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N-20011/1/2010-NAC

11th November, 2010

Dear Prime Minister,

In the meeting of the National Advisory Council held on 23 October 2010, there was a general agreement in the NAC that workers under the Mahatma Gandhi National Rural Employment Guarantee Act need to be paid the minimum wages as notified under the Minimum Wages Act 1948.

A self – contained note on the subject is enclosed suggesting some solutions.

Since the matter is of an urgent and inter-ministerial nature you may wish to have it examined and give suitable directions.

With regards,

Yours sincerely,

Sonia Gandhi

Dr. Manmohan Singh
Prime Minister of India,
New Delhi.

Encl. : As above

Background note on Payment of Wages under MGNREGS

1. Section 6 of MGNREGA provides for the fixation of wage rate in the following manner:

> 6. Wage rate.—(1) Notwithstanding anything contained in the Minimum Wages Act, 1948, the Central Government may, by notification, specify the wage rate for the purposes of this Act :
>
> Provided that different rates of wages may be specified for different areas:
>
> Provided further that the wage rate specified from time to time under any such notification shall not be at a rate less than sixty rupees per day.
>
> (2) Until such time as a wage rate is fixed by the Central Government in respect of any area in a State, the minimum wage fixed by the State Government under Section 3 of the Minimum Wages Act, 1948 for agricultural labourers, shall be considered as the wage rate applicable to that area.

2. The said section provides for two distinct methods for fixing the wages. Section 6(1) empowers the Central Government to notify the wage rate. This power is given notwithstanding anything contained in the Minimum Wages Act, 1948.

3. The second method of determination of the wages is under sub-section (2) to the effect that until such time as a wage rate is fixed by the Central Government in respect of any area in a State, the minimum wage fixed by the State Government under Section 3 of the Minimum Wages Act for agricultural labourers shall be considered as the wage rate applicable to that area.

4. It is well-settled question of law and policy that a worker is entitled to Minimum Wages notified under the Minimum Wages Act 1948. This has been reinforced by the Supreme Court which has categorically ruled that any work where minimum wages are not paid would tantamount to 'forced labour' which is violative of Article 23 of the Constitution and as such constitutes denial of a Fundamental Right. When MGNREGS was

introduced, this was accepted and the Minimum Wages notified by different States became automatically the wage rate under the scheme.

5. However, it was felt that some States tended to enhance the minimum wage rates rather arbitrarily. Therefore, Consultative Meeting was held with the States in August 2008 by the then Minister for Rural Development. It was agreed that GOI would notify the Minimum Wages of different States under Section 6(1) of MGNREG Act and further increases by States would have to be justified by them for GOI to notify the revision. This decision was implemented w.e.f. 1.1.2009.

6. Subsequently, Government of India notified Rs.100 as the applicable wage rate for MGNREGS. In several States like Rajasthan, Andhra Pradesh, Chhattisgarh, Jharkhand, Bihar, Karnataka, Kerala, the minimum wages notified under the respective State's Minimum Wages Act are now higher than Rs 100. Consequently, workers under MGNREGS are being paid less than the statutory minimum wage. This is a totally unacceptable situation and needs to be corrected at once.

7. Aggrieved by the Ministry's January, 2009 notification, some labour groups in AP took the issue of non-payment of minimum wages to AP High Court. The petitioners contended that the non-payment of minimum wages amounted to a violation of the fundamental rights of the workers. In July 2009, the High Court suspended the Ministry's notification for a period of 8 weeks and subsequently the High Court issued orders suspending the Ministry's notification until further orders. Today these orders are still in place and a contempt petition is under consideration, where the GOI and Government of A.P are respondents.

8. At the same time there is legitimate and practical concern that the states may arbitrarily raise the minimum wages and central government will have to foot the entire bill.

9. The practical solution is to update and immediately notify the current state's minimum wages under section 6(1), with a rational and generally agreed annual system for adjusting for inflation, as the section 6(1) allows GOI to notify different rates of wages for different parts of the country. The Government of India can notify the minimum wages of the respective States. This was the understanding reached between GOI and

the states in August 2008, at a meeting presided over by the Minister of Rural Development.

10. In order to protect the real wages of the workers the approved minimum wages may be indexed to the CPI for Agricultural labour as applicable for each state, and mandate annual increases accordingly in such a way wage increases become applicable from 1st of April every year automatically

11. Over and above annual increases linked to the CPI for Agricultural Labour, the Minimum Wages Act requires revision of wages at least once in 5 years. For this it is suggested that MGNREGS be notified as a scheduled employment by GOI under Schedule II of the Minimum Wages Act 1948. The rationale for suggesting this is that MGNREGS is the largest employment program in India and the workers are unorganized and that works taken up under MGNREGS are unique in nature and different from conventional agricultural work. There is a strong case for notifying it as a distinct category between agricultural work and public work. The rates should be notified as appropriate to different states and arrived at through a tripartite consultative process involving central government represented by Ministry of labour, Ministry of Rural Development, Ministry of Finance, State governments represented by the Dept of rural development and labour and the workers represented by their organisations. This would also help sort out the contentious issue of states arbitrarily raising the wages, while protecting the legitimate interest of the workers and allowing for inter-state variations which are there due to historical reasons. This will legally and constitutionally protect the legitimate rights of the workers and also remove fiscal uncertainty and allow for rational planning and budgeting.

