Analysis of the Code on Industrial Relations Bill – Part I (Trade Unions)

A group of faculty and students of the National University of Juridical Sciences, report on the Code on Industrial Relations Bill, 2015. This examines the provisions relating to trade unions. In this comment on matters relating to trade unions in the Code on Industrial Relations Bill, 2015 ('Draft Code' or 'Code'). As per the Code, the erstwhile Trade Union Act, 1926 would stand repealed, and would instead be replaced by the provisions of the Code.

Requirements for Registration

The provision relating to requirement for registration makes several changes from the corresponding provision in the Trade Union Act, 1926 (S. 4). From a reading of the new Draft Code (S. 5(1)), it appears that at least 10% of the members of the establishment or industry must be members of the Trade Union seeking registration. The existing alternate threshold of 100 members has been removed without providing any explanation. The first proviso permitting 100 members to apply is only for the purpose of making the application. A minimum of 10% of the members of the establishment or industry have to be members of the Trade Union to qualify it for application. Earlier, 7 or more members would have sufficed to apply for registration. The Draft Code however mandates that 10% or 100 members, whichever is less, are to be the applicants. In large establishments, this would inevitably mean that 100 members must be applicants for registration. This is inexplicable, especially in light of the amended requirement that the applicants must submit a copy of resolution authorizing applicants to apply (S. 6(1)(c) of the Draft Code). The amendments relating to removal of the 10% threshold for the unorganized sector and the clarification with respect to Trade Union of employers are appreciated (S. 5(b) of the Draft Code). It has been rightly noted that employee-employer relationship is unclear in the unorganized sector, and thus the threshold has been inapplicable.

Rules of the Trade Union

In the clause relating to the provisions to be contained in the constitution and rules of the trade union (S. 9 of the Draft Code), a few changes have been made, notably with respect to subscription fee for members (provided for in a separate Section; also alternatively creating a general welfare fund) and office duration for members of the executive (reduced from 3 years to 2 years). The latter (S. 9(i) of the Draft Code) needs to be explained with reasons. Recently, the Supreme Court in the case Charu Khurana v. Union of India, held that "A clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21." Thus, it may be useful to add a clause that the rules or bye-laws of the trade union must not be inconsistent with the constitution in letter and spirit.

Registration & Certification of Trade Unions

With respect to registration and certification of Trade Unions (S. 10 and S. 11 of the Draft Code), it is observed that a 60 day limitation period for the decision for the Registrar has been appreciably added. It has also been rightly provided that the Trade Union will be deemed to have been registered in case of non-communication of the decision of the Registrar within 60 days. However, a couple of aspects may be clarified: If the Registrar communicates a decision to register the Trade Union, a certificate of registration is issued, and it is treated as "conclusive evidence" of registration (S. 10(2) of the Draft Code). However, what must be treated as "conclusive evidence" in case the Trade Union is deemed to have been registered due to non-communication of the decision within 60 days? Is the 60 day limitation period from the date of the original application? What if the Registrar sends the application back to cure defects – does the 60 day period or cycle begin again after curing the defects? We also approve of the addition of clauses providing that: i) rejection of registration must be accompanied by reasons (a basic administrative law principle); ii) decision can be communicated electronically. It must be clarified whether the applicant for cancellation can only be the registered trade union. For example, in Tirumala Tirupati Devasthanam v. Commissioner of Labour & Ors, the Devasthanam had applied to the registrar to cancel the registration of the trade union of its employees. The Supreme Court held that S. 10 of the ID Act does not permit the Devasthanam to apply, and that only the trade union could do so.

This position was reiterated recently in the case of R.G. D'Souza v. Poona Employees Union. There appears to be no objective reason to disallow applications by a different party to the registrar if there are grounds for cancellation. Even the appellate remedy under S. 13 of the Draft Code is also allowed only against refusal to register or cancellation. No remedy would be available to the employer or third parties even if there is a genuine case for cancellation of registration. The registrar, in any event, has to apply his mind and record reasons for cancellation (as provided by the Draft Code). Thus it is advisable to allow third parties to apply for cancellation. S.13 of the Draft Code also states, "Any person aggrieved […]if the Registrar has not acted within 60 days on the application for registration may within such period as may be prescribed prefer an appeal to the Industrial Tribunal whose decision shall be final". However, S. 11(2) of the Draft Code provides that there shall be deemed registration if the registrar does not act within 60 days. Thus it is unclear why a provision for appeal to the Industrial Tribunal needs to be provided.

