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THE MAKING OF A NEW LABOUR LAW REGIME IN INDIA

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Summary: The Indian Parliament repealed 29 labour legislations, and created four labour codes (Code on Wages, Industrial Relations Code, Code on Social Security, Occupational Safety, Health and Working Conditions Code) in September 2020. The present reforms unsettle an entire century of labour jurisprudence dating from before India's independence, accumulated through tussle between labour and capital, State intervention and judicial pronouncements. We analyse the new labour codes with a focus on social security provisions and labour welfare. While the pronounced goal of these legislations is simplifications of complex labour laws, our analysis shows that rights of labouring class are deliberately weakened to advance neo-liberal agenda. This paper is providing historical context to this development, and assessing the likely impact of these legislations for the welfare of working class in India.

Key words: History of Labour Laws, Neo-liberal, Political Economy of Labour Welfare, India

Introduction

The Indian Parliamentary assent to the four Labour Codes in October 2020 marked a historic moment in Indian labour history: it repealed 29 labour law legislations, in the process unsettling over hundred years of labour jurisprudence accumulated through a process of struggle between labour and capital in the country. The Government claimed this as merely an

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exercise of rationalisation and simplification of a complex labour law regime, while extending benefits of regulation to unregulated sections of the working class. Why then did the major trade unions in the country unanimously vote with their feet against the new laws, with workers coming out in large numbers to participate in a nation-wide general strike on November 26, 2020?What were the motives behind the government venturing to pass laws despite their being opposed widely?

This article examines the historical development of legislative change in labour law within a political economy framework; important elements of the new labour legislation and how they differ from existing labour jurisprudence; and their potential impact in the present economic and social context.

Section 1: Historical Development of Legislative Change in Labour Law

The process of change in labour legislation in India can be analysed in the context of dialectic struggle between labour and capital, with the state role of a far from neutral arbiter. These struggles were influenced by various forces, including struggles for independence from various forms of exploitation, political and economic contestation between sections of society, and dominant global ideological influences. For a historical understanding of this process, we divide the developments into three periods: before independence – the colonial state; post-independence to the eighties – the welfare state; and the period from the nineties – the neoliberal state.

The early part of the twentieth century, prior to Independence, brought limited benefits in labour regulation and social security (Ahuja 2019). Important regulatory measures included: the Workmen's Compensation Act,

1923, compensating workplace injury, the Trade Union Act 1926, providing protection to registered unions from legal action; the Factory's Act 1934 prescribing minimum regulatory standards for hours of work and safety; and the Payment of Wages Act 1936 (ILO 2019).

Many labour regulation measures followed the setting up by Great Britain of a Royal Commission on Labour in India. The Commission appointed in 1929 sought to link conditions of employment in industry and plantations on health, efficiency and standard of living of workers[2]; it clearly brought out the concern on falling efficiency and productivity brought about by the abysmal standards of worker health and working conditions.

The Indian welfare state had its origins in the independence movement, as a result of the political churning engendered by it. The All India Trade Union Congress (AITUC), the first trade union federation in the country was established on October 31, 1920[3]. The policy on labour regulation in independent India was arguably also influenced by the post Second World War global realisation of the need for a more equitable economic and political order; the influence of the ILO, of which India was a founding member; and the progressive influences within the Indian National Congress. These early influences are evident in the fundamental rights under the Indian Constitution, which provided foundations for progressive legislation to regulate employment relations[4]. The Minimum Wages Act, Industrial Disputes Act, Contract Labour Act, and welfare measures for the organised sector (the Provident Fund and the Employees State Insurance) as

[2]Report on the Royal Commission on Labour in India (1929), highlights available at The University of Chicago Press Journals, https://www.journals.uchicago.edu/doi/10.1086/631086

[3] It is good to note Lalalajpat Rai, the first President of AITUC was also one of the leaders of the independence movement

[4]The Constitution among other rights laid down in its Articles 21, 23 and 24 enshrined the right to life and livelihood; prohibition of forced labour; and prohibition of employment of underage children in hazardous work.

well as some sections of unorganised sector workers (Beedi Workers Act and Plantation Labour Act) were some examples of these progressive legislations.

