

Employment Relations & Managerialist Undercurrents – The Case of Payment of Gratuity Act, 1972

Jerome Joseph & Srinath Jagannathan

The Payment of Gratuity Act, 1972 is an important legislation governing retirement benefits received by workers, and acquires particular significance in the absence of pension and lack of access to adequate social security for a large number of workers. We discuss here case laws pertaining to the Act in the last decade in the light of increasing the upper limit of gratuity payable to Rs. 10 lakhs. Case law pertaining to this important social security benefit suggests three broad areas of concern: inclusion-exclusion dynamics related to access to gratuity rights, the linkage of the denial or grant of payment of gratuity to reward for compliance and punishment for dissent, assertions of managerial prerogatives over the rights of workers in the pursuit of unilateralist dominance over employment relations.

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Introduction

The Payment of Gratuity Act, 1972 is an important legislation governing the retirement benefits received by workers. There has been a progressive and rapid withdrawal of the state as a bastion of employee welfare in the post liberalization phase as the state pursues the reform agenda in the wake of the relentless march of neoliberal ideologies, policies and practices.

It is evident from annual labour statistics that employment relations disputes pertaining to gratuity are on the increase. Considering 2009-10 alone, 3744 cases were filed with the appropriate controlling authority (Ministry of Labour & Employment 2011: 31). Including cases carried forward from the previous year, a total of 5174 cases were disposed off, and an amount of Rs. 28,87,70,325 was disbursed (ibid.). 1307 cases were filed with the appellate authority in 2009-10 and including cases carried forward from the previous year, 1352 cases were settled, and an amount of Rs. 1,90,57,612 was awarded to workers (ibid.). The magnitude of the awards given through third party intervention in-

dicates that violations of the Act by employers are on the rise.

The Payment of Gratuity Act, 1972 is a Central legislation which was enacted to regulate the payment of gratuity across the country for workers employed in factories, mines, oilfields, plantations, ports, railway companies, shops and establishments. It is however not applicable to employees of the Central and state governments who are governed by a different set of rules of gratuity. Earlier the Act was not applicable to employees who received more than Rs. 3500 as wages, but through an amendment in 1994 [Payment of Gratuity (Amendment) Act 1994] with effect from May 24, 1994, the Central Government removed this ceiling and made it applicable for all workers, including those in management and administrative cadres. According to the Act, a worker becomes eligible for gratuity if she has worked for five continuous years with an employer, and gratuity must be paid to her during separation arising from superannuation, retirement, resignation, death or disablement. The requirement of five continuous years of service does not apply in the case of death or disablement of a worker.

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Gratuity is paid at the rate of fifteen days wages for every year of service rendered by an employee, with the maximum ceiling on gratuity being ten lakh rupees, as per the amendment introduced in 2010 [Payment of Gratuity (Amendment) Act 2010], and effective from May 24, 2010. Prior to this amendment, the maximum ceiling on the gratuity amount was three lakh fifty thousand rupees as per the amendment introduced in 1998 [Payment of Gratuity (Amendment) Act 1998] and effective from September 24, 1997. For the calculation of fifteen days wages for monthly wage employees, the monthly wage is divided by twenty six and then multiplied by fifteen. In the case of piece rated workers, the average daily wages for the past three months of employment are calculated and then multiplied by fifteen. Employees in seasonal establishments are paid gratuity at the rate of seven days wages per season. Through a separate contract between employees and the employer, better terms of payment of gratuity than those specified in the Act can be arrived at. There is a provision that the gratuity of a worker can be withheld if it is established that the actions of the worker during the course of employment led to financial losses for the employer. The amount of deductions from gratuity can only be to the extent of damages established.

Payment of Gratuity Act, 1972 must be understood in the context of the decline of social security benefits for elderly people, and a retreat in commitment to implementing pension schemes in guaranteed, effective ways (Greenhouse 2008). Economic crisis can severely disrupt so-

cial security schemes and retirement benefits, and corporate leaders do often attempt to shift the discourse from personal responsibility to impersonal global events (Hargie, Stapleton & Tourish 2010). Ownership can be understood in the form of a hierarchy of claims on the assets and profits of an organisation (Erturk, Froud, Johal, Leaver & Williams 2010), and retirement benefits are an attempt by workers to reclaim ownership of their labour so that they are able to get the rewards for their labour power in their old age.