Office Bearers of the Trade Union

While a few grounds for disqualification to be office bearer of trade unions have been added (such as being an office bearer in 10 other trade unions as well as order of Industrial tribunal), an important clarification has to be issued. In S. 25, a clarification needs to be issued with respect to what happens when a sitting member, who has been convicted, gets a stay on conviction? Does he retain his office or does he have to apply or contest again? This is an issue what the Election Commission of India has been grappling with, in the light of the judgment in Lily Thomas v. Union of India. S. 27 of the Draft Code drastically reduces the allowed proportion of office bearers not engaged in the establishment or industry. For the unorganized sector, the earlier threshold was half, i.e., the number of officer bearers not engaged in the establishment or industry could not be more than half (S. 22(1) of the Trade Union Act). The Draft Code provides that the maximum number can be two. For all other sectors, the Draft Code completely bars anyone not engaged in the establishment or industry from being an office bearer. This is a drastic reduction from the earlier permitted number of one-third of the office bearers or five, whichever is less (S. 22(2) of the Trade Union Act). This reduction needs to be accompanied with reasons or explanation, since this affects the autonomy of the trade unions. Many of the campaigns and advocacy efforts, interlinked with the process of collective bargaining, would need the support and advice of non-workers.

Adjudication of Trade Union Disputes

S. 26 of the Draft Code is a separate provision for adjudication of disputes of trade. The Industrial Tribunal is the adjudicatory body and the jurisdiction of the civil court is explicitly barred. It also states that the order/award of the Tribunal shall be final. A possibility of a provision for appeal may be explored. S. 26(2) provides that the appropriate government may make an application to the Tribunal for 'seizing' the trade union dispute when it involves a question of 'considerable' importance. There is no indication in the statute as to what 'seizing' entails. This may affect the autonomy of trade unions and may amount to interference with the due process of law. Similarly, S. 26(3) provides a corresponding power to the Central Government in cases of disputes of national importance or if one of the parties to the dispute has offices in more than one state. The 'or' is perhaps a typographical error and must be changed to 'and'.

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Analysis of the Code on Industrial Relations Bill – Part II
(Standing Orders & Negotiating Agent)

In this comment on matters relating to Standing Orders in Chapter IV of the Code on Industrial Relations Bill, 2015 ('Draft Code'). This chapter imports the rights and duties of employers and workers set out under the Industrial Employment (Standing Orders) Act, 1946 ('Standing Orders Act') with substantial changes.

Increased Ambit of Applicability

The Draft Code greatly increases the ambit of applicability of standing orders, which is a welcome step given that clearly defined contingencies in employment contracts have the potential to reduce unnecessary litigation. S.35 of the Draft Code which deals with applicability, states that all the substantive provisions of the chapter relating to the making of rules and model standing orders by the government, drafting of standing orders by the employer, the procedure for certification and modification of said orders, appeals to the Industrial Tribunal etcetera are applicable to "all such establishments or undertakings" as have employed not less than 100 or more workers on any day during the preceding year. Under the existing Standing Orders Act, the provisions are applicable to a narrow but fragmented list of industries. This extremely fragmented definition has been streamlined and brought into consonance with the remaining legislation by virtue of the single, broad definition of "industrial establishment" under the Draft Code. However, the appropriate government retains its power to exempt establishments from the ambit of applicability. For example, the Karnataka Government can continue to exempt IT industries from having to apply these provisions.

Reduced Executive Discretion to Notify Standing Orders

In line with the Bill's proposed aim of reducing executive discretion and allowing for greater predictability and transparency, a noteworthy change proposed by the Draft Code is that the provisions of this chapter cannot be made applicable to industrial establishments employing less than 100 workers as they can do now. At the same time, the Draft Code ensures that if such an establishment has already been notified, it will continue to stay in force.