The impact of global rise in neo-liberal political and economic ideology arguably influenced Indian policy making from the eighties. While the most proximate cause for neoliberal policy measures was the Structural Adjustment Programme forced in 1990 on an Indian state facing a severe Balance of Payment crisis, the seeds for this can be seen in the liberalisation measures, particularly in the financial sector from the eighties (Patnaik & Chandrasekhar1995). The early impacts were probably on economic regulation: the removal on limits to emoluments to top executives; changes to regulations governing monopoly capital; changes to the 'license raj' – government control over private capital investments; the effective gutting of the Sick Industrial Companies Act (SICA) which enabled worker take over in management of sick companies. The Voluntary Retirement Scheme (VRS), which trade unions held as being far from voluntary, helped close down factories in urban locations to make way for property development; this was the forerunner to the more recent measures against security of employment.

The contrast between the ideological positions during the welfare phase and the neoliberal phase are clearly brought out comparing significant recommendations of the First National Commission on Labour (1969)[5] and the Second National Commission on Labour (2002)[6]. For instance, the First National Commission recommended progressive reduction of working hours from 48 hours to 40 hours per week with economic growth; in contrast the Second Commission recommended relaxation on limitation in overtime hours, with the present ceilings doubled, "to enable greater flexibility in

[5] Government of India (1969), Report of the National Commission on Labour, Ministry of Labour and Employment and Rehabilitation, 1969, available at https://casi.sas.upenn.edu/sites/default/files/iit/National%20Commission%20on%20Labour%20Report.pdf

[6] Rao G.S. (2003), India: The Report of The Second Indian National Labour Commission-2002: - - An Overview, https://www.mondaq.com/india/employee-rights-labour-relations/20167/the-report-of-the-second-indian-national-labour-commission-2002---an-overview

meeting the challenges of the market". While both Commissions recommended enactment of a National Minimum Wage, the First Commission clearly recommended regional Minimum Wages reflecting the differing cost of living and wage levels, revising minimum wage every once in 3 years, and inflation linkage for all workers, even if they were being paid more than the minimum wage; the Second Commission recommended a uniform National Minimum Wage, with revision every 5 years, and inflation linkage mandated only for the Minimum Wage fixation. Further, the First Commission recognised workers lost out when disputes went for litigation, and therefore recommended shift to collective bargaining as the method for dispute resolution, with compulsory registration of factory level unions; while the Second Commission sought to make strikes more difficult by recommending 51% ballot majority for a legal strike notice. The evident shift in the Second Commission to more liberalised labour legislation was also evident in its recommendation to increase the threshold to 300 workers for the applicability of Chapter VB restrictions under the Industrial Disputes Act for restrictions on retrenchment, layoff and closure of factories. The recently legislated Labour Codes in the country borrowed significantly from the Second Commission.

Section 2: Significant changes from the New Labour Codes

Having reviewed the historical context of new labour codes, we move to examine the key provisions of the code. Our examination is focused on security of employment, wage regulation, social security and freedom of association. On each of these spheres what jurisprudence existed in India, and how the new code is negating this jurisprudence will be examined in this section.

Security of Employment

Arguably the most vexatious road block to growth from the perspective of industry was the laws providing security of employment to workers in the organised sector. These were the focus of industry demands for greater labour flexibility.

Sections 25 (m), (n) and (o) of Chapter VB of the Industrial Disputes Act 1948 (ID Act) mandated that no employer in an establishment employing 100 workers or more could lay-off or retrench workers, or close the establishment, without prior permission from the State/Central Government. This legislation empowered workers where they were strongly organised to challenge, and often prevent arbitrary closures, or to bargain handsome compensations for job loss. Industry had long argued for repeal of this legislation, even successfully challenging it in the Supreme Court of India in the seventies, only to have the government bring back an amended legislation. The new Industrial Relations Code has amended this regulation to become applicable only in establishments employing more than 300 workers. This in effect means nearly half the employment in registered factories would no longer have protection of this regulation[7].

In order to get around this perceived rigidity in employment relations, many large establishments used contractual forms of employment, thus no longer being the direct or principal employers of these contract workers. The Government introduced the Contract Labour (Regulation and Abolishment) Act 1970 in order to regulate this form of employment. The Act provided a route to workers to claim direct and permanent employment status in the establishment where they worked, by demonstrating their work as being of a permanent nature. Many contract workers through the seventies and the eighties were able to use the provisions of this Act to gain permanent employment status. However, in 2001, a significant judgment denying

[7] As per the Annual Survey of India 2017-18, 55.5% of all workers in registered factories were employed in factories with less than 500 workers.

contract workers the right of automatic absorption as permanent workers in the event of abolishing contract employment in an establishment substantially weakened the provisions of the Act[8]. Industry had meanwhile found other workarounds, employing workers as 'trainees' or 'apprentices' or giving them the status of 'supervisor' to deny them protection of workers under the ID Act.

