section 1(3).
Thus broadly, Industrial Disputes Act, 1947, UPID Act and Industrial Employment (Standing Orders) Act, 1946 cover workplaces that fall within the definition of industry. All the units in SEZs whether multiproduct or IT/ITES units are engaged in a systematic activity carried on through the cooperation of employer and employees for the production of goods or services. Therefore they qualify as industry under the Industrial Disputes Act. Thus the law relating to termination of employment and the rights discussed above emanating there from bind the units in SEZs.

**Employees Covered and Remedies: Issues and Concerns**

**Rights in case of retrenchment**

The rights in case of retrenchment are statutory rights emanating from the central or state Industrial Disputes Act as the case may be. For the applicability of Industrial Disputes Act with respect to workers two basic pre-requisites have to be satisfied viz., the establishment must be an ‘industry’ and the concerned worker should qualify as ‘workman’ as defined in section 2(s) of the Industrial Disputes Act. The data collected for this study categorises the workers working in multiproduct SEZ as well as outside NSEZ (NOIDA Special Economic Zone) into following categories:

- Regular
- Contract labour
- Apprentice
- Temporary

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127 *Id.*, section 1(3) proviso.
128 “Workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person –

(i) Who is subject to the Air force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) Who is employed in the police service or as an officer or other employee of a prison; or

(iii) Who is employed mainly in a managerial or administrative capacity; or

(iv) Who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

129 The coverage of different workers under the rights studied in this chapter is tabulated in appendix 2.1.
A general requirement prescribed in the Industrial Disputes Act for its applicability is that there must be an employer employee or master servant relationship between the employer and the workman i.e. the contract between the employer and workman should be a contract of service and not contract for service indicated by the right of the master to supervise and control the work done by the servant.\textsuperscript{130} Control and supervision test which used to be considered sufficient to determine existence of employer–employee relationship is no longer considered sufficient and constitutes just one of the tests along with others to determine existence of the said relationship.\textsuperscript{131} In addition to the control and supervision test the other tests that have been recognised as relevant are “method of payment; an obligation to work only for that employer; stipulation as to hours; overtime, holidays etc; how the contract may be terminated; whether the individual may delegate the work; who provides tools and equipments; and who ultimately bears the risk of loss and the chance of profit.”\textsuperscript{132} The limitation of the control and supervision test had become apparent over the years with the emergence of skilled and professional workforce. The Supreme Court in \textit{Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments}\textsuperscript{133} recognised as follows:

It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole “test of control”. An integrated approach is needed. Integration test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer’s concern or remained apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the “mutual obligations” between them.

The court has also extended the corporate law principle of lifting of veil to the arena of employment law in its decision in \textit{Hussainbhai v. The Alath Factory}\textsuperscript{133}.

\textsuperscript{130} \textit{Dharangdhara Chemical Works Ltd. v. State of Saurashtra} A.I.R. 1957 SC 264.
\textsuperscript{131} \textit{Ram Singh v. Union Territory, Chandigarh} (2004) 1 SCC 126.
\textsuperscript{133} (1974) 3 SCC 498.
The workman must be performing the category of work specified in the definition i.e. skilled, unskilled, technical, manual, supervisory or clerical. In *Burmah Shell Oil Storage and Distribution Co. of India v. Burmah Shell Management Staff Association* clearly upheld that “the specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word “workman” without having resort to the exceptions.” The principle laid down in the above mentioned case has been upheld by the constitution bench of the court in *H.R. Adyanthaya v. Sandoz (India) Ltd.* Moreover the category of work being performed by the person to fall within the definition of “workman” has to be determined with reference to the principle nature of the duties and functions performed by him and not work done incidentally.

A regular worker who has rendered not less than two hundred and forty days of work in the preceding year is therefore entitled to the rights in case of retrenchment. However as far as contract labour is concerned, since there is no employer-employee relationship between him and the principal employer as he is not a workman under the Industrial Disputes Act, refraining him from working in the unit would not amount to either termination or retrenchment. Therefore a contract worker is not entitled to the statutorily recognized rights in case of retrenchment. In other words contract worker can be turned out of service by the principle employer in SEZ unit at will without any compensation etc. and therefore lacks security of employment as well as any remedy.

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134 (1978) 4 SCC 257.
136 The Industrial Disputes Act, 1947, section 2(s). The definition in UPID uses the term manual only in conjunction with unskilled work whereas in the central legislation they are separate categories.
against the entrepreneur of SEZ unit. However, if the contract labour is just a sham and on lifting the veil one finds that the principal employer exercises control over the workers’ subsistence, skill and continued employment then the so called contract workers are actually employees of the so called principal employer\(^\text{140}\) and are therefore entitled to rights in case of retrenchment provided they fulfil other requirement of continuous service. Further where the contract worker is in real sense a contract worker he would still be entitled to rights in case of retrenchment against the contractor where he is retrenched by the contractor on the ground that the contractor can be said to be carrying on a systematic activity of providing service of supply of labour in association with his employees thus satisfying the triple test laid down in \textit{Bangalore Water Supply case} indicating that such an establishment is an industry.\(^\text{141}\)

The year 2001 marks a turning point with respect to genuine contract labour employed in an activity which is usually carried on by regular workers. This is because with the decision of the constitutional bench of the Supreme Court in \textit{Steel Authority of India Ltd. v. National Union Water Front Workers}\(^\text{142}\) the notification by the appropriate government under the Contract Labour (Regulation and Abolition) Act, 1970 prohibiting engagement of contract labour for tasks which are ordinarily performed by regular workers cannot result in automatic absorption of contract workers in the establishment. This shift at the normative level brought about by the judicial interpretation of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 is bound to give a fillip to the continuity of employment of contract labour which is illegal under the legislation. This is because unlike the situation earlier where a contract labour could claim the benefit of absorption and thus retain his job in case such labour was hired in violation of section 10 of the Act now he will be rendered jobless on account of detection of such illegality and absence of relief of automatic absorption. Therefore in the current context of large scale unemployment such a normative shift will perpetuate continuation of such illegal employment of contract labour if it exists in a particular workplace. This is because such illegal contract workers are likely to prefer just the continuation of their employment rather than claiming \textit{just} employment by raising the issue that their employment is in of violation of section 10 of the Contract Labour (Regulation and Abolition) Act, 1970.

\(^\text{140}\) \textit{Hussainbhai v. Alath Factory Employees Union} (1978) 2 LLJ 397, \textit{D.C.Dewan Mohideen Sahib and Sons v. Secretary, United Bidi Workers’ Union} (1964) 2 LLJ 633.

\(^\text{141}\) The researcher is indebted to Prof. Babu Mathew for suggesting this strongly persuasive analysis.

\(^\text{142}\) A.I.R. 2001SC 3527.
As mentioned earlier employees with fixed term contract are entitled to certain rights in case of retrenchment in Uttar Pradesh as the definition of retrenchment in UPID does not exclude such workers from the definition of retrenchment. However, since the central Industrial Disputes Act, 1947 excludes workers engaged on a fixed term contract from the definition of retrenchment they are not entitled to rights in case of retrenchment. Provision with regard to workers employed on a fixed term contract was introduced through an amendment in 1984 and has thereafter provided the employers with a contrivance to legally avoid obligations under the rules relating to retrenchment.

Retrenchment rights take within their purview temporary or daily wage employees provided they satisfy the condition of continuous service of two hundred and forty days in the preceding year. Further since an apprentice is not a workman but a trainee under the Apprentices Act, despite the fact that he is included in the definition of the term workman as embodied in the Industrial Disputes Act, 1947 “apprentices are not workers and the provisions of any law with respect to labour shall not apply to or in relation to such apprentice.” However existence of these contradictory provisions in the Industrial Disputes Act and the Apprentices Act has led to a suggestion of amendment to section 18 of the latter so as “not to deny or deprive the apprentice trainee of the benefit of labour law in general and the ID Act, in particular.”

As far as IT/ITES workers are concerned the nature of employment ranges from regular, project based, contractual (fixed term renewable or non-renewable contract) and apprentices. The law relating to retrenchment fully covers the regular workers. Project based and fixed term contractual workers can claim the rights in case of retrenchment only if the termination is before the expiry of the term mentioned in the contract or during the continuation of project and where such termination before the expiry of the term was not due to the fault of the employee.

\[145\] The Apprentices Act, 1961, section 18.
\[146\] National Small Industries Corp. Ltd. v. V. Lakshminarayanan (2007)1SCC 214.
\[148\] For the coverage of different categories of IT/ITES workers under different labour laws see appendix 2.2.
expiry of such duration is not provided for by the contract. The apprentices not being workers are not entitled to rights in case of retrenchment.

**Rights in case of termination as a punishment inflicted by way of disciplinary action and Rights against termination on account of union activity**

As mentioned earlier, the source of the rights with respect to termination as a punishment inflicted by way of disciplinary action are principles of natural justice and Industrial Employment Standing Orders. The principles of natural justice are paramount and should inform every law in order to ensure that the law is just, fair and reasonable. It is therefore necessary that where the termination of employment is on the ground of misconduct that an enquiry is held so that the charge against the employee is established. Generally the standing orders lay down the norms regarding conduct of enquiry and disciplinary process however even in case the standing orders do not provide for the same the minimum requirement to follow principles of natural justice still persists. In this regard Supreme Court has also ruled that one must read the doctrine of natural justice as an inbuilt requirement of the standing orders and that the contract of employment cannot be therefore devoid of the basic principles of the concept of justice.\(^{149}\) Since the obligation to conduct enquiry, including an opportunity to the workman to put forth his case emanates from the principles of natural justice, it emerges as an essential requirement in case of termination of regular as well as temporary worker. In the context of contract labour, if the worker is a genuine contract worker then the obligation to follow principles of natural justice as well as standing orders is of the contractor. However if the contract worker is a mere sham and he/she is in reality an employee of the principal employer then the obligation to conduct an enquiry and follow principles of natural justice lies on the principle employer. However, since there is no employment contract between the employer and an apprentice, who is just a trainee and therefore not a workman, there is no question of termination of employment as employer employee relationship itself is non-existent. Thus the requirement of fairness which is recognised as essential requirement of any legal procedure is still precluded from being applied in case of apprentices.

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\(^{149}\) *Lakshmit Precision Screws Ltd. v. Ram Bhagat* (2002) 3 LLJ 516.
However, it has been opined that “creative expansion of natural justice through dynamic judicial interpretation has been reversed in recent years particularly in labour and service jurisprudence.”\textsuperscript{150} Increasingly the relief from the court in case of non-adherence to the principles of natural justice is made contingent upon causation of prejudice on that account. Thus even an order of termination of employment passed after holding disciplinary proceeding which is marred by non-adherence to any of the principles of natural justice is not to be interfered with if no prejudice has been caused on account of such non-adherence. If the employee fails to produce any material to show that non-adherence to principles of natural justice has caused prejudice, the order will not be interfered with.\textsuperscript{151} Further, court is increasingly relying on the “useless formality theory” to support denial of interference with the order of disciplinary authority even if principles of natural justice were not followed. The theory as laid down in \textit{M.C. Mehta v. Union of India}\textsuperscript{152} provides that where the court thinks that the case of the applicant is not one of ‘real substance’ or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed, then interference with such an order amounts to a useless formality which may be avoided.

Termination on the ground of union activity, as mentioned earlier constitutes a violation of right to freedom of association and union and is designated as an unfair labour practice and is therefore forbidden. Emanating from the Constitution as well as the concept of unfair labour practice, the categories of workers i.e. regular as well as temporary are entitled to its protection. However, since there is no employer employee relationship between a contract worker and principle employer (in case of genuine contract worker) and the entrepreneur and an apprentice, there is no question of termination of employment relationship between them.

IT/ITES workers whether regular, project based or contractual are entitled to rights in case of termination as punishment inflicted by way of disciplinary action as well as in case of termination on account of union activity as unlike contract workers all these categories of workers are workers of the entrepreneurs of the IT/ITES units and

\begin{itemize}
\item \textsuperscript{150} Vijay kumar, “Co-Opted by Globalisation,” \textit{CL} 116 (Nov-Dec 2008).
\item \textsuperscript{152} (1999) 6 SCC 237.
\end{itemize}
therefore it is required that the termination of employment must be in accordance with the principles of natural justice and not violative of right to unionise or an outcome of unfair labour practice. However, apprentice as in the case of multiproduct SEZ units, is not entitled to the above mentioned rights as the employer employee relationship does not exist between him and the entrepreneur.

** Remedies **

- Setting aside discharge or dismissal
- Reinstatement
- Any other relief that the authority deems fit (Back wages)

The most potent issue in the context of remedies in case of unlawful termination of employment emerges from the amendment introduced in the definition of retrenchment the Industrial Disputes Act, 1947. However, no such amendment was introduced in the UPID Act. Introduction of section 2(oo) (bb) through the amendment has taken fixed term contracts out of the purview of the definition of retrenchment therefore enabling the employers to use this contrivance to avoid obligations towards workers enshrined in sections 25F, 25G and 25 H of the Industrial Disputes Act, 1947 to which the rights in case of retrenchment extended earlier. The restrictions on the rights are further enhanced through judicial interpretation and application of section 2(oo)(bb). The Supreme Court has treated even those cases where the employer converted an otherwise indefinite appointment into a fixed term appointment as falling outside the definition of retrenchment.\(^{153}\) In addition the termination of employment of the workmen engaged on contractual basis even against a permanent post has been held to be falling out of the purview of section 25F.\(^{154}\) This has been attributed to the “purely black letter law approach” adopted by the Supreme Court without “appreciating the legal position already settled\(^{155}\) in respect of section 2(oo)(bb).”\(^{156}\) These contrivances have emerged as an assurance to the management to escape the liability under section 25F.\(^{157}\)


\(^{157}\) Ibid. Also see Bushan Tilak Kaul, “Labour Law-I” XLIII ASIL 461-462 (2007).
The second issue that arises in this context is the nature of nuances pertaining to the remedy of reinstatement. Cases relating to contravention of section 25F indicate a trend of “departure from grant of relief of reinstatement with consequential benefits to compensation only.”\textsuperscript{158} The trend before the 1990s is epitomized by the observations of Chinnappa Reddy, J., in Surendra Kumar Verma v. Government Industrial Tribunal-cum-Labour Court New Delhi\textsuperscript{159}

Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted.

In Sitaram v. Moti Lal Nehru Farmers Training Institute\textsuperscript{160} the Supreme Court held that the relevant factors for determination of relief in case of non-compliance with section 6N of UPID Act (\textit{pari materia} with 25F of Industrial Disputes Act, 1947) are nature of


\textsuperscript{159} (1981)ILLJ 386 SC. Also see Management of Panitole Tea Estate v. The Workmen (1971)ILLJ233SC

\textsuperscript{160} (1981)ILLJ 386 SC.
appointment, the period of appointment, the availability of job etc. Supreme Court in *Haryana State Coop. land Development Bank v. Neelam*¹⁶¹ subjected the relief of reinstatement of an unlawfully terminated worker to the third party right created on account of filling up of vacancy created through termination. Further by holding application of doctrines of acquiescence and acceptance *sub-silentio* to industrial proceedings, while reading them as implicit in the time taken by the worker to react to the unlawful termination, the court has made the relief contingent upon fulfilment of expectations which imposes as onerous burden on the worker in the light of the compulsions to look for alternative means of livelihood to make both the ends meet in case of termination. Though earlier in *Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd*¹⁶² the Supreme Court had rightly recognized the arduous task that gets imposed on the worker i.e. to sustain himself through protracted litigation which he/she has to undergo because of delay in the system of dispensation of justice. The fact that the worker “may not survive to see the day when relief is granted”¹⁶³ cannot be lost sight of in expecting a prompt action on the part of the worker and absence of the same leading to an adverse inference of acquiescence or acceptance *sub-silentio*.