Matters Covered by Model Standing Orders

S. 35 of the Draft Code sets out a list of matters to be covered by Model Standing Orders drafted by the Central Government allowing the scope for inclusion of unspecified matters under its ambit. It is a welcome step because the Draft Code envisages a far more expansive list of specified matters than before and it is especially commendable that it spells out certain acts which are decidedly considered to be acts of misconduct. For instance, in line with the Vishaka judgement, sexual harassment has now been classified as misconduct under the Model Orders. Further, contractual uncertainty and scope for disputes leading to judicial intervention are both reduced by the inclusion of matters such as medical aid in case of accidents in the standing orders. There is a difference between the matters on which Model Standing Orders should be framed as provided in S. 35 and the matters which are covered under the First Schedule (which lists matters that must mandatorily be covered by Standing Orders). The First Schedule contains two provisions which are missing from the Model Standing Orders and the latter contains a number of provisions not included in the former. The First Schedule contains matters that would mandatorily be included in the Standing Orders while S. 35 sets out additional guidelines for the Model Standing Order that industries should loosely follow. However, the phrase used in S. 35 is "shall make" which seems to impose a positive obligation on industries to include all matters stated in the section in their Standing Orders. In that case, it is unclear as to why there are two separate provisions dealing with matters covered by Standing Orders. Another issue worth noting here is that the existing statute envisages strict compliance of the Standing Orders with the Model Standing Orders wherever specified it has been affirmed in IOC Ltd. vs. JCLC that the Certifying Officer must verify the same. Now, the usage of the phrase "based on" in S. 35 of the new Code implies a degree of derogation from the earlier standards of strict compliance, which allows employers greater flexibility to adopt the standing orders as per their specific needs and hence is a welcome change.

However, it makes the Certifying Officer's duty to check compliance slightly ambiguous. Thus it might be better to insert an express clause indicating that the Certifying Officer shall, while examining the reasonableness and fairness of the provisions of the Standing Orders, also ensure that these provisions are reasonably based on the Model Standing Orders.

Simplified Drafting and Certification and Other Procedural Changes

The procedure for drafting and certification, while remaining largely similar, has been slightly more streamlined. This is a commendable step. There are also certain encouraging procedural changes that the Draft Code proposes. For instance, a time limit has been introduced for completion of investigation and inquiry for suspension. Also, the quantum of subsistence allowance for suspended workers has been increased. Also recommend that clauses be inserted placing a time limit on employers for submission of draft Standing Orders. Further, it might be advisable to vest the powers of a Civil Court in the Certifying Officer for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the discovery and production of documents.

Definition of Negotiating Agent

The Draft Code makes several references to a "negotiating agent". However, it offers no clarity on the definition, identification and precise role of such an agent. This ambiguity may lead employers to arbitrarily designate particular trade unions as the negotiating agent. The Report by the Second National Labour Commission (hereinafter referred to as the Report) has undertaken a detailed discussion on the definition of a negotiating agent and the need of such an agent. The Report defines a Negotiating Agent as a "registered trade union recognised or certified as such under this Act being the single negotiating agent or a combination or college of more than one registered trade unions and includes a negotiating committee". The Report emphasised on the need for a single negotiating agent and reduction in the multiplicity of trade unions so as to avoid fragmentation in collective bargaining power of the workers and prevent inter-union and intra-union conflicts. Thereafter it considered the debates surrounding the manner of recognition of a Negotiating Agent that were taken up by the First National Labour Commission (hereinafter referred to as the Commission). The Commission had looked into two ways in which a Negotiating Agent could be chosen–the secret ballot system and the check off system. The Commission had gone into the recommendations of various committees like the Ramanujam Committee, Shanti Patel Committee and the Sanat Mehta Committee. The secret ballot system is akin to the secret voting system that is followed in India for Parliamentary elections. This system allows for a democratic form of election of the Negotiating Agent and maintains the confidentiality of the choices that the workers make thereby allowing them the freedom to associate freely. The system however suffers from a lot of vices. There is a need to clarify who could participate in the election process – whether it should be the entire working class in the establishment/industry or whether it should only be the members of a registered Trade Union. Also, if the right to vote is confined only to members of a registered Trade Union, it would largely affect the freedom of association of the workers thereby forcing everyone to join a registered Trade Union. The Report also noted that a secret ballot system would not be a cost effective solution for industries like the railways or a coal mine that has hundreds of workers. The check off system allows the union to deduct union subscription fees from the wages of the workmen who are a part of the union. This thereby helps in determining the number of workers who are supporting a particular union. The check off system is beneficial in the sense that it ensures continued support of a trade union by the workers unlike a secret ballot system where the workers may secretly support another union. The check off system is more cost effective than the secret ballot system because it largely avoids the administrative costs of an election. The Report, while maintaining that neither of the systems is flawless, sides with the check off system of recognition of a Negotiating Agent. The Second National Labour Commission was of the opinion that the check off system would help in preventing dual membership. The report also side-lined the argument that the check off system would make the workers vulnerable to trade union politics by bringing out their choice in the open. It stated that the multiple legal rights that have been given to workers no longer support the apprehension of exploitation.

