Part 4

Shades of Grey: State-Business Complicity?

Chapter 7:
New Labour Codes: Are They Empowering Workers?

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Introduction

As India gained political independence, the policy makers had two options with regard to the governance of and rulemaking in the industrial relations system (IRS), viz. a state intervention model and a bi-partite model. In the former, the state interventionist institutions make the rules of the IRS and in the latter, the employers and the workers' organisations through collective bargaining make the rules and during an impasse, in negotiations, they are aided with voluntary and minimalist third-party aid. In the state interventionist model, the role of the state is high, while in the bi-partite model it is minimum, i.e., enough to enable the system to function. The policy makers and the labour market actors in politically independent India in a consensual manner preferred the state intervention model to the bi-partite model owing to several factors, viz. imbalance in the distribution of power in the labour market, inadequate growth of workers' organizations, the need for rapid industrialization under economic planning and so on.[ii] An important aspect of the regulation model is that regulation of IRS was seen as a part of the larger regulatory system concerning the industrial sector in India. As part of a mixed economy model, the government in various five year plans allowed the public sector to lead industrial development only to be complemented by the private sector. Further a strong regulatory system in terms of say industrial licensing and monopoly restrictions was put in place to govern the private sector. As a result, the institutional mechanism of IRS was structured on five major pillars namely labour laws, the labour judiciary, the interventionist labour administration, collective bargaining, and voluntary arbitration and the moral codes (such as Codes of Conduct and Discipline).[iii]

Prior to unleashing the process of codification of labour laws, the collective dialogues among the trade unions, employers and the State played an important role in shaping the economic development in India through collective participation in the decision making process.[iv] The two components of the Constitution, viz. the Fundamental Rights and the Directive Principles of State Policy together provide the framework of labour rights. Articles 14, 19, 21, 23 and 24 comprise fundamental rights promised under Part III of the Constitution and these rights by definition are justiciable. On the other hand, Articles 38, 39, 39A, 41, 42, 43, 43A and 47 form part of the Directive Principles of State Policy under Part IV of the Constitution. These are not enforceable in a court of law. But they provide valuable guidelines for the law makers and the judiciary in their businesses such as law-making and judgments. They could also be taken to represent the aspirations of a society, social justice and the ideal conditions to be realised in the course of economic development.

From Labour Laws to Labour Code

Since the 1990's, labour laws in India have been perceived by major trade and corporate houses as well as policy makers as complex, archaic and not conducive to promote the robust economic growth of the country. Many laws are old and outdated, with a few almost a century old. Consequently, they have lost their relevance with changing times and in fact have inhibited the growth of

the Indian economy, which lose out on the gains they could have made from economics of scale and innovation. Primarily, concerted efforts have been made to dilute the content of social justice in the existing industrial relations system to foster labour flexibility and protect the interest of capital. To improve India's standing in the Ease of Doing Business at the rank of 90 out of 189 countries across the globe by 2019, the government has unleashed a series of reforms in major employment laws and attempts have been made to consolidate them into labour codes.[v] Scholars who favour those reforms have welcomed these policy measures as being both progressive and business friendly [vi], whereas those who are critical of these reforms have expressed their concerns since it removes all social safety nets and legal protection to millions of workers who are pushed to the margins of precarious working conditions wherein the collective bargaining of capital outweighed the labour concerns.[vii]

Existing empirical scholarships argue that India's labour laws are a key deterrent to growth and job creation in major sectors.[viii] This strand in the literature has successfully influenced the policy making process in the favour of industrial business houses. On the other hand, relatively few empirical studies have argued that the rigidity in labour laws does not yield negative outcomes, as it creates more nuanced incentives to increase the marginal product of labour.[ix] While this strand in literature takes into account not only the de jure perception of the rigidity of labour laws but also the de facto implementation of those laws.[x]

As part of codification, the government has consolidated almost 44 central labour laws into four proposed codes as follows:

Labour Code on Industrial Relations: Consolidating the Industrial Dispute Act, 1947; Industrial Employment (Standing Orders) Act, 1946; and The Trade Union Act, 1926 – three keystone laws for industrial democracy and collective bargaining instruments in India. The proposed code has substituted "workman" by "worker" to be more gender neutral as well as expanded the definition of "employer". In the context of trade unions, strict compliances have been introduced with a mandatory requirement of holding elections every 2 years and making the leadership invalid if the represented leader is not part of 10 per cent of the total members who are working in the same establishment. This inevitably weakens the collective bargaining strengths at the macro-level whereby the collective efforts of workers will have lesser impact on the negotiation process at the factory floor. The code does not provide any scope for access to justice under adversarial adjudication labour courts but rather introduces mechanism of arbitration and has laid down the rules for dispute resolution by the intervention of a third neutral party. Negotiating agents who will have the authority to entertain appeals have been introduced instead. The code has made a provision for fund, for ensuring socio-economic schemes and allotments of workers, thereby enhancing the scope of productivity during work by ensuring a distributive efficiency in use of funds and other social security benefits through creating a trust funds which shall manage the social contribution of workers. The nature and *modus operandi* of such funds is not yet provided in the proposed code. Occupational health dimensions have also been catered to.

