

‘HIRE AND FIRE’ IN 2ND NATIONAL COMMISSION ON LABOR

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Since the release of the report of 2nd National Commission on Labour in 2002, there has been a major apprehension regarding its philosophy among scholars, political parties and general public alike. There has been a general apprehension that this report espouses a philosophy of ‘hire and fire’ and in doing so, it compromises the aspect of labour welfare. In the present paper, we have attempted to understand and analyse the real philosophy espoused by this report and in doing so, provide a proper evaluation of this report. In analysing the report, we have tried to understand whether there was an actual need for having a reform in Indian labour regulation regime and if at all reform was a necessity, whether the present scheme of reform has addressed such needs or not. Finally, by such analysis of the scheme of reform, we have attempted to answer the question as to whether such reform scheme is indeed a compromise with labour welfare.

I. INTRODUCTION

The 2nd National Commission on Labour was released by the then central government in 2002. The report runs into 1700 odd pages and not surprisingly, has opened up a can of rather nasty worms. Earlier, the 1st National Commission on Labour headed by Justice P.B. Gajendragadkar was constituted with the object of aligning or rather streamlining the labour laws with the then dominant philosophy of mixed economy. India was still in the Nehruvian era of socialistic rhetoric and the commission’s primary focus was on improving living conditions of workers, providing legal protection to workers etc.¹ In other words, the central theme of the 1st National Commission on Labour was labour welfare, and was in consonance with the popular social sentiments of the time. In contrast, the 2nd National Commission on Labour was constituted after almost four decades of the previous commission in a completely different background of liberalization, privatization and globalization (LPG). The focus of this commission was to reform labour law by liberalizing it to suit the LPG era. It has been contended by quite a few scholars that such liberalization essentially meant switching the theme from a pro labour to

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¹ V. Shankar & S. Kumaraswamy, *Report of Second National Commission on Labour: An Assault on Working Class*, http://www.cpiml.org/liberation/year_2002/november/article.htm (last visited Jun. 22, 2007).

a pro bourgeois labour law system.² The validity of such claim stands to be analyzed and confirmed. The commission, though, states its objective in very clear terms as:

*“Rationalization of labour laws and formulation of an umbrella legislation to provide minimum protection for the unorganized sector workers.”*³

Since in midst of genuine controversy nothing can be taken at face value, even such a claim of object by the commission has to be analyzed in light of actual provisions of the commission’s report for confirmation.

The controversy that has been thrown up by this commission report is a conflict between two contrasting legal regimes: a legal regime promoting a rigid labour law structure where termination or retrenchment is extremely difficult and priority is given to labour rights over the demands of market economy and another promoting a flexible and liberalized labour law regime operating through contractual labour. It is contended that this commission report accepts the principle of ‘hire and fire’ and by agreeing to the ‘hire and fire’ philosophy it has failed to protect the interest of labour.⁴ A proper analysis of these two conflicting viewpoints is needed to arrive at a possible answer as to whether the apprehensions are well founded or not. This will require categorizing and answering of few questions: first of all, the rationale behind constituting such a reform commission has to be found, then it has to be analyzed whether this commission report has truly succumbed to the philosophy of ‘hire and fire’ (in other words, does liberalization policies essentially and exhaustively mean subscribing to a hire and fire or contractual labour regime) and lastly, even if its found that the focus of the commission report is on a ‘hire and fire’ philosophy, it has to be analyzed whether that is something not pro labour and amounts to giving in to demands of market economy compromising labour welfare. In this paper, we shall undertake the task of analyzing the report of the 2nd. National Commission on Labour in light of these questions for a possible solution resolving this conflict. This article intends on putting forth the view that a contractual labour or ‘hire and fire’ regime does not necessarily mean compromising labour interests. Balancing labour interest with liberalization and flexibility in labour law regime is the possible solution.

² *Id.*

³ Object, 2nd National Commission on Labour Report, 2002, available at http://labour.nic.in/lcomm2/nlc_report.html.

⁴ Note of dissent by C.K.Saji Narayanan, 2nd National Commission on Labour Report, 2002, *supra* note 3.

