

“... the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them.”

-ILO Convention No. 168, 1988

I. Introduction:

The National Rural Employment Guarantee Act (NREGA) is an Indian job guarantee scheme, enacted by legislation on August 25, 2005. The NREGA presently, **Mahatma Gandhi National Rural Employment Guarantee Act** (MGNREGA) is an Indian law that aims to guarantee the 'right to work' and ensure livelihood security in rural areas. It provides a legal guarantee for one hundred days of employment in every financial year to adult members of any rural household willing to do public work-related unskilled manual work at the statutory minimum wage. This act was introduced with an aim of improving the purchasing power of the rural people, primarily semi or un-skilled work to people living in rural India, whether or not they are below the poverty line. Roughly one-third of the stipulated work force must be women.

II. Employment, Obligation of State and Employment Jurisprudence:

The word 'employment' is a situation in which someone has regular paid work i.e. a work that somebody is paid regularly to do for a person or company². It may be the action of giving work to someone. In other words, it is a contract between two parties, one being the employer and the other being the employee³. So, in brief, the employment indicates the followings-⁴

- an act or instance of employing someone or something.
- the state of being employed; employ; service: *to begin or terminate employment.*

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² Available at <http://www.macmillandictionary.com/dictionary/british/employment>

³ An employee may be defined as a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

⁴ Available at <http://dictionary.infoplease.com/employment>

- an occupation by which a person earns a living; work; business.
- the total number of people gainfully employed or working.
- an activity or the like that occupies a person's time: *She found knitting a comforting employment for her idle hours.*

Generally, employment means the state of having paid work.⁵ Employment and service terminologically, are different. While service means the action of helping or doing work for someone or a system supplying a public need such as transport, communications, or utilities such as electricity and water.⁶

The ILO in the year 1964 advocated for "full, productive and freely chosen employment", linking the obligation of States parties to create the conditions for full employment with the obligation to ensure the absence of forced labour.⁷ It had been followed by the International Covenant on Economic, Social and Cultural Rights, 1969. In Part III, Article 6 it states-

"(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual".

Previously, Article 23.1 of the Universal Declaration of Human Rights recognised:

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

The *United Nations Committee on Economic, Social, and Cultural Rights* in its **General Comment** on the right to work in article 2,

⁵<https://www.google.co.in/#psj=1&q=definition+of+employment>

⁶<https://www.google.co.in/#psj=1&q=definition+of+service>

⁷International Labour Organization Convention No. 122 concerning Employment Policy (1964)

paragraph 1, included that the States parties are required to utilize “all appropriate means, including particularly, the adoption of legislative measures” to ensure that everyone is protected from *unemployment and insecurity in employment* and can enjoy the right to work as soon as possible. States parties should consider the adoption of specific legislative measures for the implementation of the right to work. Those measures should-⁸

- establish national mechanisms to monitor implementation of employment strategies and national plans of action and
- contain provisions on numerical targets and a time frame for implementation.

Further, the **General Comment No. 3** (1990) of the Committee confirms that States parties have a core obligation to:⁹

- To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
- To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers’ and workers’ organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular.

Further, the **General Comment 18**, on the **Right to work**, the States parties obliged to consider the adoption of specific legislative measures to-

- establish national mechanisms to monitor implementation of employment strategies and national plans of action and

⁸ Available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/generalcomments/committeeeconomicsocial/nr/1347>

⁹ Available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/generalcomments/committeeeconomicsocial/nr/1347>

- contain provisions on numerical targets and a time frame for implementation.

They should also provide the means of ensuring compliance with the benchmarks established at the national level and the involvement of civil society, including experts on labour issues, the private sector and international organizations. In monitoring progress on realization of the right to work, States parties should identify the factors and difficulties affecting the fulfilment of their obligations. The National Employment Strategy must-

- take particular account of the need to eliminate discrimination in access to employment;
- ensure equal access to economic resources and to technical and vocational training, particularly for women, disadvantaged and marginalized individuals and groups, and
- should respect and protect self-employment as well as employment with remuneration that enables workers and their families to enjoy an adequate standard of living.

