Who is a Worker? Seeking Answers from Economics and the Law

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Draws from 'Who is a worker? : Searching the Theory of the Firm for Answers in K.V. Ramaswamy(ed.) Labour Employment and Economic Growth in India CUP 2015 & Ongoing Work

Plan of Talk

- Indian Labor Force and the coverage of Indian Labor Laws – Who can be legally covered so as to draw benefits of Labor Law?
- How to approach Labor Law reform in this context?
- Labor, Labor Law and the 'Theory of the Firm'

Total Work force: 430 Million

♦ Agriculture (50%) ♦ Services/informal (40%) ♦ Org. (10 %)

Two 'Transitions'

1. Services/Informal – Urban
2. Two transitions – a) unskilled agricultural to Services/Informal b) informal to formal (low absorption)

Reach of Labour Laws follows Statistical Classification

Typically Benefits accrue to workers who are legally recognised as being a *worker* only if employed in formal sector. Elaborate Juridical Construction of Exclusion

I. Exclusion by Law

- Laws pertaining to safety and health confined to sectors mines, plantations & prominently those covered by the Factories Act 1948 – Power 10, No power 20 .
- Size of employing establishment determines whether social security or conditions of work apply

Exclusion by Law (contd.)

(i) Employee's Provident Fund etc.(10-20)
(ii) Industrial Standing Orders (50-100)
(iii) Industrial Disputes Act in relation to retrenchment, lay-off and closure compensation. (permission from govt)

- Functional & Remunerative Categories based on definition of 'workman' under the IDA

According to Section 2 (s) of the IDA a *workman* is defined as

'any person (including an apprentice) ***employed*** in an industry to do *any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward*, whether the terms of employment be expressed 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: -

who is subject to the Army Act 1950 or the Air Force Act 1950 or the Navy Act 1957; or

who is employed in the police service or as an officer or other employee of a prison; or

who is employed mainly in *a managerial or administrative capacity; or*

who being employed in a supervisory capacity, draws wages exceeding one thousand six hundred 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.'

Exclusion by Law (contd.)

- Army, Navy, Police, Air Force. Prisons, categories of supervisors and all managers are excluded! (Sometimes management tries to label workers as managers to get out of the rigors of labour law.)

Exclusion by Law (contd.)

+ Court ruled Exclusions

Teachers are not 'workman' – Sundrarambal v. Govt of Goa, Gaman and Diu [(1988)4 SCC 42] was the first case, followed by Ahmedabad Pvt Primary Teachers Association v Administrative Officer [(2004)1 SCC 755); Medical Representatives not 'workman' H.R.Adyanthaya vs Sandoz (India) Ltd [(1994) 4 SCC 164] In Sonepat Co-Op Sugar Mill vs. Ajit Singh it was held that since teachers, advertising managers, chemists gate sergeants, welfare officers were not allowed to be 'workman' so are not legal assistants. In this type of case the court accepts arguments that the workers were not doing "skilled or unskilled manual, supervisory, technical or clerical" work and therefore were not 'workman'

Exclusion by Law (contd.)

- Second Labour Commission says " The Commission is of the view that their coverage as well as the definition of the term 'worker' should be the same in all groups of laws, subject to the stipulation that social security benefits must be available to all employees including administrative, managerial, supervisory and others excluded from the category of workmen and others not treated as workmen or excluded from the category of workmen… We propose that instead of having separate laws, it may be advantageous to incorporate all the provisions relating to employment relations, wages, social security, safety and working conditions etc. into a single law with separate parts in respect of establishments employing less than 20 persons."

Exclusion by Law (contd.)

- The definition uses phrases such as 'work for hire or reward' and 'terms of employment be expressed or implied' which are interpreted as situating the employment relation within the rubric of the master-servant model. The common law on this is used to discern whether there is a 'contract of service' or 'contract for services' with the direction and control test - that the prima facie test for determination of the relationship between master and servant is the existence of the right of the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work…' Dharangadhara Chemical Works Ltd. v. State of Saurashtra (1957) 1 LLJ 477 (SC)
- Variant of this used in almost all cases that have subsequently come in, emphasizing the facts of the case(sometimes beneficial – beedis ad other times not- not sufficient to look at control but other relevant factors) & onus of proof is on the worker contesting. More importantly need to conjoin this with developments regarding 'contract labor'

Exclusion by Law (contd.)

