Is "Make in India" Constrained by Indian Labour Market Regulations?

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Abstract

This paper examines whether "Make in India" policies are constrained by over-regulation or under-regulation in the Indian labour market. Specific labour law provisions and the scope of circumventing them as evidenced from strategy-as-practised are analysed. The paper concludes that the Indian Labour Market is undergoverned and over-controlled because: (1) the nature of implicit "quid pro quo" grant of oligopolistic protection in the product market in the license raj period against reciprocal guarantees of lifelong employment protection has been nullified without being jettisoned from the tripartite frame; (2) the weakened countervailing power of trade unions has affected social dialogue required to balance the interests of organized and unorganized workers, and (3) the failure of successive governments to put employment in mission mode has shrunk the real price of skilled labour to unprecedented lows and in some cases even below statutory minimum wages. Skill premia in wages required for quality cannot be sustained in conditions akin to chattel slavery due to underregulation and the pace of change required cannot be attained in scale economies due to overregulation.

Keywords: Make in India, Indian Labour Regulations, Strategy-as-practised

1. Introduction

"Make in India" is a new national programme in India designed to facilitate investment, foster innovation, enhance skill development, protect intellectual property and build manufacturing infrastructure. Industrialists have responded to the "Make in India" campaign rather cautiously citing an array of concerns about infrastructure, power supply, competitiveness, credit policies, delays in government approvals for land, environmental clearances, asset restructuring and labour laws. This paper focuses only on the last mentioned of these concerns to examine whether reluctance to create more employment and decent work in manufacturing and services is the outcome of India's labour laws militating against flexibility and adjustments required in a competitive business environment. Is the Indian Labour Market over-regulated or under-regulated? There is much to be argued on both sides in this debate.

There are three main arguments for labour law reform: first, that the Industrial Disputes Act, 1947 (ID Act) breeds inefficient over-regulative interference with the employer's right to hire and fire that inhibit adjustments in workforce levels and disallow progressive changes in work norms and work practices for productivity improvements (Besley and Burgess, 2004); second, that the proliferation of 64 central and state labour laws with a wide amplitude of variations in definitions makes implementation unwieldy due to definitional ambiguities (Debroy, B. and P.D. Kaushik, 2005); and thirdly, that labour protection would expand if reduced cost of coverage could widen the safety net (Basu, 2006) recognizing that "regulation has a part to play" (Basu, 2016, p.123). There have hardly been any changes in labour laws since 1984 (except of a minor nature such as in Bonus, Gratuity, for apprenticeships and quality of work life provisions such as for safety in mines and oilfields). However, since Mathur (1989) citing evidence that labour laws had not obstructed labour market adjustments and flexibility predates these clarion calls for reform, the complaints can be examined afresh in the context of specific labour law provisions that are being castigated.

The main complaint is that labour laws encourage violent militancy of the kind recently witnessed in automobile plants in Gurgaon-Manesar (Maruti) and Sanand (Tata Nano) and force

employers through conciliation and adjudication proceedings into Faustian bargains even when additional costs of such bargains can no longer be passed on to customers. This din has reached a point that the government promised labour reforms and has published proposals in 2015. Some researchers have hailed these as causing "seismic shifts" (Secki, 2015) on grounds that the Labour Code on Industrial Relations Bill, 2015 dilutes the commitment to "Shramev Jayate" (the 2014 pro-Labour announcement). The government proposed to raise the bar for trade union registration from 7 persons to 100 persons or 10% of the workforce with no more than 2 non-employee office-bearers. It is also envisaged to expand the scope of misconduct to include "go-slow", "work-to-rule" and "sexual harassment". In the ID Act, it is proposed to limit applicability of Chapter V-B restrictions on prior permissions for lay-offs, retrenchments and closures to establishments employing over 300 workmen and to exempt small factories employing less than 40 workers from Factories Act. These proposals have been vociferously opposed by trade unions across party lines who united to protesting with a day's general strike on 2 September 2015. Yet, states such as Rajasthan notified the Chapter V-B change without consulting trade unions and raised the threshold employment level for a factory from 20 to 40. .
With the diminished coverage of workers due low trade union density and the weakening of the countervailing power of trade unions, workers' representatives, NGOs and activists have drawn attention to contrarian concerns that decent work and minimal labour standards are beyond the reach of an overwhelming majority of workers who lack a nexus of employment with any employer and are no more than "working non-employees". The paradox of overregulation coexisting alongside underregulation and weak enforcement points to the need for a systematic examination of the evidence for both overregulation and underregulation as a question of investigating the balance.