Some of the Indian states like Maharashtra, West Bengal, Kerala and Orissa have implemented the concept of a Negotiating Agent or a Recognised Union in their state legislation. Maharashtra has for long had the rule for a recognised union. Chapter III and IV deal extensively with the recognised trade union. Under West Bengal Trade Unions Rules, 1998, the recognised trade union is selected by voting using the secret ballot system. The union securing more than 50 % of the votes would be the recognised union. In case no union secures the majority, a “union securing a minimum of 10 % vote in case of a class of industry and a minimum of 15 % vote in case of any individual industrial unit shall be granted the status of a constituent member of joint bargaining council”. All these statutes have envisaged the identification of a recognized union because of the urgent need to do away with the multiplicity of unions, which increases the transaction costs of collective bargaining to a great extent. As was held in Balmer Lawrie Workers Union, Bombay vs. Balmer Lawrie & Co. Ltd., “a recognised union does not impinge upon the freedom of association – it only reiterates the larger national interest of industrial peace and harmony”. Therefore we appreciate the efforts of the Draft Code to streamline the multiplicity of trade unions by referring to a single negotiating agent, but hope that some clarity will be provided in the final version of the Bill on the mode of recognition and certification of such an agent in order to reduce the scope of arbitrariness in the designation of a Negotiating Agent as well as possible litigation over the same ambiguity.

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Analysis of the Code on Industrial Relations Bill – Part III
(Definitions, Conditions of Service & Compounding of Offences)

I. Definitions

Appropriate Government

While the definition of "appropriate government" under S. 2(1)(a) of the Draft Code has largely been retained from the IDA, the new definition clarifies that where the entire business of an establishment is confined to the territories of a state, the government of that state shall be the appropriate government. However, this definition is silent on cases where an employer has establishments in more than one state. The Supreme Court has suggested that two state governments may indeed have concurrent jurisdiction. However, we believe that such an interpretation is fraught with further confusion and duplication of authority. Allowing concurrent jurisdiction for two state governments would mean that there would be two authorities operating in the same field at the same level leading to avoidable conflict and confusion. Further, this would also encourage forum-shopping on part of employers and workmen for the purpose of pursuing remedies under Chapter VII and statutory approvals under Chapter X of the Draft Code. Therefore, it is advisable that the principle of concurrent jurisdictions for more than one state government be dispensed with. For the aforesaid reasons, we recommend that the Draft Code have an additional clause in S. 2 (a) for the purpose of clarifying that where an employer has establishments in more than one state, there shall be only one appropriate government that shall be determined on the basis of the sites of employment.

Industrial Disputes

The first part of the definition of "industrial disputes" in the Draft Code corresponds to the definition contained in S. 2(k) of the IDA. However, the Draft Code makes an addition and broadens the scope of the provision. It states that "in the case of termination of individual worker by way of discharge, dismissal, retrenchment will also be termed as industrial dispute". The import of this addition is presumably to retain the scheme of the current IDA wherein a purely individual dispute cannot be termed an industrial dispute if it does not relate to termination of employment. However, this would contradict the scheme provided in S. 53 of the Draft Code, which allows any person aggrieved, even an individual, to file an application before the Tribunal having jurisdiction. If the Draft Code intends to retain the scheme of the IDA of allowing collective disputes in general, this should be indicated in the definition.

Industry

The ambit of "industry" under the Draft Code has not been substantially altered. The Draft Code incorporates the Bangalore Water Supply definition of industry. While this goes against the Supreme Court's opinion in Coir Board, Ernakulam vs. Indira Devi and State of U.P. vs. Jaibir Singh, we believe the widening of industry under the Draft Code is apt to protect workers excluded by a narrower definition till the time such alternative statutory regimes are created.