In this article, we analyse the issues emerging from recent Supreme Court judgements pertaining to the Payment of Gratuity Act, 1972. We discuss the emerging case law pertaining to the Act in the previous decade in the light of increasing the upper limit of gratuity to ten lakh rupees. The case law pertaining to this important social security benefit suggests that there are three broad areas of concern – inclusion-exclusion dynamics related to access to gratuity rights, the linkage of the denial or grant of payment of gratuity to reward for compliance and punishment for dissent, assertions of managerial prerogatives over the rights of workers in the pursuit of unilateralist dominance over employment relations - thus necessitating a strong case to protect the rights of workers pertaining to gratuity secured after years of the struggle of the toiling classes.

Inclusion-Exclusion Dynamics

The politics of exclusion emerges from territories of recognizability which create boundaries for those who cannot be recognized within prevalent grammars of

knowledge, identity and subject formation (Butler 2009). Exclusion involves the production of the marginal, so that prevalent power relationships in society are sustained and subject positions which can uneasily confront these power relationships are pushed to the periphery of discourse and practice (Samaddar 2009). In terms of lived experiences, exclusions are understood as the basis of second class citizenship, where equality, rights and access to dignified spatiality are subordinated to the needs of over-arching social contracts (Vosko 2006). Exclusion often results in the experiences of precariousness, insecurity, the loss of social and political rights, along with uncertain expressions of citizenship, where the immersion in a political collective allows for framing assertions of justice (Vosko 2010). This conceptual understanding of exclusion can enable us to understand the exclusions which have been practiced in the Payment of Gratuity Act, 1972 as evidenced by case law during the last decade.

In the Ahmedabad Private Primary Teachers' Association versus Administrative Officer and Others, the Supreme Court (2004(1) SCR 47) ruled that primary school teachers were not eligible for gratuity under the Act. The judgement heavily relied on the definition of employee envisaged in section 2(e) of the Act according to which “‘employee’ means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment

are express or implied, [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity].” The Supreme Court ruled that teachers do not fall under any of the categories of skilled, semi skilled or unskilled workers, nor could they be classified as working in managerial or administrative capacity. The Supreme Court compared the definition of an employee in the Gratuity Act with the definition of an employee in the Provident Fund Act, and found that the definition was more wide ranging. According to Section 2(f) of the Provident Fund 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.” Since the definition of an employee under the Gratuity Act was far more restricted than in the Provident Fund Act, the Supreme Court ruled that teachers were not eligible for gratuity. Later in 2009, the government introduced an amendment in Parliament [Payment of Gratuity (Amendment) Act 2009 applicable with retrospective effect from April 3, 1997] to ensure that teachers were covered under the Payment of Gratuity Act. Finally, it was not a unilateral act of the state that removed the barriers of exclusion for school teachers, but their own struggles for almost thirty years which led to their securing the right to gratuity (Kingdon & Muzammil 2000; Fernandes supports pension, gratuity;

Teacher’s association express concern 2004).

The exclusion of primary teachers from the Gratuity Act, up to the 2009 amendment, founded on a legislative definition of the meaning of “employee” by the legislature and buttressed by a disconnected and decontextualized interpretative jurisprudence of the judiciary, is indicative of the marginalization of a splintered working class rendered powerless and vulnerable in determining their own destiny. The Inclusion-Exclusion dynamics in working class struggles to secure and protect rights as evidenced by the struggle of one section of the working classes to seek the benefits of the Gratuity Act shows that the vulnerability of a splintered working class movement weakens its representative power in the face of the combined effect of the actions of employers, the legislature, the executive and the judiciary.