Thus, the international human rights framework places primary responsibility on governments for ensuring the right to work. Governments are obligated to-

- To recognize "Full, productive and freely chosen employment" to gain his living by work, linking the obligation of States parties to create the conditions for full employment with the obligation to ensure the absence of forced labour¹⁰.
- To take steps to include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment, as a means to safeguard fundamental political and economic freedoms to the individual.
- Utilize the maximum available resources to ensure the right to work based on the resources of society as a whole, not only the resources within the current budget.
- Prevent third parties, including individuals, businesses and non-governmental institutions, from depriving people of their rights (protect); and taking active measures so that individuals and communities can realize their rights (fulfill).

¹⁰International Labour Organization Convention No. 122 concerning Employment Policy (1964)

- Guarantee equality and non-discrimination of opportunity, in access to employment, training and working conditions, and treatment in employment on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.
- To provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal.¹¹
- Guarantee human rights in relation to both conduct and results, so that governments are responsible for their direct action and inaction, as well as, for example, the resulting conditions of work and rates of unemployment.
- Respect, protect and fulfill the right to work, by refraining from any action that deprives people of their rights (respect).
- Monitor the fulfillment of the right to work by the government and non-state actors, provide effective remedies when rights are violated, and ensure the effective participation of civil society in the ensuring the right to work, for example, by protecting the right to organize.

III. Right to Work with Human Dignity and Employment Jurisprudence:

*The right to work is not an unconditional right to a job, but an obligation on states to take measures designed to eliminate unemployment.*¹² The **right to work** is the concept that people have a human right to work, or engage in productive employment, and may not be prevented from doing so. The phrase "the right to work" was coined by the French socialist leader Louis Blanc in light of the social turmoil of the early 19th century and rising unemployment in the wake of the 1846 financial crisis which lead up to the French Revolution of 1848.¹³ The right to property was a crucial demand in early quests for political freedom and equality, and against feudal control of property. Property can serve as the basis for the entitlements that ensure the realisation of the right to an adequate standard of living and it was only property owners which were initially granted civil and political rights, such as the right to vote. Because not everybody is a property owner, the right to work was enshrined to allow everybody to attain an

¹¹Art. 4, ILO Convention No. 158 concerning Termination of Employment (1982)

¹²<http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-work>

¹³Revolutions of 1848: A Social History by Priscilla Robertson, 1952, Princeton University Press

adequate standard of living.¹⁴ The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.¹⁵ Now, the right to work is enshrined in **Articles 23 and 24** of the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on 10 December 1948; **Articles 6, 7, 8, and 10** of the *International Covenant on Economic, Social, and Cultural Rights* adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976; **Articles 8 and 22** of the *International Covenant on Civil and Political Rights* adopted by the United Nations General Assembly on 16 December 1966, and in force from 23 March 1976; **Article 5** of the *Convention on the Elimination of All Forms of Racial Discrimination* adopted and opened for signature by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969; **Article 11** of the *Convention on the Elimination of All Forms of Discrimination Against Women* adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it came into force on 3rd September 1981. The right to work guarantees the opportunity to have fulfilling and dignified work under safe and healthy conditions, with fair wages affording a decent living for oneself and one's family. It also provides for freedom from unemployment and the right to organize. Several key human rights principles are fundamental to the right to work with dignity¹⁶:

- **Individual and Collective Right:** The right to work is an individual right that belongs to each person and is at the same time a collective right to form and join trade unions.
- **Availability:** The government must provide specialized services to assist and support individuals in order to enable them to identify and find available employment.

¹⁴Alfredsson, Gudmundur; Eide, Asbjorn (1999). *The Universal Declaration of Human Rights: a common standard of achievement*. MartinusNijhoff Publishers. p. 533. ISBN 978-90-411-1168-5.