The third issue in the given context is the relief of back wages and the shift in the relative judicial emphasis between the two rationales behind the same viz., remedy for wrongful termination and mitigation of the situation of the workman arising out of wrongful termination. The trend has been away from the former towards the latter and that too subject to many restrictions. Earlier the Supreme Court in *Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd*¹⁶⁴ while accepting that there cannot be a straight jacket formula laid down held that “full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure.”¹⁶⁵ The fact that the workman was always willing to serve but was kept away there from through improper and unjustified termination of service therefore offering no justification for not awarding him full back wages which were legitimately due to

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¹⁶² (1979)1 SCR 563.
¹⁶³ Ibid.
¹⁶⁴ Ibid.
him. In determining the back wages the court suggested striking a balance between the sacrifice made by the management and the one expected from the worker necessitating that out of the two the one which is stronger, has cushion and capacity must bear the greater brunt. However recent decisions of the court indicate a shift away from full back wages as the normal rule. Specifically in *U.P. State Brassware Corporation Ltd. v. Udaip Narain Pandey* the court observed that “although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.”

Some of the factors that have been recognized by the court as having a bearing on the determination of back wages are as follows:

- Proof of joblessness of the terminated workman
- Length of service rendered by the terminated workman
- Nature of employment i.e. regular, ad hoc, short term, daily wage, temporary the etc
- Manner and method of selection and appointment
- Special qualification required for the job

Out of the factors mentioned above, the nature of employment (appointment) and the manner and method of selection are the decisions of the management and it is the primary responsibility of the management to do the same in accordance with rules. For instance if against a permanent post a contract worker is hired or fixed term appointment is made or the employment is through the backdoor rather than through...
proper channel, it is the management that is at fault. In such a case to make
determination of back wages payable by the employer dependent on these factors in
which the worker may not have played any role gives management an opportunity to
take advantage of its own wrong. Further length of service pitted against unlawfulness
of termination is dependent on the unpredictable timing of bad fate befalling on the
workman, without the worker having any role in its determination. Furthermore the
court has been denying back wages to workmen on the ground of the principle of “no
work no pay” holding that there is no justification for paying wages to the
workman for the period when the worker did not actually work for the enterprise.\textsuperscript{174}
The court has justified this approach on account of passage of time and the need for
pragmatism in addressing problems dogging industrial relations.\textsuperscript{175} The relevance of
this principle has very rightly been questioned on the ground that the principle is
applicable where the worker does not work on his own will and not where the worker
who is willing to render service is unlawfully prevented by the employer from doing
so.\textsuperscript{176} The Supreme Court has itself admitted that there has been an absolute about turn
on the question of back wages by the Court.\textsuperscript{177} The court further strangely remarked
that “a person is not entitled to get something only because it would be lawful to do
so.”\textsuperscript{178} The question that then arises is, what, if not law, is the determinant of
entitlements.

Further in lieu of reinstatement and back wages what has emerged as a preferred
remedy being ordered by the court for the last few years is compensation. However the
courts have relied on the facts and circumstances of each case to determine the amount
of compensation. In different cases it has varied from Rs. 40,000/- to daily wagers
who had worked for two or three years 25 years ago,\textsuperscript{179} to Rs. 2 lakh after setting aside
the order of the High court of Allahabad ordering payment of Rs. 50,000/- as
compensation after considering material on record,\textsuperscript{180} or payment of Rs. 56,000/-
altering the order of the labour court ordering reinstatement with full back wages

\textsuperscript{173} Ibid.
\textsuperscript{174} Saran Kumar Gaur v. State of U.P 1993 Supp (2) SCC749; Surjit Ghosh v. Chairman and MD, UCO
\textsuperscript{178} Id., at p. 492.
\textsuperscript{179} Senior Superintendent Telegraph (Traffic) Bhopal v. Santosh Kumar Seal (2010) 6SCC 773.
further altered by High Court ordering reinstatement with 30% back wages.\textsuperscript{181} Similarly reinstatement with full back wages ordered by the labour court in \textit{Jagbir Singh v. Haryana State Agriculture Marketing Board}\textsuperscript{182} was completely struck down by the High Court and altered to compensation of Rs. 50,000/- by the Supreme Court. Unlike other cases, in the above mentioned case the court did enumerate factors like method of appointment, nature of employment and length of employment as factors that are relevant among others in determining compensation in cases of illegal retrenchment. However wide variation observed in the amount of compensation necessitates clear enumeration of principles by the Supreme Court for determination of amount of compensation. The absence of consistency in the matter of determination of compensation on account of the clearly laid down factors that should weigh with the industrial adjudicators in awarding fair and just compensation and the need for the same has also been vehemently emphasised by Prof. Kaul while reviewing cases relating to the same.\textsuperscript{183}

Another barrier in realization of the rights in case of termination of service is the fact that many a times no appointment letter is issued by the employer to the workmen. Since the rights and remedies in case of wrongful retrenchment are dependent on the pre-requisite of having rendered continuous service for at least 240 days in the preceding year, the same becomes an onerous task for the worker in the absence of an appointment letter apart from enabling the employer to out rightly deny the service of the worker. The court has held that the initial burden of proving the fact of continuous work for 240 days in a year is on the worker and mere affidavits or self-serving statements have been considered inadequate to discharge such burden.\textsuperscript{184} However recently the approach of the court in placing a heavy initial burden on the workman has been watered down in decision by a three judge bench in \textit{Y. M. Yellatti v. Asst. Executive Engineer}\textsuperscript{185} where the court observed that in case of daily wage earners “there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon

\begin{itemize}
  \item \textsuperscript{181} District Programme Coordinator, \textit{Mahila Samakhya v. Abdul Kareem} (2008) 17 SCC 61.
  \item \textsuperscript{182} (2009) 15 SCC 327.
  \item \textsuperscript{183} Bushan Tilak Kaul, “Labour Law-I” XLVI ASL 529 (2010).
  \item \textsuperscript{185} (2006) 1 SCC 106.
\end{itemize}
the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc.\textsuperscript{186} In this case in the absence of nominal muster roll the court relied on a certificate issued to a daily wager by former assistant engineer as sufficient to discharge the burden of proof imposed on the workman. Further in the context of drawing an adverse inference against the employer the court has held that mere non-production of muster roll by the employer is of no consequence.\textsuperscript{187} However in \textit{Sriram Industrial Enterprises v. Mahak Singh}\textsuperscript{188} the court has taken the view that non-production of attendance register which was the best evidence in the case without giving any cogent reason for the same entitles the court to draw an adverse presumption under section 114(g) of the Evidence Act, 1972 against the management and therefore upheld reinstatement of the workers. Unlike the Supreme Court’s approach in cases with respect to proof of continuous service, the court with respect to dismissal of a workman without holding a departmental enquiry has rightly held that the onus of proving misconduct on the part of the workman is on the employer who seeks to sustain the action of the management in dismissing the worker.\textsuperscript{189}

2.3.A2 RIGHT TO FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

2.3A2.1 International Standards

Right to form union for protection and promotion of ones economic and social interests is a well recognized constituent of individuals’ human rights.\textsuperscript{190} Further the right to “Freedom of Association and the Effective Recognition of the Right to Collective Bargaining” has been recognized by the International Labour Organisation (ILO) as a fundamental right at work with an obligation on all its members to respect, promote and realise in good faith the principles concerning the said convention irrespective of whether they have ratified the convention or not.\textsuperscript{191}

\textsuperscript{188} (2007) 4 SCC 94.
\textsuperscript{189} Amar Chakravarti v. Maruti Suzuki India Limited (2010) 14 SCC 471.
\textsuperscript{190} The International Covenant on Economic, Social and Cultural rights, 1966, Article 8(1) (a).
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) recognizes the right of the workers and employers to establish and join (subject to rules of the organization only and without previous authorization) organization of their choice.\(^{192}\) Exception to this rule recognized under the Convention pertains to armed forces and police for which it is provided that the extent to which these guarantees shall apply to these categories will depend on national laws.\(^{193}\) The right to establish organization of their choice includes the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration, activities and formulate their programmes,\(^{194}\) to establish and join federations and confederations and affiliate with international organizations of workers and employers\(^{195}\) Obligation is imposed on public authorities to refrain from interference that would restrict the exercise of the right.\(^{196}\) The law of the land should not impair the guarantees provided in the said Convention\(^{197}\) and the rules regarding acquisition of personality by these organizations should not be such that impair the enjoyment of the right recognized in the Convention.\(^{198}\) Further the states parties undertake to take proactive measures to ensure that workers and employers freely exercise the right to organize.\(^{199}\)

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98) of ILO seeks to protect workers against the following:

- Anti-union discrimination\(^{200}\) in general and in particular
  - making employment contingent upon undertaking not to join a union
  - Making employment contingent upon giving up already existing union membership
  - Dismissal on account of union activity
  - Prejudice the worker on account of union membership

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\(^{192}\) Freedom of Association and the Protection of the Right to Organise Convention, 1948, Article 2.

\(^{193}\) Id., Article 9.

\(^{194}\) Id., Article 3(1).

\(^{195}\) Id., Article 5.

\(^{196}\) Id., Article 3(2).

\(^{197}\) Id., Article 8(2).

\(^{198}\) Id., Article 7.

\(^{199}\) Id., Article 11.

\(^{200}\) The Right to Organise and Collective Bargaining Convention, 1949, Article 1.
• Acts of interference\textsuperscript{201} in the organizations establishment, functioning or administration
  o Acts to promote establishment of workers organizations under the domination of employers or employers’ organizations
  o Acts to support workers organizations by financial or other means with the object of controlling them

To achieve respect for the right to organise the Convention requires setting up machinery appropriate to national conditions\textsuperscript{202} as well as requires measures to be taken to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.\textsuperscript{203} Like the Freedom of Association Convention this convention too provides that the extent of application of this convention to armed forces and police will be determined by the national laws and regulations.\textsuperscript{204} The norms laid down in Convention No. 98 are sought to be furthered through Collective Bargaining Convention 1981 (No. 154) which seeks to promote collective bargaining by extending it to all employers and all groups of workers, with respect to all matters and should not be allowed to be hampered because of absence or inappropriateness of rules with respect to the same.\textsuperscript{205}

The issue of unionisation and collective bargaining assumes significance with respect to SEZs because of the purported conflict between these rights and the perception of their economic effect of increased labour cost. It is argued that strong freedom of association and collective bargaining rights tend to increase the cost of labour and thus affect the competitiveness of the production units. However contrary to this perception there are various studies that indicate that stronger democracy, freedom of association and collective bargaining rights are associated with lower country credit risk, which might also be expected to enhance economic performance, trade competitiveness,\textsuperscript{206}

\begin{footnotesize}
\begin{enumerate}
  \item Id., Article 2.
  \item Id., Article 3.
  \item Id., Article 4.
  \item Id., Article 5.
  \item Collective Bargaining Convention, 1981, Article 5.
\end{enumerate}
\end{footnotesize}
foreign direct investment,\textsuperscript{207} higher total exports, total manufacturing exports and labour intensive manufacturing exports.\textsuperscript{208}

\textbf{2.3A2.2 Domestic Standards}

The Constitution of India guarantees right to form associations and unions to citizens.\textsuperscript{209} Within the Hohfeldian analysis it implies a disability on the part of the state from imposing a duty upon the citizens to exercise or refrain from exercising freedom of association as well as claim in the citizens and corresponding duty of the state not to interfere in the exercise of the freedom by the citizens.\textsuperscript{210} The two aspects of the said right i.e. individual aspect is an offshoot of the freedom of conscience and the collective aspect is concerned with increasing the bargaining power of the workers in the employment relationship.\textsuperscript{211} Balance is tried to be maintained between the two aspects of the right. The right as recognized in the Constitution is not absolute but is subject to restrictions on the basis of sovereignty and integrity of India, public order or morality.\textsuperscript{212} The right recognized in the Constitution extends to all the citizens and different associations may get registered under different laws and the unions of employers or workers can get registered under the Trade Unions Act, 1926 provided they are for any of the following purposes:\textsuperscript{213}:

- Regulating the relations between workmen and employers
- Regulating relations between workmen and workmen
- Regulating relations between employers and employers
- Imposing restrictive conditions on the conduct of any trade or business

The primary function of a union being promotion and protection of interests of its members, it has to strive to better the terms and conditions of employment and

\textsuperscript{208} Ibid.
\textsuperscript{209} Article 19(1)(c).
\textsuperscript{210} Kamala Sankaran, \textit{Freedom of Association in India and International Labour Standards} 73 (Lexis Nexis Butterworths Wadhwa Nagpur, 2009).
\textsuperscript{212} The Constitution of India, 1950, Article 19(4).
\textsuperscript{213} The Trade Unions Act, 1926, section 2(h).
generally to advance their economic and social interests so as to achieve for them a rising standard of living. At a broader level unions undertake activities to make their voice heard in the policy making bodies so that the priorities adopted subserve the best interest of the workers, at a narrower level they indulge in a social dialogue/collective bargaining with the employer to protect and promote the interest of workers at the shop floor, industry or sectoral level. The purpose of social dialogue is to arrive at a mutually acceptable agreement between the employer and the workers concerning working conditions, terms of employment and relations between employers and workers and their organisations. Social dialogue thus necessarily involves negotiations between employers and workers for the above stated purpose. Within the legal framework pertaining to labour relations in India these negotiations may be purely voluntary or a result of voluntariness and compulsion. The two categories result in collective agreements which may be categorised as follows:

- Purely voluntary on account of voluntarily undertaken direct negotiations
- Collective agreements with some element of compulsion behind them for instance collective agreements negotiated by parties but registered before a conciliator as settlement
- Collective agreements which acquire legal status because of successful discussion between the parties when the matters in dispute were under reference to industrial tribunals/ courts and could be considered sub judice, the agreement reached being recorded by the tribunals/courts as consent awards

Collective bargaining presupposes existence of the following:

- Existence of bargaining agent
- Representativeness of the bargaining agent of the interests they are supposed to be defending
- Independence of the bargaining agent

The first out of the three pre-requisites of existence, representativeness and independence of bargaining agent is its existence. Absence of unionisation inside or outside SEZs can therefore be a formidable barrier in existence of social dialogue. Further to be able to negotiate on behalf of workers another pre requisite is recognition.

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of a bargaining agent. However, in India except for industrial relations legislations in certain states\textsuperscript{217} the central industrial relations framework does not embody any mechanism for recognition of union for the country as a whole.\textsuperscript{218} Serious differences exist with respect to the method that should be adopted for recognition of union where more than one union exist. The two methods that have been the focus of debate without resulting in any consensus are method of verification of the fee paying membership of the unions and method of election by secret ballot.\textsuperscript{219} Absence of a strong tradition of social dialogue in India is also attributed to the concern for work stoppages, unwarranted disturbances in industrial peace and organisational weaknesses of labour.\textsuperscript{220} Thus in the absence of or weak unionisation and settled process for recognition of a bargaining agent, the process of social dialogue is bound to be weak.

