A Structural Analysis of Indian Contract Labor Laws

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This paper attempts a structural analysis of some aspects of the Indian labor laws applicable to the contract workers based on the fundamental concepts of opposites and co-relatives developed by Wesley Newcomb Hohfeld in his two famous articles published with the same name: "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", published in Yale Law Journal in the years 1913 and 1917 respectively. The structural strengths and problems of these laws have been discussed based on the understanding emerged whilst reading and analyzing these statutes per se, and not on implementation issues.

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The Problem of Plenty

The Indian labor law regime faces the problem of plenty. There are about 44 Central labor laws and 200 state laws (Datta & Sil, 2007) governing labor matters. It is primarily the Contract Labor (Regulation & Abolition) Act, 1970 along with the Workmen's Compensation Act, 1923, the Factories Act, 1948, the Employees' State Insurance Act, 1948, Minimum Wages Act, 1948, Industrial Disputes Act, 1947, the Employees Provident Funds Act, 1952 and the Maternity Act, 1963[1], which are largely applicable to the contract workers (Kumar, 2012). However, in spite of the plethora of regulations, the contract labor system in the country has been in disarray. Part of the problem can be seen by a structural analysis of these laws themselves. Through a structural analysis of the relevant aspects of these laws based on the eight fundamental concepts of opposites and co-relatives developed by

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[1] See Ministry of Labor, Government of India website for all Acts and Rules under reference http://labour.nic.in/upload/uploadfiles/files/ActsandRules

Wesley Newcomb Hohfeld[2] in his two famous articles published with the same name: "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", in Yale Law Journal in the years 1913 and 1917, an attempt is here made to identify the inherent problems in the contract labor laws in India.

Hohfeld built upon his discourse on legal entitlement on his understanding of rights, privileges, power and immunity. Some of these are 'in rem' or multital as in the case of rights and have "a large number of fundamentally similar rights residing in one person; and any one of such rights has as its correlative one, that is (having), fundamentally similar duties residing respectively in many different persons", while a duty in rem, or multital duty is "one of a large number of fundamentally similar duties residing in one person; and any one of such duties has as its correlative one, that is (having), fundamentally similar rights, or claims, residing respectively in many different persons (Hohfeld,1917: 745). Others are those which are 'in personam' or paucital. Hohfeld gives several examples from day to day life to elucidate his analysis. "If at common law the lien of the mechanic, manufacturer or other laborer consists of the 'right to retain' the thing in his possession" or "a privilege of retaining possession, this is certainly a privilege relating to a thing. More than that, such privileges are multilal privileges, or privileges in rem, existing not only against the owner of the chattel but also against all persons in general, and correlating with no-rights in the latter" (Hohfeld,1917: 737-38.). He further negates that such analysis is merely 'academic" and devoid of functional utility, and calls to apply his eight conceptions "in judicial reasoning to the solution of concrete problems of litigation" (Hohfeld, 1917: 711-12). In his structural analysis, Hohfeld has clarified that the existence of miltital or paucital rights or claims do not exclude the holder from holding other privileges or relations which may be joint or secondary, such as a claim arising when the primary right is breached. Corbin (1919:165) while simplifying the structural analysis of Hohfeld asks to determine the legal relations between A and B by seeking answers to the following questions:

(I) What may A (or B) do, without societal penalty assessed for the benefit of the other?

(2) What must A (or B) do, under threat of societal penalty assessed for the benefit of the other?

(3) What can A (or B) do, so as to change the existing legal relations of the other?

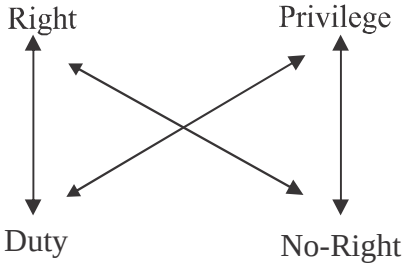
Corbin further explains the Hohfeldian concept of co-relatives and opposites that if one wishes to determine that A may conduct himself in a certain way he has a privilege with respect to B, and B has no-right that A shall not so conduct himself.

Likewise if we determine that A must conduct himself in a certain manner he has a duty to B, and B has a right against A.

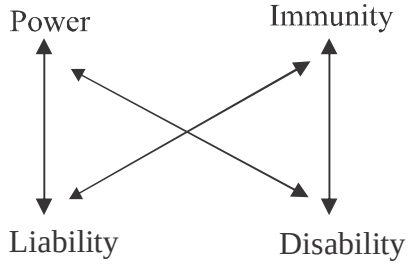
[2] Wesley Newcomb Hohfeld (1879-1918) was an American jurist whose two essays on jurisprudence published in Yale Law Journal found acceptability in legal circles for analysis of law.