Labour Code on Social Security and Welfare: Consolidating security laws such as the Employees Provident Funds and Miscellaneous Provisions Act, 1952; Employee State Insurance Act, 1948; Maternity Benefits Act, 1962; and Employee Compensation Act, 1923. The code shall allow up to 30 per cent contributions from employees towards ESIC and EPFO with self employed workers contributing towards 20 per cent. In the code, all establishments will be liable to pay compensation if they fail to contribute towards the social security schemes of workers. The code in many ways overlooked the changing nature of work, instead of focusing on labour process wherein the larger share of the workforce is engaged; it is still using the classical approach for defining employment and establishment category. The code is also silent on employment opportunities in global value chains, which is driving the modern retail sector. It provides a

crucial social security measure, conditioned on Aadhaar-based registration service to a portable social security account, which may promote exclusionary employment practices.

Labour Code on Wages[xi]: The Code on Wages, 2019 replaced four key federal labour laws: The Minimum Wages Act, 1948; The Payment of Wages Act, 1936; The Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. The code aims to ensure minimum wages for all employees and timely payment of wages. While minimum wages is not clearly defined, wages include salary, allowances or any other components expressed in monetary terms. The code contemplates National Minimum Wage and State level Minimum Wages, which further leaves a lot to the discretion of the administrators to determine minimum wages which will likely lead to temporary, spatial and unequal differences. The needs based criteria should include specific nutrition requirements, clothing and housing needs, medical expenses, family expenses, education, fuel, lighting, festival expenses, provisions for old age and other miscellaneous expenditure. The Reptakos judgment by the Supreme Court lays down important criteria for fixing of minimum wages and should be upheld by the code. The joint committee for designing the minimum wages do not provide any scope for members of civil society and other trade union members to be represented. While the definition of employee excludes apprentices, the worker now includes journalists and sales promotion employees, which was not previously there. The Code also excludes a large number of workers in the unorganized sector through an ambiguous and narrow definition of the term 'employer'. Workers in the unorganised sector especially the ones employed in the on-demand economy, as well as all types of contractual workers, cannot establish their employment relations with the employer in order to benefit from the provisions of the Code. It also contains a significant provision with respect to Article 14 of the Indian Constitution, as it provides for prohibition of discrimination on the grounds of gender. Provisions for wages for two or more classes of work and minimum time rate for piece work have been included which are critical social security measures. There is inclusion of clauses on overtime payment but silence on provision of women workers to work in night shifts. The code proposed to set up a quasi-judicial body and appellate authority to redress violations regarding workers' wages is a step in the right direction and may lead to speedy, cheap and effective resolution of wage disputes; however, **the judgment of these bodies should be subject to review by Courts** (as per CPC section 9). Furthermore, **the condition of a claim to be filed only by an appropriate authority, employee or trade union needs revisiting** as it would exclude millions of undocumented casual and informal workers, as well as workers who do not belong to a trade union. Finally, the code is silent on **upholding the liability of the principal employer to pay due wages** in case the contractor fails to do so. For an economy with 93 per cent informal workers it is a highly critical wage protection measure that should not be diluted. Further, **wage deductions on conditions of non-performance or to recover losses is a highly anti-worker measure which should be dropped.[xii]**

Labour Code on Occupation Health and Safety: This code has consolidated following four major laws: The Factories Act, 1948; Dock Workers (Safety, Health & Welfare) Act, 1986 & The Dock Workers (Safety, Health & Welfare) Regulations, 1990; The Mines Act, 1952 and other laws pertaining to mines; and finally, The Building & Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996. Under this code, workers definition excludes an apprentice. Further different types of workers have been defined, for instance contract worker, migrant worker, working journalist, audio-visual worker, etc. Like the previous code, this code also has overlapping categories of workers and establishments which might affect the effective coverage under newly designed enforcement mechanism. They provide a strong measure of occupation health and safety, working hours and welfare conditions as proposed in the code as they provide duty-bound measures to be effectively implemented by the employer, including weekly

and compensatory holidays. The code also establishes National and State health boards. The code also includes provisions for Inter-state migrant workers, however, it does not define the administrative jurisdictions of State labour departments.