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When the employment relations stakeholders fail to recognize the vulnerability of post retirement employees and fail to provide for gratuity which is a matter of right after years of dedicated service, then this has grave consequences

for fair and just ways of employment governance. One of the major issues in industrial relations practice has been early retirement schemes which have been offered to enable employers to restructure their operations, and the consequences for workers in the form of curtailed benefits (Casey 1992). It may be difficult for unions to prevent discrimination against older workers, as employers attempt to enforce schemes of early exit in order to be relieved of many benefits that workers may become eligible for on a seniority basis (Duncan, Loretto & White 2000). Consequently, older workers are urged to accept insecurity as a natural condition of the employment relationship, and cope with the changed labour market situation by accepting different psychological stages of grief (Ainsworth & Hardy 2009, 2004). Even with respect to gratuity, this question of age assumes importance, as it is primarily seen as a retirement benefit, which allows older workers some sense of social security as they can lead their post retirement lives with dignity and self respect. Insisting that the ceiling of ten lakh rupees could not be increased further or that the number of days of wages for each year of service could not be increased beyond fifteen, the Labour Minister in the course of the Parliamentary debate said that employers do not have the capacity to pay (Rajya Sabha May 5 2010). This indicates that in the eyes of the executive arm of the state, the welfare of the post retirement employee category is of lesser significance than the profit maximizing interests of the commercial sector.

These tensions become evident when we see other instances of the inclusion-exclusion dynamics in the context of the right to gratuity emerging from case law in the last decade. In *Shivanand Gaurishankar Baswanti versus Laxmi Vishnu Textile Mills and Others*, the Supreme Court (2008 July 11) ruled that it would not intervene in an agreement signed between the employer, the representative union and other creditors, which surrendered the gratuity payment due to employees and agreed for a substantially less one time cash compensation. Against the dues of Rs. 132 crores including gratuity, the representative union agreed for a settlement of Rs. 22.21 crores against the wishes of many workers.

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While the case of primary teachers represented the fragmentation within the labour movement, the case of Vishnu Textile Mills reflects the lack of democracy within the labour movement. The presence of trade unions aligned with state oriented political parties, often serve the interests of the classes which matter for the state, than the interest of workers, who yearn for a collective site to express their anger and suffering. Entering into a tripartite agreement without consulting workers, when 400 of their comrades had sacrificed their lives waiting for dues, indicates the lack of democratic culture within the labour movement

through which trade union leaderships can be made accountable to workers. The Vishnu Textile Mills case related to workers' right to gratuity is a case of the betrayal of workers by their trade union representatives on the altar of the careerist interests of trade union bureaucracies, vested interests of their political affiliates and the unconscionable commercial interests of corporate capital.

Butler (2009: 36-7) writes about democracy in the following words, "If a form of power is imposed upon a people who do not choose that form of power, then that is, by definition, an undemocratic process." Thus, the logic that a representative union has the right to sign away the rights of gratuity of workers earned after years of dedicated labour is inherently undemocratic. Industrial democracy relies on a pluralist paradigm where thoughts and views of workers are constantly considered as important intellectual contributions filled with originality, rather than viewing them as only furthering ideological dogmas (Ackers 2007). Collective bargaining arrangements are intended to protect the interests of workers to ensure that managements are not allowed to arbitrarily reduce wages to create competition among workers, and draw from the cheapest possible labour (Webb & Webb 1921). While the links between trade unionism and representative democracy are evident from some of the earliest industrial relations works (Webb & Webb 1897), it needs to be remembered that the interests of workers cannot be subordinated to statist electoral politics or corporatist profit maximization antics. Industrial democracy is established when unions

representing workers are able to craft agreements pertaining to a variety of matters such as training, discipline, promotion and industrial engineering or scientific management studies (Clegg 1950). In order for industrial democracy to be successful, it is necessary that the oppositional function of trade unions is not restricted by any role of collaboration or joint consultation in management decisions that they may need to make (Clegg 1951). This functional view of democracy needs to be compared with the lived experiences of workers and their concerns need to be taken into account while crafting any effective industrial relations theory of pluralist functioning.

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These two illustrations of inclusion-exclusion dynamics in the context of the Payment of Gratuity Act, indicates that the struggle for crafting just social and economic relationships among employment relations stakeholders is an ongoing one, and it is through collective enactments of struggle alone that the state and other organisational sites of employment can be made responsive to workers.