However, if we determine that by his own voluntary act A can change B's legal relations with A (or with X), A has a legal power and B has a liability.

Similarly, if we determine that A cannot by his own voluntary act change the legal relations of B, then A has a disability and B has an immunity.



Hohfeld co-relatives (denoted by ↕) and opposites (denoted by ↘) as given below can be used in the analysis of all legal entitlements:



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While pairs of correlatives shall exist together to establish the validity of a legal structure, no pair of opposites can co-exist together. To elaborate in terms of contract labor laws, when the contract workers are duty bound to work for certain hours for production, the contractor or the principal employer have the right to the labor of the workers. However, when we say that the workers have the privilege to work as per their desire, then no duty lies upon the contractor to pay them the minimum wages. Or when the workers have a right to minimum wages, the contractor or principal employer has no-right to pay them less. The difference between right-duty regime and privilege-no right regime is the invocation of the penalty clause in the event of breach of the former. Similarly if the contractor or principal employer has the power to enforce upon the workers certain enhanced working period, it becomes the liability of the workers to follow the change, however if the former has no such power (disability), the workers are immune to such imposition of new working period.

The Contract Labor (Regulations & Abolition) Act, 1970

The structural analysis of labor laws in terms of Hohfeld correlatives and opposites may first start with the Contract Labor (Regulations & Abolition) Act, 1970, which is the major law regulating contract workers relations.

The Contract Labor (R & A) Act regulates the legal entitlements or the rights, privileges, power and immunity of the workers, contractors, and the enforcement agencies (State). The Act provides both for primary and secondary entitlements to these stakeholders but has some structural issues leading to irregu-

lar realization of these entitlements. The Act applies to "every establishment in which 20 or more workmen are employed or were employed on any day of the preceding 12 months as contract labor" (section 1). Thus the Act in its' applicability provides a disability to the enforcement agencies in regulating organizations having borderline cases and a correlated immunity to the contractors against prosecution.[3] What is seen on the ground is then a conscious attempt by both the principal employer and the contractor at the first juncture to explore the possibility of avoiding the law based on the limitations of the Act.

The Act provides for licensing of both the contractor and the principal employer, thus entrusting power upon the enforcement agencies and correlated liability on the part of the license seekers. However secondary entitlements or claims arising due to the breach of these liabilities are so minuscule that enforcement becomes a problem (Shastree 2013:6)

Section 20 provides power to the principal employer to recover from the contractor by deductions or as a debt payable, "if the contractor does not provide amenities under Sections 16 to 19 within the time prescribed". However no specific liability has been created upon the contractor thus creating a disjoint to deal with such a situation. Another structural problem is the lack of joint entitlement or liability of other stakeholder i.e., the enforcement agencies which is essential to deal with such a scenario. The resultant is the abject lack of facilities like canteens, latrines, urinals, rest rooms, crèches, washing facilities, and first aid for the workers though expressly provided in the Act.

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Section 21 outlines duties of the contractor with respect to payment of wages to the workers. It bounds the contractor to pay wages timely and before representatives of principal employer, but no consequential right has been created in the Act per se to the workers in the event of breach of these provisions. Though power has been delegated to the principal employer to recover from the contractor by deductions when the contractor fails to pay wages or other entitlements to the workers (Section 21(4)) and jural power to enforcement agencies is implied, but a direct jural relationship (co-relative) between the contractor and the workers is missing, moreover like in section 20 there is a lack of joint entitlement between stakeholders like the principal employer and enforcement agencies, thus creating an unavoidable disability and consequential immunity to contractors. It may be due to this structural problem ingrained in the Act that most contract workers face delayed or short payment.

[3] Shastree (2013:6) has cited that paltry fines like Rs 200/- or even less makes a mockery of labor law entitlements

Under chapter III, rule 25 (2) (v)(a) of the contract labor (Regulations & Abolition) central rules, 1971, it has been provided that "in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer, the wage rate, holidays, hour of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer" (Kumar,2012: 288). However while providing these rights to the workers no simultaneous duties have been created on the other parties by the Act itself. In fact, while making this provision in the law, it seems no serious attempt was made to make suitable provisions or co-relatives to ensure implementation. Moreover, judicial interpretations demarcating core and non-core areas[4] within the organization has concocted disability for law enforcement agencies and even the court itself against implementing this provision of the Act and consequently endowed with immunity to the principal employers against penalty of breach. As seen from the Hohfeldian perspective while on the one hand co-relatives in the form of right to workers and duty to principal employers, contractors or the State is non-existent, on the other hand both rights and no-rights (which being jurally opposites should not exist together) exist together for the workers.

