Split Legal Regime in India's Labour Laws

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Abstract

Industry wants the 'fundamental right to manage' believing that certain groups of organised workers who constitute only eight percent of the total workforce are overprotected. Furthermore, it considers that employment generation is more important than employment protection. Industrial representatives, further admits that wages in India are low, but the productivity of workers is very low and thus the labour costs are high. The trade unions in response quickly demand to know the parameters industry uses to judge productivity, as this is a complicated and debatable issue. Trade unions further argue that industry and government have deliberately been exaggerating the 'overprotection of certain organised workers', to divide organised from unorganised workers. They argue that organised workers with basic rights should not be regarded as overprotected as it has taken decades of struggle for the workers to achieve those rights.

Introduction

Indian Labour Laws were enacted by the British colonial power, and are still comparatively the same. These old enactments have created a discussion in India, where the Indian industry, as a collective body, has for long been of the opinion that a law enacted in 1947 or before have no relevance today. Moreover, this group has felt that despite economic reform in the country, labour policy is unchanged.

The body of legislation that forms the industrial and labour structure in India is massive. Minimum Wages Act, 1948; Trade Unions Act, 1926; Contract Labour Act, 1970; Weekly Holidays Act, 1942; Beedi and Cigar Workers Act, 1966, Factories Act, 1948, Industrial Disputes Act, 1947, Employees State Insurance Act, 1948, Employee Provident Fund Act,

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1952, Workmen's Compensation Act, 1923 are few samples of this ocean of labour laws, which form a network of chaotic, overlapping and sometimes contradictory laws with a tendency to push away people who either should or are affected by them. In addition to the above there are special sectoral laws applicable to particular sectors of the unorganised workforce.

Under this category are laws like the Building and Construction Workers Act 1996, the Bonded Labour System (Abolition) Act 1976, The Interstate Migrant Workers Act 1979, The Dock Workers Act 1986, The Plantation Labour Act 1951, The Transport Workers Act, The Child Labour (Prohibition and Regulation) Act 1986, and The Mine Act 1952. Broadly speaking these sectoral laws either abolish or prohibit an abominable practice like bonded labour or they seek to regulate exploitative conditions by regulating working hours and conditions of service. A recent trend has been to seek the creation of a welfare fund through the collection of a levy from which medical benefits or pension provisions are made. Workers and management may contribute and attempt to set up tripartite boards for implementation of welfare benefits.

The Industrial Disputes Act (IDA), 1947

The single most significant labour law is the Industrial Disputes Act 1947. This was enacted a few months before India's independence, and regulates the hiring and firing rules of the industrial sector, and is an effort to pronounce a policy that is founded on old-fashioned economics and a naïve understanding of the way markets function. The IDA has doubtless done more to hold back the growth of India's manufacturing sector than any other policy. The IDA makes it very hard for firms to dismiss workers, and has an over protectionist tone. An amendment made to the IDA in the mid-1980s requires that any firm employing more than 100 workers needs to get permission from the state government before retrenching workers.

However, in practise this permission is rarely given. What is remarkably clear about the IDA, and so many other Indian labour laws is that they leave no room for free contracting. For instance a firm, which wants to manufacture a product that has volatile demand - like fashion garments, and wish to offer workers higher wages, but make it clear to them that they could be given a month's notice and asked to leave. Such a contract will have no legal standing because the IDA specifies in advance how and when workers may and or may not be retrenched. Hence such contracts are non-existent. At first sight this law looks like a balanced piece of legislation that protects and promotes the jobs of poor workers, however, a practical glance at

the IDA makes it clear that it may just force an employer not to employ in many cases. As stated by Professor Basu, —while the Indian economy is booming, there is evidence that workers are not partaking in the boom adequately. Employment is not growing as fast as working age population, nor are wages rising as rapidly as per capita income.