\textbf{2.3A2.2a Coverage}

\textit{Workplaces Covered}

Since focus of the study is on the social dialogue between employer and workmen in the units in SEZs the coverage will be examined with respect to workmen. The Trade Unions Act, 1926 defines workmen as follows:

\begin{quote}
All persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.\textsuperscript{221}
\end{quote}

The terms “trade” or “industry” are not defined in the Trade Unions Act, 1926. Therefore some of the High courts have relied on the definition as embodied in the Industrial Disputes Act, 1947 whereas others have doubted “whether the two statutes are \textit{pari materia} and whether the words in one enactment could be interpreted in the light of the other.”\textsuperscript{222} However going by the fact that the units in SEZs qualify as

\begin{itemize}
\item \textsuperscript{216} Bernard Gernigon, “Collective Bargaining – Sixty Years after its International Recognition” Background Paper, ILO 6 (CSAC98/2009).
\item \textsuperscript{217} Madhya Pradesh, Rajasthan, Bihar.
\item \textsuperscript{221} The Trade Unions Act, 1926, section 2(g).
\item \textsuperscript{222} Kamala Sankaran, \textit{Freedom of Association in India and International Labour Standards} 79 (Lexis Nexis Butterworths Wadhwa Nagpur, 2009).
\end{itemize}
industry even within the narrow definition of the term the workers unions in the same are entitled to protections under the Trade Unions Act, 1947. The exclusions from the application of Trade Unions Act, 1926 in general extends to the unorganised sector.

**Workers Covered**

The right to unionisation and collective bargaining takes within its ambit the regular and temporary workers since the employment relationship exists between the employer and these categories of workers. However unlike the trade unions that may be constituted by regular or temporary or both the categories of workers there is no obligation of the employer to recognise a trade union consisting of either of contract workers or apprentices. On the other hand all the categories of workers of IT/ITES units except apprentices have a right to form a trade union as well as a claim to recognition of their status as such by the employer.

The primary purpose of a trade union is collective bargaining. It is well recognized that the freedom of association and the right to collective bargaining go a long way in securing better conditions of work and realization of rights of workers. As discussed in chapter 4 all the labour laws are normatively applicable in the SEZs. However it must be noted that the law relating to unionization and social dialogue merely envisages a duty to refrain from interfering with formation, administration, activities and programmes of trade unions whereas the actual realization of the right to unionise and ensure free social dialogue with the employers requires certain enabling conditions the absence of which pose barriers in the actual realization of the right to unionise and have free social dialogue. In deeper analysis these barriers emerge as inherent in the liberal conception of rights. The subject of law in liberal legal theory is an abstract, socially de-contextualised, hyper-rational, wilful individual systematically stripped of particularities, complexities and materiality. Human beings as such live in a material world, suffer from material harms and enjoy material benefits but as bearers of positive human rights they are reduced to the quasi-disembodied legal subject.

Though human rights is “a paradigmatic place in which humanity, subject and law come together,” human rights law (positive legal rights) being encapsulated in laws

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223 *Bank of India Employees Association v. Reserve Bank of India* (1983)2 LLN 872 (Bom).


225 *Id.*, at p. 523.

scheme of reason and abstraction is unable to fully address the implications of human situatedness and associated sufferings of real human beings. Thus it is argued that “liberal legal rationality tends to cloak the socially contingent and agnostic nature of natural and human rights.” Moreover, the “absolutist right to property” being one of the constitutive elements of the “modern” paradigm of human rights along with the perception of human being as a disembodied being within this paradigm has reproduced “hierarchies” inter alia of socio-economic status. This hierarchy therefore constricts the social dialogue between capital and labour which occurs within such existing hierarchy.

In fact the critical legal approach discredits social dialogue primarily reflected in the law relating to collective bargaining by viewing it as a contrivance within the liberal ideology to co-opt the labour in its own domination which “simultaneously authorizes and limits employee participation in workplace governance” by garbing the “authoritarian nature of the employment relationship” marked by the “prerogative of private capital to control the production process.” Since, negotiations, consultation etc however, do not occur in vacuum, the bargaining power of the negotiating parties is immensely determined by the context, legislative and policy framework in which they negotiate. ILO has also recognized that “heightened international economic competition and greater capital mobility weakens the bargaining position of labour, exerts downward pressure on labour standards.”

While not losing sight of the preceding discussion the following specifically emerge as barriers to the realization of the above mentioned right in SEZs:

- Restricted access to SEZs

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228 Id., at p. 529.
232 Id., at p. 454.
233 Id., at p. 461.
234 Id., at p. 459.
Physical isolation from other industrial workers, lack of prior experience in union activity strongly connects unionization in SEZs to access for trade union representatives to workers working in SEZs.\textsuperscript{236} In the context of arrest of three trade union activists while distributing information on their trade union in a free trade zone in Dominican Republic as they did not have permission to enter the zone, the Committee on Freedom of Association (hereinafter referred to as CFA) drew attention of the Government to the principle that workers’ representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces.\textsuperscript{237} Measures to ensure reasonable access for representatives of workers organizations to EPZs to apprise the workers in the zone of potential advantages of unionisation was also emphasized by the Committee of Experts on Application of Conventions and Recommendations in the context of restrictions requiring prior permission of authority to access EPZs in Nigeria.\textsuperscript{238}

The law in India also regulates entry to SEZs. Rule 70 of SEZs Rules provides that the entry of persons to the processing area of the SEZ shall be regulated by the Development Commissioner through the issue of identity cards. The rule provides for issue of identity cards to entrepreneurs, regular employees of the units as well as issue of temporary identity cards to casual visitors and contractors. Record of the entries of latter kind is to be maintained at the SEZ gate. Though this rule has the potential to restrict entry of trade union activists into SEZ, yet there is no data available with respect to the same.

- Legal restrictions on industrial action

Legal restrictions on Industrial action emerge from designation of units in SEZs as “public utility”.\textsuperscript{239}

- Anti union discrimination


\textsuperscript{237} Committee on Freedom of Association, 234\textsuperscript{th} Report, Case No. 1221 (Dominican Republic), paragraph 114.

\textsuperscript{238} Committee of Experts on Application of Conventions and Recommendations, 2004, 75\textsuperscript{th} session, Convention No. 87, Observation, Nigeria.
Anti union discrimination is prohibited under the central Industrial Disputes Act, 1947 and as discussed in the first part in this section of the chapter it also stands prohibited in Uttar Pradesh as unfair labour practice. However, the labour market conditions constitute a barrier in exercise of the right against such discrimination as they may result in such discrimination going unchallenged. Further a separate mechanism is provided under the SEZs Act for exercise of the right by conferring on the Development Commissioner the powers of the labour commissioner. Allegations of anti-union discrimination were levelled against Worldwide Diamonds Manufacturers Ltd. in Vishakhapatnam Export Processing Zone in a case before the CFA. The complainant alleged that the Development Commissioner had personally warned the workers that they might lose their jobs if they joined any trade union. Further there were allegations of termination of services of two workers, suspension of one worker and imposition of fine on 22 workers for their trade union activities once the trade union was formed and dismissal of fifteen workers in connection with a strike organized by a union in the said company. Though the government denied these allegations however, because of insufficient information CFA could not undertake an objective examination of the allegations. It however stated that the government was responsible for preventing all such acts of anti-union discrimination and examine such complaints within the national framework which should be prompt and impartial and considered as such by the parties concerned.\textsuperscript{240} CFA also requested the government to undertake independent and thorough investigation into the allegations and to take necessary steps to reinstate the dismissed workers without loss of pay and compensate those who were suspended or fined.\textsuperscript{241}

- Refusal by the employer to negotiate

Social dialogue is adversely affected on account of the refusal of the employer to negotiate with the workers. One of the issues raised in the case relating to Worldwide diamonds Manufacturers Ltd. discussed above was allegation of the workers of refusal on the part of the management to negotiate with the union of the workers of the company. It was alleged that following a strike by the workers and an assurance by state functionaries, the management refused to talk to the union. Despite the rhetorical recognition of the right to unionise and collective bargaining by the government no

\textsuperscript{239} The aspect has been discussed in detail in chapter 4 of this study.
\textsuperscript{240} CFA, 331\textsuperscript{st} Report, Case No. 2228 (India), paragraph 458.
negotiations took place. CFA recalled the significance of the obligation to encourage and promote the full development and utilization of machinery for voluntary negotiation with a view to regulation of terms and conditions of employment by means of collective agreements. The CFA therefore called upon the government to take all necessary measures to encourage a settlement of the dispute between the parties through collective bargaining and keep it informed in this respect.  

- Labour market conditions and Unionisation

In general the labour market in India has witnessed decline of unionization and a gradual shift from prevalence of external unions to internal unions and gradual casualisation of jobs by replacing regular unionized workers with contract or casual workers in establishments weakening of labour’s tie with the political parties and shift of govt. support to employers together with rising unemployment has enhanced vulnerability of workers vis-à-vis the employers. In such a context bargaining power of the labour stands greatly reduced which is exacerbated by the belief that a choice has to be made between continuation of employment and unionization on account of dwindling security of employment as discussed in the first part of the chapter together with the huge “armies” of unemployed people out of which new recruitments can be made dispensing with unionized workers.

2.3B INDIVIDUAL RIGHTS

RIGHT TO DECENT CONDITIONS OF EMPLOYMENT

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241 Id., paragraphs 740-742.
242 Id., paragraph 469.
243 The number of trade unions furnishing returns in the country has declined from 8152 in 1999 to 6531 in 2001 and the membership of trade unions also declined from 64 lakhs to 58 lakhs during the same period. Generally see Indian Labour Yearbook, 2005, Ministry of Labour and Rehabilitation, New Delhi, cited in Biswajit Ghosh, “Coping with Market Liberalism: Politics of Trade Unionism in Contemporary India” in Samir Dasgupta, Jan Nederveen Pieterse, Politics of Globalisation 273 (Sage Publications, New Delhi, 2009). Also see Subesh Das, Managing People at Work: Employment Relations in Globalising India, 53-73 (Sage Publications, New Delhi, 2010).
244 External union is the one where at least one office bearer is an external leader, while internal union has no outsider as an office bearer. See Subesh Das, Managing People at Work: Employment Relations in Globalising India 47 (Sage Publications, New Delhi, 2010).
245 Subesh Das, Managing People at Work: Employment Relations in Globalising India 47 (Sage Publications, New Delhi, 2010).
246 This has been done by restructuring units by introducing voluntary retirement schemes (VRS) for regular employees.
2.3B1 Right to Minimum Wages

Though the Constitution enjoins upon the State to endeavour to all workers a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, the realization of living wage for workers remains a distant dream even after six decades of planned development. Thus the positive right in the context of wages exists within the narrow arena of minimum wages.

2.3B1.1 International Standards

Human rights treaty law recognizes the right to gain ones living by work and therefore, the remuneration that one is entitled to, assumes significance. The inextricable link between work and decent living is sought to be operationalised by setting standards of minimum wages. Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966 recognises the entitlement to fair and equal wages which allow a decent living for the workers and their families. The Minimum Wage Fixing Convention, 1970 (no. 131) requires the minimum wage fixing machinery to consider the following in determining the level of minimum wages:

- the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;
- economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

The Convention also requires the States Parties to establish machinery for fixation of minimum wage as well as take appropriate measures, including adequate inspection to ensure effective application of all provisions relating to minimum wages. Protection of Wages Convention, 1949 (No. 95) requires that the wages

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248 The Constitution of India, 1950, Article 43.
249 Article 3 (a).
250 Article 3 (b).
251 Article 4.
252 Article 5.
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should be paid in legal tender\(^\text{253}\) directly to the worker\(^\text{254}\) without any restrictions on disposal of wages.\(^\text{255}\) Wages are to be paid regularly and in case of termination of employment final settlement of wages due should be made in accordance with national laws.\(^\text{256}\)

### 2.3B1.2 Domestic legal Framework

The wages in India may get fixed through collective bargaining, arbitration,\(^\text{257}\) adjudication\(^\text{258}\) or under the Minimum Wages Act, 1948. The first method mentioned depends on the existence of strong trade unions whereas the second and the third methods presuppose existence of a dispute between employer and employees over wages. The fourth method of fixation of minimum wages is based on the proactive role of the state completely independent of existence or otherwise of trade unions or wage dispute. Since in the context of SEZs, the fixation of wages by the government under the Minimum Wages Act emerges as the most potent one, the legal framework with respect to minimum wages focuses on the broad parameters for fixation of minimum wages under the Act. However before going into the method of fixation and the norms guiding the fixation of minimum wages it is pertinent to reflect upon the concept of minimum wage.

Wages play a three-fold role i.e. fair remuneration to labour, fair return to capital and incentives to efficiency.\(^\text{259}\) The Constitution of India enjoins upon the state to endeavour to secure to all workers a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.\(^\text{260}\) The living wage as defined by the Committee on Fair Wages, 1949 “represented a standard of living which provided not merely for a bare physical subsistence but for

\(^{253}\) Article 3(1).
\(^{254}\) Article 5.
\(^{255}\) Article 6.
\(^{256}\) Article 12.
\(^{257}\) The Industrial Disputes Act, 1947, section 10A.
\(^{258}\) Id., section 10.
\(^{260}\) The Constitution of India, 1950, Article 43.
the maintenance of health and decency, a measure of frugal comfort including education for the children, protection against ill health, requirements of essential social needs and some insurance against the more important misfortunes.”

However committee recognized that the prevalent national income does not permit payment of living wage on standards prevalent in more advanced countries. Further, given the large number of unemployed in the country, early on the undesirability to leave the determination of wages to the market forces was realized and addressed through the enactment of the Minimum Wages Act, 1948. It was with the intention to fix minimum wages in industries where sweated labour is more prevalent or there is greater chance of exploitation of labour that the Minimum Wages Act, 1948 was enacted.

The purpose of minimum wage was “to ensure not merely the bare sustenance of life but the preservation of the efficiency of the worker by providing some measure of education, medical requirements and amenities.” The obligation to pay minimum wages once they are fixed under the Act is absolute and it is not open to the employer to plead inability to pay the prescribed wages to the employees. Thus the right to minimum wages emerges as an absolute right irrespective of the paying capacity of the employer. The Minimum Wages Act, 1948 recognises two methods for fixation of minimum wages viz.,

- Committee method – in this method the appropriate government appoints committees and sub-committees to hold enquiries and advise the government in respect of fixation or revision of minimum wage
- Notification method – in this method the appropriate government publishes its proposals with respect to minimum wages in the official gazette for the information of persons likely to be affected thereby. In this publication it also specifies the date (not less than two months from the date of notification) on which the proposals from people with respect to the same will be considered.

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262 Ibid.
267 Id., section 5(1) (b).
After considering the advise of the committee or committees (in case of committee method) or representation of people (in case of notification method) the government by notification in the official gazette fixes or revises the minimum rates of wages. Since the purpose of minimum wages is to provide not only for bare sustenance of life but the preservation of the efficiency of the worker by providing some measure of education, medical requirements and amenities, the amount fixed should be adequate to fulfil these needs. Thus certain norms have been recognized for fixation of minimum wages. These norms which have emerged out of recommendations of the Tripartite Committee of the Indian Labour Conference held in New Delhi in 1957 and the decision of the Supreme Court in *The Workmen represented by Secretary v. The management of Reptakos Brett & Co. Ltd* are as follows:

(i) In calculating the minimum wage, the standard working class family should be taken to consist of 3 consumption units for one earner; the earnings of women, children and adolescents should be disregarded.