Dynamics of Punitive Politics

In the Secretary, Oil and Natural Gas Commission (ONGC) and Another versus V U Warriar, the Supreme Court (2005 April 20) ruled that penal rent for over-

staying in the residential premises of the company after retirement could be offset against the gratuity payments that the worker was due to receive. Since ONGC was a statutory body, the rules framed by it had a statutory import, and they took precedence over the Payment of Gratuity Act. Another argument was that Warriar was a gold collared employee and eviction notices had been served on him.

In contrast with the ONGC versus Warriar case, in another instance, the Supreme Court ruled that the gratuity amount could not be deducted to recover the damages incurred by the employer. In *Jaswant Singh Gill versus M/s. Bharat Coaking Coal Limited and Others*, the Supreme Court (2006 November 10) ruled that the disciplinary charges levelled against Jaswant Singh had not led to his termination, and he had instead been allowed to retire. Also, the extent of damage in causing deliberate shortages in coal stock had not been monetarily quantified.

Firstly, case law pertaining to the Payment of Gratuity Act, 1972 focuses on the functional view of deviance rather than examining how deviance may have emerged from social constructions within the organisation. For instance, Jaswant Singh was allegedly able to connive with vested interests to show shortages of coal stock, perhaps because organisational democracy and public accountability of Bharat Coaking is extremely less. If there had existed organisational democracy to a very large extent, then organisational actors who might be hierarchically subordinate to Jaswant Singh might have mus-

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tered the courage to speak out and bring the issue of manufactured shortages to light. It is necessary for organisations to strengthen mechanisms of dissent and internal democracy if corruption and dereliction of duty are to be avoided. Punitive mechanisms and linkages to Gratuity Act can often lead to innocent workers being wrongly judged guilty and thus being deprived of gratuity which they have earned after putting in years of service. The ONGC case also hints at complex social realities such as that of urban housing, and the inability of workers to build good housing for themselves in urban areas. V U Warriar petitioned ONGC to stay in the company flat even after retirement obviously because he had been unable to build a comparable house through his remuneration from ONGC. If a gold collared employee is unable to build a suitable urban home, then it is not clear whether other employees will ever be able to build such homes. The inability of workers to build good homes for themselves indicates the inequalities emerging from the employment relationship and social failure at a collective level to make urban spaces accessible to workers.

Managerialist Containment

In the *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union versus Srinivas Resorts Lim-*

ited and Others, the Supreme Court (2009 February 27) ruled on conflicts between the Payment of Gratuity Act, 1972 and Andhra Pradesh Shops and Establishments Act, 1988. The Andhra Pradesh Act provided for the payment of service compensation to workers who had worked for a year in a shop or establishment. While the Payment of Gratuity Act extended only to those establishments which had more than ten employees, the Andhra Pradesh Act extended to all shops and establishments, even to those employing just one person. One of the reasons for which the Supreme Court struck down the Andhra Pradesh Act was that it created a divide between workers employed in the administrative office of a factory and the workers in a factory. While the workers in the administrative office would be governed by the Andhra Pradesh Shops and Establishments Act and would be eligible for service compensation at the end of one year, the workers in the factory would be governed by the Payment of Gratuity Act and would be eligible for gratuity only after five years. The Supreme Court held that service compensation and gratuity served the same function, and therefore these provisions of the Andhra Pradesh Shops and Establishment Act were unsustainable under Article 14 of the Constitution. The more important reason for the Supreme Court to reject the service compensation provision of the Andhra Pradesh Act was that it held the period of one year to be extremely less to be deserving of any form of gratuity. Thus the Supreme Court ended up making managerial arguments to justify the provisions of the

Andhra Pradesh Act as being unhelpful for employers.

In the Beed District Central Co-operative Bank Limited versus State of Maharashtra and Others, the Supreme Court (2006 September 29) held the scheme for gratuity provided by the Beed Bank to be more favourable than the Payment of Gratuity Act, 1972. Against the upper limit of Rs. 3.5 lakh, the Beed Bank provided an upper ceiling of only Rs. 2.5 lakh. The Court ruled in favour of this ceiling as the gratuity was calculated on the basis of 26 days wages for every completed year of service rather than the 15 days wages as specified by the Act.