The Trade Union Act, 1926

The Trade Union Act facilitates unionisation both in the organised, and the unorganised sectors. It is through this law that the freedom of association that is a fundamental right under the Constitution of India is realised. However, the right to register a trade union does not mean that the employer must formally recognise the union, there is in fact no law which provides for recognition of trade unions and consequently no legal compulsion for employers, even in the organised sector, to enter into collective bargaining.

India has ten major central union organisations of workers based on different political ideologies. Almost every union is affiliated to one of these. These central organisations have state branches, committees, and councils from where its organisation works down to the local level. The first central trade union organisation in India was the All India Trade Union Congress (AITUC) in 1920, almost three decades before India won independence. At about the same time workers at the Buckingham and Carnatic Mills, Madras went on strike. The management brought a civil suit against the workers in the Madras High Court, and not only obtained an injunction order against the strike, but also succeeded in obtaining damages against the leader for "inducing a breach of contract'. This was followed by widespread protests that finally yielded in the Trade Union Act 1926 giving immunity to the trade unions against certain forms of civil and criminal action. This further facilitated registration, internal democracy, a role for outsiders and permission for raising a political fund subject to separate accounting requirements.

Payment of Wages Act, 1936

Prior to the enactment of this Act, the workers suffered many evils at the hands of the employers such as mode and manner of wage payment, a large number of arbitrary deductions in wages, irregular payments, etc. These grave evils attracted the attention of the Royal Commission on Labour which recommended for a suitable legislation to check these evils.

Consequently the Payment of Wages Act was passed on 23rd April, 1936. It came into force from 28th March, 1937. It was amended in 1937, 1940, 1957, 1962, 1964, 1976, 1982 with a view to make it more comprehensive.

Factories Act, 1948

The Act came into force on 1st April, 1949. It was enacted with a view to removing a number of defects, revealed in the working of the Act, 1934. The Act of 1948 not only consolidates but also amends to the whole of India. The object of the Act is to secure health, safety, welfare, proper working hours, leave and other benefits for workers employed in factories. In other words, the Act is enacted primarily with the object to regulate the conditions of work in manufacturing establishments coming within the definition of the term 'factory' as used in the Act.

Employee State Insurance Act, 1948

Every industrial worker has to face some common hazards and risk such as sickness, employment injury, unemployment and old age and maternity in case of women workers. Since an individual worker can not save much from his earnings to meet such contingencies. For saving workers from such sufferings social security measures have been introduced in all the industrially advanced countries and also in some developing countries either by legislation or by collective agreements.

During the last 50 years in India also, a number of social security measures have been undertaken by enacting suitable legislations. One such measure is the Employee's State Insurance Act which was passed in 1948.

Employees' Provident Fund act, 1952

This Act is one of the legislative measures undertaken soon after independence for providing social security to industrial workers by making some provision for their future or old age. At the time of independence provident fund facilities were available only to Government and Semi-Government employees and to employees of some big industrial establishments.

The first legislation enacted to create legal right of workers to have provident fund facilities was the Coal Mines Provident Fund and Bonus scheme Act of 1948. At first the employers opposed this legislation as it involved additional financial liability and the employees considered contribution to provident fund as a compulsory provident fund scheme and there also was a demand from workers of other industries for extending similar benefits to them too. After gaining some experience in working the provident fund scheme in coal mines, the Government of India passed the Employees' Provident Fund Act in 1952.

Workmen's Compensation Act, 1923

The Act ensures workmen and their dependents some relief in case of accidents arising out of and in course of employment and resulting in either death or disablement of workmen. The Government passed the Indian Fatal Accident Act in 1855, which enabled the certain heir of the decreased workmen to pursue the employer for recovering necessary damages. The Workmen's Compensation Act was enacted in 1923 to meet the objectives of the employer.

Protection Laws: Protecting Who?