(ii) Minimum food requirement should be calculated on the basis of a net intake of calories, as recommended by Dr. Akroyd for an average Indian adult of moderate activity.

(iii) Clothing requirements should be estimated at per capita consumption of 18 yards per annum which would give for the average workers' family of four, a total of 72 yards.

(iv) In respect of housing, the rent corresponding to the minimum area provided for under Government's Industrial Housing Scheme should be taken into consideration in fixing the minimum wage.

(v) Fuel, lighting and other 'miscellaneous' items of expenditure should constitute 20% of the total minimum wage.

(vi) children education, medical requirement, minimum recreation including festivals/ceremonies and provision for old age, marriages etc. should further constitute 25% of the total minimum wage.

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268 *Id.*, section 5(2).
269 (1992)1SCC 290.
Out of these the first-five norms were recommended by the Tripartite committee and the last one added by the Supreme Court on the ground that “the concept of 'minimum wage' is no longer the same as it was in 1936. Even 1957 is way-behind. . . Each category of the wage structure has to be tested at the anvil of social justice which is the live-fibre of our society today. Keeping in view the socio-economic aspect of the wage structure, we are of the view that it is necessary to add the following additional component as a guide for fixing the minimum wage in the industry.”

The court also added that “the wage structure which approximately answers the above six components is nothing more than a minimum wage at subsistence level. The employees are entitled to the minimum wage at all times and under all circumstances. An employer who cannot pay the minimum wage has no right to engage labour and no justification to run the industry,” As early as 1958 the court had held that the industry which is unable to pay its workers bare minimum wage has no right to exist. In *U. Unichoyi v. The State of Kerala*, the Constitution bench of the Supreme Court clarified the use of adjective “bare” and it held that too much emphasis on this word would lead to “the erroneous assumption that the maintenance wage is a wage which enables the worker to cover his bare physical needs and keep himself just above starvation.” Recognising that this is not what is meant by the concept minimum wage the court held that the “contents of this concept must ensure for the employee not only his sustenance and that of his family but must also preserve his efficiency as a worker.”

2.3B1.2.1 Minimum Wage and Real Wage: Post Reform Reality

The ability of minimum wage fixed following any of the mechanisms mentioned earlier to meet the sustenance needs of workers as well as preserve his efficiency as a worker is strongly related to rate of inflation. Too high inflation results in decline in real wages even though in absolute terms the minimum wage may be increasing, the corresponding increase in cost of living on account of inflation would in such a situation result in decline in real wages. It is the dearness allowance component of

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wage that is geared towards neutralisation of inflation. As observed by the First National Labour Commission, “the only purpose of dearness allowance is to enable a worker in the event of a rise in cost of living to purchase the same amount of goods of basic necessity as before.”\textsuperscript{275} The Commission recommended “neutralisation at the rate of 95% should be afforded to minimum wage earners in respect of any future rise in the cost of living.”\textsuperscript{276} There have been reports of marginal increase in real wages despite the increase in labour productivity over the years in the manufacturing sector.\textsuperscript{277} While the workers hardly experienced any increase in real wages (1.6%) in the post reform period while supervisory and managerial staff experienced an increase of 3.8% in the corresponding period.\textsuperscript{278} The ratio of earnings between managerial and supervisory staff and workers in the post reform period has been 3.3:1. On account of the same K. P. Kannan and G. Raveendran opine as follows\textsuperscript{279}:

The declining share of wages as well as slow growth in real wages of workers would suggest a declining power of workers and their organisations. The support for economic liberalisation and globalisation from employers and higher paid supervisory and managerial staff and the opposition to it from the workers and their organisations seem to be grounded in the distribution of benefits to these groups. The workers as a class lost in terms of both additional employment and real wages.

The method of fixation of minimum wage itself needs to be revisited. It is not only on account of the degree of neutralisation that is provided for but also the consumer price index for industrial workers on which fixation is based being itself questionable on account of change in the basket of goods which is not accounted for adequately. Thus even though the right as posited within the domestic framework is the right to minimum wage but the capacity of that wage itself to meet the basic necessities of the workers is questionable. Therefore if the workers are just being paid minimum wage they are practically living below the subsistence level.

\textsuperscript{276} Id., paragraph 16.47.
\textsuperscript{278} K.P.Kannan, G. Raveendran “Growth Sans Employment: A Quarter Century of jobless Growth in India’s Organised Manufacturing” XLIV (10) \textit{EPW} 89 (7\textsuperscript{th} March 2009).
\textsuperscript{279} Ibid.
2.3B1.3 Coverage

Workplaces Covered

The obligations under the Minimum Wages Act pertain to the industries mentioned in the schedule to the Act, though the National Commission on Labour in its report\textsuperscript{280} recognised that

What applies to establishments included under the schedule to the Minimum Wages Act, must, on principles of social justice, apply with equal force to industrial establishments not included in the schedule.

Scheduled employment has been defined as an employment specified in the schedule or any process or branch of work forming part of such employment.\textsuperscript{281} The Minimum Wages Act enables the appropriate government to add any employment to the schedule to the Act in respect of which it is of the opinion that minimum rates of wages should be fixed under this Act.\textsuperscript{282} This can be done after giving three months notice of its intention to do so.\textsuperscript{283}

A major development with respect to the jurisprudence pertaining to minimum wages and the obligation of the employers to pay minimum wages has been the landmark contribution of the Supreme Court through its decision in \textit{People’s Union of Democratic Rights v. Union of India}\textsuperscript{284} wherein the court held that when a person provides labour or service to another for remuneration less than the minimum wage, which may be on account of his poverty or helplessness he cannot in these conditions be said to be acting as a free agent with a choice between alternatives but under the compulsion of economic circumstances such labour or service provided by him would be clearly 'forced labour.' The payment of minimum wages therefore assumes a sanctity, violation of which amounts to infringing the Constitutional guarantee against forced labour. The Supreme Court in \textit{State of Gujarat v. Hon’ble High Court of

\begin{footnotesize}
\textsuperscript{281} The Minimum Wages Act, 1948, section 2
\textsuperscript{282} Id., section 7.
\textsuperscript{283} Ibid.
\textsuperscript{284} (1982)3 SCC 235.
\end{footnotesize}
Gujarat\textsuperscript{285} held that the state is under an obligation to pay minimum wages to prisoners who perform work in jails on the ground that non-payment of minimum wages would amount to engaging forced labour. This was held irrespective of the fact that such an employment does not find mention in the schedule to the Minimum Wages Act. Thus till the beginning of the new millennium on the basis of the jurisprudence that had developed with regard to minimum wages as well as forced labour it could have easily been said that the right to minimum wages exists irrespective of the kind of employment (i.e. whether one included in the schedule to the Minimum Wages Act or otherwise) and category of workers i.e. regular, temporary or contract. However, the recent decision of the Supreme Court in \textit{Lingegowd Detective and Security Chamber (P) Ltd. v. Mysore Kirloskar Ltd.}\textsuperscript{286} did not find any requirement to pay minimum wages in employments that are not included in the schedule to the Minimum Wages Act, 1948, thus undoing the pro-labour jurisprudence developed by the courts over the years. Not only this the Court opined that the decision of the Court in \textit{People’s Union for Democratic Rights v. Union of India},\textsuperscript{287} having been “rendered on a totally different context” has no relevance to the issue at hand in the said case.\textsuperscript{288}

**Employees Covered**

The combined reading of the definitions of employer and employee under the Minimum Wages Act, 1948 indicates that the legislation includes within its fold the following persons:

- Persons employed whether directly or through another person\textsuperscript{289}
- Persons employed for hire or reward to do any work, skilled or unskilled, manual or clerical in a scheduled employment with respect to which minimum wages have been fixed
- Includes an out worker or home based worker to whom articles or materials are given out by another person for processing for sale for the purposes of the trade or business of that other person
- Employee declared to be an employee by the appropriate government

\textsuperscript{285} (1998)7 SCC 392.
\textsuperscript{286} (2006)5SCC180.
\textsuperscript{287} (1982)3 SCC 235.
\textsuperscript{288} (2006)5 SCC 180.
\textsuperscript{289} The Minimum Wages Act, 1948, section 2(e).
The use of expression “persons employed directly or through another person” extends the applicability of the legislation beyond regular or temporary workers to include contract workers as well. However, since an apprentice is a trainee not an employee the legislation would still exclude them from its coverage. Since the wage structure in IT/ITES units is way above the minimum wage and it is not an industry included in the schedule to the Act therefore application of this right to IT/ITES workers is not considered.

2.3B2 **Right to Bonus**

Bonus as a right does not stand recognized under the international legal regime therefore the discussion with respect to this right is restricted to the domestic norms.

2.3B2.1 **Domestic Framework**

Bonus, which emerged, to begin with, as a gratuity to workmen beyond their wages and in the special historical context that developed during the Second World War as a “payment made to the workers out of the extraordinary profits earned during the war,” primarily connoting an *ex-gratia* payment made by the employer later got crystallised into a legally enforceable right under the Payment of Bonus Act, 1965. The Payment of bonus Act was preceded by deliberations by the Indian Labour Conference on this issue in April 1948 followed by appointment of Committee on Profit Sharing by the Government of India and finally principles on payment of bonus evolved by the Labour Appellate Tribunal in 1950. However a trend towards recognition of bonus as a legal claim and not just as gratuity can be traced back to the observation of Chagla J., in *General Motors (India) Ltd. v. Its Workmen* where he opined that “it is almost universally accepted principle now that the profits are made possible by the contribution that both capital and labour make in any particular industry and I think it is also conceded that labour has a right to share in the increased profits that are made in any particular period. But the distribution of increased profits amongst workers is better achieved by giving an annual bonus than by a further increase in wages.” Another justification for bonus was put forth by the Industrial

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291 *Id.*, paragraphs 7.20, 7.21.
292 Labour Gazette, Bombay (June 1942).
Court, Bombay in *Rashtriya Mill Mazdoor Sangh v. Millowners’ Union* 293 which observed, “the justification for such demands as ‘industrial matter’ arises especially when wages fall short of the living wage standard and the industry make huge profits part of which are due to the contribution which the workers make in increasing production, the demand for a bonus is, therefore, an industrial claim when either of both these conditions are satisfied.”

With respect to calculation of bonus the Labour Appellate Tribunal in the *Mill Owners Association, Bombay v. The Rashtriya Mill Mazdoor Sangh, Bombay* 294 ruled that "as both capital and labour contribute to the earnings of the industrial concern . . . it is fair that labour should derive some benefit if there is a surplus after meeting prior or necessary charges". The court recognized the following prior charges:

1. Notional nominal depreciation
2. Provision for income tax payable for the bonus year, calculated on the amount obtained by deducting from gross profits the statutory depreciation allowable under the Income-Tax Act
3. Fair return on the paid-up capital must be secured and that ordinarily it should be paid at the rate of 6% per annum
4. Return on reserves or depreciation used as working capital, normally at 4 percent
5. Provision for rehabilitation, replacement and modernisation of the machinery

Upholding the formula laid by the Labour Appellate Tribunal the Supreme Court in *Associated Cement Companies Ltd. Dwarka Cement Works, Dwarka v. Its Workmen* 295 explained the process of calculation of bonus thus, “The notional accounting for this purpose starts with the figure of the gross profits which are arrived at after payment of wages and dearness allowance to the employees and other relevant items of expenditure. Then a deduction for depreciation is made, and on the notional balance thus derived a provision for taxes payable is allowed. Then follow the provisions for reserves for rehabilitation, return on paid-up capital and return on reserves employed as working capital. That gives the amount of surplus if any. Whenever the working of this formula leaves an amount of available surplus, labour

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293 Government of India, Industrial Court Reporter, Labour Department 390 (1946).
294 (1950) LLJ 1247.
295 A.I.R.1959 SC 967.
was held entitled to claim a reasonable share in this amount by way of bonus for the current year. This formula is based on considerations of social justice and is intended to satisfy the legitimate claims of both capital and labour in respect of the profits made by the industry in a particular year.”

However, in 1964 at the recommendations of the Tripartite Commission appointed by the Government of India to consider in a comprehensive manner the question of payment of bonus, the Payment of Bonus Ordinance was promulgated followed by the Payment of Bonus Act, 1965.\(^{296}\) Besides laying down the method for the calculation of bonus on the basis of allocable surplus which is sixty percent or sixty seven percent of the available surplus depending on certain considerations\(^ {297}\) and also method for calculation of available surplus after deducting certain sums deductible from gross profits,\(^ {298}\) the Act makes payment of minimum bonus obligatory upon the employer irrespective of whether the employer has any allocable surplus in the accounting year.\(^ {299}\) Bonus that was a subject matter of collective bargaining was thus transformed into a statutory right with the amount of bonus also being ascertainable in accordance with the principles laid down in the legislation. The legislation specifies 8.33 percent of the salary or the wage earned by the employee during the accounting year or Rupees one hundred, whichever is higher as the minimum bonus and twenty percent of such salary or wage as the maximum bonus.\(^ {300}\) In order to account for the changes in the allocable surplus to be utilized for the purpose of payment of bonus each year the legislation provides for a contrivance in the form of set on and set off where the allocable surplus exceeds or falls short of the requirement for the payment of bonus in a particular year, to be adjusted in succeeding accounting year.\(^ {301}\) Further for the calculation of bonus salary or wage is constituted by the basic pay together with dearness allowance.\(^ {302}\)

### 2.3B2.2 Coverage

**Workplaces Covered**

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\(^ {297}\) *Id.*, section 2(4).
\(^ {298}\) *Id.*, sections 5, 6.
\(^ {299}\) *Id.*, section 10.
\(^ {300}\) *Id.*, sections 10, 11.
\(^ {301}\) *Id.*, section 15.
\(^ {302}\) *Id.*, section 2(21).
The Payment of Bonus Act extends to the following workplaces

- Every Factory
- Every other establishment in which twenty or more persons are employed on any day during an accounting year
- Establishment or class of establishments notified by the appropriate government after giving two months notice of its intention to do so

Since the units in SEZs studied in this research qualify as either factories or establishment employing twenty or more persons the obligation falls upon the employers to pay bonus to those workers who are entitled under the Act.

**Employees Covered**

Every employee who has worked in the establishment for not less than thirty working days in a particular year is entitled to bonus provided the employee’s per month salary is less than three thousand five hundred rupees. The term employee under the payment of Bonus Act includes any person doing skilled, unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment are express or implied. Apprentices are expressly excluded from the definition of employee under the Act. Thus the regular or temporary employees who have worked for not less than thirty working days in the factory or establishment and who have salary less than the threshold mentioned under section 8 are entitled to bonus. Even seasonal workers, part time workers, probationers have been held to be entitled to bonus. In fact Kerala High court has held that every employee is entitled to bonus. However, use of expression “person employed” indicates that the pre-requisite for the person to be an employee under the definition there has to be an employer-employee relationship which does not exist between the principal employer and contract worker therefore the legislation excludes contract workers from its purview.

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303 The Payment of Bonus Act, 1965, section 1(3).
304 Id., sections 8, 2(13).
305 Id., section 2 (13).
308 Bank of Madura Ltd. v. Bank of Madura Employees Union 1970 Lab IC 1215.
309 Mahabir Tiles Work v. Union of India A.I.R. 1968 Ker 143.
As in case of minimum wages, the wages of workers working in IT/ITES units being beyond the limit prescribed below which the worker is entitled to bonus therefore this right is not considered with respect to IT/ITES workers.