The structural analysis of the Contract Labor (R & A) Act, 1970 and the Rules effected in 1971, shows that the Hohfeldian jural correlatives of right-duty, power-liability or immunity- disability do not exist together in many of the provisions of the law, instead jural opposites of right- no right, power-disability were found to exist together at some places. Till these structural impediments are taken care of the entitlement problems are bound to remain.

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The Social Security Acts

(The Employee's (Workmen's) Compensation Act, 1923, The Employees' State Insurance Act, 1948, The Maternity Act, 1963 and the Employees Provident Funds Act, 1952)

By law, the Employee's (Workmen's) Compensation Act, 1923 and the Employees' State Insurance Act, 1948 are exclusive of each other. There is an express provision in Section 53 of the ESIC Act that , "an insured person (under the ESIC Act) or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 or any other law".

[4] Even before the promulgation of the Contract labour (R & A) Act, in the case of Standard Vacuum Refinery Company- verses- their workmen (1960 AIR 948; 1960 SCR (3) 466) the Supreme Court observed that contract labor should not be employed where; the work is perennial, or of core nature, or when the work is sufficient to employ considerable number of whole time workers or where work mostly concerns regular workmen.

Therefore the employer needs to seek for either of the two social security cover for the workers. Similarly the Maternity Act of 1963 has an exclusion provision for those workwomen who are covered under the ESIC Act[5]. The Employees Provident Funds Act, 1952 on the other hand provides broadly for "the institution of provident funds, pension fund and deposit-linked insurance fund for employees".

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(I) The Employee's Compensation Act, 1923[6], includes all workmen (except casual workers) (section 2(n)) and specifically creates provision for the contract workers as the contractor or "managing agent" (Section 2 (e) & (f)) has been included in the definition of an employer. No major exclusion has been made in the Act except that no liability lies upon the employer when the disablement to the worker is less than three days (Section 3(a)). While imposing duty upon the employer for compensation in the case of job related disablement it creates rights to the workers for their legal entitlement. Though there is ambiguity in the tripartite relationship of workers-contractor-principal employer in the contract labor system as to on whom among the contractor or the principal employer this duty would ultimately lie, but as there is a jural joint relation between the principal employer and the contractor, the Hohfeldian structure seems to be in tandem.

(II) The Employees' State Insurance Act though much wider in coverage than the Employee's Compensation Act provides for certain exclusions. The Act is applicable to establishments[7] employing 10 or more workers; also workers getting more than Rs.15000 per month[8] have been excluded. The Act provides for Employees' Insurance Courts and Special Tribunal to deal with primary and secondary claims arising due to breach of its provisions. Just like the Employee's Compensation Act, the ESIC Act specifically makes provision for the contract workers as the contractor or "immediate employer" (Section 2 (13)) has been included. The Act makes a clear distinction between the principal employer who is the owner or 'occupier' of the establishment and the contractor who is the intermediary. The Act imposes duty upon the employer for compensation in the case of job related disablement and creates co-related rights to the workers for their

[5] See section 2(2)

[6] The Worker's Compensation Act has been renamed as the Employee's Compensation Act

[7] The original Act covered mostly factories and had delegated the power to the appropriate government to extend the provisions of this Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise (Section 1(5)). Thus with the passage of time more and more establishments have been covered.

[8] Earlier the limit was Rs 10,000 upto 30-4-2010, Rs 7,500 upto 30-9-2006 and Rs 6,500 p.m. upto 31-3-2003.

legal entitlement. The Act states that the principal employer at the first instance shall pay the contribution of both the employer and the employee (Section 40) and later shall recover the same from the 'immediate employer (contractor), and at other places uses the term 'employer' or 'principal employer'[9] to impose jural relations, but as there is a jural joint between the principal employer and the contractor, the Hohfeldian structure seem to be in order.

The Act creates no joint jural relation upon the contractor who is the real employer of these workers.