2. The case for over-regulation

Labour is a concurrent subject in India's Constitution and the Union Parliament and State Legislatures can both make labour laws. So the first question to consider is: Have they been making too many labour laws or too few laws? Considering that India has not ratified many ILO conventions there are hardly any new arenas legislated upon by the Central government or by the States. In practice, states have been active in making and periodically revising laws on minimum wages for particular categories of workers, including seasonal labour, plantation labour,

agricultural workers, domestic workers etc. and in ensuring that statutory contributions for health insurance, provident fund, bonus etc. are properly accounted for. No one really grudges this despite the fact that minimum wage notifications are routinely challenged in High Courts by employers' associations and their implementation gets delayed in the process. Labour Laws made by state legislatures apply to the limited territorial state jurisdiction and can be superseded by subsequent laws made by Parliament. Among the large number of labour laws there are very few pieces of central legislation that have been criticised by employers as oppressive with regard to some of their provisions. These are:

2.1 The Industrial Disputes Act, 1947
2.2 The Industrial Employment (Standing Orders) Act, 1946
2.3 The Contract Labour (Regulation and Abolition) Act, 1970

In addition, one could criticise the proliferation of unions enabled by Indian Trade Unions Act, 1926 which has been supplemented in Maharashtra (and a few copycat states who have borrowed this law) with state legislation:
2.4 Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act, 1970
Let us consider what is problematic in these.

2.1 The Industrial Disputes Act, 1947 (last amended in 1984)

This law has its genesis in the requirements of uninterrupted production in wartime during World War II when the Defence of India Rules (Rule 81A) introduced a feature of compulsory adjudication of industrial disputes enabling the government to conciliate, and if necessary, adjudicate on an industrial dispute. This mediation feature is at the core of this law enabling any of the parties in the tripartite frame (workmen, employers, government) to trigger the conciliation feature followed by adjudication, if conciliation fails. Workmen and employers can force each other to the negotiation table by approaching the government (or threatening to approach the government) for invoking the mediation features and the government may also, *suo moto*, do so in the public interest. This possibility is not dependent on the existence of a trade union!

Restraints on strikes and lockouts in public utility services were first legislated in the Trade Disputes Act of 1929 but at that time no provision had been made for compulsory adjudication of a dispute to make a negotiated settlement or adjudication (by a Labour Court or Industrial Tribunal) binding. The binding nature of a tripartite settlement under Section 12 (3) read with Section 18(3) of the ID Act caters to the possibility that it may be impossible for an employer to secure an agreement with all workmen and as long as an agreement is considered fair and acceptable by a representative majority of workmen and by the government conciliation officer, it can be made binding on all workman. Not doing so could mean an endless round of disputes until all splinter groups have been satisfied which would be devastating for industrial peace and productivity. So the involvement of the government as part of the tripartite frame sanctioned by the ILO is a blessing rather than a curse. But the possibility that workmen can frequently raise all kinds of disputes and drag employers to conciliation proceedings or adjudication proceedings is what employers consider to be a nuisance. This can easily be prevented by reforming the law to provide for long term settlements in line with what is already practised by many progressive employers.