Provisions for women under the codes: The Code on Wages, 2019, under sub-section (2) of section 42 states that one-third of the members in sub-section (1) would be women.[xiii] Similarly, the Code on Industrial Relations, in section 4(4), provides that at least 50 per cent of the Grievance Redressal Committee, constituted to resolve disputes arising out of individual issues, should be composed of women. The draft code on Occupational Safety, Health and Working Conditions, 2018, contains extensive provisions, which have taken into account the circumstances under which female workers work. For instance, section 7 provides for separate rooms for the children of women, and bathing places equipped with showers and lockers. Chapter X of this code contains special provisions related to employment of women. Section 42 provides for working hours, which the appropriate government may change under the procedure laid down, while section 43 enables the government to prohibit employment of women under certain circumstances, which could be detrimental to their health and well-being. The code establishes social security organisations for administrative purposes, one amongst which is the National Social Security Council of India, often referred to as the National Council. Clause 3.6 of the draft code provides for proportional representation to the women in the central board. Similar clauses enable women to be represented to other entities such as the Executive Committee, Advisory Committee, and Standing Committee.

As per chapter eight of the report of the Second National Commission on Labour, women not only need maternity protection, but also against widowhood, desertion and divorce, which is why special measures would have to be taken to increase their participation in gainful employment and raise their economic status.[xiv] Hence, the above mentioned provisions ought to be gauged from an economic standpoint, in order to holistically assess their impact on women workers.

Why Should Ranking Systems Matter Generally?

The ease of doing business (EDB) index clearly sparks media and policy attention. Because of the authority and resources of the World Bank, the rankings have the potential to be accepted as an indicator of the true underlying business environment. As such, they have the potential to define problems, set standards, reward compliant behaviour; in short, they become an implicit yet powerful governance tool.[xv] By ranking states according to specific criteria, actors attempt to define goals and set states in competition with one another to achieve them. Some states respond by devoting significant resources to improving their scores. Rwanda, for example, has formed a bureaucracy to manage their Global Ranking Index profile. Similarly, India is in the global race to push forward the hard core procedural reform that fits the expectation of neo-liberal market reforms. In the context of the labour regulation debate, despite removing the labour market rigidities and allowing flexibility the Indian economy is yet to show any positive impact of labour reform. Rather, worst on numerous indicators, reforms are failing to provide decent livelihood, causing serious problem of welfare loss. In a recent paper, Sapkal and Shyam Sundar (2017) [xvi], it was found that those states that have reformed labour laws in favour of the employer are hurting the working class widely and forcing them into the world of precarity. If one would believe that these indices actually affect the policies and its process, then indeed it is merely influencing the domestic politics and not the welfare activity of the state.

Interface between Flexibility and Labour Rights Indicators at the Global level

The EDB exercise till 2010 ranked the countries on ten components, viz. starting a business, dealing with construction permits, employing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and closing a business.[xvii] Global agencies and researchers have criticised these exercises principally as leading to "a race to (the) bottom" in labour standards as countries compete to improve their relative ranking vis-à-vis other countries which meant progressive dilution in labour standards in a country. In order to be a lead competitor in the global production chain, the labour standards across many developing countries have been weakened relative to the developed countries. To attract the foreign direct investment in the host developing countries, the labour regulation regime has been weakened and the predatory competition has been promoted among developing countries. Weaker labour standards are seen to reduce the labour costs of production of goods and services and capital prefers lower labour costs with other things such as productivity remaining equal.[xviii] The absence of trade unions and collective bargaining would obviously reduce the nuisance value arising out of labour rights' assertion function and allow more scope for exercise of managerial rights and introduction of technology and suitable reorganisation of work without protests. Also, it has been observed in India that compulsory adjudication of industrial disputes functions better where trade unions are present and act as meaningful representatives of workers.[xix] Furthermore, the domestic business lobbies raise a stink of these adverse rankings and lobbies with the government to ease the regulations especially on labour markets.

As a result of tremendous pressure by ITUC and ILO, the World Bank stopped ranking countries on the employing workers index (EWI) since 2010 though it provides qualitative information on this aspect in the Reports since then. The ILO has been for long and quite substantially in the recent post-globalisation period, advocating respect for labour standards by member countries and conceived of global benchmark concepts like the Decent Work, Core Labour Standards or the Fundamental Human Rights, Formalising Informality and so on. It has been seen as the sole agency, technically and qualitatively, for determining labour standards and their implementation in countries by the global community in the late 1990s. The ILO has provided an alternative framework for framing labour policies as against the World Bank's EDB. In the ILO's perspective, two labour rights are core and essential for achieving all other labour rights, viz. freedom of association and the right to collective bargaining as enshrined in ILO Conventions, C87 and C98.