- Contract labor has old history in India where 'contractors' supply labor! To regulate The Contract Labour (Regulation and Abolation) Act 1970
- Key clause Section 10 titled *Prohibition of employment of contract labour* - the government can abolish taking into account relevant factors

These are

(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment:

(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through regular workmen in that establishment or

an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole-time workmen.

***Explanation.--** If a question arises whether any process or operation or other*

work is of perennial nature, the decision of the appropriate Government thereon

shall be final.'

- Air India Statutory Corporation & ors vs United Labour Union and Ors [(1997(9SCC 377] abolition means absorption by principal employer. Countered in Steel Authority of India v. National Union Water Front Workers saying abolition is not tantamount to absorption, also the issue whether the 'contract is sham or genuine' then an industrial dispute to that effect needs to be raised.

- Following this the test to discover whetherthe contract labour agreement is 'sham, nominal and is a mere camouflage', by pointing out that if the contract is for the supply of labour then the labour will work under the 'directions, supervision and control of the principal employer' but since the salary is paid by the contractor the 'ultimate supervision and control lies with a contractor'. The facts of this case involved a very protracted tussle between a set of unskilled labourers at the Madras airport, who had been used as loaders for decades without gaining the benefits of being in a direct employment relationship with the employer. The innovation of the judgment is to label the contractors control as *primary* and the principal employers control as *secondary*. This test is clearly designed to make it harder for workers hired as contract labour to establish an employment relationship with the principal employer (International Airport Authority of India v. International Air Cargo Workers Union and another (2009) 13 SCC 374)

Exclusion by Law (contd.)

- Outside Contract Labour, turning increasingly to fixed term contracts.

(i) Changes to Industrial Standing Order Rules with Fixed Term not entitled to termination benefits

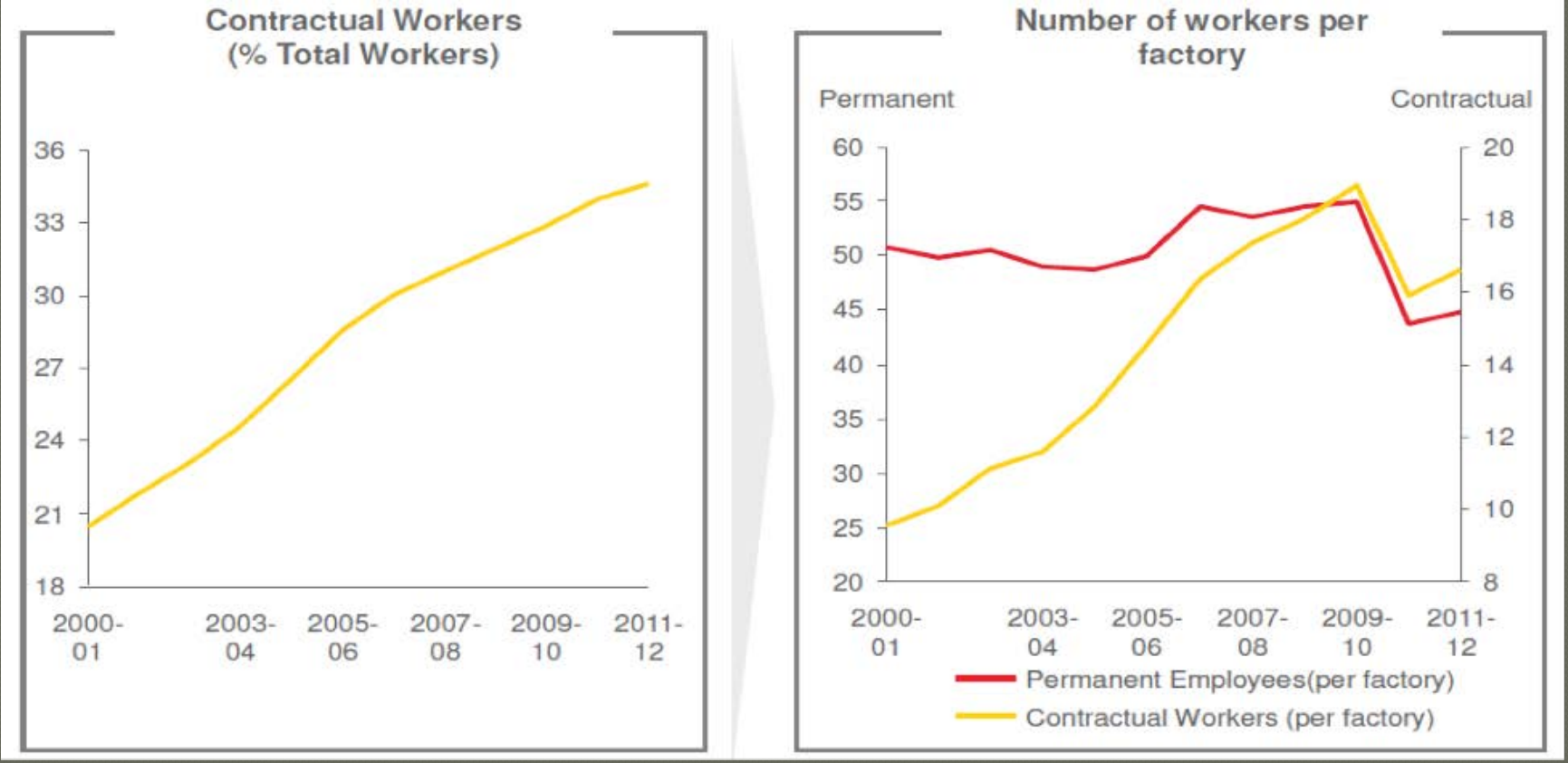
(ii) Repeated hiring on fixed term contracts with no Termination Benefits up held by SC (Municipal Council, Samarala vs. Raj Kumar (2006) 3 SCC 81)