Wages

The Draft Code states that wages are payable to "a person employed in respect of his employment or of work done in such employment". The IDA on the other hand specified that wages are payable to a workman. Thus, the Draft Code broadens the scope of which wages may be paid to. Further, while value of house accommodation, supply of light, water, medical attendance and travelling concessions were included in the definition of wages under IDA, the Draft Code specifically excludes them. The Draft Code states that wages specifically includes remuneration payable under any award or settlement, overtime wages, additional remuneration payable under terms of employment, sum payable on termination of employment and sum to which employee is entitled under any scheme framed.

Recommend that the Draft Code incorporate the recommendation of the Second National Labour Commission that 'wages' and 'remuneration' be separately defined, the former to include only basic wages and dearness allowance, and the latter to include other allowances, overtime payment, bonus, gratuity and social security contributions along with wages. This may make the process of calculating additional payments such as bonuses less problematic.

Worker

The new definition broadly follows the current definition of workmen under S. 2 (s) of IDA. One significant expressive shift lies however in the substitution of the term "workman" with the term "worker" reflects the incorporation of the Second National Labour Commission's suggestion, as the latter is a gender neutral expression. Further, while the definition of workmen under IDA specified that "workmen" does not include those who employed in a supervisory capacity, draw wages exceeding ten thousand rupees per mensem, the Draft Code removes the specified amount to wages as notified by the central government from time to time. This may be viewed in relation to the Second National Commission on Labour's suggestion that "highly paid jobs" should be excluded from the purview of laws relating to workmen, and included in a proposed law for the protection of non-workmen. As an alternative, the Commission recommended that the Government may fix a sufficiently high cut-off limit of remuneration, beyond which employees would not be treated on the same footing as ordinary workmen. However, the Draft Code only creates this condition for employees employed in a supervisory capacity. For highly paid employees in non-supervisory positions, no specific exclusion has been enacted. The Commission had recommended that supervisory personnel should be excluded from the purview of labour laws meant for workers, irrespective of quantum of salary. This recommendation has not been incorporated. The new definition of worker leaves certain questions about the nature of some professions ambiguous. In ESIC Medical Officers' Association vs. ESIC, the Supreme Court held that medical doctors cannot be considered workmen under the IDA, as medicine is a noble profession. The distinction between occupation and profession was reiterated. In Bharat Bhawan Trust, the Supreme Court held that artists employed by a theatre company engaged in the production of theatre do not indulge in manual, unskilled labour. Thus, they are not workmen under IDA. We submit that this interpretation is erroneous and does not find any support in the scheme or the text of the IDA. Nobility of work or extent of training and knowledge by themselves do not merit an exclusion from the protective cover of labour laws. Therefore, we recommend that the Draft Code should explicitly clarify that the mere fact that a person is a professional shall not exclude him from the definition of worker. He shall be considered a worker as long as all the express elements of S. 2(zf) are fulfilled.

II. Change in Conditions of Service - Dismissal of Workers during Pendency of Proceedings

Currently, S. 33(2)(b) of the IDA requires approval for any dismissal of a worker during pendency of proceedings. There remains ambiguity however regarding the status of employment of a worker if the approval is not granted, i.e., whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal. Further, the consequences of failure to make application under S. 33(2)(b) are still unclear. Some cases have declared that this would render the order of dismissal inoperative, whereas some other cases have ruled that non-compliance with S. 33(3)(b) will only render the employer liable to punishment under S. 31 of the IDA and the remedy of the employee is either by way of a complaint under S. 33A or by way of a reference under S. 10(1)(d) of the IDA. In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd vs. Ram Gopal Sharma and Ors, the Court stated that "It is clear from the proviso to S. 33(2)(b) that the employer may pass an order of dismissal or discharge and at the same time make an application for approval of the action taken by him". Yet, the issue has remained mired in confusion. Unfortunately, the Draft Code does not do enough to dispel this confusion. It may be said that with addition of the words "and such application is approved" in the proviso to the corresponding provision in the Draft Code, employers would have to wait for the approval of the application before dismissal can be operative. However, even now the Draft Code does not specify whether the worker stands suspended in the interim period. Therefore, it would be advisable for the Draft Code to explicitly clarify the consequence of non-compliance with S. 48.