The ITUC has been publishing data on violations of trade unions and collective bargaining rights in more than 100 countries and these have been used by some scholars (e.g. Kucera 2002). Since 2014 it has been publishing Global Rights Index (GRI). It has 333 affiliated organisations in 162 countries and territories on all five continents, with a membership of 180 million. A questionnaire is sent to 333 national trade unions in the member countries seeking information on violation of labour rights. Suitable intervention is made to elicit sound data. Legal experts analyse labour codes/ laws to identify clauses that hurt internationally recognised labour rights. The textual information is matched with 97 categories of rights based on ILO rights and jurisprudence and each is given one point. After summing up the scores for each country, the countries are classified into five ratings, 1-5, labour rights' violations increase with the score – Irregular violations of rights (1), Repeated violations of rights (2), Regular violations of rights (3), Systematic violations of rights (4), No guarantee of rights (5) and No guarantee of rights due to the breakdown of the rule of law (5+). The 97 indicators are classified as violations in law or in practice for the following criteria, viz. Civil liberties, Right to establish or join unions, Trade union activities, Right to collective bargaining, and Right to strike.[xx]

It can be safely argued that efforts to promote labour flexibility could and rather would lead to

weakening of labour rights and labour market outcomes eventually via two channels taken together. The government's keenness to promote the ease of doing sends two signals, formal and informal. In cases where the government has to take concrete legal measures there will be a lag effect to do so thanks to political transaction costs. But policy announcement effects take place, which embolden the employers to take measures on their own. Together these two reinforce one another. Various measures regarding numerical flexibility components such as hiring, firing, severance pay, etc. reduce standard work practices and promote informality in the labour market which weaken the bargaining power of trade unions vis-à-vis employers. All these affect the labour market outcomes in terms of unemployment, quality of jobs, assured pay components (fixed versus variable components, etc.) and so on – even the flexibility school admits to short-term costs arising out of structural adjustments. As a result, we should expect ease of doing in general and numerical flexibility measures reflected in EWI to be associated with weak labour rights as reflected by GRI measures to erode labour rights in law and/or practice.

Conclusion and Way Forward

The Central Government was caught up in the pressure group tactics of labour and capital. While for the government, capital infusion is necessary to generate a certain amount of employment and growth for which capital needs liberalisation of labour laws; the labour sector protests and going against the collective aspirations and demands of the working class could prove to be politically costly as was found out by several governments at the states and the National Democratic Alliance (NDA) at the general elections in 2005. The political economy angle of labour law reforms is further reinforced by the argument that protests by labourers to labour law reforms belong to 'mass politics' while the reforms concerning other economic institutions like capital market belong to 'elite politics' – the implication is that mass politics are highly visible and noise-making, while the elite politics is only for the discernible and can be seen on the corridors of power. The impacts of the mass politics are loud and direct while that of the elite politics is indirect and through various systems.[xxi] The initiatives by the state are a welcome step to rationalise and streamline the procedural laws, and to improve the effectiveness of the labour administration in the country. While so doing, the policy focus has shifted from labour to capital, while promoting a business-friendly legal environment. All four proposed codes, often provide overlapping definitions of workers, establishment and competent authorities who shall be the key players in industrial relations. This might further affect the substantive branches of labour laws. Secondly, the effective provisioning of social benefits has been entrusted with private sectors, which may have a negative impact as there is an attempt to privatise social security funds. Thirdly, the collective bargaining power of trade union has been diluted which might affect the negotiations at the factory level. Though the Code on Wages has been accepted in both houses, the execution of this code is unlikely to be discussed, as it will be unviable to employers to accept the proposed minimum wages. Fourth, the executive and administrative part is aiming to consolidate the decision making power at the centre, leaving aside a social dialogue with other stakeholders. This will have serious implications in the long run. All codes are silent on the dynamics of the industry which are changing due to technological innovations and diffusion, technology assisted employments are silent in the proposed draft. Finally, the dilution of dispute resolution systems will affect the social cohesion in the industrial democracy as it aims to promote private methods of dispute resolution.