(III) The Maternity Act, 1963 is a legislation made as per the provisions contained in the ESIC Act[10]. As per section 3(o) of the Act, "woman means a woman employed, directly or through any agency" thus covering contract women workers. While creating rights for the workers, correlative duties have been created upon the employer who is the principal employer or an official who is in control of the establishment. Thus, the Act creates no joint jural relation upon the contractor who is the real employer of these workers. Moreover the Act provides for exclusion of those women workers who were employed for less than one hundred and sixty days in the twelve months period immediately preceding the date of their expected delivery (section 5(2)). The Act thus creates entitlements for the workers based on the duties enforced upon the principal employer who is neither their direct employer and nor can ensure their tenural conditions. The secondary liabilities on breach[11] also fall upon the employer and not on the contractor. Thus, though the Maternity Benefit Act was enacted for providing better coverage to the working women, the Act could bring little relief to the contract women workers seemingly due to these structural issues,.

(IV)The Employees Provident Funds Act, 1952 lays down provisions for the Employees' Provident Fund Scheme, Employees' Pension Scheme and Employees' Deposit-Linked Insurance Scheme and delineates the composition and functions of different bodies to run these schemes. The EPF Act covers contract workers, as per the Act "employee means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer, and includes any person em-

[9] In some sections like 40, 44, 73A (chapter V-A) the term principal employer has been used.

[10] See Section 95(2)(ef) of ESIC Act.

[11] The penalty under Maternity Act for breach has been weakly formulated. The Act provides for punishment with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or both (section 21)

ployed by or through a contractor in or in connection with the work of the establishment" (Section 2(f) (i)). Similarly employers cover contractors also, as "employer means in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier" (section 2(e) (i)). The Act like the ESI Act provides for contribution from the principal employer which shall be deducted from the contractor's bill. The Act makes elaborate provisions for recovery of money (section 8) and for penalties[12] (section 14) for the employers and the contractors in the case of default. The Act at the same time provides for certain exclusions which are uniformly applicable to both regular and contract workers, the Act is not applicable to those establishments where less than 20 workmen are employed, also employees getting wages more than Rs 6500 per month may be exempted. The Hohfeldian structure of the EPF Act seems to have well- positioned correlatives where rights have been created for the workers and proper duties have been defined for both the principal employer and the contractor. A structure for secondary entitlement has been setup in the case of breach of law, powers of law enforcement agencies have been based upon the liabilities created upon the contractor and principal employer. Provisions of severe penalties have been formulated to enforce compliance. The exclusions made in the law need amendment for better applicability, but overall the structure of the Employees Provident Funds Act seems to pass the rigor of Hohfeldian examination.

Therefore as per the above analysis, while the social security regimes of the Employee's (Workmen's) Compensation Act, 1923, the Employees' State Insurance Act, 1948 and the Employees Provident Funds Act, 1952, are found to be structurally sound, there are issues with the structure of the Maternity Act, 1963.

The Factories Act, 1948

The Factories Act interpret "worker" as a person employed, directly or by or through any agency (including a contractor[13]) with or without the knowledge of the principal employer (Section 2 (L)). The employer is termed as the "occupier" on whom the ultimate control over the affairs of the factory lies. Section 119[14] of the Act gives an overriding effect to the provisions of the Factories Act against the Contract Labor (R&A) Act wherever the provisions of the latter is inconsistent with the former. This section thus does not pronounce that the Contract Labor (R&A) Act would not apply but only provides for the precedence of the Factories Act. Unlike the other legislations the Factories Act is a predominantly a welfare legislation aimed at the health, safety, proper working hours and other entitlements of the workers. But from the contract workers

[12] The penalty as per EPF act is imprisonment up to three years or a fine of up to Rs 10000 (section 14).

[13] Added by the Factories (Amendment) Act, 1976.

[14] Included by the Factories (Amendment) Act, 1976.

Though the Factories Act by its' landmark Amendment Act of 1976 provides for uniform entitlements to regular and contractual workers, but fails structurally in creating joint duties upon contractors.

point of view the Act suffers from serious structural anomalies. By adding 'including a contractor' in section 2(L), the amendment attempted to provide all benefits available in the Act to the contract workers as available to regular workers, however while creating the right structure to this category of workers, the duty structure was not amended. More so unlike the other Acts, the employer has been clearly identified and termed as "occupier" (section-119) in the Act and no joint jural relation has been established with the contractor who is the real employer of the contract workers. More so the liability on all cases of breach falls upon the "occupier" and not the contractor. Section-92 clearly states that, "if there is any contravention of any of the provisions of this Act or of any rules made there under or of any order in writing given there under, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment", similarly section-88 provides for penalty upon the "occupier" in the case of accidents or work place injury to the workers and section 87 & section 102 relates to penalty provisions in the case of breach of welfare measures providing for the 'occupier' or manager as the sole party liable for proceedings. Section 111A which elaborates upon the right of workers imposes duties upon the 'occupier' and 'the enforcement agencies' and not upon the 'contractors'. Thus, though the Factories Act by its' landmark Amendment Act of 1976 provides for uniform entitlements to regular and contractual workers, but fails structurally in creating joint duties upon contractors.

