Critical Comments on Draft Rules under Industrial Relations Code

Laws, Rules and Codes notified either by the Central or State governments must not only be framed within the purview of the governing Code, but they must also be laid down with clarity to enable operationalization. Thus, Rules must be clear, precise and comprehensible. The Central government has issued the draft of Industrial Relation (Central) Rules, 2020 (henceforth referred to as Rules) on October 29, 2020. But before analysing the technical aspects of the Rules, observations are in order on some equally important issues relating to "regulation hygiene", i.e. the cultural and political mindset governing the language of regulations.

There are cultural and language issues in the framing of Code/Rules which require serious attention. The Code and Rules use "worker" in place of "workman" but employs the sexist "he/him" which is neither sensible nor gender-sensitive and must be corrected. It is another matter that the legal third gender is not included.

In the application to be submitted before the Tribunal in an industrial dispute (Form-VI), the applicant must "beg" to state the relevant facts and circumstances of the case. In a civilized society even informal relations the continued use of the "colonial expression", "beg" cannot be allowed.

It needs to be understood that political unionism is still the dominant defining feature of the working-class movement in India and union recognition often depends on the parties in power. Thus, state governments, depending on the parties in power and the preference of their labour wings regarding the method of recognition, will legislate the method and this will lead to divergences across the states.

Urgency cannot be an excuse for committing grammatical and printing errors that exist in not only the Code but also the Rules which jars. It is Industrial "Relations" (not Relation) Code. Having said that, the government must be complemented that for once it was efficient in putting out the draft Rules in a quick time. But the regulations should have been composed in a language that is correct and simple, if not elegant and grand as the Constitution of India!

There are two major problems with the draft Rules:
1. It has left out two major aspects of the Code, viz. regulations relating to trade unions and the Model Standing Orders (MSO).
2. It contains faults, is incomplete and not well constructed. In Part-1 of this piece, the focus will be on the first of these aspects.

Rules Relating to Trade Unions

The Central government has left the Rules relating to trade unions to the state governments. However, under the Trade Unions Act 1936, the then Federal government formally issued regulations concerning trade unions in 1938. Some state governments like Maharashtra adopted them or framed their own Rules as Karnataka did.

There are two major reasons why the Central government should frame the Rules relating to trade unions under the Industrial Relations Code (IRC) or make amendments to it. The IRC has left many of the substantive clauses like the union membership fees, objects on which general or political funds of a trade union should be spent, manner of amalgamation of trade unions, the "matters" to be included in a collective agreement, the criteria for recognition of a single union, method of verification of membership for determining the negotiating union and the constituents of the negotiating council and the facilities to be provided to the recognised trade unions.

It is important to recognise that the existing Central law like the Trade Unions Act, 1926 (TUA) contains clauses on all the aforementioned clauses. In that sense, TUA is a "complete" law and did what it sought to do, unlike IRC. The central trade unions (CTUs) in India has been divided rather sharply on their choices among the three methods of recognition, viz. membership verification, check-off (verification of membership by determining a number of workers who have a membership fee to unions deducted from their salaries) and secret ballot. The Indian National Trade Union Congress (INTUC) has been strongly advocating membership verification and the left unions like All India Trade Union Congress (AITUC), Hind Mazdoor Sabha (HMS), Centre for Indian Trade Unions (CITU), etc. the secret ballot method.

It needs to be understood that political unionism is still the dominant defining feature of the working-class movement in India and union recognition often depends on the parties in power. Thus, state governments, depending on the parties in power and the preference of their labour wings regarding the method of recognition, will legislate the method and this will lead to divergences across the states. For example, the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1970 (MRTU and PULPA) drafted by Congress (INTUC is its labour wing) stipulates "membership verification method," while Kerala and West Bengal (dominated by Left-wing trade unions) prefer "secret ballot".