The new Industrial Relations Code does away with the Contract Labour Act. Instead, it has simplified the procedure for employing workers without the burden of permanency in employment tenure, through legalising the system of 'Fixed Term Contract', whereby workers can be employed for a fixed tenure, with no obligation on the employer after the term of the tenure. The employer can further also progressively extend the duration of the tenure. This in effect creates a system of temporary 'permanent workers' - surely a legal oxymoron!

Wage Regulation

One important cornerstone of wage regulation in India is the Minimum Wage Act 1948. It flows from Article 43 of the Indian Constitution which enjoins the state to procure for all workers "a living wage, conditions of work ensuring a decent standard of life…". Two basic features of the Act are mandated revision of the Minimum Wage at least once every five years using a tripartite consultative process involving trade unions, employers and the government; and second, indexing Minimum Wage to inflation. While the implementation of the Act suffered from significant infirmities, it remained an important regulation to prevent decline in real wages. Rulings of the Supreme Court of India denied attempts by industry to argue adverse

[8]The Steel Authority of India Judgment (Steel Authority of India and Ors vs National Union Waterfront Workers &Ors on 30th August 2001 before the Supreme Court of India) held that even where contract work in an establishment was abolished workers did not have automatic right of absorption.

industrial conditions to pay below the Minimum Wage[9]; they held that payment below Minimum Wage was equivalent to forced labour[10].

According to the Union Labour Ministry, around 70 percent of all workers were excluded from protection under the Minimum Wage legislation[11]. The Government remedy in the Wage Code is to introduce a new National Floor Wage covering these workers. However, no parameters are provided for fixing the Floor Wage[12]. The introduction of a Floor Wage below the Minimum Wage in effect weakens the Minimum Wage as a regulator of wages against predations by employers; it is tantamount to legitimising the employment of forced labour. The perversity of this action can be seen when the simple alternative course of extending coverage by the Minimum Wage to all workers is evident.

Social Security

The most significant benefit claimed by the Government in enacting the Labour Codes is universalising social security coverage, extending benefits to all informal workers[13]. A superficial reading of the Code on Social Security would suggest just that. The Code extends economic security under the Employees Provident Fund (EPF) Scheme, and health security through the

[9] The Supreme Court of India in U. Unichoyi And Others vs The State Of Kerala on 14 April, 1961 ruled that "..any hardship that may be caused to employers by the wages fixed under the Act or their incapacity to pay the same are irrelevant considerations in fixing such wages."

[10]The Supreme Court of India in People'S Union For Democratic ... vs Union Of India & Others on 18 September, 1982 ruled that: "…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 scope and ambit of the words 'forced labour' under Article 23".

[11] Speaking on the floor of the Rajya Sabha (Upper House), the Union Labour Minister claimed that only 30 percent of India's 50 crore workers were covered by Minimum Wages. (refer Press Information Bureau, Government of India, 23 September, 2020, https://pib.gov.in/PressReleseDetailm.aspx?PRID=1658197

[12]At various instances, the Labour Minister announced a Floor Wage of Rs.178 per day in 2019; subsequently the Finance Minister announced Rs.202 as the Floor Wage. This is only around half the Rs.375 per day Floor Wage recommended by the Labour Ministry's Expert Committee on Wage in 2019; it is even lower than the poverty line family expenditure estimated by the Government appointed Rangarajan Committee in 2011, corrected for inflation.

[13]Social security for informal sector workers has been a long standing challenge in several countries in the global south (refer Pellissery and Walker, 2007).

Employees State Insurance Corporation (ESIC) to establishments employing ten workers or more. This leaves out nearly 80 percent of all Indian workers. However, the Code grants the Central Government the power to extend measures of EPF and ESIC to these excluded informal sector workers.

A closer examination shows however, the Government claim of universal coverage as being largely unmet by the Code.The informal sector workers have to be satisfied with a promise of some special schemes yet to be defined. They are meanwhile allowed access to ESIC hospitals if underutilised facilities are available. Given the already stretched resources of these hospital facilities, the chances of informal sector workers to actually benefit from this enabling clause are extremely low. At the same time, the new Codes abolish various employment sector specific social security schemes, except for informal workers in the construction sector. Thus, an estimated 5 million worker, mostly women, involved in beedi rolling across the country will no longer avail of benefits under the Beedi Workers Welfare Cess Act 1976, financed through a cess levied on the sale of beedis.