2.3B3 Right to Decent Working Hours, Intervals, Weekly Rest, Leave and Special Payment for Working Overtime

2.3B3.1 International Standards

ICESCR recognizes the right of everyone to enjoyment of just and favourable conditions of work which ensures in particular rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Subject to certain exceptions pertaining to undertaking run by members of family, employees working in supervisory, managerial and confidential capacity, situation of accident, urgency or force majeure, for work required to be done continuously by a succession of shifts etc, ILO Hours of Work (Industry) Convention, 1919 (001) in general recognises that the hours of work in any industrial undertaking whether public or private should not exceed eight per day or forty eight per week. Forty-Hour Week Convention, 1935 (047), ILO seeks to reduce the weekly hours of work from forty eight to forty. This Convention entered into force in 1957. Whereas India is a party to the Convention 001 it has not ratified Convention 047. Therefore legally applicable standard in terms of weekly hours of work for India is forty eight.

Weekly Rest (Industry) Convention, 1921, (014) of ILO recognizes the right to one day (twenty four hours) of rest every week for all those working in an industrial undertaking. Having special regard to the humanitarian and economic considerations and after consultation with workers and employers organizations, the States Party to the Convention have been empowered to provide for partial exceptions including suspensions or diminutions from the above stated obligation but for such exceptions provision for

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310 Article 7 d.
311 Hours of Work (Industry) Convention, 1919, (No. 001), ILO, Article 2.
312 Id., Article 2(a).
313 Id., Article 3.
314 Id., Article 4.
315 Id., Article 2.
316 Ratified by India on 14th July, 1921.
317 Weekly Rest (Industry) Convention, 1921, (No. 014), ILO, Article 2.
318 Id., Article 4.
compensatory period of rest must be made. The employers are under an obligation to display at a conspicuous place the day recognized as weekly off for all the workers collectively or display the roaster according to which rest day is to be provided to workers in turn.

ILO Convention (No. 132) titled Holidays with Pay Convention recognizes the right of all the employees except sea fearers to annual paid holiday of not less than three weeks for one year of service. The States Parties have the power to prescribe a minimum period of service for entitlement to annual holiday with pay, which as per the Convention should not exceed six months and where the person’s length of service is less than that required for full entitlement of paid leave then the person is entitled to a holiday with pay proportionate to his length of service during that year. Public or customary holidays whether or not falling during the annual holiday are not to be counted as part of the minimum annual holiday with pay. Minimum annual holiday with pay are distinct from periods of incapacity to work resulting from sickness or injury. A person availing this right to annual paid leave is entitled to normal or average remuneration for the period of said leave. In case of termination of employment of a person who has completed a minimum period of service corresponding to the entitlement for paid leave is entitled either to holiday with pay proportionate to the length of service for which he has not received such a holiday, or compensation in lieu thereof, or the equivalent holiday credit. The Convention also declares agreements to relinquish the right to minimum annual holiday with pay to be null and void.

2.3B3.2 Domestic Framework

Within the domestic legal framework, the above mentioned rights are primarily recognized and protected under the Factories Act, 1948 with respect to workplaces that fall within the definition of ‘factory’ read with Industrial Employment (Standing Orders) Act, 1946

\[\text{Id., Article 5.}\]
\[\text{Id., Article 7.}\]
\[\text{Id., Article 5.}\]
\[\text{Id., Article 4.}\]
\[\text{Id., Article 6(1).}\]
\[\text{Id., Article 6(2).}\]
\[\text{Id., Article 7.}\]
\[\text{Id., Article 11.}\]
\[\text{Id., Article 12.}\]
Development of Special Economic Zones and its Impact on Labour Rights and Livelihood in NCR

together with the standing orders approved there under and the Shops and Establishments Act with respect to the workplaces that fall within the definition of ‘shop’ or ‘establishment’. Therefore the issue that arises in the context of this research is whether the IT, ITES and non-IT units in SEZs fall within the said categories so as to be bound by these legislations. The issue is examined hereunder.

2.3B.3 Coverage

Workplaces Covered

The Factories Act, 1948 applies to those workplaces that fall within the definition of factory under the Act. The term factory is defined under section 2(m)\textsuperscript{329} of the Factories Act. The determination of whether a premises or precincts is a factory or not depends on two factors:

- The number of persons working therein
- Manufacturing process being carried on therein

The term manufacturing process is defined in section 2(k)\textsuperscript{330} of the Factories Act.

\textsuperscript{329} “Factory” means any premises including the precincts thereof –

(i) Whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) Whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on –

But does not include a mine subject to the operation of [the Mines Act, 1952 (35 of 1952)], or [a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place]

[Explanation I] – For computing the number of workers for the purposes of this clause all the workers in [different groups and relays] in a day shall be taken into account;

[Explanation II, - “For the purposes of this clause the mere fact that an electronic data processing unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.”]

\textsuperscript{330} Manufacturing process” means any process for –
**IT, ITES Units: Whether a Factory**

The question with regard to workers in IT sector or units providing IT enabled services is whether such units fall within the definition of factory under the factories Act. The term factory as defined in the factories Act, 1948 is based on the nature of activity being carried on in any premises and the number of workers working to carry out that activity. With respect to the nature of activity the requirement is that a manufacturing process is being carried on in the premises or any part thereof. However in the light of explanation II to this provision mentioned above the question is whether IT/ITES units can be called a factory.

A part of the question stated above i.e. whether development of software amounts to factory under the Factories Act, arose for consideration before the Supreme Court in *Seelan Raj v. The Presiding officer Ist Additional Labour Court, Chennai.* The court in this case referred this question to a higher bench and the final pronouncement of the Supreme Court with respect to the same is still awaited.

Applying the definition of ‘manufacturing process’ to the processes carried on in IT industry, it may be said that Software development (in case of units engaged in development of software) pertains to creation of computer programme which may be used for the purpose which it is meant to serve. It prima facie amounts to creation of an enabling tool to be used in the computer processes which unlike other tools is intangible but is stored and passed on in something tangible. The question then is whether the intention of the legislature while enacting the factories Act was to restrict the manufacturing process to the production of only tangible things or whether the Act can be interpreted, without causing

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(i) Making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) Pumping oil, water, sewage or any other substance, or

(iii) Generating, transforming or transmitting power, or

(iv) Composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding, or

(v) Constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels, or

(vi) Preserving or storing any article in cold storage

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331 The Factories Act, 1948, Section 2(m).
332 (2001)4 SCC 634.
violence to the words of the legislation, to include manufacturing of intangible things like a computer programme as well. Since every law is a living document and has to be interpreted in the light of the changing circumstances and contexts or else it fails to be a guide to human conduct, restricting the definition of manufacturing only to tangible things and excluding a large number intangible things which mankind has produced through the development of technology would be to freeze the law in the era in which it was made and holding it absolutely impotent to address the current issues to which it should logically apply through mere extrapolation. Further a computer programme amounts to making something (though intangible) with a view to its use, sale etc. therefore production of computer software amounts to a manufacturing process.

However, as far as IT enabled services are concerned it would depend on whether something is being produced (even if intangible) for the purpose of use, sale, transport, delivery or disposal as a result of such service or not to determine whether it should fall under the definition of ‘manufacturing process’ under the Factories Act. This will depend on the kind of IT enabled service being provided. For instance units providing IT enabled services like call centres offering customer care services cannot be said to be producing anything tangible for the purpose of use, sale etc but can be viewed as likely to result in something intangible as customer satisfaction, which cannot be sold and as far as its use is concerned it is only likely that the probable (not certain) result of such service i.e. customer satisfaction may ultimately (though not immediately) result in promotion of sale, add to the goodwill of the manufacturer and therefore is intended to be used though indirectly by the service provider to enhance sale of the product being manufactured by it with respect to which the service is being provided. Such a service would also therefore fall within the definition of manufacturing process. Further IT enabled service providers providing transcription services and thus creating something tangible to be used can be easily said to be engaged in a manufacturing process.

**IT, ITES Units: Whether a Shop or Establishment?**

Even if it is held by the Supreme Court that development of computer software or delivering IT enabled services in any form does not involve a manufacturing process and thus does not make the unit a factory under the factories Act, the next logical question would be whether these units fall within the purview of the legislations pertaining to shops and establishments. Since the sample for the empirical study pertaining to IT sector
workers is drawn from the private SEZ from the state of Haryana, it is desirable to analyse this question in the light of the Shops and Establishments Act in force in the state of Haryana i.e. The Punjab Shops and Commercial Establishments Act, 1958. The Act defines “commercial establishment” in section 2(IV) of the Act, while the term “shop” is defined in section 2(XXV).

The definition of commercial establishments in the Punjab Shops and Establishments Act is broad enough and explicitly includes premises where “any business, trade or profession is carried on for profit.” Further even the definition of “shop” includes within its ambit “premises where any trade or business is carried on or where services are rendered to customers and includes offices.” Any IT unit whether manufacturing computer hardware, software or providing IT enabled service for profit would fall within the wide scope of the definitions of commercial establishment and shop. Thus the domestic framework discussed below refers to the provisions in not only the Factories Act which would be applicable to the workers working in units in multiproduct SEZs but also provisions in the Punjab Shops and Establishments Act, 1958 which are applicable to IT/ITES units in the State of Haryana.

Workers Covered

The Factories Act defines the term worker as including the following:

- Person employed, directly or by or through any agency including a contractor with or without the knowledge of the principal employer

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333 Government of Haryana, Notification No. 1/32/83-1 Lab dated 25.8.98 published on 31.8.98 (Department of Labour).
334 Commercial establishment means any premises wherein any business, trade or profession is carried on for profit, and includes journalistic or printing establishment and premises in which business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on or which is used as hotel, restaurant, boarding or eating-house, theatre, cinema or other place of public entertainment or any other place which the Government may declare, by notification in the official Gazette, to be commercial establishment for the purposes of this Act.
335 “Shop” means any premises where any trade or business is carried on or where services are rendered to customers and includes offices, store rooms, godowns, sale depots or warehouses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948
336 The Factories Act, 1948, section 2(l).
- Person employed either for remuneration or otherwise
- Employment may either be:
  - In any manufacturing process
  - Cleaning any part of the machinery or premises used for the manufacturing process
  - Work incidental to or connected with the manufacturing process or the subject of the manufacturing process

The definition excludes from its purview any member of the armed forces of the Union.\(^{337}\)

Thus as per this definition regular, temporary as well as contract workers working in units in multi-product SEZs are entitled to rights recognized in the Factories Act. However, an apprentice not being an employee is not entitled to the rights therein.

The Punjab Shops and Commercial Establishments Act, 1958 defines employees as “a person wholly or principally employed in, or in connection with, an establishment, whether working on permanent, periodical, contract or piece-rate wages or on commission basis even though he receives no reward for his labour, but does not include a member of the employer’s family.”\(^{338}\)

With respect to IT/ITES workers if the said units are considered falling within the definition of ‘factory’ as discussed above then all the categories of IT/ITES workers i.e. regular, project based as well as contractual would be entitled to all the above mentioned rights under the Factories Act, 1948. However, if IT/ITES units are deemed to be a ‘shop’ or an ‘establishment’ and not a factory then the use of terms “permanent, periodical, contract or piece rate wages, or on commission basis” in the definition of employee in the Punjab Shops and Commercial Establishments Act, 1958 takes within its purview regular, project based, contractual employees. Therefore all these categories of workers would be entitled to decent conditions at work determined by factors mentioned earlier. However apprentice being a trainee and not an employee remains excluded from the purview of the Act.

2.3B3.4 Content of the Rights

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\(^{337}\) Ibid.

Normative Framework of Labour Rights 92
As mentioned earlier the norms pertaining to the right to decent working hours, intervals, weekly rest, leave and special payment for working overtime primarily find embodied in the Factories Act, 1948 and the Punjab Shops and Commercial Establishments Act, 1958. Since the units in multiproduct SEZ would qualify as a factory under the factories Act on account of carrying on a manufacturing process with requisite number of workers as required under the definition of factory under the Factories Act, 1948 and IT/ITES units are covered under the Punjab Shops and Commercial Establishments Act, 1958 as applicable to the state of Haryana, the scope of rights enshrined therein must be analysed for the purposes of laying down the domestic legal framework with respect to these rights.

In tune with the international norm laid down in Hours of Work (Industry) Convention, 1919 (001) the Factories Act as well as the Punjab Shops and Establishments Act, 1958 also restrict weekly hours of work to forty eight. Though the limit imposed on the daily hours of work is nine, yet this is subject to the maximum limit of forty eight hours in a week. Like the ILO Convention the Factories Act also provides for relaxation in working hours to adjust change in shifts but with the previous approval of the Chief Inspector. There is an obligation on the employers to give interval for rest, of at least half an hour to the workers every five hours of work. This maximum period of work fixed at five hours is extendable to six hours under the written order of the state government or the Chief inspector subject to the control of the state government. Including the intervals, the spread-over of period of work is restricted to ten and a half hours in any day extendable to twelve hours by the Factories inspector for reasons specified in writing under the Factories Act, 1948 whereas the spread-over in case of commercial establishments is twelve hours in a day. A worker who works for more than nine hours in any day or for more than forty eight hours in any week is entitled to wages at a rate twice his ordinary rate of wages in respect of overtime work.

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338 Section 2(vi).
341 Id., section 54 proviso.
342 The Factories Act, 1948, section 55(1); The Punjab Shops and Commercial Establishments Act, 1958, section 8(1).
343 Id., section 55 (2).
344 Id., section 56.
345 Id., section 56 proviso.
346 The Punjab Shops and Commercial Establishments Act, 1958, section 8(2).
347 The Factories Act, 1948, section 59(1); The Punjab Shops and Commercial Establishments Act, 1958, section 7(2) (b).
The Factories Act as well as the Punjab Shops and Establishments Act declare first day of the week i.e. Sunday as a holiday. Change in this weekly off prescribed under the Factories Act may be affected by an employer by delivering a notice at the office of the Inspector of his intention to work on the said day and of the day which is to be substituted as well as display a notice to this effect in the factory. The provision to enable substitution of some other day as holiday except Sunday does not imply that the employers can, at their sweet will convert successive Sundays into working days. Even where exemption is granted to a factory from the requirement of adhering to Sundays as weekly off the workers are entitled to compensatory holidays of equal number in subsequent two months as the number of holidays lost on account of such exemption.

The Punjab Shops and Establishments Act confers the power on the Government to fix any day other than Sunday to be the close day in respect of any class of establishments for the whole or part of the state. Moreover the employer of an establishment is also empowered to open his establishment on the close day if such day happens to coincide with a festival, however the employees required to work on that day are to be paid remuneration double the rate of their normal wages calculated by the hour.