The Code of Discipline (a non-legal document reached in a tripartite agreement in the Indian Labour Conference in 1958, on the one hand and the state labour laws which provide for union recognition like MRTU and PULPA and the Kerala Trade Union Recognition Act, 2010 (KTURA) clearly provide for all the substantive matters and procedural details concerning the recognition of the union.

There cannot be multiple Model Standing Orders (MSO). Several plants in the same firm in paints, engineering and textiles differ in terms of their technology and product diversification. This will result in differences in the kinds of employees that these plants in the same firm employ. Hence the Standing Orders for each will be different.

They have defined all the provisions concerning the recognition process and the rights of recognised trade unions and the conditions for withdrawal of recognition. So, it is the function of the mother instrument, IRC, to define these in detail. But for incomprehensible reasons, IRC has left these to the rule-making processes. Then, the Central government being the author of IRC should cure this malady by making Rules on all aspects relevant to trade unions. The Central government must also ponder whether it is expedient for it to delimit the "matters" to be covered by the collective agreement as it has stressed the need for dynamism and flexibility.

Model Standing Orders (MSOs)

IRC has made some controversial and even contestable reforms on Standing Orders (SO). Section 29(1) of IRC empowers the Central government to make the MSO. If employers adopt the MSO they would be deemed to have been certified under IRC. It is quite probable that many employers could use this route to avoid the entire process of having Standing Orders (SO) certified. It is important to understand that in the normal process employers have to consult trade unions or representatives of workers, send the draft SO to the Certifying Officer who in turn would have to seek the opinions of trade unions and then apply his/her mind to certify it and this can be contested by either party by going to an Appellate Authority to have it finally certified.

It will make sense for employers to adopt the MSO which one presumes will bypass all these processes and not be contested by trade unions to the Appellate Authority. Given the huge role given to the MSO, the fore-mentioned due processes should have been a part of the Rules framed under IRC as has been the practice so far. But the draft Rules do not contain the MSO. The government is proposing to issue multiple MSO for each sector of economic activity covered by the IRC.

Its justification: “Each sector has its own rights and special issues, so we are contemplating standing orders in at least five-six broad categories. Such a move will take care of peculiarity of that particular sector, rather than seeking a modification in the standing order, which will be a time-consuming process…”

The Code and Rules use “worker” in place of “workman” but uses the sexist “he/him” which is neither sensible nor gender-sensitive and must be corrected. It is another matter that the legal third gender is not included. This is inadvisable for two reasons. This arrangement makes three assumptions, viz. industry bodies possess complete information and will be conveyed completely to the Central government; conditions in an industry are homogenous across spaces and will not change over time; the Central government is an efficient regulator to make complete contracts.

One or all the three need not be obtained and then these will lead to inefficient and even inappropriate rule-making processes. For example, industries differ in terms of technology. Several plants in the same firm in paints, engineering and textiles differ in terms of their technology and product diversification which will result in differences in the kinds of employees these plants in the same firm employs and hence the SO will be different for each. For example, a fully automated plant belonging to the same firm may or may not require workers at all as defined in IRC while those employing older technologies will have differential requirements. Also, many state governments adopt various industrial, economic, and labour market and institutional (say preference in terms of jobs for locals or a high proportion of migrant workers) which means plants in these regions would differ from their sister plants elsewhere.

Secondly, these will lead to micro-management of labour-management relations and the excessive hand of State and this will lead to “bureaucratic-raj”. What then is the guarantee that MSO will be durable and will not be subject to modification of SO? The best practice would be to make a MSO and leave it to the parties at the local level to adapt them to suit the local conditions.

Thirdly, it would be pertinent to quote the observations made by Justice P.B. Gajendragadkar in Salem Erode Electricity Distribution Company Ltd. Vs. Salem Erode Electricity Distribution Co. Ltd. Employees, 1965 Supreme Court. This is what he said with regard to a certified SO: “It would at once be clear that by the operation of the Act (Industrial Employment (Standing Orders) Act), all industrial establishments will have to frame terms and conditions of service in regard to all the matters specified in the Schedule, and that naturally would introduce an element of uniformity inasmuch as industrial employment in all establishments to which the Act applied would,…be governed by terms and conditions of service in respect of matters which are common to all of them.”