Annexure I - Legal opinion of the Addl Solicitor General of India on minimum wages and MGNREGA

Annexure II - An open Statement by 15 eminent jurists on payment of minimum wages to MGNREGA workers

P.T.O.

12. In their letters addressed to the Prime Minister, the Chief Ministers of Rajasthan and Andhra Pradesh have requested that the provisions of the Minimum Wages Act be respected. The opening paragraph of the Andhra Pradesh Chief Minister's letter sent to the Prime Minister on 4th November is as follows: "*I write this letter requesting compliance to the orders of the Honourable High Court of AP in W.P. No. 11848/ 2009 which suspended the operation of Section 6 (1) of the Mahatma Gandhi National Rural Employment Guarantee Act which proposed to fix a different (and lesser) wage rate for works under MGNREGA compared to the Minimum Wages Act. The order of the High Court was that the Government being the agency for implementing minimum wages, cannot itself violate the minimum wages*"

13. An immediate solution could be reversion to section 6 (2) of the Mahatma Gandhi NREGA. This was discussed in the NAC meeting of October 23rd 2010 and is being suggested by the Chief Ministers. It is line with the emergency and final recommendation of the Central Employment Guarantee Council's Working Group on Wages. The High Court of Andhra Pradesh has also stated in its order of July 2009 that : "*by suspending the operation of the impugned notification, sub-section (2) of Section 6 of the Rural Employment Guarantee Act, would spring automatically into operation, treating as if the impugned notification has not been made by the Central Government under sub-section (1) of Section 6*"

Annexure I

LEGAL OPINION OF Ms Indira Jaising Additional Solicitor General of India on MGNREGA and the Minimum Wages Act, given to the Working Group on Wages of the Central Employment Guarantee Council on 9th July 2010.

"1. My opinion has been asked on the question, what should be the wages paid to the workers who are given guaranteed work under the National Rural Employment Guarantee Act, 2005 (hereinafter called, 'The Act' for short). In order to answer the question it is necessary to glance at the objects and reasons of the Act. In brief the object is to provide:
a) minimum days of employment
b) secure waged employment
c) enhancing livelihood security to the poor.

2. The question that has arisen for consideration is what should be the rate of wages paid by the Central Government to such guaranteed work. The matter is governed by section 6 of the Act.
6. Wage rate.—(1) Notwithstanding anything contained in the Minimum Wages Act, 1948, the Central Government may, by notification, specify the wage rate for the purposes of this Act :
Provided that different rates of wages may be specified for different areas :
Provided further that the wage rate specified from time to time under any such notification shall not be at a rate less than sixty rupees per day.

(2) Until such time as a wage rate is fixed by the Central Government in respect of any area in a State, the minimum wage fixed by the State Government under Section 3 of the Minimum Wages Act, 1948 for agricultural labourers, shall be considered as the wage rate applicable to that area.

3. The said section provides for two distinct methods for fixing the wages. Sub Section (1) of section 6 empowers the Central Government to notify the wage rate. This power is given notwithstanding anything contained in the Minimum Wages Act, 1948. At the first glance, this may lead to the impression that the wage noted under subsection (1) above may or may not be a minimum wage fixed under the Minimum Wages Act. However, on closer examination, this view may not be correct as will be, hereinafter, discussed.

4. The second method of determination of the wages is under sub-section (2) to the effect that until such time as a wage rate is fixed by the Central Government in respect of any area in a State, the minimum wage fixed by the State Government under Section 3 of the Minimum Wages Act, 1948 (11 of 1948) for agricultural labourers, shall be considered as the wage rate applicable to that area.

5. After the enactment of the law, the wages were paid at the rate of minimum wage as fixed by the State Government under Section 3 of the Minimum Wages Act, 1948 (11 of 1948) for agricultural labourers. It may be noted that minimum wages vary from state to

state. The highest rate appears to be in Kerala. Delhi Government has also fixed the minimum wage rate of Rs. 203 for unskilled agricultural workman, Rs. 225 for semi-skilled agricultural workman and Rs. 245 for skilled agricultural workman with effect from 1.2.2010.

6. Presently, wages have been notified under sub-section (1) of section 6 of the Act to be Rs. 100 per day. The effect of this fixation is that the minimum wages under sub-section (2) of Section 6 will cease to apply and all the workmen under the National Rural Employment Guarantee Act, 2005 will be paid only Rs. 100 per day.