Minimum Wages Act, 1948

On going through the Minimum Wages Act, one can see that this is a comprehensive piece of legislation covering all scheduled employment types (section 2 (b) i & ii) and employer types (section 2(e)). The contract workers are also covered as "employer means any person who employs whether directly or through another person", and "employee means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment (section 2(i)). The Act provides for co-relational rights & duties and powers & liabilities. Joint liabilities have been created in a company on "every person who at the time the offence was committed, was in charge of, and was responsible to, the company" (section 22 C). Even when any contract or work agreement is made where "an employee either relinquishes or reduces his right to a minimum rate of wages…shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act" (section 25). The Act provides for fixing wages on hourly, daily or even on piece meal basis and delineates the basis and the mode for calculation of the minimum wages.

The analysis of the Act shows it to be structurally sound, the problems in

implementation need to be found beyond the domain of law.

Industrial Disputes Act, 1947

The Industrial Disputes Act makes provision for the "investigation and settlement of industrial disputes". The Act mainly lays down the procedure for raising and settlement of industrial disputes. On the question of contract workers, the Industrial Disputes Act makes no distinction between regular and contractual workers. By definition, as per the Act a, "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". However as one proceeds with the structural analysis of the Act, one can see that the rights of the contract workers have been not be co-related through creation of duties on other parties in the other sections. Most of sections clearly entitle those workmen who are on the industrial establishment muster roll[15] and since last one year[16]. Even the newly incorporated Chapter V-B[17] provides relief against lay-off to those workmen, "whose name is borne on the muster rolls of an industrial establishment to which this Chapter applies" (Section 25-M, Chapter V-B) and "who has been in continuous service for not less than one year" (Section 25-N, Chapter V-B). The contract workers being indirect employees are on the pay roll of the contractors and do not have any tenure claims. The Act also does not cover the establishments set up for the construction works or projects where most of the contract workers labor (section 25FF). The IDA further provides for representation of workmen who is party to a dispute only through "any member of the executive or office bearer of a registered trade union of which he is a member" or "other office bearer of a federation of trade unions" or "where the worker is not a member of any trade union, by any other workman employed in the industry in which the worker is employed and authorized in such manner as may be prescribed." Thus the Act in its provisions itself has provided exclusions for the contract workers.

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The Industrial Disputes Act like the Factories Act though seems to provide for uniform entitlements both to regular and contractual workers, but on a detailed analysis provides for many exclusions for the latter category of workers. However, this being an Act for raising industrial dispute especially in the case of retrenchment, can provide some respite to the contract workers once their appeal is admitted.

[15] See sections 2 (kkk), 25C, 25D, and 25M.

[16] See sections 25B, 25C, 25F, 25FF

[17] Inserted by amendment of 1976, prohibits lay off without prior permission of the Government.

Conclusion

Hohfeld was himself concerned with the problem of equity in law. He had added a supplementary note "on the conflict of equity and law" at the end of his second paper published in the Yale Law Journal (Hohfeld ,1917: 767-70) where he categorically stated that when equity laws are created with special tribunals for upholding them, these may sometimes come in conflict with the common laws which may get the former repealed. The powerful may thus use the Common laws to get the equity laws revoked or modified in their favor. Hohfeld (1917:768) cites the example of Workman Compensation Act as, "the many workmen's compensation Acts effecting important changes in the substantive law and at the same time establishing special tribunals for enforcing the law are thus (been) modified." The challenge then for the contract labor laws is also to structurally align itself with the Common laws in India so as to sustain itself in the long run or else suitable amendments need to be made in both the Common laws and contract labor laws to make them complimentary to each other. Moreover, the structural problems of these laws *per se* need to be removed gradually through amendment legislations and/ or judicial pronouncements, so as to make them more effective. However while following this approach it should be always kept in mind that structural corrections in themselves cannot solve all the issues related to realization of the objectives laid down in these laws.

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