The faultiness is visible in the Industrial Relations Rules released by the government. In key areas, it has been hastily drafted and is not an improvement on the existing laws.

The Central government issued the draft of Industrial Relation (sic) (Central) Rules, 2020 on October 29, 2020. It has serious flaws and is either incomplete or not well articulated and therefore merits a closer and critical look. One hopes that the inaccuracies and discrepancies are rectified. Thus Chapter II of the Rules prescribes an elaborate arrangement relating to the setting up of a Works Committee (WC) in an industrial unit. The WC, represented by employees and representatives of employers, aims to reduce differences and ensure smooth functioning. But under the Rules, the setting up of the WC has left to the appropriate (read state) government which under Section 3 (1) of Industrial Relations Code (IRC) may issue a special or general order requiring industrial establishments to constitute WCs.

What is the use of Central Rules when the constitution of the WC is contingent on orders of the appropriate government?
May we know how many such orders have been passed in the last ten years by the appropriate governments?
Do the lawmakers have these statistics to be able to make Rules in 2020?

The Rules envisage a role for “trade unions” but not the negotiating union or negotiating council for both Works Committees and Grievance Redressal Committees (GRC). Not specifying and identifying the role of the negotiating union or the recognised union is a lapse that should have been avoided. But what of the Rules provided for WCs? Since the IRC stipulates that representatives of workers will be chosen “in such manner as may be prescribed” in consultation with their trade union, the Rules envisage a role for “trade unions” but not the negotiating union or negotiating council (henceforth, recognised union) for both WCs and Grievance Redressal Committees (GRC). Not specifying and identifying the role of the negotiating union or the recognised union is a lapse that should have been avoided.

Interestingly, Section 20 (2) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Laws Practices Act (MRTU and PULP Act 1971) — sanctioned by the Central government for industries in the country to maintain harmonious employee-employer relationship — rightly stipulates: “(2) Where there is a recognised union for any undertaking, – (a) that union alone shall have the right to appoint its nominees to represent workmen on the Works Committee constituted under Section 3 of the Central Act;”

Even the voluntary but tripartite instrument, the Code of Discipline, conceives that the recognised union will have the right of nominating its members to all the bipartite consultative committees in an industrial establishment. Again, when the employer intends to change the conditions of service under Section 40, he or she must give notice to the workers’ affected by such changes, recognised union where it exists and the workers’ body as suitable. However, the Rules do not contemplate this aspect at all.

The Ambiguous Status of Unions

In effect, though the lawmakers have provided for recognition of trade unions, they have completely failed to include them in the various industrial relations processes in an establishment. This scheme of governance will not promote and sustain conducive industrial relations. It is well-known that the absence of provisions for union recognition has virtually destroyed the prospects for industrial democracy which was envisaged especially in the First and Second Five Year Plans.

Under the IRC Rules, the employer shall provide “for the selection of worker‘s representatives on the Committee…The new Rules thus refers to “selection” of workers’ representatives without providing the rules for such a selection. Also why is the expression union “may” choose its representative used? Wouldn’t “shall” have been more appropriate?

In 1969 the National Commission on Labour (NCL) made considered recommendations concerning WC which is worth reporting here for the benefit of Rule-making: “The recognised union should be given the right to nominate all worker members on this body. With union recognition obligatory, this would eliminate the most important cause of conflict and antipathy between unions and Works Committees.”

Faults & Inadequacies in Rulemaking

The draft Rule-makers possibly relied on the Industrial Disputes Rules, 1957 (IDR, 1957) as a template and while adapting it has made some mistakes that will contribute to inefficiencies in governance. Here is an example in the clauses relating to the constitution of Works Committee in an industrial establishment: The IDR, 1957 ensures representation of employees from each segment of an establishment.