An interesting feature of the Social Security Code is the inclusion of the growing sector of platform workers, employing estimated 15 million workers in the country (Behara 2020). The workers are defined as outside the 'traditional employer-employee relationship', and do not find any mention in the other three Labour Codes. The new legislation requires platforms to create a cess based Welfare Scheme for platform workers, which is surely welcome. However, benefits from the Scheme are pegged at a maximum of 5% of the expenditure of employers on these workers. Compare this with the cumulative 15.5% of wage contributed by employers to ESI and EPF for organised sector workers. The value of welfare available to the platform workers is therefore, at the maximum, less than a third that available to the formal sector.

Freedom of Association

The Trade Union Act 1926 gave the Indian working class the legal right to form trade unions, even while the country remained a colony to Britain. While the Act provided for deregistration of unions, this provision was limited to internal functions of the unions. Importantly, the law provided elected union officer bearers immunity from prosecution for criminal conspiracy. Thus no trade union or its officers would face legal action for participating in strikes or industrial action, even if the strikes were declared unlawful. The new Industrial Relations Code, however, provides for deregistration of unions for "contravention of this Code", making more ambiguous conditions for deregistration. With deregistration, the officers and members lose immunity from prosecution for criminal conspiracy, and become vulnerable to punitive action. The outcome can become criminalisation of all forms of working class dissent, further weakening collective bargaining strength vis a vis the state and employers[14].

The Trade Union Act also gave trade unions the right to constitute a political fund with voluntary donations from members, which could, among other purposes, be used to finance expenses of participating in elections. The amended new Industrial Relations Code has deleted the provision, in effect denying the right to collective political participation to members of trade unions. This denial should be taken in conjunction with the legal provision for corporate bodies to purchase election bonds for contribution to any political party, keeping the contribution secret[15]. This skewing the game in favour of corporate interests in influencing political outcomes clearly brings out the neoliberal character of the present Indian regime.

[14]Mody G (2020), "A recipe to tear down trade unions", *The Hindu*, November 16, 2020. The article provides an excellent discussion on the impact of the Industrial Relations Code on trade union rights.

[15]Electoral bonds scheme was introduced through the Finance Acts of 2016 & 2017, which amended four legislations – Foreign Contribution Regulation Act, 2010 (FCRA), Representation of the People Act, 1951 (RoPA), Income Tax Act, 1961 and the Companies Act, 2013.

Section 3: The Labour Codes in a Post Pandemic Economy

In order to analyse possible impacts of the Labour Codes in the current Indian context it is useful to understand the dominant political regimes in power since the nineties. The two main political formations which formed government were the Indian National Congress Party (INC) led coalition (the UPA) and the Bharatiya Janata Party (BJP) led coalition (NDA). While both were wedded to a neoliberal economic agenda, the BJP might be termed more firm in its avowal of neoliberalism. Thus, while the Second Labour Commission recommendations were available since nearly two decades, it took the current NDA government to implement the Labour Codes. The UPA government felt the need to temper the ill-effects of jobless growth and rising inequalities resulting from its neoliberal policies with reforms such as the Mahatma Gandhi Rural Employment Guarantee Act (MGNREGA), termed the largest workfare measure introduced as a Right to Livelihood enactment for rural India. In contrast, the NDA has been more resolute with neoliberal policy implementation, even in the face of manifest ill-effects of some of its big ticket legislations. Both its demonetisation of currency in 2016, and formalising the economy through a uniform policy of taxation of all commercial transactions (GST) in 2017 were recognised by several economists as having severe negative impact on the informal economy, which continues to support half the employment in the country; consequently slowing economic growth. The pandemic that followed resulted in severe economic recession, and job losses. The Centre for Monitoring Indian Economy (CMIE) estimated 122 million people lost their livelihood in April 2020 alone, when the lockdown was imposed; nearly three quarters of job losses were in the informal sector (Unni 2020).Further,21 million salaried jobs were lost in the five months from April to August 2020 (Vyas 2020).

The commitment of the NDA to neoliberalism was evident in its implementing a drastic lockdown of the economy, while not stepping in with

adequate income or livelihood support for affected people in the cities, many of whom were migrants, and had no alternative but to trek back to their villages amidst severe hardship.Its parsimony with direct government spending to revive the economywas also in line with the neoliberal agenda to keep fiscal deficit in check, even while the current economic crisis was recognised as demand led, and therefore needing government stimulus.