¹⁵<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/generalcomments/committeeeconomicocial/nr/1347>

¹⁶Available at <http://www.nesri.org/programs/what-is-the-human-right-to-work-with-dignity>

- **Accessibility:** The labor market must be open to everyone and free of discrimination, as well as physically accessible to all.
- **Acceptability and Quality:** Workers are entitled to just and favorable work conditions, including safe working conditions, the right to form trade unions, and the right to freely choose and accept work.

The Constitution of India has conferred innumerable rights on the protection of labour which provides the sources of employment jurisprudence. Specifically, Articles 14, 19, 21, 23 and 24 form part of the Fundamental Rights guaranteed under Part III of the Constitution and Articles 38, 39, 39-A, 41, 42, 43, 43-A and 47 form part of the Directive Principles of State Policy under Part IV of the Constitution.

IV. MGNREGA vis-à-vis Employment Jurisprudence:

Article 21 of the Constitution of India clubs life with liberty, dignity of person¹⁷ with means of livelihood¹⁸ without which the glorious content of dignity of person would be reduced to animal existence. Further, the principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. Here, the State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right conferred under the Article 21. Though in India, Right to work is not a fundamental right, it is interesting to note that the MGNREGA aims to ensure the livelihood security which is a fundamental right and connecting the same with right to work for the unskilled rural population to have a better legal framework for implementation. Further, the Supreme Court has considered right to work can be claimed as fundamental right only after employment.¹⁹ Again, it has been recognized that right to work can be considered as fundamental right only in cases where legislative guarantee is given in the form of legislation.²⁰ Hence, it can be presumed that the guarantee ensured by the government in the form of MGNREA to provide 100 days work may be treated as fundamental. The Act initially spoke about it will be for 5 years, still, the Act

¹⁷ *Francis Coralie Mullin v. Administrator, Union Territory, Delhi*, AIR 1981, SC 746

¹⁸ *Olga Tellis v. Bombay Municipal Corporation*, 1986 AIR 180 1985 SCR Supl. (2) 51 ;1985 SCC (3) 545 1985 SCALE (2)5

¹⁹ *AIR India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645

²⁰ *State of Maharashtra v. Sau Shobha Vitthal Kolte*, AIR 2006, Bom 44.

is active and it may be submitted that due to the Constitutional obligation and vote bank politics this legislation will be in existence for ever. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) imparts dignity to the rural people through an assurance of livelihood security of the households²¹ in rural areas²² of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult²³ members volunteer to do unskilled manual work²⁴. People of rural areas are entitled to preferred work²⁵ under the Act, failing which the government is liable to pay an unemployment allowance within the stipulated time of 15 days. For poverty alleviation and rural development, the Central Government or the State Government, within the limits of its economic capacity and development, make provisions for securing work through MGNREGA to provide unskilled manual work not less than one hundred days in a financial year²⁶ on demand in order to ensure livelihood security and at the same time create durable assets to augment basic resources available to the poor. Let's have a look on the main features of the Act of 2005.

- The people involved in such unskilled manual works is likely to get the minimum wage fixed by the State Government under section 3 of the Minimum Wages Act, 1948 for agricultural labourers. Section 6(2)
- The applicant is entitled to receive a daily unemployment allowance within fifteen days of receipt of his application seeking employment or from the date on which the employment has been sought. Section 7(1)
- A person working for seven hours would normally earn a wage equal to the wage rate. Para 8; (Schedule I) [Section 4(3)]

²¹"household" means the members of a family related to each other by blood, marriage or adoption and normally residing together and sharing meals or holding a common ration card; (section 2(f))

²²"rural area" means any area in a State except those areas covered by any urban local body or a Cantonment Board established or constituted under any law for the time being in force; (Section 2(o))

²³"Adult" means a person who has completed his eighteenth years of age. (Section 2(a))