7. My opinion has been sought on the question whether this fixation of wage is lawful and constitutional. Reliance is placed upon the expression "Notwithstanding anything contained in the Minimum Wages Act, 1948" to fix a rate that is almost half of the minimum wage under sub section (2) of Section 6.

8. In order the answer the question, it is necessary to examine the very concept of minimum wage. From as far back in 1947, it has been recognized that minimum wage is a need based and should ensure the minimum needs of the workman. Minimum wages are distinguished from fair and living wages. Whereas minimum wages are meant to provide for bare subsistence, 'living wages' represent a standard of living and not merely bare physical subsistence for living (recommendation of Committee on fair wages).

9. In Kamani Metals and Alloys v. Their workmen (1967) II LLJ 55 SC it was observed: "Broadly speaking, the first principle is that there is a minimum wage which, in any event must be paid, irrespective of the extent of profits, the financial condition of the establishment or the availability of workmen on lower wages. This minimum wage is independent of the kind of industry and applies to all alike big or small. It sets the lowest limit below which wages cannot be allowed to sink in all humanity. The second principle is that wages must be fair, that is to say, sufficiently high to provide a standard family with food, shelter, clothing, medical care and education of children appropriate to the workmen but not at a rate exceeding his wage earning capacity in the class of establishment to which he belongs. A fair wage is thus related to the earning capacity and the workload. It must, however, be realised that "fair wage" is not "living wage" by which is meant a wage which is sufficient to provide not only the essentials above mentioned but a fair measure of frugal comfort with an ability to provide for old age and evil days. Fair wage lies between the minimum wage, which must be paid in any event, and the living wage, which is the goal."

10. Article 23 of the Constitution of India reads as under:
23. Prohibition of traffic in human beings and forced labour.—(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

11. In People's Union for Democratic Rights Vs. Union of India (1982) 3 SCC 235, the

question was whether workmen employed by the Union of India on wages lower than the minimum wages could be said to be forced labour. While deciding the issue the court held:
"It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration, which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would we 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour.' There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force' particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socioeconomic justice for all and every one shall have the right to work, to education and to adequate means of livelihood."

12. It is, therefore, clear that the minimum wages are the lowest possible wage at which a workman can be employed by any employer private or public. I may mention that the word 'employment' must not mean employment of a formal nature under the contract of employment but has reference to the performance of services as labour for a given wage, whether on a daily basis or on a casual basis or on a contractual basis (as in the contract labour) or under any scheme relating to unemployment relief or any relief work like a famine related work.

13. In Sanjit Roy Vs. State of Rajasthan (1983) 1 SCC 525, Justice Bhagwati relying on People's Union for Democratic Rights Vs. Union of India (1982) 3 SCC 235 it was held:
"I must, therefore hold consistently with this decision that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and

if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the Court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated.
If this be the correct position in law, it is difficult to see how the constitutional validity of the Exemption Act in so far as it excludes the applicability of the Minimum wages Act 1948 to the workmen employed in famine relief works can be sustained. Article 23, as pointed out above, mandates that no person shall be required or permitted to provide labour or service to another on payment of anything less than the minimum wage and if the Exemption Act, by excluding the applicability of the Minimum Wages Act 1948, provides that minimum wage may not be paid to a workman employed in any famine relief work, it would be clearly violative of Article 23."

14. Sub-section (1) of Section 6 needs to be considered in the light of these decisions. So read, it should be clear that the expression "Notwithstanding anything contained in the Minimum Wages Act, 1948" cannot permit the Central Government to fix a wage below the minimum wage in the state in question for to do so would be a clear violation of Article 23 of the Constitution of India. Even otherwise, both the subsections must be read harmoniously with each other. Both the subsections cover the same field, namely, payment of wages for employment under the Act.

15. While it is clear that sub-section (2) mandates the payment of the minimum wages fixed by the Central Government at the rate of the minimum wages fixed by the State Government. Although, on a bare reading, it appears that both the subsections operate in a mutually exclusive field and subsection (2) will cease to operate once subsection (1) comes into play. However, the fixation of rate of wage by the Central Government cannot be oblivious of the benchmark prescribed under subsection (2) of Section 6 of the Act. The rate at which wages are to be paid under subsection (1) can only be analogous to the rate at which wages are fixed under sub-section 2. The work given to be performed whether paid for under either subsection is identical. The Central Government cannot be left with the arbitrary choice of deciding whether to pay under sub-section (2) or to pay under subsection (1) of section 6. Regardless of the subsection under which wage is fixed, there must be a parity in the quantum of payment under both the above said sub-sections.