The impact of the new Labour Codes should be analysed in the foregoing context. We consider three specific areas of impacts of the Codes.

First, the Codes weaken freedom of association. At a time of job losses and economic slowdown, the effect will be to further weaken bargaining power of workers. This would further weaken workers' ability to struggle for rights to security of employment and better wages. There could consequently be rise in xenophobia, and viewing migrants as competing for jobs that 'locals' are vying for.

Second, the reverse migration from cities was a desperate measure by workers attempting to escape the impossible conditions for survival in cities during the lockdown. Migrant workers would be reluctant to make this journey back to distant cities as long as the threats of the pandemic and economic slowdown continue. Their demand would be for alternative employment closer home. This could create pressure on capital to restructure production supply chains by farming out low technology outsourcing to the poorer states from where migrant workers came. There could be competitive downward pressure from states on statutory wages and employment conditions to attract investment. This can further build downward pressure on statutory wages across the country, mediated through the mechanism of a common National Minimum Wage.

Third, the pandemic has raised a global debate on universal health care being essential to maintaining a globalised world order. The new Code on Social Security also promises universal health coverage, primarily through expansion of the ESIC to all workers. However, the ESIC is already stretched: it employed around 6 doctors per one lakh beneficiaries in 2016, as against the WHO norm of 100 doctors (Mani & Prathibha 2019); the proportion would fall further with the expanded membership, in the absence of increased investment and revenues, making ESIC operations unviable, and vulnerable to privatisation pressures. Further, the present availability of ESIC services varies substantially between states. In the economically developed southern states of Tamil Nadu and Karnataka, ESIC coverage in terms of beneficiaries as proportion of the total population in 2017 was around 20 percent; the proportion was only 0.7 percent for the less developed state of Bihar[16]. Could restructuring supply chains to shift low technology production to the less developed states also reduce health entitlements for workers in these states? Would this in turn reduce employer accountability to health of workers – an about turn from the position following the Royal Commission and subsequent establishment of the ESIC?

Conclusion

This paper has shown that the promise of universal welfare measures through social security for the labourers, particularly in an economy where over 90% population is in informal economy, is creating a 'low-flat rate residual universalism' (Leisering 2019: 358). This promise is breaking the mobilisational capacity among labour unions to resist the slashing of social rights hitherto enjoyed to demand their rights through agitation and struggle. This is a paradigmatic shift in Indian labour history.

[16]Employees State Insurance Corporation Annual Report 2016-7, https://www.esic.nic.in/attachments/publicationfile/eb8a5bdd4ad83e6f6ae325462021ff51.pdf

The Covid pandemic came to India at a time when the economy was limping with the lowest economic growth rates in the last decade. However, government response was more of supply side stimulus[17], with the pushing through of the Labour Codes a continuation of this policy. The trade union movement, though united against the Codes, is fighting a defensive struggle, and unlikely to be able to wrest major concessions from a government determined to move ahead with its neoliberal agenda. Without a safety net, the Codes are likely to push more workers into informality, and further accentuate economic and social divides. The impact is likely to be pulling the economy down further[18], setting a reinforcing cycle of further divisions, creating further barriers to growth.

Neoliberal orthodoxy would have markets correcting the more egregious impacts of government policies with countervailing regulatory measures. A school of analysis in development economics suggests the relationship between law and economic development following global cycles: it recognises three dominant 'Moments' in this relationship (Turbek and Santos 2006). The First Moment was during the immediate post-World War 2 years, when development policies focussed on the state role in social and economic transformation, with law supporting a 'welfare state'. The Second Moment from the eighties, shifted focus from an administrative state to private capital, and role of law became more to restrain the state from curbing market freedom. With the turn of the century, we now are in the Third Moment, when markets are seen as imperfect and state role recognised in controlling market failures. However, the Indian experience, and similar other experiences of neoliberal and authoritarian regimes across the world suggests that such corrections are not inevitable. We may instead be in for a long haul with widening gaps in economic and political power between sections of society strengthening the divisions that prevent a democratic

[17] Jayati Ghosh (2020) argues the destructive effects of Covid were compounded by Government response.
[18] See for instance the interview by Karan Thapar of Prof. Kaushik Basu in The Wire, October 20, 2020, https://thewire.in/economy/watch-kaushik-basu-karan-thapar-chief-economic-covid-19-world-back

resilience. The depredations of the Labour Codes on rights of workers might be there to stay for some time.

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