(iii) Even long term employment of daily wage, casual workers, ad- hoc workers employed by the government, do not have rights of legitimate expectation on jobs…reason it is unfair to those who were employed using due procedure. (Secretary, State of Karnataka and Ors vs. Umadevi and Ors AIR 2006 SC 1806, (2006) 4 SCC1)

Exclusion by Law (contd.)

- This often means that though an enterprise may be covered by the law due to its size or sector, a number of workers employed fall outside the law due to nature of work they perform or other exclusionary criterion. There is thus, informal employment within a formal enterprise
- In effect at the boundaries jurisprudence of Indian labour law has created de-facto **'employment at will'** type of relations. (In law & unfairness from a rights perspective)

Empirical Detail




Labour market has gone through significant breaks
Growth in Workers (%3YMA)
(Organised Manufacturing)
10
5
0
-5
-10
1985-86
1990-91
1995-96
2000-2001
2005-06
2011-12

Exclusion by Law (contd.)

- To quote an ILO report in this regard 'The different groups have been termed "informal" because they share one important characteristic: they are not recognized or protected under the legal and regulatory frameworks. This is not, however, the only defining feature of informality. Informal workers and entrepreneurs are characterized by a high degree of vulnerability. They are not recognized under the law and receive little or no legal or social protection and are unable to enforce contracts or have security of property rights.' ILO, 2002,

Labor Law Reform

- Labour Laws (on a/c of difficulty of firing labour) inhibit employers from hiring labour because they have to carry large stocks even when product markets have a downturn – buzzword is flexibility.
- Past section tells us that such flexibility has been engineered by the Supreme Court – as well as selective legislative changes….

Labor Law Reform

Two Frames (Mcleod in Handbook of Labor Eco) 2010

- 1) Traditional model – w reflects abilities of workers & efficient allocation of labor. Outcomes can be inequitable (distributional sense) + labor subject to unforeseen shocks. The institutions of minimum wages, unions, termination compensation, unemployment insurance, centralized bargaining, are devices that compensate for the risks and inequities. If markets generate efficiency then interventions generate inefficiency. IMPLIES INEVITABLE EQUITY (FAIRNESS) – EFFICIENCY TADE-OFF. (Corollary: inability of firms to make adjustments hurts long run interests of workers)

Labor Law Reform

- 2) Transaction Cost perspective which says ‘institutions are a response to market failure – with the institution solving a resource allocation problem. Labor law has been around since antiquity + China is quite busy in legislating a labor law!!! Having said this it is still not very clear ‘how labor law works or impact of legal rules on economic performance in this context’

Labor, Labor Law and the 'Theory of the Firm'

- One route is the theory of the firm and 'incomplete contracts' – particularly at the boundary of the firm.