The entitlement of annual leave with wages under the Factories Act is restricted to those workers who have worked for two hundred and forty days or more in a factory in the previous calendar year. For adults the leave with pay extends to one day for every twenty days of work performed during previous calendar year and for children it is calculated at the rate of one day for every fifteen days of work performed. The calculation of the annual leave with pay excludes intermittent holidays or those occurring at either end of the leave period. The workers availing such leave are entitled to wages at a “rate equal to the daily average of his total full time earnings for the days on which he actually worked during the month immediately preceding his leave.” If he has not worked on any day during the calendar month immediately preceding his leave then he is

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348 The Factories Act, 1948, section 52(1); The Punjab Shops and Establishments Act, 1958, section 10(1).
349 Id., section 52 (1)(b)(i).
350 Id., section 52(1)(b)(ii).
351 Motor and Machinery Manufacturers Ltd. v. State of West Bengal 1964 (2) LLJ 562.
352 The Factories Act, 1948, section 53.
353 The Punjab Shops and Establishments Act, 1958, section 10(1) proviso.
354 Id., section 10(3).
355 The Factories Act, 1948, section 79.
356 Id., section 79 (1) (i).
357 Id., section 79 (1) (ii).
358 Id., section 79 (1) Explanation 2.
359 Id., section 80(1).
to be paid at a “rate equal to the daily average of his total full time earnings for the days on which he actually worked during the month preceding his leave.”

Under the Punjab Shops and Establishments Act, 1958, every employee who has been in employment for not less than twenty days in a year is entitled to one day’s earned leave for every such twenty days. For young persons the entitlement is of one day leave for every fifteen days of employment during the year. Further the Punjab Shops and Establishments Act explicitly entitles every employee in an establishment seven days of casual leave and seven days of sick leave with wages in a year. Besides this Independence day, Republic day, Mahatma Gandhi’s Birthday and five other holidays with wages in a year in connection with such festivals as the government may declare from time to time are recognised under the Act. In case any employee is required to work on any such holiday he is entitled to remuneration at double the rate of his normal wages calculated by the hour.

### 2.3B4 Access to Canteen

The Factories Act, 1948 empowers the State Government to make rules requiring the occupier of factory in which more than two hundred and fifty workers are ordinarily employed to establish and maintain a canteen for the use of the workers. The rules may provide for food stuffs to be served in the canteen, their prices, items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs. The Punjab Shops and Commercial Establishments Act, 1958 however does not embody any provision regarding the obligation to establish a canteen.

### 2.3B5 Social Security in the form of Health Insurance, Provident Fund, Gratuity, Accident Compensation

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360 Id., section 80(1) proviso.
361 Id., section 14(1) proviso.
362 Id., section 14 (1) proviso.
363 Id., section 14(4).
364 Id., section 12.
365 Id., section 12 proviso.
366 The Factories Act, 1948, section 46(1).
367 Id., section 46(2).
International Covenant on Economic, Social and Cultural Rights, 1966 recognises the right of everyone to social security including social insurance.\textsuperscript{368} It is a general right recognized under the Covenant but the ILO lays down the contours of this right with specific reference to workers. ILO limits the scope of social security to maintenance of one’s income against loss or diminution while the broader concept of social security considers it as a basket of policies and institutions fashioned to enable a person to attain and maintain a decent standard of life.\textsuperscript{369} Whereas the developed countries spend almost 40% of the GDP on the maintenance of social and safety nets, the public expenditure on social security in India is 1.8% of GDP against 4.7% in Sri Lanka and 3.6% in China.\textsuperscript{370}

Social security may be provided to workers in a number of ways. They may be divided into two viz., those which address contingencies arising while the worker is in active employment and which consequently affect his capacity to work or result in suspension of earnings etc. and those arising out of loss of employment, old age or death of the worker. This study focuses on some of the aspects of social security of workers working in SEZs in National Capital region. These aspects are as follows:

- Health Security through the Employees State Insurance Act, 1948
- Old age/retirement benefits through the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the Payment of Gratuity Act, 1972
- Accident Compensation through the Employees Compensation Act, 1923

Therefore the discussion with respect to international and domestic standards also pertains to these aspects of social security.

\textbf{2.3B5.1 International Standards}

The Social Security (Minimum Standards) Convention, 1952 (102) of ILO embodies obligations to secure benefit in respect of conditions requiring medical care of preventive or curative nature,\textsuperscript{371} sickness benefit,\textsuperscript{372} unemployment benefit,\textsuperscript{373} Old-age benefit,\textsuperscript{374}
employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivor’s benefit. The medical care benefits should include condition of morbidity, pregnancy and their consequences. The beneficiary or his breadwinner may be required to share in the cost of medical care. The benefits minimally to be provided in case of morbid condition include at least general practitioner care, domiciliary visiting, specialist care at hospitals or outside hospitals, essential pharmaceutical supplies and hospitalization. In case of pregnancy prenatal confinement, postnatal care and hospitalization where required must be provided. The incapacity to work resulting from morbid condition involving suspension of earnings is one such contingency in which sickness benefits should be provided. Employment injury benefit primarily includes benefits in case of accident or disease resulting from employment causing morbidity, incapacity to work involving suspension of earnings, total or partial loss of earning capacity, loss of faculty or death. There should be proper cooperation between government institutions administering medical care and vocational rehabilitation services to re-establish handicapped persons in suitable work. The Convention envisages periodical payment in case of incapacity for work, total loss of capacity to earn, loss of faculty or death of breadwinner. However, where incapacity is slight or where the authorities are satisfied that the lump-sum will be properly utilized in such cases periodical payment may be commuted into a lump-sum. In the condition of pregnancy, confinement and their consequences and suspension of earnings are some of those conditions in which Maternity benefits are necessarily to be provided. The benefit envisaged in case of suspension of earnings resulting from pregnancy and from confinement and their consequences are periodical payments. The benefits envisaged under the Social Security (Minimum Standards) Convention, 1952 may be restricted to prescribed categories of employees, classes of economically active population, residents as

375 Id., Article 31.
376 Id., Article 39.
377 Id., Article 46.
378 Id., Article 53.
379 Id., Article 59.
380 Id., Article 8.
381 Id., Article 10(2).
382 Id., Article 10 (1) (a).
383 Id., Article 10 (1) (b).
384 Id., Article 13, 14.
385 Id., Article 32.
386 Id., Article 35.
387 Id., Article 36(1).
388 Id., Article 36(3).
389 Id., Article 47.
390 Id., Article 50.
well as be made contingent upon the requirement of qualifying period having been met through certain period of contribution, employment or residence.\(^\text{391}\) Though India is not a party to the above mentioned Convention yet the domestic legal framework embodies norms pertaining to social security of workers especially medical benefit, sickness benefit, employment injury benefit and maternity benefit.

Old age benefit is embodied in part V of the Social Security (Minimum Standards) Convention, 1952 of ILO. The contingency covered through this aspect of social security is survival beyond a prescribed age and the Convention recognizes that the prescribed age should not be beyond sixty five years unless higher age is fixed by the competent authority with due regard to the working ability of the elderly in the country concerned.\(^\text{392}\) Certain restrictions may be imposed on the benefits like suspension of the benefit if the person is engaged in any prescribed gainful employment or if the benefit is a contributory benefit then if the earnings of the beneficiary exceed a prescribed amount, if the benefit is non-contributory then it may be reduced in case the beneficiary’s earnings or his other means or the two taken together exceed the prescribed amount.\(^\text{393}\) Maintenance of Social Security Rights Convention, 1982 (No. 157) seeks to maintain social security rights embodied in the Social Security (Minimum Standards) Convention, 1952 in course of acquisition as well as maintenance of migrant workers rights in social security.

Though India is not a party to the Social Security (Minimum Standards) Convention, 1952 the second National Commission on Labour has recommended that the said convention may be ratified by India within a reasonable period of time.\(^\text{394}\)

2.3B5.2 Domestic Standards

As emphasised by the first National Labour Commission, “the concept of social security is based on ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country’s welfare should be given protection against certain hazards.”\(^\text{395}\) The ensuing

\(^{391}\) Id., Articles 1(f), 9, 15, 33, 48.  
\(^{392}\) Id., Article 26 (1), (2).  
\(^{393}\) Id., Article 26 (3).  
section analyses the domestic legal framework pertaining to health insurance, gratuity, provident fund and accident compensation.

2.3.5.2.1 Health Security

The empirical study focuses on the realization of health aspect of social security of workers in SEZs in the National Capital Region, especially as emanating from the Employees State Insurance Act, 1948 (hereinafter referred to as ESI Act). The legislation aims at providing certain benefits to employees in case of sickness, maternity and employment injury.\(^{396}\)

The entitlements under the Act cover a range of conditions\(^{397}\):

- Sickness benefit
- Maternity benefit
- Disablement benefit
- Dependents’ benefit
- Medical benefit
- Funeral expenses

The empirical study focused on medical benefit actually availed by SEZ workers and the general coverage actually enjoyed by them under the ESI Act.

The ESI Act seeks to secure the above mentioned entitlements to the workers to whom the Act applies through a scheme for health insurance for the workers administered through the Employees’ State Insurance Corporation.\(^{398}\) The standing committee of the Corporation administers the affairs of the Corporation and has the power to perform any of the functions of the Corporation.\(^{399}\) In the performance of its functions the Corporation and its standing committee are advised by the medical benefit council, regional boards, local committees, regional and local medical benefit council.\(^{400}\) The benefits under the scheme of health insurance are funded through Employees State Insurance Fund held and administered by the Corporation.\(^{401}\) The fund is constituted by the contributions payable by

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\(^{396}\) The Employees’ State Insurance Act, 1948, Long Title.
\(^{397}\) Id., section 46.
\(^{398}\) Id., section 3.
\(^{399}\) Id., section 18.
\(^{400}\) Id., sections 22, 25.
\(^{401}\) Id., section 26.
the employer and the employee at such rates as are prescribed by the central government. The obligation to deposit both the employer’s and the employee’s contribution to the fund is on the principal employer. The principal employer has the power in turn to recover the employee’s contribution from the employees directly employed by him or from the immediate employer in case of employees employed by or through an immediate employer. The extent of contribution of employers is 4.75% of wages and that of the employees is 1.75% of wages. Employees earning up to Rs. 100 a day as wages are exempted from payment of their part. Further the state governments bear one-eighth share of expenditure on Medical benefit within the per capita ceiling of Rs. 1200/- per annum and any additional expenditure beyond the ceiling. The disbursement of the benefits is done directly to the employees by the Corporation in accordance with the scheme. An identity card (referred to in the primary data as ESI card) including the photograph and particulars of the family entitled to medical benefit is issued to every person insured under the ESI Act.

2.3B5.2.1a Coverage

Workplaces Covered

The Act applies, in the first instance to all factories including factories belonging to the Government with the power conferred on the appropriate government under the legislation to extend the provision of the Act to other establishments, class of establishments, industrial, commercial, agricultural or otherwise after giving six months notice of its intention to bring about such extension in its application. Under these enabling provisions, most of the State Governments have extended the ESI Act to certain specific classes of establishments, such as, Medical and Educational Institutes, shops,
hotels, restaurants, cinemas, preview theatres, motor transport undertakings, newspaper and advertising establishments etc., employing 10 or more persons.\footnote{Employees State Insurance Scheme, 2011, paragraph 2, available at http://www.esic.nic.in/images/CitizensCharter1011.pdf}

**Employees Covered**

The coverage of the Act and in turn the enjoyment of the rights under the legislation are not only determined by the type of establishment and its coverage under the legislation but also by the definition of the term “employee” under the legislation. The ESI Act includes the following in the category of employees\footnote{The Employees State Insurance Act, 1948, section 2(9).}

- Person directly employed by principal employer on the
  - Work of factory/establishment
  - Work Incidental or preliminary to the work of factory/establishment
  - Work Connected with the work of the factory/establishment
- Irrespective of whether such work is done by the employee in the factory/establishment or elsewhere.
- Person employed by or through an immediate employer (including a contractor)
  - on the premises of the factory/establishment, or
  - Under the supervision of the principal employer or his agent on work which is
    - Ordinarily part of the work of the factory/establishment
    - Incidental or preliminary to the work of factory/establishment
- Persons whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service
- Persons employed for wages on any work connected with the
  - administration of the factory/establishment or any of its parts, department or branch
  - purchase of raw materials for or distribution or sale of the products of the factory/establishment
- Any person engaged as apprentice

The definition of employee under the ESI Act excludes the following categories from the purview of the Act\footnote{Id., section 2(9) (a), 2(9) (b).}
Apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment

- any member of Indian naval, military or air forces
- any person whose wages exceed Rs. 15000/- per month

The number of states and Union Territories covered by the scheme are 29 as of 31.3.2011. However out of the labour force of 393.25 million the ESI Act covers only 8 million. The provisions that assume significance in the light of the coverage under the ESI Act are those conferring the power on the appropriate government to exempt by notification in the official gazette “any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year” with the power to renew such exemption and to exempt any person or class of persons employed in any factory or establishment or class of factories or establishments from the operation of the Act.

Casual employees and temporary employees are classified as employees under the ESI Act. However workers hired for a specific work of sporadic nature or for process unconnected with the operations of the establishment, or some work which does not form the integral part of such operations are not employees within the ESI Act. In the context of this research the Act applies to regular, temporary as well as contract workers but does not apply to apprentices. Further since the pay structure in IT/ITES units is different from that in non-IT units in SEZs data with respect to IT employees excludes health insurance from its purview.

2.3B5.2.2 OLD AGE/RETIRAL BENEFITS

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415 The Employees State Insurance Act, 1948, section 2(9) (iii) (b) read with Employees State Insurance (Central) Rules, 1950, paragraph 50.
418 The Employees State Insurance Act, 1948, section 87.
419 Id., section 88.
420 Regional Director, Employees State Insurance Corporation Madras v. South India Flour mills (P) Ltd. (1986) 3 SCC 238.
422 Employees' State Insurance Corporation v. Premier Clay Products 1995 SCC (L&S) 162.
The Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as EPF Act) was enacted to provide for the old age, invalidity and survivorship benefit to the workforce in the organized sector. The Act provides for the institution of three categories of funds and schemes to operationalise the above stated benefits:

- Provident fund operationalised under the Employees Provident Fund Scheme, 1952
- Pension Fund operationalised under the Employees Pension Scheme, 1995
- Deposit Linked Insurance Fund operationalised under Employees’ Deposit Linked Insurance Scheme, 1976

The central government is conferred power under the EPF Act to frame schemes for the establishment of provident funds or Employees’ Pension scheme for the purpose of providing for superannuation pension, retiring pension, permanent total disablement pension, widow or widower pension, children pension or orphan pension to the employees or beneficiaries of such employees as the case may be or Employees’ Deposit Linked Insurance Scheme for the purpose of providing life insurance benefits to the employees. The EPF Act mandates laying of these schemes as well as modifications in these schemes before each House of the Parliament for a period of thirty days so that the Parliament exercises control over the power to make schemes delegated to the executive. All the three funds created for the above stated purposes vest in and are administered by the Central Board constituted under section 5A of the EPF Act. The contribution payable under the Provident Fund Scheme is ten percent of the basic wages, dearness allowance and retaining allowance payable to each employee covered by the scheme. The contribution of the employer to the Provident Fund is equal to that of the employee.

The nature of the EPF Act has been reflected upon by the Supreme Court in the following words:

The Employees' Provident Fund & Miscellaneous Provisions Act of 1952 is a beneficial piece of legislation and can amply be described as a social security

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424 The Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, sections 5, 6A, 6C.
425 Id., section 5(1).
426 Id., section 6A(1).
427 Id., section 6C.
428 Id., sections 6D, 7.
429 The Employees’ Provident Fund Scheme, 1952, paragraph 29 (1).
430 Id., paragraph 29 (2).
statute, the object of which is to ensure better future of the employee concerned on his retirement and for the benefit of the dependants in case of his earlier death. The amount is payable in one lump-sum and as a matter of fact it acts as a buffer to the retirement of or on the death of an employee.