²⁴"unskilled manual work" means any physical work which any adult person is capable of doing without any skill or special training; (Section 2(r))

²⁵"preferred work" means any work which is taken up for implementation on a priority basis under a Scheme. (Section 2(k))

²⁶Section 3(1), the MGNREGA, 2005

- Women will be given Priority to in such a way that at least one-third of the beneficiaries shall be women who have registered and requested for work under this Act. Para 6; (Schedule II), [Section 5]
- A period of employment shall ordinarily be at least fourteen days continuously with not more than six days in a week. Para 15; (Schedule II), [Section 5].
- If any personal injury is caused to any person employed by accident arising out of and in the course of his employment, he shall be entitled to, free of charge, such medical treatment as is admissible under the Scheme. Para 24; (Schedule II), [Section 5].
- Where hospitalisation of the injured worker is necessary, the State Government shall arrange for such hospitalisation including accommodation, treatment, medicines and payment of daily allowance not less than half of the wage rate required to be paid had the injured been engaged in the work. Para 25; (Schedule II), [Section 5].
- If a person employed dies or becomes permanently disabled by accident arising out of and in the course of employment, he shall be paid by the implementing agency an ex- gratia payment at the rate of twenty-five thousand rupees or such amount as may be notified by the Central Government, and the amount shall be paid to the legal heirs of the deceased or the disabled, as the case may be. Para 26 (Schedule II), [Section 5].
- The facilities of safe drinking water, shade for children and periods of rest, first-aid box with adequate material for emergency treatment for minor injuries and other health hazards connected with the work being performed shall be provided at the work site. Para 27 (Schedule II), [Section 5].
- In case the number of children below the age of six years accompanying the women working at any site are five or more, provisions shall be made to depute one of such women worker to look after such children. Para 28 (Schedule II), [Section 5].
- The person deputed under paragraph 28 shall be paid wage rate. Para 29 (Schedule II), [Section 5].
- In case the payment of wages is not made within the period specified under the Scheme, the labourers shall be entitled to receive payment of compensation as per the provisions of the Payment of Wages Act, 1936 (4 of 1936). Para 30 (Schedule II), [Section 5].

- The wages under a Scheme may be paid either wholly in cash or in kind provided that at least one-fourth of the wages shall be paid in cash only. Para 31 (Schedule II), [Section 5]. Further, the State Government may prescribe that a portion of the wages in cash may be paid to the labourers on a daily basis during the period of employment. Para 32 (Schedule II), [Section 5].
- If any personal injury is caused by accident to a child accompanying any person who is employed under a Scheme, such person shall be entitled to, free of charge, such medical treatment for the child as may be specified in the Scheme and in case of death or disablement, through an ex gratia payment as may be determined by the State Government. Para 33 (Schedule II), [Section 5].
- In case of every employment under the Scheme, there shall be no discrimination solely on the ground of gender and the provisions of the Equal Remuneration Act, 1976 (25 of 1976), shall be complied with. Para 34 (Schedule II), [Section 5].

V. Conclusion and Suggestion:

Thus, it can be noticed that the entire body of legislation is one of the soundest source of employment jurisprudence in India which follows almost all of the established principles of employment jurisprudence. As in the very body of the Act there is no prohibition of employing pregnant women, people with disabilities²⁷ and people above the age of sixty (old aged people²⁸), sufficient precaution should be taken considering the nature of incapacities of such willing workforce in connection with the employment of such sections of people, even if there is a provision of assigning preferred works under this Act. Further, the Act has not laid down any sort of mechanism for the dismissal of a person from such a kind of employment.

²⁷See general comment No. 5 (1994) on persons with disabilities, including other references in paragraphs 20-24.

²⁸See general comment No. 6 (1995) on the economic, social and cultural rights of older persons, paragraph 22 (and paragraph 24 on retirement). See also ILO Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983. See article 1, paragraph 2, on access to employment. See also the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, proclaimed by the General Assembly in its resolution 48/96 of 20 December 1993.