II. REFORMING INDIAN LABOUR LAW: NECESSITY OR LUXURY?

The 2nd National Commission on Labour was constituted with the objective of reforming the labour law to suit it to the existing era of liberalization, privatization and globalization.⁵ Before going into any analysis or discussion with respect to any specific issue in the commission report, we feel it necessary to address a few very basic questions:

- Was it really necessary to reform the existing labour law?
- Was the existing regime insufficient and unsuccessful? If so, what is the kind of reform that is needed?

Answering these questions is essential for proper appreciation or criticism or even plain analysis of the report submitted by the 2nd National Commission on labour.

A. WHY REFORM? LOCATING POSSIBLE CHINKS IN THE EXISTING LABOR REGULATION REGIME

There are a multitude of laws regulating labour in India. The body of legislation that regulates industrial and labour relations is truly huge. To name just a few, Minimum Wages Act, 1948; Trade Unions Act, 1926; Contract Labour Act, 1970; Weekly Holidays Act, 1942; Beedi and Cigar Workers Act, 1966. These, it is reminded, is a mere sampler and there are many more such legislations regulating labour relations in India.

Today, in India there are 45 legislations at the national level and close to four times of that at the level of state governments that monitor the functioning of labour markets.⁶ Many of these laws date back to pre independence colonial era, passed with the objective of controlling conflict and enhancing industrial efficiency. Sadly, experience in recent times has not been too encouraging. According to recent World Bank estimates, in 2004, there were 482 cases of major work stoppages, resulting in 15 million human days of work loss.⁷ Between 1995 and 2001 around 9% of factory workers were involved in these stoppages. The figure for China is close to zero. On the other hand, the wages of Chinese workers are rising at a much faster rate as compared to that of Indian workers. It must be noted that these facts are not entirely unrelated.⁸

⁵ *Supra* note 1.

⁶ See Kaushik Basu, *Why India's labour laws are a problem*, available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/so> (Last visited on June 28 2007)

⁷ *Id.*

⁸ *Id.*

Multitude of laws regulating similar relations pose a very obvious problem: the legislations are often found to be overlapping and even contradictory. This gives rise to enormous confusion in the actual operation of the legislations and often proves to be a hindrance in the path of achieving the objective of such legislation.⁹ In view of such mazy and chaotic regime regulating labour, it seems reasonable that there is a need to streamline the regime and there is a strong cause for a reform and even overhaul.¹⁰

These discussions without reference to the single most important legislation regulating labour in India, the *Industrial Disputes Act, 1947* (hereinafter referred to as the *IDA*) will prove to be of little or no value. This act was enacted a few months before India's independence for primarily guiding the 'hire and fire' rules of the industrial sector (although the formal objective of this Act states it was enacted with the object of maintaining *industrial peace*.¹¹) This act has been vehemently criticized by noted economist, Kaushik Basu as:

*"A good example of a well-meaning policy that is founded on antiquated economics and a handsome misunderstanding of the way markets function."*¹²

Had it not been supported by his pertinent observations, such statement could have been ignored as mere overtly harsh criticism, but empirical observations stated in support of such statement makes it extremely difficult to dismiss such statement as mere misapprehended criticism. It is a fact that the IDA makes it very hard for firms to fire workers. Further, an amendment made to the IDA in the mid-1980s requires that any firm employing more than 100¹³ workers needs to get permission from the state government before retrenching workers (and in practice that permission is seldom given).¹⁴ It's often said that such a regime is primarily responsible for holding back the growth of manufacturing sector of the country. This rigid set up, not leaving any room for free contracting, discourage functioning or setting up of manufacturing units with volatile demand which requires the freedom of free contracting. This has been illustrated by a classic illustration by Kaushik Basu:

"Suppose a firm wants to manufacture a product that has volatile demand - like fashion garments. This firm may want to offer workers higher wages but make it clear to them that they could be given a month's notice and asked to leave. Such a

⁹ See Basu, *supra* note 6.

¹⁰ *Id.*

¹¹ Statement of Object and Reason, The Industrial Disputes Act, 1947.

¹² See Basu, *supra* note 6.

¹³ Act 46 of 1982, S. 12.

¹⁴ See Basu, *Supra* note 6.

contract will have no legal standing because the IDA specifies in advance how and when workers may and or may not be retrenched. Hence we do not see such contracts.”