- Coase told us that firm emerges where the 'costs of the price mechanism' make the organization of every economic activity in the market excessively costly. Emphasized costs of negotiation & limits of firm is diminishing returns to management.

- These costs (transaction costs) were explicated by Benjamin, Klien et al. as being associated with relationship specific investment (opportunism after lock-in) leading to vertical integration, which lowers opportunism and increases investment. No limit!!!!

Labor, Labor Law and the 'Theory of the Firm' (contd.)

- Grossman and Hart (86))JPE give us limits by suggesting 1)incomplete contracts at ex-ante stage of *relationship specific investment* but ex-post efficient bargain 2) residual rights define ownership (important in a world of incomplete contacts as the source of decision) Owner of asset has right of control, apart from what has been contracted out. Now, ownership will affect ex post surplus, which in turn will affect incentives to make a ex-ante relationship specific investment. A merger then does not yield unambiguous benefits as owner-manager looses control incentives to invest in the ex ante relationship specific investment decrease. Thus size of firm is determined by what is best for levels of ex-ante investment.

- Since all ownership structures cause ex-ante inefficiency balancing Costs and Benefits suggest highly complementary assets should be owned in common. As firm grows, the relation of one asset to the other can diminish – if no lock in effects separation better.(integration only increases hold ups without compensating gains.)

Labor, Labor Law and the 'Theory of the Firm' (contd.)

- Hart and Moore (90) JPE. 2 periods 1) relationship specific inv by workers – skill which are uncontractible ex ante(such as investment in settling in a location, training for tasks) 2) payoff by working on asset. Here workers work on an asset owned by a 'owner' & the paper investigates how concentration of asset impacts relationship specific investment made.

Labor, Labor Law and the 'Theory of the Firm' (contd.)

Translation of this into Labor and the Firm

- For Coase, labor hired in by the firm is very important – relations with labor very different from relations with independent contractor. Control and direction define what is internal and external to the firm
- Property Rights version of the Theory of the Firm ratifies this by identifying firm with all non human assets but excluding human assets (no slavery). However acknowledges ownership incentives to invest in relationship specific investments of workers.

Labor, Labor Law and the 'Theory of the Firm' (contd.)

- Need to Go outside to legal theory Orts suggest go to legal categories that can help solve economic problems. Eric W. Orts 'Shirking and Sharking: A Legal Theory of the Firm' *Yale Law & Policy Review*, Vol. 16, No. 2 (1998), pp. 265-329
- One such is work Njoya 'Property in Work', which says labor law is not just master and servant but other contract doctrines such as estopell, reliance, legitimate expectation can make us think of 'property in work'

Labor, Labor Law and the 'Theory of the Firm' (contd.)

- We can thus think of 1) human capital investments as relationship specific investment & 2) in the property rights vision of the firm while human assets (ownership) is impossible, workers are allowed to work with assets of the firm. We can add to this and say 'property in work' is tantamount to allowing workers to work with assets owned by the firm. Labor law specifies the 'property in work' & determines the ex- post surplus, which in turn determines ex-ante investments. Law may be source of determining ex-ante investment & therefore needs to be approached as such.

Labor, Labor Law and the 'Theory of the Firm' (contd.)

- Go Back to Klein, Crawford and Alchian (1978) and realise that when a worker can 'hold up' - "vertical integration of a relevant asset, the employee's human capital, has not occurred." + On the other end the employers oppurtunistic firing of a worker near retirement who has invested specifically in the job. Solution: Trade Unions, Fixed Wages, Long term Contracts as devices of vertical integration…

Labor, Labor Law and the 'Theory of the Firm' (contd.)

MacLeod and Nakavachara 'Can Wrongful Discharge Law Enhance Employment?' EJ 2007

- Looks at American use of good faith and other implied contract exceptions to the employment at will doctrine and sees a positive correlation between their use and employment where relationship specific investment by workers is important.
- Emphasizes that while legislation covers the average case, cases that come to be determined in courts on a/c of egregious behavior of employers are crucial marginal cases. These, if not corrected will lead to a preemptive fall in productive relations.

Concluding Comments

- As we move more towards greater ‘free’ contracts – greater onus on the judicial system – it needs to draw from doctrines of equity
- Equity doctrines are not merely ‘fair’ they also encourage mutually productive long term relations rather than quick short term ones.