16. Hence, in my opinion, the fact that the payment is made with the object of providing guaranteed work to the unemployed is irrelevant to the question what should be the rate at which wages are to be paid. In other words, a possible argument that since the person seeking employment was unemployed and the payment is a measure of social welfare cannot justify payment of wages below minimum wage.

17. Capacity to pay is not relevant while fixing minimum wages. So long as the employment is the "waged employment" as quoted in the statement of objects and reasons of the Act wage has to be paid at the rate of minimum wages. It is irrelevant, whether such employment is in a relief work, under National Rural Employment Guarantee Act, casual work, contract work. It is equally irrelevant whether the payment is made monthly, weekly or daily. It is equally irrelevant whether rate is a time rate or piece rate. The non obstante clause in subsection (1) of section 6 by itself will not enable the Central Government to fix a wage at a rate lower than what is provided under the Minimum Wages Act. The payment of wage below minimum wage would amount to forced labour."
Indira Jaising – 9th July 2010

Annexure II

An open Statement:
Government of India and State Governments must honour the Minimum Wages Act and Stop Perpetuating Forced Labour on MGNREGA works

India's celebrated landmark legislation, the National Rural Employment Guarantee Act (MGNREGA) 2005, was designed to provide a minimum level of income to all rural families while empowering them through a series of legal entitlements. There was the basic entitlement of 100 days work at minimum wages. It has been inconceivable to have the government pay less than the minimum wage on its own works. However in an unconstitutional and deliberately callous decision, the Central Government has de-linked the wage paid to MGNREGA workers from minimum wage thus severely undermining the sanctity of the Minimum Wage Act, and attempting to legalize what the Supreme Court of India has declared to be "forced labour".

In January 2009 through a notification the Central Government froze wages under this Act at Rs. 100 per day. Thus with time MGNREGA wages have fallen below the statutory minimum wages in many states; and have also fallen in real terms with the unabated double digit food price inflation over the past year. Most state governments refuse to pay anything more than what the Centre gives them and now several states (e.g., Andhra Pradesh, Karnataka, Kerala, Himachal Pradesh, Haryana, Uttrakhand, Rajasthan) are paying people working on MGNREGA work sites much below the minimum wage. In one of the more shocking examples, Rajasthan recently paid 99 workers in Tonk district one rupee a day after eleven days of work!

The Minimum Wages Act (1948) established powers of the State Governments and the Government of India to fix minimum wages for scheduled employments. The Act holds that minimum wages should be revised at intervals not exceeding 5 years. The 15thIndian Labour Conference (1957) put forward a "needs based" formula for fixing minimum wage that is based on minimum food requirements, clothing requirements, cost of living and fuel costs. These recommendations were made binding by the Supreme Court in the case of Unnichoyi vs. State of Kerala (1961), and enhanced in the Workmen vs the Management of Raptakos Brett and co Ltd (1992).

Further, the Supreme Court, in three separate rulings, has held that non payment of minimum wages is tantamount to 'forced labour' prohibited under Article 23 of the Constitution. Further the Supreme Court holds that 'forced labour' may arise in several ways, including "compulsion arising from hunger and poverty, want and destitution". Consequently the notification of 1stJanuary 2009 itself has been set aside as unconstitutional by the Andhra Pradesh High Court, but the Central Government has persisted with invoking it across the country.

With growth rates at 8-10% and the growing gap between the rich and the poor, MGNREGA was hailed as a legislation that would guarantee those at the bottom end of the pyramid basic entitlements. To undermine the right to minimum wages is unfair and

unconstitutional. It makes a mockery of India's claim to foster humanitarian values. The Government of India must immediately revoke its unconstitutional notification, and along with state governments ensure that minimum wages are paid to all workers in India.

The Undersigned

1. Justice V. R. Krishna Iyer (Former Judge, Supreme Court of India)
2. Justice M. N. Venkatachaliah (Former Chief Justice of India)
3. Justice J. S. Verma (Former Chief Justice of India)
4. Justice P. B. Sawant (Former Judge, Supreme Court of India)
5. Justice A. P. Shah (Former Chief Justice, Delhi High Court)
6. Justice K Ramaswamy (Former Judge, Supreme Court of India)
7. Justice V. S. Dave (Former Judge, Rajasthan High Court)
8. Fali S. Nariman (Senior Advocate, Supreme Court of India)
9. Santosh Hegde (Present Lokayukta (Ombudsman) Karnataka, Former Solicitor General of India, Former Judge Supreme Court of India)
10. Kamini Jaiswal (Senior Advocate, Supreme Court of India)
11. Rajeev Dhawan (Senior Advocate, Supreme Court of India)
12. Dr. Mohan Gopal (Former Director, National Law School of India, Bangalore)
13. Prashant Bhushan (Noted Civil Liberties Lawyer, Supreme Court of India)
14. Upendra Baxi (Emeritus Professor of Law, University of Delhi)
15. Vrinda Grover (Lawyer and Director of MARG)

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