Absence of scope of free contracting thus is seen by many as one of the shortcomings of the present regime. It has been consistently argued that such *rigid* framework without the scope of free contracting is also responsible for stunted growth of employment opportunities in the manufacturing sector. The general conclusions in this regard can often be misleading. At first sight, this legal regime might look like a regime protecting the jobs of poor workers. What often is overlooked is the fact that this law also keeps hundreds of thousands of workers unemployed because firms, wary of the fact that they will not be able to offload them, do not hire in the first place.¹⁵ This acts as a huge disincentive for potential manufacturing units dealing with commodities with volatile demand. They often reconsider setting up of labour intensive units, as the legal regime is found to be very unaccommodating. Both growth of manufacturing sector and employment is lost that way and the figures speak for themselves. Labour data from the 1980s show that the number of people employed in firms of size greater than 100 workers has gone down. *This has been the market's natural response to the amendment in the mid-'80s.*¹⁶

Some other sets of facts also bring in an interesting pattern. Some recent data compiled by the World Bank collate the level of rigidity of hiring and firing rules in different nations -100 being the score of the highest conceivable rigidity. India is among the most rigid countries with a score of 48. China has a score of 30, Korea 34, Norway 30; Singapore close to 0. *The fact that the less rigid nations also have more efficient economies, higher wages and a smaller share of labourers who are long-term unemployed must be taken note of and should not be dismissed as a freak coincidence.*¹⁷

The shortsighted nature of the policy behind enacting most of the labour laws contributed to this present rigid state of the regime.¹⁸ Besides the problem of

¹⁵ *Supra* note 10.

¹⁶ *Id.*

¹⁷ See Basu, *supra* note 6.

¹⁸ “*Most of India's labour laws were crafted with scant respect for 'market response.' If X seemed bad, the presumption was that you had to simply enact a law banning X. But the fact that each law leads entrepreneurs and labourers to respond strategically, often in complicated ways, was paid no heed. In a poor country no one with any sensitivity wants workers to lose their jobs. So what does one do? The instinct is to make it difficult for firms to layoff workers. That is exactly what India's Industrial Disputes Act, 1947, did, especially through some later amendments, for firms in the formal sector and employing more than 100 workers. But in today's globalise world, with volatile and shifting demand, firms have responded to this by keeping their labour forces as small as possible. It is little wonder that in a country as large as India less than 10 million workers are employed in the formal private sector. Some commentators have argued that India's labour laws could not have had much of a consequence since most of them apply to only the formal sector. What they fail to realise is that one reason*

rigidity, India's complex web of legislation leads to a system of dispute resolution that is incredibly slow. Data from the Ministry of Labour reveal that in the year 2000 there were 533,038 disputes pending in India's labour courts; and of these 28,864 had been pending for over 10 years. This is yet another problem that has to be addressed for reforming the existing regime.¹⁹ These observations by noted economist Kaushik Basu strongly advocate the need for a reform in Indian law. Rigidity seems to be the primary shortcoming of the existing regime.

B. POSSIBLE SOLUTION: IMPARTING FLEXIBILITY BY INTRODUCING A CONTRACTUAL HIRE AND FIRE OR 'FREE CONTRACTING' REGIME

As it is evident from the discussion on shortcomings of the existing labour law regime, reforming it would require removal of the excessively rigid framework. For achieving this object, there seems to be strong argument in favor of introducing some degree of freedom for free contracting for imparting flexibility in an otherwise rigid regime.

C. RECONCILING THIS SOLUTION WITH OUR PRO-LABOUR PHILOSOPHY

A question arises that by espousing such cause for reform, are we increasingly playing in hands of market economy compromising labour welfare? Answering this question will provide an insight into the matter as to whether the reforms that are hinted to be required, are compatible with the social welfare philosophy espoused by Indian constitution. The answer will also help in determining the model of reform that has to be adopted.