Under 41 (1), The employer should get it in writing from the registered trade union of the number of employees who are members and how they are distributed among the sections, shops and departments of the establishment. Where an employer has reason to believe that the information furnished to him by any trade union is false, he may, after informing the union, refer the matter to the Assistant Labour Commissioner (Central) who after hearing the parties, shall decide the matter and his decision was final.

Under IDR, 1957, the employer shall then provide for the election of employees' representative on the Committee in two groups—
(1) those to be elected by the workmen of the establishment who are members of the registered trade unions, and
(2) those to be elected by the workmen of the establishment who are not members of the registered trade union or unions, bearing the same proportion to each other as the union members in the establishment bear to the non-member.

Contrast that with the IRC Rules which does not encourage the employer to see if there is representation in the Union from each segment of the establishment. This key aspect is missing from the IRC Rules. Moreover, under the IRC Rules the employer shall provide "for the selection of worker's representative (sic) on the Committee in two following groups, namely:-
(a) registered Trade Union may choose their representatives as members for Works Committee in the proportion of their (sic) membership.
(b) where there is no registered Trade Union, workers may choose amongst themselves representatives for Works Committee" The new Rules thus refers to "selection" of workers' representatives without providing the rules for such a selection. Also why is the expression union "may" choose its representative used? Wouldn't "shall" have been more appropriate?

India is one of the countries which cannot and hence does not provide statistics on the union coverage in industrial relations and the coverage of workers by collective bargaining. However, Form IX requires the employers proposing to effect layoff/retrench/closure to send a copy of it to the Labour Bureau for statistical purposes.

In the case of having workers' representatives in Grievance Rredressal Committees, the draft Rules have made provisions [see Rule 4(5)(a)(b)]. But the Rules do not make it clear as to how the workers or trade union may choose their representatives. It is best to allow the recognised union/workers to nominate their representatives to the bipartite bodies without the intervention of the employers. Trade unions and workers must be trusted to govern themselves and there could be safeguards like a dispute resolution system at the instance of these parties and not by an employer.

It is difficult to understand the logic of Rules 24(2)(3). They envisage a context wherein an individual worker will give the strike notice to an employer or receive a lockout notice from an employer and the worker/employer who has these notices shall intimate the same electronically to the conciliation officer. Then what is the relevance of institutional mechanisms governing collective actions?

Collection of Statistics for Evidence-based Reforms

Further, the Rules have done away with the clause requiring the submission of annual returns by employers on the functioning of WCs. In fact, the government should consider the option of making it mandatory for both employer and the [recognised] union/workers' representatives to submit annual returns on WC and GRC. In the absence of any information, the government will not be able to assess the functioning of it or reforming it? Similarly, it has also done away with the reporting of strikes/lockouts.

In fact, information on strikes and lockouts are collected on a voluntary basis which has its shortcomings. The Labour Bureau has stopped publishing its annual report on industrial disputes since 2015 due to the non-submission of information either by the state labour departments and/or employers. The government has considered the possibility of empowering the Labour Bureau to collect labour statistics. Then, it must address it through the legislative route or include suitable provisions in the Rules for all industrial relations variables.

The Code or the Rules must require all the collective agreements and the conciliated settlements to be registered with the respective headquarters of the labour department as they are in the West. Rule 75 of IDR requires the conciliation officer to maintain a register of conciliated settlements. These documents must be accessible to researchers and others with suitable safeguards and an embargo for scientific analyses.

India is one of the countries which cannot and hence does not provide statistics on the union coverage in industrial relations and the coverage of workers by collective bargaining. However, Form IX requires the employers proposing to effect layoff/retrench/closure to send a copy of it to the Labour Bureau for statistical purposes. Hence, the lawmakers can make similar changes in the Rules concerning other industrial relations aspects also.

Electronic Fad

The business lobby has effectively persuaded the Central government to convert all manual aspects relating to registration, returns submitting, records maintaining, to the electronic mode. Rule 1A(c) defines "electronically" as: "any information submitted by email or uploading on the designated portal or digital payment in any mode for the purpose of Code."