A recent study by the Federation of Indian Chambers of Commerce and Industry and All India Organisation of Employers points out that there are more than 55 central labour laws and over 100 state labour laws. It is indeed important to note, that all labour laws provide for an inspectorate to supervise implementation, and also have penalties ranging from imprisonment to fines. Cases of non-implementation need to be specifically identified, and complaints filed before magistrates after obtaining permission to file the complaint from one authority or the other. Very few cases are filed, very rarely is any violator found guilty, and almost never will an employer be sent to prison. However, according to scholars, this does not mean that no labour laws are implemented.

On the contrary experience has proved that the implementation of such laws is directly proportional to the extent of unionisation. This generalisation is particularly true of the informal sector. Moreover, data from the Ministry of Labour reveal that in the year 2000 there were 533,038 disputes pending in India's labour courts; and of these 28,864 had been pending for over 10 years.

Almost all pro-worker developments that accrued since independence are now identified as areas of rigidity and in the name of flexibility there is pressure on the government of India to repeal or amend all such laws. Interestingly, if such a proposal is fully implemented, labour law, especially for the organised sector, will go back to the colonial framework where state intervention was meant primarily to discipline labour, not to give it protection, according to Mr Babu Mathew, Professor in Labour Law.

The Contract Labour Act deals with the abolition of contract labour. Under this law, local governments can abolish some contracted labour by creating permanent jobs. The Indian industry has over and again stated this as interference in employing labour. The most distinctly visible change from globalisation is the increased tendency for offloading or subcontracting. Generally this is done through the use of cheaper forms of contract labour, where there is no unionisation, no welfare benefits, and quite often not even statutorily fixed minimum wages. Occasionally the tendency to bring contract labour to the mother plant itself is seen. This is very often preceded by downsizing, and since there is statutory regulation of job losses, the system of voluntary retirement with the so called 'golden handshake' is widely prevalent, both in public and private sectors.

The Trade Union Act provides that seven or more members of a trade union are required for its registration, whereas industry wants to restrict the forming of unions. The government has already proposed some changes in the Trade Union Act. One of the major changes would make it compulsory for a trade union to have a membership of at least ten percent or one hundred, whichever is less. The trade unions have argued that the right to organise is a fundamental right.

Indian labour laws are such that closing down an industrial unit is perhaps more difficult than opening or running one. The law states that establishments that employ more than 100 people [6] will have to seek the permission of the "appropriate government" before closing it down. The industry wants the threshold limit to be increased to 1,000 workers, while unions are fighting tooth and nail to keep the number at 100. Labour law experts say the legislation is complicated and, in some cases, puts too much power in the hands of the government. J. S. Saroha, a management consultant on industrial laws, says, "In a few cases, the Supreme Court has judged in favour of the employer, stating just as the right to earn a living or do

business is a fundamental right, the right to close a business is a fundamental right too. Legislative changes can be made where the termination compensation can be increased, but make the closure easier. Not doing this only puts power in the hands of a few in the government.

Social Security and Unemployment Allowance; a Government not in Favour

A permanent worker can be removed from service only for proven misconduct or for habitual absence - due to ill health, alcoholism and the like, or on attaining retirement age. In other words the doctrine of 'hire and fire' is not acknowledged within the existing legal framework. In cases of misconduct the worker is entitled to the protection of Standing Orders to be framed by a certifying officer of the labour department after hearing management and labour, through the trade union. In such cases, employers must follow principles of 'natural justice', which is an area that is governed by case-law. An order of dismissal can be challenged in the labour court and if it is found to be flawed, the court has the power to order reinstatement with continuity of service, back wages, and consequential benefits.

In contradiction to the over-flow in laws to —protect 'the employee, there is no provision or guideline for social security measures in case of unemployment.' 'Social security', and 'social safety net' are often talked about in the context of 'labour law reforms.' However, the legislature has paid meager concern to this issue. A question was raised in Lok Sabha on whether the government of India proposed to take any effective measures to provide unemployment allowance to those unemployed young men/women whose names have been registered in various employment exchanges of the country for more than three years. The minister of state for labour and employment, added that 'the central government is not in favour of making payment of unemployment allowance to any category of the unemployed youth.'