Subsistence Allowance during Pendency of Proceedings

The confusion on non-compliance of S. 48 is further compounded by the removal of the time limit of three months placed on the authority to decide on such an application for approval. Additionally, judgements such as The Management, Hotel Imperial, New Delhi and Ors. v. Hotel Workers Union and Ram Lakhan, Etc. Etc. vs. Presiding Officer &Ors have revealed a multiplicity of judicial views on payment of subsistence allowance to the employee pending approval under S. 33 (2) of the Act. There are opposing views on this matter; the right of the employer as a master to terminate the services of the worker against the principles of natural justice which should not allow for a worker to wait for six-seven years for the adjudication of the dispute without any payment. In light of this ambiguity, it would be prudent for the drafters to clarify in the Draft Code itself whether subsistence allowance is to be paid to the worker in the interim period.

III. Compounding of Offences

S. 104 provides that all offences under this Draft Code may be compounded before trial, or pending trial; compoundability is not allowed for a second offence. In other words, if a person has been convicted of an offence, the second time that she is accused of the same offence, it is not compoundable. While this provision would contribute significantly on reduction of caseload of the Tribunals and Courts, its operation would lead to compromising justice for efficiency. Imprisonment is a greater incentive than fines for compliance to labour laws by large employers. By making offences under this Draft Code compoundable, the deterrent of imprisonment is effectively removed. The Supreme Court has concurred with the underlying rationale stating- “The business-man culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a being a plea of guilt, coupled with a promise of ‘no jail’.” This rationale may be extended to affluent employers too. We recommend that this provision be deleted from the Draft Code.

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Analysis of the Code on Industrial Relations Bill – Part IV

The comment on matters relating to voluntary reference of disputes to arbitration, procedures and powers of authorities, strikes and lockouts, lay off, retrenchment and closure and the miscellaneous provisions in Chapters VI to IX of the Code on Industrial Relations Bill, 2015 ('Draft Code').

I. Voluntary Reference of Disputes to Arbitration

Change in Time Frame for Reference to Arbitration

The provision on Voluntary Reference of Disputes to Arbitration (S. 50 of the Draft Code) states that parties to the dispute can refer it for arbitration at any time, even after the dispute has been referred to a Tribunal. This is a major change from S. 10A of the IDA. As per the existing act, in case a party decides to refer a dispute for arbitration, S. 10A of the IDA mandates such reference to be made before the dispute has been referred to a Labour Court/Tribunal/National Tribunal. This was also reiterated by the Supreme Court in Karnal Leather Karmachari Sangathan vs. Liberty Footwear Company. The increase in time frame for reference will mean that more and more disputes will be referred to for arbitration at any time. Such a provision can have a damaging effect. Referral of a dispute for arbitration at a late stage of proceedings before the Tribunal would waste the time and energy of the Tribunal. Also, the intention of the legislature to include arbitration was to introduce an alternate remedy to adjudication. The Draft Code tries to do away with this fact. There would be no bar against adjudication even after a reference has been made. This would essentially mean the movement of a case between multiple judicial forums thereby resulting in judicial inefficiency and inexpediency. There should be a limit in the time frame for reference of a dispute by retaining the provision that a dispute could be referred to for arbitration only before the Tribunal/National Tribunal has taken it up.

II. Procedure, Powers and Duties of Authorities

Removal of Court of Enquiry, Labour Court and Board of Conciliation

The Draft Code removes the Court of Inquiry, Labour Court and the Board of Conciliation (S. 5, 6 and 7 of the IDA). This is a welcome change given that the multiplicity of forums and difference in disputes that could be referred to each forum made it difficult for the parties to resolve disputes in an expeditious manner.

Application to the Tribunal

The Draft Code has done away with the reference of any industrial dispute by the Appropriate Government (S. 10 of the IDA). Under the IDA, adjudication of disputes can start, apart from a narrow set of exceptional cases, only after reference by the Appropriate Government. This scheme vests inordinate power in hands of the political executive and this has smothered the autonomy of trade unions. Now, the aggrieved person can file a suit directly before the Tribunal/National Tribunal. This is a welcome move given that it would free the remedy of adjudication from being hostage to executive discretion. Such a change also furthers the principles laid down in a series of judicial decisions from Ram Avtar Sharma v. State of Haryana, Telco Convoy Drivers Mazdoor Sangh v. State of Bihar to Sarva Shramik Sangh v. Indian Oil Corporation Ltd. & Others.

Time frame for Application to the Tribunal

Currently, an Industrial Dispute can be referred to a Tribunal/National Tribunal only after a reference of the dispute to the Tribunal/National Tribunal by the Appropriate Government (S. 10 of the ID Act). But there is no formal limitation period within which the government has to refer a dispute. This has resulted in a confounding set of judicial precedents[1]. However, S. 53 of the Draft Code now imposes a formal time frame of 3 years within which any industrial dispute has to be brought up before the Tribunal. Such a time frame would actually provide quicker remedies by eliminating a large number of cases on archaic matters.