The deeper conflict in the case of Andhra Pradesh Shops and Establishments Act appears to be in the use of gratuity as a managerial tool to extract organisational compliance from workers, while simultaneously escaping from any liability towards gratuity in the event of employment periods lesser than five years. The deeper conflict in the case of Beed Co-operative Bank is to retain the conditions and restrictions of offering better terms of gratuity than the Payment of Gratuity Act. Thus all the terms of gratuity need not be better than that of the central legislation, and a few terms being better can qualify for exemption of employers from the Central legislation. This allows room for employers to plan for their own gratuity agreements with complex terms and conditions with the intent of exerting control over employees and creating the subject of the worker which is more amenable to managerial engineering. Managerial projects of commitment

and loyalty with implicit individualised frames of governance are also emphasised in the rejection of the provisions of Andhra Pradesh Shops and Establishment Act, as the room for collective bargaining agreements which could call for similar gratuity norms for other employees as well, is sought to be closed.

In terms of case law, the Payment of Gratuity Act, 1972 also becomes a site for workers to defend the rights they have obtained after years of struggle, even as managements attempt to contain the benefits that can be made available to them. It is necessary to inquire into these deeper conflicts and make sense of the way in which they reveal themselves in the interpretations counter-posed against each other. In the case law pertaining to the Payment of Gratuity Act, 1972, these conflicts are an attempt by managements to contain the right to gratuity. While they are successful sometimes, at other times they are unsuccessful.

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to its employees to opt for a pension scheme instead of the payment of gratuity, which the employees accepted. After having opted for this pension scheme, the employees applied for gratuity through a notice in 1988, claiming that their opting for a pension scheme could not deprive them from obtaining gratuity which was a statutory right. The Allahabad Bank claimed that this pension scheme had better terms than the Payment of Gratuity Act, 1972, and therefore they should be exempt from the Act. The Supreme Court ruled that a pension scheme was not comparable with the payment of gratuity, and the workers could not be denied gratuity just because they had opted for a pension scheme, as framing such an alternative for workers was incorrect.

In *M C Chamaraju versus Hind Nippon Rural Industrial Private Limited*, the Supreme Court (2007 August 24) ruled that a worker who had been transferred between establishments owned by the same employer was eligible for payment of gratuity. Chamaraju was appointed as a supervisor by V K Poddar the Managing Director of Agarwal Investments, Poddar Granites and Hind Nippon Company Limited in 1984. Chamaraju worked in Poddar mines in Sira till 1990 and thereafter was transferred to other places such as Bellary and Chamarya Nagar. He worked till February 1993, and while no notice of termination was issued to him, no wages were paid from March 1993. Thereafter, Chamaraju filed for settlement of dues in September 1995, and the Supreme Court ruled that he should be given the gratuity amount of Rs. 16,875 without any further delay.

The case of the Allahabad Bank indicates that while pension is an important social security mechanism for retired workers, options cannot be presented to them to provide pension in lieu of gratuity. There is therefore a need for multiple forms of social security and one of them cannot be traded off with respect to others. This sense of struggle is also reflected in the Chamaraju case where it is indicated how employers may attempt to elude the payment of gratuity by transferring workers to different establishments owned by them, and how workers need to resist these moves and assert their right to obtaining all statutory benefits including gratuity.

Conclusion

The data emerging from Gratuity related case law clearly indicates that this post retirement social security site is also witness to strategic managerialist constructions in which inclusion-exclusion politics is used to minimize costs and maximize profits. Underlying the managerialist inclusion-exclusion activism is also the familiar behavioural paradigm in which the denial or grant of even statutory rights is informed by a sinister “reward for compliance” and “punishment for dissent” agenda. And the ultimate managerialist goal is to establish hegemonic unitarist control over not only employees and their organizations but also on the legislative, executive and judicial arms of the state.

The ground reality of employment relations, therefore, points towards the need for organisations to be governed in ways which are committed to democracy, responsibility and justice. In crafting gover-

nance mechanisms, there is a need to go beyond managerialism and embrace a more plural approach where multiple stakeholders are engaged in an inclusive dialogue. Governance cannot merely encompass a resource or agency perspective, with profit, alignment or optimisation as its ends. Instead governance implies the creation of politees where actors converse with each other, and discuss the ways in which the needs of society can be met in ethical, collective ways.

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