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ii. Shyam Sundar, K.R. (1999), Industrial Conflict in Tamil Nadu, 1960-80, Unpublished Ph.D. Thesis, Mumbai University

iii. K R Shyam Sundar and Sapkal, Rahul. (2019). Labour Laws and Governance Reforms in the Post-Reform Period in India: Missing the Middle Ground, Essays in Honour of Prof. K P Chellaswamy, Synergy Books Publication, New Delhi. ISBN: 978-93-5258-11

iv. Shyam Sundar, K.R. (2018, c), "Labour Laws and Governance Reforms in Indian States: Informalising Formality!", in K.R. Shyam Sundar (ed.), Contemporary Reforms of Labour Market and Industrial Relations System in India:Ease of Doing Business Versus Labour Rights, New Delhi, Academic Foundation

v. Sapkal, Rahul (2016). Labour Law, Enforcement And The Rise Of Temporary Contract Workers: Empirical Evidence From India's Organised Manufacturing Sector, European Journal of Law and Economics, Springer, Vol. 42(1), pp.157-182

vi. (See for further discussion) Besley, T. and R. Burgess (2004), "Can Regulation Hinder Economic Performance? Evidence from India", Quarterly Journal of Economics, Vol. 119, No. 1, pp.91-134

vii. (See for further discussion) Sapkal, Rahul and Nilamber Chettri (2019). Precarious Work, Globalisation and Informalisation of Workforce: Empirical Evidence from India, in "Globalization, Labour Market Institutions, Processes and Policies in India Essays in Honour of Prof. L K Deshpande", edited by K R Shyam Sundar Palgrave McMillan, Singapore, pp 143-164.

viii. Debroy, Bibek (2005), "Issues in Labour Law Reform", in Bibek Debroy and P.D. Kaushik (eds.), Reforming the Labour Market, New Delhi, Academic Foundation in association with Friedrich Naumann Stiftung and Rajiv Gandhi Institute for Contemporary Studies

ix. Sapkal, Rahul (2016). Labour Law, Enforcement And The Rise Of Temporary Contract Workers: Empirical Evidence From India's Organised Manufacturing Sector, European Journal of Law and Economics, Springer, Vol. 42(1), pp.157-182

x. ibid.

xi. The bill on Wage Code has been passed by both houses and has received assent of Hon'ble President of India on 8th August 2019. The concerns raised in this section has not been addressed in the Codes on Wages, 2019.

xii. Working Peoples Charter, (2019), "Statement On The Newly Legislated 'Labour Code On Wages 2019", (Mimeo) (First Published on 12th August, 2019)

xiii. 42. (1) The Central Government shall constitute the Central Advisory Board which shall consist of persons to be nominated by the Central Government—

(a) representing employers;

(b) representing employees which shall be equal in number of the members specified in clause (a); and

(c) independent persons, not exceeding one-third of the total members of the Board.

Non-applicability of this Chapter.

Central Advisory Board and State Advisory Boards.

(2) One-third of the members referred to in sub-section (1) shall be women and a member specified in clause (c) of the said sub-section shall be appointed by the Central Government as the Chairperson of the Board.

xiv. Labour.gov.in. (2018). Labour Code on Social Security. [online] Available at: https://labour.gov.in/sites/default/files/SS%20Code%20 2018-02-28%20FOR%20UPLOADING.pdf [Accessed 16 Nov. 2018].

xv. Storm, Servaas (2019), Labor Laws and Manufacturing Performance in India: How Priors Trump Evidence and Progress Gets Stalled, Institute for New Economic Thinking, Working Paper No. 90, January 2019, https://www.ineteconomics.org/uploads/papers/WP_90-Storm-Labor-Laws.pdf, accessed September 21, 2019.

xvi. Sapkal, Rahul and K.R. Shyam Sundar (2017). Determinants of Precarious Employment in India: Empirical Evidence from India, in Arne L. Kalleberg , Steven P. Vallas (ed.) Precarious Work (Research in the Sociology of Work), Vol. 31(1) Emerald Publishing, pp.335-361.

xvii. World Bank, (2010), "Doing Business: Reforming Through Difficult Times", Washington DC (Available on, http://www.doingbusiness.org/en/reports/global-reports/doing-business-2010 accessed September 19 , 2019.

xviii. Kucera, David (2002), "Core labour standards and foreign direct investment", International Labour Review, Vol. 141, Nos. 1&2, pp.31-69.

xix. Ramaswamy, E.A. (1988): Worker Consciousness and Trade Union Response, New Delhi: Oxford University Press.

xx. ITUC (2018), Global Rights Index 2018: The World's Worst Countries for Workers, https://www.ituccsi.org/ituc-global-rights-index-2018 , accessed September 21, 2019.

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