The Working Group on Labour Policy for the Ninth Five Year Plan (1997-2002) had recommended that the ILO Convention No. 102 concerning Social Security (Minimum) Standards, 1952 should be examined and efforts be made to ratify the same during the Ninth Five Year Plan period. However, in reply to a question in Rajya Sabha , the government of India stated: 'The question of ratification of the ILO Convention No. 102 was examined by the government from time to time. In India, at present there is no comprehensive social security against unemployment. However, other social security measures as envisaged by the ILO

Convention No. 102 are by and large met under the existing social security schemes of the country, especially the Employees State Insurance Scheme. Yet the coverage of the scheme is not as wide as envisaged under the convention. The resource position of the country at this stage of development does not facilitate ratification of the convention immediately.' [1]

Women's Right to Work and Labour Law

Apart from the Maternity Benefit Act, almost all the major central labour laws are applicable to women workers. The Maternity Benefit Act is applicable to notified establishments. Its coverage can therefore extend to the unorganised sector also, though in practice it is rare. A woman employee is entitled to 90 days of paid leave on delivery or on miscarriage. Similar benefits, including hospitalisation facilities are available under the law. The Factories Act restricts women working at night. One of the controversial subjects discussed has been to amend this act to allow women to work night shifts. According to Government sources, out of 407 million total workforce, 90 million are women workers, largely employed (about 87 percent) in the agricultural sector as labourers and cultivators. In urban areas, the employment of women in the organised sector in March 2000 constituted 17.6 percent of the total organised sector.

The Equal Remuneration Act was passed in 1976, providing for the payment of equal remuneration to men and women workers for same or similar nature of work. Under this law, no discrimination is permissible in recruitment and service conditions, except where employment of women is prohibited or restricted by the law. The situation regarding enforcement of the provisions of this law is monitored by the Central Ministry of Labour and the Central Advisory Committee. On occupational hazard concerning the safety of women at workplaces, in 1997 the Supreme Court of India pronounced that sexual harassment of working women amounts to violation of rights of gender equality.

As a consequence it also amounts to violation of the right to practice any profession, occupation, and trade. Furthermore, the judgment laid down the definition of sexual harassment, the preventive steps, the complaint mechanism, and the need for creating awareness of the rights of women workers. Implementation of these guidelines has already begun by employers by amending the rules under the Industrial Employment Standing Orders Act 1946.

A Call to Liberalise Labour Laws

The Organisation of Economic Cooperation and Development (OECD) has suggested India to liberalise its labour policies which it states, if not changed, would slow down the productivity. Labour laws, if too stringent, raise the cost of adjusting the workforce. This may slow down the adoption of latest technology, which requires work-place reorganisation and substantial changes in the composition of workforce. This will create problem for a country like India, which needs to catch-up with the 'frontier' rapidly. On business regulation and tariff front, though it varies across the states, it is still burdensome. Policies that used to reserve some industries for very small firms still exist. Despite trade liberalisation, in 2003 India had one of the highest tariff rates in the world. India should liberalise business regulation by doing away with reservations for small firms, reduction in tariff rates and easing of labour laws for large firms. Such an approach could pave the way for labour market reforms. Taking note of India's infrastructure woes and comparing it to China which, spends around 3% of its GDP on infrastructure whereas in India, it's around mere 0.5%.

Professor Basu argues that in a poor country, law makers may legislate emotionally so that workers don't loose their jobs – thus, making it difficult for firms to layoff workers. This is what may be called the feature of India's Industrial Disputes Act, 1947, especially through some later amendments, for firms in the formal sector and employing more than 100 workers. However, in today's globalised world, with unpredictable and shifting demands, firms have responded to this by keeping their labour forces as small as possible, which has resulted in India having less than 10 million workers employed in the formal private sector. Some commentators have argued that India's labour laws could not have had much of a consequence since most of them apply to only the formal sector.

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