Execution of an award of a Tribunal / National Tribunal by a Civil Court

S. 57(10) of the Draft Code is a new provision, which allows the execution of the award of a Tribunal/National Tribunal by a Civil Court within 6 months from the date when it receives the order, award or settlement. Such a provision necessitates that the government should also include a provision making it mandatory for the Tribunal to send the award within a specified time period so as to ensure the timely performance of such award, order or settlement.

Commencement of Awards

With regard to the commencement of awards (S. 63 of the Draft Code and S. 17A of IDA), the Andhra Pradesh HC had said that the provision is unconstitutional in Telangana Work-charged Employees State Federation v. Government of India. The right that this provision (S. 63 of the Draft Code) gives to the executive to sit on a judicial order or modify/reject it was stated to be unconstitutional. It has also been held that the provision creates an irrational distinction between difference in the commencement of awards between public and private sector undertakings. The judicial pronouncement does have merit and the government should make necessary modifications so as to avoid any confusion about the constitutionality of this provision.

III. Strikes & Lockouts

Removal of distinction between Public Utility Services and other Industries

S. 71(1) of the Draft Code seeks to eliminate the distinction between public utility services and other industries by imposing uniform restrictions. It makes submission of prior notice for strikes and lock-outs mandatory for all industries and not just public utility services. Such universalisation would reduce the impact of disruption caused by coercive actions since the concerned parties would have the time to prepare and adapt. The Second National Commission on Labour and the International Labour Organisation for the Committee on Freedom of Association advocated the requirement of prior notice. Also, as has been held in Vidyasagar Institute of Mental Health Neuro Sciences v. Vidyasagar Hospital Employees Union, a strike should not be done by causing disadvantage to the people who are not willing to get involved in it. Hence the inclusion of industrial establishments as a whole under the provisions of S. 71 is a desirable move.

Definition of Strike

The definition of strike corresponds to the previous definition contained in S. 2(q) of the IDA, except for one addition. The Draft Code adds that strike includes “the casual leave on a given day by the fifty per cent or more workers employed in an industry”. This is an improvement for the new definition embraces cases where the substance of strike is present though the form may be different.

Notice period for a strike

S. 71 (1)(a) and (b) of the Draft Code, needs to be clarified. There is confusion as to whether a strike cannot commence within 6 weeks of the notice or within 14 days. Even though Essorpe Mills Ltd. vs. Presiding Officer, Labour Court has held that both these clauses need to be read together, the applicability of the two different time periods need to be clarified. Clause (d), (e) and (f) of 71(1) and (2) prohibits strikes and lock-outs irrespective of the subject matter of the dispute pending. This is uncalled for given that it restricts the right to strike in an unrelated matter, which is the major weapon for collective bargaining. The provision allows complete subversion of the statutory freedom to strike through filing of applications that may have no nexus with the subject-matter of strike. Therefore, we recommend that the provision should prohibit a strike only on matters connected with the subject-matter.

Coercive and wilful go-slow and gherao and prohibition of strikes in breach of a contract

The Draft Code has added two new clauses under S. 71. While clause 8, which prohibits a coercive and wilful go-slow and gherao during conciliation proceedings and arbitration proceedings, is commendable, clause 7 really seems to be redundant. Clause 8 supports the holding of Jay Engineering Works v. State of West Bengal, which had explicitly stated that a gherao couldn't go to the extent of being violent and coercive. Clause 7 provides blanket ban on strikes in breach of contract. This seems to be contradictory to this entire section. Does this mean that an employer can impose a complete prohibition on strikes if the contract of service, which is usually a standard form of contract with the employees at a lesser bargaining power, states so? The entire aim of the Draft Code is to bring about industrial harmony and not to encourage such subordination. Hence keeping such a provision would be against the aim of the act.

IV. Lay Off, Retrenchment & Closure

Applicability of the Chapter

This Chapter broadly corresponds to Chapter V-A of the IDA but its application goes beyond mines, factories and plantations as defined under the Factories Act, 1948, Mines Act, 1952 and the Plantations Labour Act, 1951 respectively.