2.3B5.2.2a Coverage

Workplaces Covered

EPF Act applies to the following categories of workplaces:

- Factory engaged in any industry specified in schedule I and in which twenty or more persons are employed

- Establishments employing twenty or more persons, which the central government may by notification in the official gazette specify in this behalf

- Establishments employing less than twenty persons but subject to the applicability of the Act through a notification by the central government after giving at least two months notice of its intention to do so

- Establishments in which employer and the majority of the employees agree that the provisions of this Act should be made applicable to the establishment and the Central Provident Fund Commissioner issues a notification in the official gazette to the same effect

- Establishments to which EPF Act applies but where the number of employees therein at any time falls below twenty

By way of clarification the EPF Act specifically lays down that the Act applies to all the departments and branches of the establishments falling within the purview of the Act. Further power is conferred on the central government to add any industry to the schedule I of the Act.

Exempted establishments:

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432 The Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, section 1 (3) (a).
433 Id., section 1 (3) (b).
434 Id., section 1 (3) proviso.
435 Id., section 1(4).
436 Id., section 1(5).
437 Id., section 2A.
• Establishment registered under the Co-operative Societies Act, 1912 or other law in force relating to co-operative societies employing less than fifty persons and working without the aid of power\textsuperscript{439}
• Central or state government establishments whose employees are entitled to benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the central or state government\textsuperscript{440}
• Establishments set up under any Central, Provincial or State Act whose employees are entitled to benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act\textsuperscript{441}
• Prospective or retrospective exemption granted by the Central government to the class of establishments subject to conditions specified in the notification to that effect\textsuperscript{442}

\textit{Employees Covered}

Coverage of the EPF Act extends to the following categories of persons\textsuperscript{443}:

• Employed for wages in any kind of work, manual or otherwise
• Employed in connection with the work of an establishment
• Employees getting wages directly or indirectly from the employer
• Includes persons employed through a contractor in or in connection with the work of the establishment
• Includes persons engaged as apprentice except an apprentice under the Apprentices Act, 1961

The power has been conferred on the Central government to exempt employees working in establishments from the purview of the EPF Act if the rules of its provident fund with respect to the rates of contribution as well as the benefits enjoyed by such employees are

\textsuperscript{438} \textit{Id.}, section 4.
\textsuperscript{439} \textit{Id.}, The Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, section 16 (1) (a).
\textsuperscript{440} \textit{Id.}, section 16 (1) (b).
\textsuperscript{441} \textit{Id.}, section 16 (1) (c).
\textsuperscript{442} \textit{Id.}, section 16 (2).
\textsuperscript{443} \textit{Id.}, section 2(f).
Development of Special Economic Zones and its Impact on Labour Rights and Livelihood in NCR

not less favourable than the benefits provided under this Act.\textsuperscript{444} \textit{P. M. Patel v. Union of India}\textsuperscript{445} the Supreme Court held that the definition of employee in the Employees Provident Funds and Miscellaneous Provisions Act, 1952 is very wide and includes home workers rolling beedis since they are “employed in connection with the work of the establishment.” All the categories of workers in IT/ITES units (regular, project based, contractual) except apprentices are entitled to contribution to provident fund.

\textbf{2.3B5.2.3 GRATUITY}

Gratuity is in the nature of “terminal benefit, paid lump sum, complementary to periodical pension payments.”\textsuperscript{446} In labour jurisprudence the concept of gratuity has undergone a metamorphosis over the years. Starting with the conception of gratuity as a “reward for long and meritorious service” it developed into “a retiral benefit in consideration of the service rendered” bringing within its purview payment of gratuity “even if the employee resigned or voluntarily retired from service” and finally the Payment of Gratuity Act, 1972 made payment of gratuity under the Act obligatory being one of the minimum conditions of service.\textsuperscript{447} Unlike provident fund, gratuity is a payment made by the employer without there being a corresponding contribution from the employee. The Supreme Court has held Payment of Gratuity Act, 1972 as belonging to the genre of Minimum Wages Act, the Payment of Bonus Act, the Provident Funds Act, Employees State Insurance Act, and other like statutes which statutes lay down the minimum relevant benefits which must be made available to the employees and specifically recognized that the said legislation is a welfare measure introduced in the interest of the general public to secure social and economic justice to workmen to assist them in their old age and to ensure them a decent standard of life on their retirement.\textsuperscript{448}

The Payment of Gratuity Act, 1972 recognizes the entitlement of an employee to gratuity\textsuperscript{449} on the termination of his employment after he has rendered continuous service for not less than five years,—

\textsuperscript{444} Id., section 17.
\textsuperscript{445} A.I.R.1987 SC 447.
\textsuperscript{447} \textit{Bakshish Singh v. Darshan Engineering Works} (1994) 1 SCC 9, at pp. 18, 24.
\textsuperscript{448} Id., at p. 26.
\textsuperscript{449} The Payment of Gratuity Act, 1972, section 4.
(a) on his superannuation, or
(b) on his retirement or resignation, or
(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.\textsuperscript{450}

The Act is administered by the officer appointed as a controlling authority by the appropriate government.\textsuperscript{451} The Act also imposes an obligation on every employer to obtain an insurance in the prescribed manner for his liability for payment towards the gratuity under this Act, unless the employer or establishment is under the control of the central government or state government,\textsuperscript{452} or on account of an already established and approved gratuity fund the appropriate government has exempted such employer from the obligation of compulsory insurance.\textsuperscript{453}

\textbf{2.3B5.3a Coverage}

\textit{Workplaces Covered}

The Payment of Gratuity Act, 1972 applies to\textsuperscript{454}

- every factory, mine, oilfield, plantation, port, railway company,
- shop or establishments covered under the Shops and Establishments Act of a state currently employing or having employed ten or more employees in the preceding twelve months
- Other establishments or class of establishments currently employing or having employed ten or more employees in the preceding twelve months as notified by the central government

\textit{Employees Covered}

\textsuperscript{450} \textit{Id.}, section 4.
\textsuperscript{451} \textit{Id.}, section 3.
\textsuperscript{452} \textit{Id.}, section 4A.
\textsuperscript{453} \textit{Id.}, section 4A (2).
The Payment of gratuity Act, 1972 covers within its purview the following persons\textsuperscript{455}:

- Those employed on wages in any establishment, factory, mine oilfield, plantation, port, railway company or shop
- Those so employed may be doing any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work

The entitlement under the Act is irrespective of the following:

- Whether the terms of such employment are express or implied
- Whether or not such person is employed in a managerial or administrative capacity

However it does not include person holding a post under central or state government being governed by any other Act or rules providing for payment of gratuity.

It is also significant to note that unlike the ESI Act there is no provision in the Payment of Gratuity Act, 1972 for exempting any factory, shop etc. from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. Further the Supreme Court in \textit{Bakshish Singh v. Darshan Engineering Works}\textsuperscript{456} recognized that “the provisions for payment of gratuity contained in section 4(1)(b) of the Act are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Article 19(6) of the Constitution.”

Regular as well as temporary employees who have rendered five years of continuous service thus stand entitled to gratuity whereas a contract worker on account of not being an employee of the principal employer and an apprentice under the Apprentices Act, 1961 being just a trainee and not an employee are not entitled to gratuity.

\textsuperscript{454} \textit{Id.}, section 1(3).
\textsuperscript{455} \textit{Id.}, section 2(e).
\textsuperscript{456} (1994) 1 SCC 9, at p. 26.
However the contract worker has a right to gratuity as against the contractor. Like in case of provident fund all the workers working in IT/ITES units except apprentices are entitled to gratuity provided they satisfy the other conditions embodied in the legislation.

2.3B5.4 Accident Compensation/ Occupational Disease

The data with regard to multiproduct SEZ Workers as well as non-SEZ workers pertains to accident compensation whereas that relating to IT/ITES workers seeks to probe into the kind of work related health issues they face. The latter are then considered in the light of the occupational diseases embodied in the international as well as domestic law with a view to explore whether the kinds of health issues specifically faced by IT/ITES workers stand recognised under international or domestic legal framework.

2.3B5.4a International Standards

The Employment Injury Benefits Convention, 1964 (No. 121) of ILO requires the States Parties to provide through national legislation norms pertaining to employment injury extending to all categories of employees including apprentices, in the public and private sectors, including cooperatives and in the case of death of the breadwinner prescribed categories of beneficiaries.\(^{457}\) However casual employees, those employed otherwise than for the purpose of employer’s trade or business, out-workers, members of employers family living in his house in respect of their work for him or other categories of employees not exceeding ten percent of the total number of employees may be exempted from the norms pertaining to employment injury.\(^{458}\) Apart from recognition of occupational diseases\(^{459}\) and providing for the same, the contingencies identified in the Convention to be covered under the employment injury legislation are morbid condition, incapacity to work resulting from such a condition and involving suspension of earnings, partial or total loss of earning capacity, loss of faculty, loss of support suffered as the result of the death of the breadwinner by prescribed category of beneficiaries.\(^{460}\) The Convention allows commuting accident to be included in the definition of industrial accident.\(^{461}\) The benefits envisioned in

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\(^{457}\) The Employment Injury Benefits Convention, 1964 (No. 121), Article 4(1).

\(^{458}\) Id., Article 4(2).

\(^{459}\) Id., Article 8.

\(^{460}\) Id., Article 6.

\(^{461}\) Id., Article 7.
the Convention include medical care, allied benefits and cash benefits in case of incapacity to work, partial or complete disablement.\textsuperscript{462} Further the benefits may be made contingent upon the length of service, duration of insurance or payment of contributions.\textsuperscript{463} Despite existence of legislation in India pertaining to employment injury in India, the convention No. 121 still stands unratified by India.

The international standards with respect to occupational diseases are incorporated in the Workmen’s Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42). The Convention recognises the right of workers emerging from the corresponding duty of the state to pay compensation in case of incapacitation or death on account of occupational disease.\textsuperscript{464} The schedule appended to the Convention enumerates certain diseases and poisonings produced by the substances also mentioned therein which the states party to the convention are required to consider as occupational disease.\textsuperscript{465}

2.3B5.4a Domestic Standards

One form of social security recognized by the Social Security (Minimum Standards) Convention, 1952 of ILO is employment injury benefit.\textsuperscript{466} In India the legislation that specifically provides for the same is the Employees Compensation Act, 1923. It imposes an obligation on employers to pay compensation to their employees for injury by accident. The Royal Commission on Labour identified the objective of the then christened Workmen’s Compensation Act\textsuperscript{468} as follows:

Provision for compensation is not the only benefit flowing from workmen’s compensation legislation; it has important effects in furthering work on the prevention of accidents, in giving workmen greater freedom from anxiety, and in rendering industry more attractive.

\textsuperscript{462} Id., Article 9(1).
\textsuperscript{463} Id., Article 9(2).
\textsuperscript{464} The Workmen’s Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42), Article 1.
\textsuperscript{465} Id., Article 2.
\textsuperscript{466} Id., Article 31.
\textsuperscript{467} Substituted for the word “workmen’s” through the Workmen’s Compensation (Amendment) Act, 2009, Act 45 of 2009, section 2.
\textsuperscript{468} Report of the Royal Commission on Labour in India 298 (1931).
Further the statement of objects and reasons of the Act recognized that “the growing complexity of industry with the increasing use of machinery and consequent danger to the workmen along with the comparative poverty of the workmen themselves renders it advisable that they should be protected, as far as possible from hardships arising from accidents.” Additionally such legislation was not only expected to reduce the number of accidents by encouraging the employers to take adequate safety measures but also ensured adequate medical treatment of the employees in case of accident.

In furtherance of these objectives the Employees Compensation Act, 1923 broadly provides for compensation to be paid in following cases:

- For personal injury caused to an employee by accident arising out of and in the course of his employment
- For occupational disease peculiar to that employment contracted by the employee

The data collected from blue collar workers for the purpose for this study pertains to accident compensation rather than occupational diseases. In the said context the determination of amount of compensation has been laid down in section 4 of the Employees Compensation Act, 1923 and the amount varies with the disablement caused by the accident i.e.

- Death from injury
- Permanent or total disablement from the injury
- Permanent partial disablement from the injury
- Temporary disablement whether total or partial resulting from the injury

The occupational diseases covered by the Employees Compensation Act, 1923 primarily includes diseases caused by chemicals emitted in particular occupations, infectious and parasitic diseases contracted in an occupation where there is particular risk of contamination, diseases caused by work in compressed air or those caused by noise. It does not include health problems caused on account of working posture, working timings which do not match with the biological clock or impairment of sense organs like eyes on account not of chemical emission but because of exposure to glare and certain rays emitted from

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469 Statement of Objects and Reasons, Gazette of India, Part V, p. 313.
computers or hearing problem not arising out of noise but continuous exposure to sound. Thus the scope of occupational disease as embodied in the Employees Compensation Act, 1923 though in tune with the International Convention No. 42 of ILO is still limited in scope as far as newly emerging health issues especially pertaining to IT/ITES sector are concerned. On account of this the work related health issues of workers working in IT/ITES sector remain internationally as well as domestically unrecognised.

2.3B5.4b Coverage

Since the Employees Compensation Act, 1923 provides for the liability of the employer to pay compensation to the employees to whom injury is caused by accident arising out of and in the course of his employment and creates a corresponding entitlement in the employee to such compensation, thus the coverage of the legislation depends on the definitions of employer and employee as embodied in the Act. The term employer as defined in the Act includes the following:

- Body of persons whether incorporated or not
- Managing Agent of employer
- Legal representative of deceased employer
- Principal employer when service of employee are let or lent on hire to another by the immediate employer

The term employee encompasses the following:

- A railway servant, not permanently employed in any administrative, district or sub-divisional office of a railway or in any capacity specified in Schedule II
- Master, seaman or other member of the crew of an aircraft
- Captain or other member of the crew of an aircraft
- Person recruited as driver, helper, mechanic, cleaner or any other capacity in connection with a motor vehicle

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470 The Employees Compensation Act, 1923, section 2(1)(e).
471 Id., section 2(1) (n).
• Person recruited for work abroad by a company and employed outside India in capacity as is specified in Schedule II and the ship, aircraft, motor vehicle or company is registered in India
• Employed in any capacity as specified in Schedule II (27 occupations listed)

Besides enumerating these categories of employees the Act confers power on the state governments to add more occupations to Schedule II. On the basis of the coverage discussed above the right to compensation in case of injury for the purposes of this study would therefore extend to regular, temporary as well as contract workers but would not include apprentice within its fold.

2.3C RIGHT TO AN EFFECTIVE ENFORCEMENT OF THE ABOVE STATED COLLECTIVE AND INDIVIDUAL RIGHTS THROUGH LABOUR INSPECTIONS

Labour inspections constitute a significant contrivance for securing enjoyment of rights by workers. “The purpose of inspection is to ensure that the greatest possible number of problems relating to the protection of workers are solved at the workplace as a result of dialogue and consultation between the actors directly involved, employers and workers, with supervision and advice by the labour inspectorate regarding compliance with legislation, minimum standards, and the terms of any relevant (enforceable) collective agreement.”\textsuperscript{472} It is said that the system of labour inspection is best organized as a system within a larger context of a State system to administer social and labour policy and to supervise compliance with norms that give effect to the same.\textsuperscript{473}

2.3C1 International Norms

Labour Inspection Convention, 1947 (No. 81) is the primary ILO instrument dealing with labour inspection of industries and commercial establishments. The Convention applies to all those workplaces to which legal provisions relating to conditions of work

\textsuperscript{472} Helena Perez Vasquez, “Good Labour Practice Compilation of Labour Inspection Practices and Guidelines for Effective Labour Inspections in EPZs” \textit{ILO} 3 (2010).