At the very first instance, it is submitted that the fear, that the required labour reform in form of introducing a free contracting regime is in conflict with labour welfare seems to be unfounded. Espousing a cause for introduction of free contract does not imply advocating a regime which recognizes and encourages freedom of firms to arbitrarily hire and fire workers. What we are advocating is a legal regime which allows the firms to regulate labour through contractual agreements depending on their needs and demands. This, it is submitted, will introduce the much needed flexibility in the labour law regime.

the formal sector has remained miniscule is because of these laws (and also the culture that the laws have spawned)." Basu, *Supra* note 6.

¹⁹ *Id.*

III. PHILOSOPHY OF HIRE AND FIRE IN 2ND NATIONAL COMMISSION ON LABOUR REPORT: TRACING IT AS A STEP TOWARDS REFORM AND ASCERTAINING ITS POSSIBLE EFFECT

As it has been already discussed in the preceding chapter, a rigid labour regulation framework seems to be the primary shortcoming of the existing regime. It has already been empirically demonstrated that such rigid framework making hiring and firing extremely difficult is a major force that held back growth of the manufacturing sector. A reform of the existing regime in its true sense would thus require removal of this rigid framework making retrenchment extremely difficult, in order to rejuvenate manufacturing sector, which in turn will result in economic growth and increased employment opportunity. For achieving this end, the only plausible solution seems to be a more flexible labour regulation regime with *increased scope for free contractual hire and fire*. A proposal for reform to be of any consequence must address this issue in these lines. With this background, we will have a close look at the 2nd National Commission on Labour Report to try and identify whether this reform proposal has addressed this issue.

A. HIRE AND FIRE IN 2ND NATIONAL COMMISSION ON LABOUR REPORT

Chapter V of the report reads '*Approach to review of laws*'. The report promptly brings in the issue of *right to hire and fire at will* of the entrepreneurs. In a very matter of fact manner the report did not go into the question of merits and demerits of such right but instead emphasized that such a right to hire and fire at will implies discretion on part of the employer and hence the discretion should not be unbounded and arbitrary. The same should be subject to judicial review.²⁰ The report explained the importance of judicial review of exercise of such right to hire and fire at will in the following words:

"When one asks for the right to hire and fire at will, it means the will of the entrepreneur; exercised without hindrance, on the basis of what he considers legitimate or warranted. The question that arises is whether this 'right' is to be exercised, closing all avenues for a third party review or a judicial review. It is easy to take the view that the person against whom the action is taken should not have a veto. But is he to have a right of appeal against animus or prejudice or caprice? If there is to be a right to appeal, it has to be to a judicial or quasi-judicial authority. We cannot ignore the fact that even if the labour court does not have jurisdiction, and the existing laws are

²⁰ See Chapter V, 2nd National Commission on Labour Report, 2002, *supra* note 3, at para. 5.33

*amended to provide for the right to hire and fire, the Constitutional rights of the citizen to seek justice according to the principles of natural justice cannot be taken away”.*²¹

The implied acquiescence of the report to the philosophy of ‘hire and fire at will’ or in other words the ‘free contract’ approach must be noted. What the report was concerned with, it seemed, is not the merits of the philosophy espoused, but a reasonable mode of implementation of the free contract approach. It clearly implies opinion on the part of the commission that it feels introducing such a free contracting or ‘hire and fire at will’ regime indeed is necessary, and it is more of a matter of providing a procedural guarantee of judicious implementation of this regime that the commission is concerned with. It is submitted that the commission seems to be not too far off the mark in its formulation of approach of reform. The report also identified the fact that introduction of such a free contracting regime will demand fundamental change in perception of ‘employment’. It is indeed obvious that introduction of a regime that only recognizes employment through contracts for stipulated period of time would necessitate a fundamental change in the conception of employment as is understood in still existing system espousing ‘permanent jobs’.²² The report is also quick to point out that such a transition would require certain preconditions. Among the preconditions, it specifically emphasized institutionalizing social security measures. In the words of the report:

*“A fundamental change of this kind has to be preceded by (i) the evolution of a socially accepted consensus on the new perception of jobs (ii) the evolution of a system of constant up-gradation of employability through training in a wide spectrum of multiple skills; (iii) the setting up of a system of social security that includes unemployment insurance and provisions for medical facilities; and (iv) the institution of a mandatory system of two contracts that each employer signs with the employees (somewhat as in the Chinese system) – one, an individual contract with each worker, and two, a collective contract with the workers’ union in the undertaking.”*²³

The report thus observed that there are complex considerations involved in implementation of the shift from the present rigid regime to a free contracting regime. At the same breath, the report was emphatic that existence of such considerations should in no way deter the necessary transition.²⁴ If the approach is anything to go by, it seems that the report is sure to recommend some changes in line of introducing a ‘free contracting’ or ‘hire and fire at will’ regime.