Several actors in industrial relations such as trade unions, employers, government officials like Certifying Officers (CO), Appellate Authority (AA), the Tribunal officials are expected to conduct electronic transmission and dissemination. It also provides for digital payment say for securing a copy of the award of a certified Standing Order (SO).

In three cases the Rules provide for physical of communication viz. application to the Grievance Redressal Committee, arbitration agreement, and strike/lockout notice. In cases of layoff/retrenchment and closure (L/R/C), applications to the government will be sent by registered or speed post. It appears that the Tribunals will work mostly with manual methods save in case of communication of awards [Rule 22(13)].

The Rules stipulate that lockout notice should be displayed conspicuously by the employer on a [physical] notice board or an electronic board at the main entrance of the establishment and the latter appears to be far-fetched in stretching modernity. Instead of the latter, the Rules could have provided for circulation of the notice via email.

The critical questions that arise from the shift to electronic means of communication and web-based operations are:

▪ It is alright for the Central government to make Rules relying on electronic and web-portals which concern the Central Sphere which includes banks, insurance, telecommunications, civil aviation, port and docks, mines, etc. But State governments which deal with brick and mortar establishments of varying sizes and modernity may not be able to rely on digital communication systems. The state governments must also create a dynamic and efficient website for all kinds of storage of documents and uploading.

▪ The Rules assume the parties are all tech-savvy and have access to electronic devices and storage facilities. It will be prudent to provide for non-electronic systems of communication as an alternative and graduate progressively to an e-system.

Lay Off, Retrenchment & Closure (L/R/C)

Even though IRC has increased the threshold of industrial establishments which must seek prior permission from the government for L/R/C from the existing 100 to 300 employees, the prior permission still remains important.

To arrive at an informed decision regarding L/R/C the government should ask for information covering numerous aspects of business and workforce deployment. Given the considerable controversy that these clauses have created, there is a serious need for the government to consult the labour department officials, retired or serving presiding officers and the social partners to understand whether the information sought from the employers for taking the decision was adequate or not. On the pretext of reforms and simplification, the government cannot dilute this important aspect which will affect hundreds and thousands of workers as well as businesses.

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When one compares the information sought in the existing forms for retrenchment and closure (25 questions covering a wide variety of business aspects) with the new combined Form X one finds it asks far less information in 10 questions for L/R/C. It asks for far fewer details which may not provide adequate information to make sensible and sensitive decisions. What has been done is to provide a combined form for L/R/C in place of separate forms for each.

The Adjudication Process

The rules relating to trade unions will hopefully be made separately by the state governments since the Rules dealing with the adjudication process (Rule 22) do not consider trade union disputes as defined under Section 22 of IRC. But it is shocking to note that there is only a single form (Form-VI) for the entire adjudication process which unarguably goes on for months, even years. On the receipt of an application by the concerned parties or parties concerned (the two expressions in English are different and yet apply in equal measure here!), the Tribunal starts the adjudication process under Section 53(6).

There are two omissions in the Rules when compared to the existing IDR, 1957, viz. the submission of a rejoinder under Rule 10B(4) in IDR, 1957; fixing the date for evidence (and time framework for both of them). Under Rule 22(7) the Rules have extended the time for submission of documents, etc. by the opposite party from the existing 15 days to one month.

Now the vital question is: have the rule-makers studied the loopholes and failures in the existing adjudication system to make the entire process more secure and time-bound? This will be the real reform that will mean much to both workers and employers. If they did not do it, then the government is missing another golden opportunity.

Finally, while the Code circumscribes the contents of Rules, the latter must be as elaborate and as concrete as possible. The government must reduce the transaction costs, but cannot lose vital information in such a quest. While the government is in a tearing hurry to implement the Codes which is welcome, it has to remember that they will be redefining episodes in the legislative and administrative history of India. Hence the government must take good care to frame them as complete and competent documents and provide for efficient compliance.