\textsuperscript{473} \textit{Id.}, p. 2.
and the protection of workers are enforceable, though there may be certain workplaces that may be exempted. Following three broad functions of labour inspections are envisaged by the Convention:

- to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers
- to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provision
- to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions

Labour inspections should be under the control and supervision of a central authority, their activities should involve coordination with other government services as well as between inspectors, employers and workers. Independence and stability of employment of inspecting staff must be ensured while ensuring that they are duly qualified and adequate in number to perform the duties. The powers of the inspectors recognised under the Convention encompass the following:

(a) to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection;

(b) to enter by day any premises which they may have reasonable cause to believe to be liable to inspection; and

(c) to carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed, and in particular--

(i) to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions;

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474 Labour Inspection Convention, 1947 (No. 81), Article 2.
475 Id., Article 3.
476 Id., Article 4.
477 Id., Article 5.
478 Id., Article 6.
479 Id., Article 7.
480 Id., Article 10.
481 Id., Article 12.
(ii) to require the production of any books, registers or other documents the keeping of which is prescribed by national laws or regulations relating to conditions of work, in order to see that they are in conformity with the legal provisions, and to copy such documents or take extracts from them;

(iii) to enforce the posting of notices required by the legal provisions;

(iv) to take or remove for purposes of analysis samples of materials and substances used or handled, subject to the employer or his representative being notified of any samples or substances taken or removed for such purpose.

On the occasion of an inspection visit, inspectors shall notify the employer or his representative of their presence, unless they consider that such a notification may be prejudicial to the performance of their duties.

Another significant principle recognised under the Convention is that the workplaces should be inspected as often and as thoroughly as is necessary for effective application of the relevant legal provisions. Finally apart from furnishing of reports of inspections and annual reports to and by the central authority the Convention also provides for prompt legal proceeding and adequate penalties for violation of legal provisions enforceable by labour inspectors.

2.3C2 Domestic Norms

All the legislations relating to securing decent conditions at work embody a mechanism of inspection of factory, premises, establishment etc. The powers of inspections under these legislations are either conferred upon the inspector of factories, Labour Commissioner except in case of Employees State Insurance Act, 1948 or Employees Provident Fund and Miscellaneous Provisions Act, 1952. The duties of the inspectors under various legislations are tabulated below:

Table 2.1 – Powers of Inspectors under Different Labour Legislations

482 Id., Article 16.
483 Id., Articles 19, 20.
484 Id., Article 17.
485 Id., Article 18.
<table>
<thead>
<tr>
<th>S. No.</th>
<th>Title of the Legislation</th>
<th>Powers of Inspectors</th>
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| 1     | The Contract Labour (Regulation and Abolition) Act, 1970 | • Enter at all reasonable hours premises where contract labour is employed  
• Examine register, record or notices or require their production  
• Examine any workman employed therein  
• Require any person giving out work or workman to give any information with respect to names, addresses and payments to persons to whom work is given out  
• Seize, take copies of such register, record of wages, notices with respect to offence under this Act (section 28) |
| 2     | The Employees State Insurance Act, 1948 | • Require any principal or immediate employer to furnish information necessary for the purposes of this Act  
• Enter any office, establishment, factory or other premises occupied by such principal or immediate employer at any reasonable time  
• Require person incharge to produce and allow the inspector to examine accounts, books and other documents relating to employment of persons, payment of wages or other information  
• Examine principal or immediate employer his agent or servant or any person found in such factory, establishment, office or other premises or any person believed to be or have been an employee  
• Make copies or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises |
### Normative Framework of Labour Rights

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<th>S. No.</th>
<th>Title of the Legislation</th>
<th>Powers of Inspectors</th>
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</table>
| 3      | The Employees Provident Funds and Miscellaneous Provisions Act, 1952 | - Require any employer or any contractor from whom any amount is recoverable to furnish information considered necessary  
- Enter and search at any reasonable time any establishment or premises and require person incharge to produce before him for examination any accounts, books, registers or other documents relating to employment of persons or payment of wages in the establishment  
- Examine with respect to any matter relevant to above stated purposes the employer or contractor, agent, servant or person found incharge of the establishment or any premises or is believed to be an employee in the establishment  
- Make copies of or take extracts or seize (in case there is reason to believe that an offence has been committed under this Act) from any book, register or other document maintained in relation to the establishment |
| 4      | The Factories Act, 1948  | - Enter any factory  
- Examine premises, plant, machinery, article or substance  
- Inquire into any accident, dangerous occurrence and take statements of persons for inquiry  
- Require production of register or document relating to factory  
- Seize or take copies of any register, record or any other document with respect to any offence under the Act  
- Direct occupier not to disturb any premises, or |
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<th>S. No.</th>
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<td>anything lying therein</td>
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<td>• Take measurements, photographs, and make recordings as considered necessary for inquiry into any accident or dangerous occurrence</td>
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<td>• Take possession, dismantle or subject to test any article or substance found in the premises which is likely to cause danger to the health or safety of the workers</td>
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<td>• No person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself (Section 9)</td>
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<td>5</td>
<td>The Industrial Disputes Act, 1947</td>
<td>• Power of the board, court or any member thereof or of conciliation officer, Labour Court, Tribunal, National Tribunal or any person authorised in writing by them may enter any building, factory, workshop, any place or premises at any time between sunrise and sunset (or person authorised by them may enter after due notice) for any conciliation, investigation, inquiry or adjudication entrusted to these authorities under the Act (Rule 23 – “Power of Entry and inspection”)</td>
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<td>6</td>
<td>The Minimum Wages Act, 1948</td>
<td>• Enter at reasonable hours with assistants any premises or place where employees are employed or work is given out to out-workers in any scheduled employment in respect of which minimum rate of wages have been fixed under this Act for examining any register, record of wages or notices</td>
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<td>• Examine any person found in such premises or place who is believed to be an employee employed therein or out-worker to whom work is</td>
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<td>S. No.</td>
<td>Title of the Legislation</td>
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<td>given therein</td>
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<td>• Require any person giving out-work or any out-workers to give any information which is in his power to give with respect to names and addresses of persons to, for and from whom the work is given out or received and with respect to payments to be made for the work</td>
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<td>• Seize or take copies of registers, records of wages, or notices or portions thereof which are relevant in respect of an offence under this Act believed to have been committed by an employer (section 19(2))</td>
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<td>7</td>
<td>The Payment of Bonus Act, 1965</td>
<td>• To require an employer to furnish information</td>
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<td>• Enter any establishment or premises with assistants at any reasonable time</td>
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<td>• Require the person found incharge to produce for examination any accounts, books, registers and other documents relating to the employment of persons or the payment of salary or wage or bonus in the establishment</td>
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<td>• Examine the employer, his agent or servant or any other person found incharge of the establishment or any premises connected therewith or any person believed to be or have been an employee in the establishment</td>
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<td>• Make copies of or take extracts from any book, register or other document maintained in relation to the establishment (section 27)</td>
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<td>8</td>
<td>The Payment of Gratuity Act, 1972</td>
<td>• Require an employer to furnish such information as is necessary</td>
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<td>• Enter and inspect at reasonable hours with</td>
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<tr>
<td>S. No.</td>
<td>Title of the Legislation</td>
<td>Powers of Inspectors</td>
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<td>assistants any premises of or place in any factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which the Act applies for examining any register, record or notice or other document required to be kept or exhibited in relation to the employment of any person or payment of gratuity to the employees and require their production for inspection</td>
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<td>• Examine with respect to any relevant matter or for any of the aforesaid purposes the employer or any person in such premises or place and is believed to be an employee employed therein</td>
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<td>• Make copies of and take extracts from any register, record or notice or other document any relevant document</td>
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<td>• Search, seize with assistants register, record, notice or other document considered relevant in respect of the offence believed to have been committed</td>
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<td>(section 7B)</td>
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<td>9</td>
<td>The Payment of Wages Act, 1926</td>
<td>• Make examination and inquiry to ascertain observation of provisions of the Act and rules</td>
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<td>• Enter, inspect and search with assistants any premises or any railway, factory or industrial or other establishment at any reasonable time for carrying out the objectives of the Act</td>
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<td></td>
<td>• Supervise payment of wages to persons employed upon any railway, factory or industrial or other establishment</td>
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<td></td>
<td></td>
<td>• By a written order require production at such place as may be prescribed any register or record made in pursuance of this Act</td>
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</table>
The legal norms pertaining to the powers of inspectors are in tune with the international standards discussed above. It is desirable to note that all the legislations mentioned above except the Factories Act, 1948 explicitly provide for examination of worker/out-worker/employee etc. by the inspectors. However, the use of term ‘may’ indicates all the duties of inspectors enumerated above being draped in form of broad guidelines rather than absolutely essential requirement of any or every inspection. This indicates that the inspectors are legally not bound to examine the workers in each and every inspection at each and every premises, establishment etc. This aspect assumes significance in the light of the revelations brought to light in the primary data and the question that needs to be delved into is whether the strict enforcement of labour rights in the neo-liberal era has necessitated revisiting the system of labour inspections established under the abovementioned legislations.

The SEZs Act, 2005 embodies an enabling provision regarding power to central government to assign to the Development Commissioner any other function under any other law apart from the ones mentioned in the SEZs Act\(^{486}\) or delegated upon him by a general or special order by the central government or the state government concerned.\(^{487}\) In pursuance of this power various state governments have conferred on the Development Commissioner all the powers of the labour commissioners.\(^{488}\) In this context the efficacy of the system introduced in SEZs in India with respect to labour inspections wherein the powers of the labour Commissioner have been delegated to

<table>
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<th>S. No.</th>
<th>Title of the Legislation</th>
<th>Powers of Inspectors</th>
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|       |                         | • Take on the spot or otherwise statements of any persons considered necessary for carrying out purposes of the Act  
• Seize, take copies of registers, documents or portions thereof in respect of an offence believed to have been committed by an employer (section 14(4)) |

\(^{486}\) Section 12(2) (e).  
\(^{487}\) Section 12 (4).  
\(^{488}\) Generally see chapter 4 and appendix 4.1.
the Development Commissioner is worth examining. This is undertaken in the chapter analysing primary data in which one of the aspects is labour inspections in SEZs.

2.4 Conclusion

The domestic legal framework with respect to labour rights being studied in this research is broadly in tune with the international norms irrespective of the fact that India has not ratified many ILO Conventions. However, the international framework itself is very broad and flexible and just lays down broad guidelines for the domestic norms thus allowing a great degree of flexibility in the domestic standards which therefore seldom stand inconsistent with the international standards. Considering the three categories of rights considered in this chapter separately the analysis of domestic standards with respect to collective rights like security of employment reveals gradual narrowing down of normative extent of rights in case of termination of employment initially through legislative initiative in the form of exclusion of fixed term contracts from the purview of retrenchment and later through judicial pronouncements especially with regard to the kinds of remedies provided to workers in case of illegal termination of employment especially with respect to workers in precarious employment relationship like daily wage, contract, casual workers. The judicial pronouncements indicate a shift in the judicial approach post liberalisation. Whereas pronouncements prior to 1990s indicate a pro-worker approach of the judiciary which seems to have dwindled to the level of extinction after the year 2000 which instigates one to ponder if the judiciary is also influenced by the neo-liberal ideology of letting the market operate as freely as possible and through the judicial decisions liberating the employers from the purported onerous obligations in the form of reinstatement with consequential benefits to mere compensation in case of unlawful termination. One of the reasons put forth by the court itself in deviating from the settled judicial precedents has been the “need for pragmatism in addressing problems dogging industrial relations.” One finds the strong foundation with respect to the conceptual framework of labour rights jurisprudence created by the legislature and interpreted by the judiciary in the light of the true spirit of the values enshrined in

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489 Appendix 2.3 presents in tabular form the ratification status as well as correspondence between domestic and international standards.
part IV of the Constitution gradually being eroded not primarily through legislative amendments but rather through a change in judicial attitude. The initial contribution of the Constituent Assembly, legislature and the court indicated a shift in labour rights jurisprudence from contract to status where 1949 onwards the court subjected freedom of contract to claims of social justice. However with the adoption of the new economic policy and ushering of the process of liberalisation and globalisation as recognised by the Supreme Court itself “there has been a shift in the courts’ approach in dealing with the cases involving the interpretation of social welfare legislations.”

The change in judicial attitude is marked now by a shift in a direction opposite to the one that was apparent immediately after independence. The shift is now from status back to contract by the courts giving primacy to the form, nature, ingredients, unscrupulous aspects included in the contract, irregularities in appointment in which the worker had no role to play, consideration of financial health of the enterprises etc over the status of a worker as a part of the collectivity. Though the collective right to unionisation stands recognised constitutionally as well as statutorily yet the economic realities of the lives of workers constituted through the process of economic globalisation which has secured free movement of capital as against free movement of labour as well as the establishment of SEZs as territories inaccessible to general public, offering fiscal incentives to entrepreneurs therein together with the ‘public utility’ status under labour law has secured at best only a symbolic existence of the right to unionise.

Individual rights in the form of decent conditions at work stand recognised and protected through their elaborate incorporation into the domestic legal framework. This arena does not seem to have been normatively altered on account of the wider process of globalisation. However, the extent of their de-facto realisation can only be discerned from the in depth analysis of the primary data pertaining to the conditions of work of SEZ and non-SEZ workers. Further the data is also likely to indicate the influence of the abovementioned developments with respect to the extent of normative recognition of security of employment and the right to unionise on the degree of realisation of the right to decent conditions at work.

The enforcement of collective and individual rights through the mechanism of inspections though in tune with the international standards remains subject to a high
degree of flexibility conferred upon the inspecting staff in terms of the kind of examination they may undertake during inspections. The powers of the inspectors generally relate to entry into a premises or establishment etc. search, require production of and examine registers, records, notices, take copies thereof or seize them. All the legislations (The Contract Labour (Regulation and Abolition) Act, 1970, The Employees State Insurance Act, 1948, The Employees Provident Fund and Miscellaneous Provisions Act, 1952, The Payment of Wages Act, 1926, The Payment of bonus Act, 1965, The Payment of Gratuity Act, 1972, The Minimum Wages Act, 1948) except the Factories Act, 1948 include an explicit provision relating to examination of employer and employees in the premises or establishment being inspected. However the use of term ‘may’ in all the legislations while conferring the powers with regard to inspections suggests that the obligation to examine the employer and employees is discretionary rather than mandatory. However absence of examination of the right holders and duty bearers in an inquiry aimed at finding out the adherence to norms turns out to be a lacuna. Since on the basis of the inspections the inspectors are expected to infer whether violation of any right has been committed by the employer and thus may result in an action against the employer for vindicating the right of the employee, the principles of natural justice require that the right holder as well as the duty bearer must be personally heard. This will also go a long way in securing effective realisation of the rights of workers. Examination of employer and workers therefore should be an essential part of the inspection protocol.