²¹ *Id.*

²² See Chapter V, 2nd National Commission on Labour Report, 2002, *supra* note 3, at para.5.34,

²³ Chapter V, 2nd National Commission on Labour Report, 2002, *supra* note 3, at para. 5.35-36

²⁴ See Chapter V, 2nd National Commission on Labour Report, 2002, *supra* note 3, at para.5.36,

One of the major contentions arose regarding viability of existing § 9A of The Industrial Disputes Act, 1947 read with item 10, 11 of the Fourth Schedule. Items 10 and 11 of Fourth Schedule read:

*“10. Rationalization, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen;
11. Any increase or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift not occasioned by circumstances over which the employer has no control.”*

It has been vehemently contended by employers that the aforementioned provisions imparts rigidity in their functioning thus affecting their efficiency. It has been contended that such provisions prevent the employers from adjusting labour size to meet market demands and economic exigencies in the best interest of the undertaking. The report observed that this concern is particularly justified in this present era of globalization and liberalization where all economic activities have become subject to market pressures, compelling employers to accept different levels of adjustments, including the size of the labour force, if he wishes to continue in business.²⁵ Accordingly, the report found that it is entirely unreasonable as to why such an important decision affecting the very existence of the undertaking can not be left best to the prudence of the employer. The report argued:

“Size of employment is a matter which can be best decided by the employer himself or herself keeping in view various attendant circumstances. If an entrepreneur starting an activity afresh has the right to decide on the number of persons he/she will employ in various sectors of his activity, there is no reason why this option cannot be exercised by an existing employer in, respect of his continuing activity. A prudent employer will, no doubt, not act capriciously, and in the pattern of industrial relations we envisage, he will be ill advised not to consult the negotiating agent on such matters even as he might consult financial institutions, technical experts and others; but, yet, the decision will be his”.²⁶

The drift of the report is clear. It clearly finds merit in the argument that the aforementioned provisions have imparted rigidity in the labour regulation regime in matters of employing and retrenching workers and such rigidity is not viable in the present era of globalization and increased competitiveness. Thus, the report favors removal of such rigidity by allowing the employers to take their call on *hiring and firing* workers in order to adjust the size of the labour force as per

²⁵ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at para.6.81.

²⁶ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at para. 6.82.

the market demands and economic exigencies. This essentially implies a clear drift towards introduction of 'hire and fire at will' regime. But at the same time the report did qualify this discretion or will of employers. It envisaged a non capricious action on part of the employers in this matter and also suggested consultation with market experts to arrive at the right decision regarding size of labour force, employment, retrenchment. This read with Chapter V of the report which stated provision regarding judicial review of the action of the employer, essentially strengthens the provision of judicial review of such action by defining the considerations and scope of judicial review. As anticipated, the report suggested a relaxation of the stringent norms prescribed for retrenching workmen. The report stated that there need be no statutory obligation for the employer to give prior notice, in regard to item 11 of the Fourth Schedule for the purpose of increase or reduction in the workforce, as is the position now under Section 9A.²⁷

There have also been strong arguments from the employer's side for removal of Chapter V B of the Industrial Disputes Act 1947 (IDA) which mandates prior permission of the appropriate government in respect of retrenchment and layoffs. The managements argued that achieving or maintaining competitiveness in a globalized era will be impossible if they are to treat the workforce employed to be constant. In an era where interests are market driven, the undertakings can not possibly exist if they are not given opportunity to adjust their workforce as per the requirement of the market.²⁸ The only concern is to address the fear of the Trade Unions that the total elimination of the existing law that requires the Government's permission for retrenchment or downsizing will lead to sudden and indiscriminate laying off or retrenchment of workers, resulting in sudden loss of jobs and incomes, uncertainty and possible starvation for themselves and their families. The commission report suggested '*viable and adequate system of social security including unemployment allowances and transitional facilities*'²⁹ as the possible solution but also observed that since such infrastructural buffer can not be obtained overnight, the viable alternative is:

*"to pay adequate compensation, offer outsourced jobs to retrenched workers or their cooperatives, if any enterprise decides to close down give workers or Trade Unions a chance to take up the management of the enterprise before the decision to close is given effect to: underwrite facilities for medical treatment, education of children, etc. and provide for a third party or judicial review of the decision, without affecting the right of the management to decide what economic efficiency demands."*³⁰

²⁷ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at para.6.82.