Continuous Service – Burden of Proof

S. 75 of the Draft Code, which corresponds to S. 25B of the IDA, define continuous service. The provision suffers from certain ambiguities. One such issue pertains to the burden of proving continuous service. In a long series of judicial pronouncements, the burden of proving continuous service has been put on the worker, such as Range Forest Officer vs. ST Hadimani and Surendranagar District Panchayat vs. Gangaben Laljibhai. Although this follows the fundamental rule of evidence in that the one making the positive assertion is expected to prove the same, it is our view that in light of the far greater difficulty of the worker in asserting his attendance as opposed to the employer who keeps a record of the same, the burden of proof should be shifted from the worker to the employer.

V. Special Provisions relating to Layoff, Retrenchment & Closure in Certain Establishments

Increased Applicability of the Chapter

Chapter X of the Draft Code corresponds to Chapter V-B of the IDA. The applicability of Chapter V-B in the existing statute is limited to a factory, mine or plantation. No such limitation has been imposed under the Draft Code, which is a welcome development.

Definition of Layoff

The provision on lay-off in the Draft Code corresponds to the first part of S. 2(kkk) of the Industrial Disputes Act. However, the Draft Code omits the "Explanation" and "Proviso" which were present in the Act. Due to these omissions, S. 2(1)(n) of the Draft Code leaves certain contingencies ambiguous. At what point of a working day can a worker said to be "laid-off"? How many hours should lapse from the time the worker presents himself at work? What happens if the worker is made to work only one shift in a day? What happens if the worker is not given employment even after being asked to present him during the second half of the shift for the day? The ID Act mandated that the workman be paid full basic wages and dearness allowance for that part of the day. With the omission of this guarantee, workmen's rights may be diluted. These issues should be clarified.

Change in Threshold & Compensation

This Chapter imposes a requirement of prior governmental approval for any lay-off, retrenchment and closure for establishments covered by it. The current law specifies the threshold limit for the number of workers under this Chapter as 100. It has been argued that the stringent requirements have throttled the expansion of labour-intensive manufacturing sector. As a result, there have been various proposals for changing this number. The contention of the central trade unions has been that with increased mechanisation of work, a greater number of workplaces hire fewer workers, and hence the threshold should be lowered. In contrast, there has been overwhelming pressure from business associations to increase the threshold in the interest of better functioning of medium enterprises because higher thresholds increase flexibility in hiring of labour to match the fluctuation in demand. Analysts respond to such concerns of trade unions with the claim that short-term job losses are offset by long term increase in employment. The Report of the Second National Labour Commission also recommended restoration of the original limit of 300. We welcome the increment. However, we would like to mention a few caveats. Inter-sectorial mobility is low in India and therefore, the claim that loss of jobs in one sector would be set off by creation of jobs in another may not be empirically grounded. Secondly, long-term benefits cannot as a matter of policy offset the very real impacts of short run losses of livelihood. Thirdly, to leave workers with absolutely no claims post dismissal would discourage any investment in firm-specific skills and eventually hamper the competitiveness of firms. In any case, constitutional principles of security of employment and right to livelihood must remain paramount in our legislative design and cannot be compromised for the sake of economic efficiency.

VI. Miscellaneous Provision

Unfair Labour Practices

There have been numerous conflicting cases regarding the status of continued casualisation of service of worker as an unfair labour practice. This confusion has largely been restricted to public sector establishments, bound by Article 12 of the Constitution of India. The Constitution Bench in Secretary, State of Karnataka and Ors. vs. Uma Devi has laid down that courts should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme. Some cases have interpreted Umadevi's case as not overriding the powers of Industrial and Labour Courts in passing appropriate order, once unfair labour practice on the part of employer is established. However, an ambiguity in this regard persists especially since Umadevi was a Constitution Bench judgement. We recommend that the status of continued casualisation of service of workers as an unfair labour practice be explicitly clarified in the Draft Code.

Recovery of Money

S. 93 lays down the procedure for recovery of money from an employer. This section of the Draft Code is an exact reproduction of the corresponding provision of the IDA (S. 33C). There appears to be ambiguity with respect to whether a claim under S. 33C should already have been adjudicated. We recommend that the Draft Code clarify the same. In order to discourage the filing of fictitious claims, there must be an imposition of time limit. However, condonation of delay, as envisaged by the Limitation Act, must remain so as to avoid excessive stringency.

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