²⁸ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at para.6.85.

²⁹ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at paras. 6.85-86

³⁰ *Id.*

Consequently, the report stated that prior permission will not be necessary in respect of lay-offs and retrenchment of any employment size. Workers, however, are entitled to two months notice, or notice-pay in lieu of notice, in case of retrenchment. The Commission recommends that the rate of retrenchment compensation should be higher in a running organization than in a sick one.³¹ The Commission also stated that Chapter VA of the Act may be amended to provide for sixty days notice for both retrenchment and closure, or pay in lieu thereof, the provision for permission to close down an establishment employing 300 or more workers should be made a part of chapter VA, and chapter VB should be repealed.³² This would essentially mean leaving out almost 60% of the workforce (constituting industries employing up to 300 workmen) to the free contracting regime or hire and fire at will regime depending on the changing market demands.³³ So the reform in form of introduction of the free contracting regime has arrived. Now it remains to be answered as to how far can we balance this philosophy of 'hire and fire' with that of labour welfare.

B. MODEL OF 'HIRE AND FIRE' REGIME PROPOSED IN THE REPORT- PRO LABOUR OR ANTI LABOUR?

The 'hire and fire' regime proposed in the 2nd National Commission on Labour Report has come under severe criticism from a number of fronts. Not very surprisingly, the harshest critic of the recommendations in the report have been certain leftist political bodies but criticism, as they have put, seems to be politically motivated and lame to say the least. For example the proposed hire and fire regime has been criticized in the following words by a political body in its website:

*"The recommendations have also made section 9A of the Industrial Disputes Act redundant and have given complete freedom to the employers to effect any change in working conditions even without notice. The report of the Second Labour Commission has thus given a blanket approval to some of the long-standing demands of the industry."*³⁴

It is submitted that such criticism is misinformed and even misleading. It is submitted that the recommendations regarding § 9A of ID Act is in context of item 10 and 11 of Fourth Schedule which substantially concern issues of retrenchment and reduction of size of workforce and are not ordinary conditions of service. The freedom given to employer to effect change is regarding these items

³¹ See Chapter VI A 2nd National Commission on Labour Report, *supra* note 3, at para.6.88. See also Rudder Datt, *Report of National Commission on Labour: Inconsistencies weaken the safety net*, available at <http://www.blonnet.com/2002/12/03/stories/2002120300080900.htm> (last visited Jun. 21, 2007).

³² See *supra* note 3, at para. 6.89.

³³ *Id.*

³⁴ See generally Shankar & Kumaraswamy, *supra* note 1

i.e. item 10 and 11 of the Fourth Schedule and not regarding 'any service condition'.³⁵ Again, the statement that this report has given 'a blanket approval' to demands of industry is prejudiced by political color as it does not seem to be so from a reading of the original provisions of the report. The commission has observed initial difficulties in the transition as our infrastructure of social security is not strong enough but that does not warrant a criticism that the report has sought to substitute job security with insufficient social security measures.³⁶ The commission, identifying this problem has proposed a number of alternatives such as adequate compensation, outsourced job opportunity etc.³⁷ Most importantly, the report throughout has advocated for judicial review of employer's action to ensure that such action is not capricious. As such, the hand given to employers is under no circumstance 'blanket'. Not surprisingly, the alternatives and the aspect of judicial review does not find place in the criticism. It has to be understood that what is proposed by way of reform is not freedom to employers to arbitrarily hire and fire workers. What is proposed is a 'hire and fire' regime where an employer can enter into different kinds of contracts with the workers according to needs and requirements of the market. We have to see the proposition from another perspective that one firm may offer a low wage and life-time guarantee of work and another a high wage and very short notice to quit.³⁸ The importance of non capricious action and providing adequate procedural guarantee in form of judicial review of such action is repeatedly emphasized in the report.³⁹ Safeguards during period of transition from a secure job regime to a contract labour regime in form of '*viable and adequate system of social security including unemployment allowances and transitional facilities*'⁴⁰ have been proposed. Since due to lack of infrastructural facility these propositions cannot be realized immediately, separate alternative solutions to safeguard labour interests by '*adequate compensation, offer outsourced jobs to retrenched workers or their cooperatives*'⁴¹ have also been proposed. Motivated criticism omitting mention of these features has given rise to this misapprehended conception about the proposed 'hire and fire' regime as being *anti* labour. The argument that removal of the rigid framework of retrenchment will result into growth of industrial undertakings and employment opportunity has also been criticized. Responding to this argument that such a policy of labour

³⁵ *Supra* note 23.

³⁶ "The security proposed by the Commission is not job security but some kind of social security in the form of meager financial assistance till the retrenched, laid-off worker hopefully finds a new job." Shankar & Kumaraswamy, *supra* note 1.

³⁷ Chapter VI A 2nd National Commission on Labour Report, 2002, *supra* note 3, at para. 6.82.

³⁸ *Supra* 9.

³⁹ See generally ¶ 5.33 of Chapter V, ¶ 5.35-36 of Chapter V, ¶ 6.82, Chapter VI A 2nd National Commission on Labour Report, 2002, available at http://labour.nic.in/lcomm2_nlc_report.html.

⁴⁰ *Supra* note 25.

⁴¹ *Supra* note 26.

flexibility will lead to enlargement of employment size, the S. P. Gupta Special Group on Targeting Ten Million Employment Opportunities per Year (2002), states:

*“One should remember that the contribution of total employment by the organized private sector is hardly 3.5 per cent and, therefore, the potential of generating sizable employment in this sector, even by changing the law, will be insignificant over the Tenth Plan period.”*⁴²

What such criticism fails to realize is the fact that one reason the formal sector has remained miniscule is because of these laws (and also the culture that the laws have spawned).

The proposed reform of labour laws is, contrary to popular perception, in the interests of the workers, what government needs to do is have this topic debated and explained so that workers, instead of opposing such reform, become its advocate. Misleading, misinformed and politically motivated criticisms should be countered immediately.⁴³

IV. CONCLUSION

The primary problem with the Indian labour regulation regime is its rigidity in matters of employment and retrenchment. This shortcoming is primarily responsible for holding back growth of the industrial/manufacturing sector and thereby reducing employment opportunity. The Report of the 2nd National Commission on Labour recommends reform of the existing labour law regime by introducing a *‘hire and fire at will’* or a free contractual regime as this will impart much needed flexibility in the otherwise rigid labour regulation framework where labour retrenchment is extremely difficult. Such reform has come under severe criticism from all fronts for providing the employers *‘free hand’* in employing and retrenching workers, but such criticism of the proposed reform as being *anti* labour is misapprehended. The popular perception in this regard is conditioned by misleading and misinformed criticisms which *fails or malafidely omits* to mention that the report also states a number of observation and recommendations safeguarding labour interest as it understands that the freedom given to employer to free contract should not be unbridled. The report qualifies such freedom to *‘hire and fire at will’* by providing both procedural and infrastructural guarantees. The proposed reform, contrary to popular perception, is in the interests of the workers as the reform, rendering the framework flexible, will ensure growth of industrial undertakings and with it, employment opportunity.

⁴² Ruddar Datt, *Report of National Commission on Labour: Inconsistencies weaken the safety net*, <http://www.blonnet.com/2002/12/03/stories/2002120300080900.htm> (last visited Jun. 21, 2007).

⁴³ See generally Shankar & Kumaraswamy, *supra* note 1.

Thus, our hypothesis that introducing a contractual labour or *'hire and fire'* regime does not necessarily mean compromising labour interests and balancing labour interest with liberalization and flexibility in Labour Law regime is the possible is found to be correct. It is admitted, although, that for this to hold good, the safeguards stated in the report have to be adequately implemented.