During the pendancy of an industrial dispute, employers are restrained from altering conditions of service under Section 33 of ID Act without permission/approval from the conciliating or adjudicating authority where a dispute is pending. This includes restraint on punitive action for proven misconduct. Permissions are required for matters connected to the dispute and approvals for matters not connected to the dispute. So this provision ties the hands of employers once an industrial dispute has been formally raised. The intent of this provision was to prevent unfair labour practices such as targeting workmen who may have reasonable grounds to be protesting.

The ID Act (Chapter V-B) restrains employers from implementing lay-offs, retrenchments and closures in industrial establishments employing 100 or more workmen, without previous government permission. This number used to be 300 and was brought down to 100 in 1984. Employers consider this an unreasonable restriction on their right to adjust employee numbers commensurate with business requirements. However, this does not prevent an employer from

declaring a lock-out on certain grounds or simply announcing a cessation of operations for reasons beyond control leaving the status of the establishment's action to be given a name at some undetermined later date. The arm-chair analysis of the ID Act by Besley and Burgess (2004) does not take note of how flexibly employers have been able to operate.

One of the most onerous conditions in the ID Act is the requirement that any notice of change concerning terms and conditions of work be given 21 days in advance. This make it virtually impossible to exercise any management prerogatives arising from business needs on how work is to be carried out because workmen can demand to be consulted for agreement and can use the 21 days to raise an industrial dispute.

2.2 The Industrial Employment (Standing Orders) Act, 1946

The purpose of this legislation [IE (SO) Act] was to formally standardize certain terms and conditions of industrial employment so as to make them transparent across a wide range of establishments including factories, mines, plantations, railways, oil-fields, tramways, docks, ports, workshops, etc. The law requires employers to submit conditions of employment for certification and after certification to display them in the industrial establishment. What employers find problematic is the difficulty in modifying these notified conditions because the modification proposal can go to conciliation and become an industrial dispute and take years before any changes become effective.

Model Standing Orders (last modified in 1971) helpfully distinguished between casual (employment of a casual nature caused by some exigency), temporary (work of a temporary nature) and *badli* (absentee cover) workmen. The scope for disciplinary action against misconduct (misconducts had to be listed) was also specified in detail together with procedural requirements. In practice, employers have cited "serious general misconduct" to take action for unlisted misconducts and have successfully defended such actions in courts.

A reading of the Fourth Schedule of the ID Act reveals the expansive scope of matters requiring notice of change some of which are covered by the IE (SO) Act, 1946. The Fourth Schedule List includes:

2.2.1 Wages, including the period and mode of payment

2.2.2 Contribution paid or payable for the benefit of the workmen under any law

2.2.3 Compensatory and other allowances

2.2.4 Leave with wages and holidays

2.2.5 Starting alteration or discontinuance of shift working otherwise than in accordance with standing orders.

2.2.6 Job Classification by grades

2.2.7 Hours of Work and Rest Intervals

2.2.8 Withdrawal of any customary concession or privilege or change in usage

2.2.9 Introduction of new rules of discipline, or alteration of existing rules, exept in so far as they are provided in standing orders

2.2.10 Rationalisation, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen

2.2.11 Any increase or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift (not occasioned by circumstances over which the employer has no control

The government proposes to make modifications to standing orders possible within a year of the first set and notifying the Labour Department without consulting workmen leaving open the possibility of dialogue or negotiation in a tripartite forum. This would be a progressive welcome step because 21st century competitive business conditions require a pace of change that this archaic law may delay.

2.3 The Contract Labour (Regulation and Abolition) Act, 1970

The main features of this legislation that employers regard as cumbersome are two:

1. A statutory requirement that contract labour be abolished on work of perennial nature with a view to achieve equal pay and job security for equal work
2. The liability of the Principal Employer to be prosecuted if the contractor defaults in respect of wages, health insurance, provident fund, bonus or any other dues of a workman.

Anyone who has worked 240 days (including leave spells or days absent) in any period of 365 days is legally entitled to be considered permanent and entitled to the benefits of Chapter V-A of the ID Act (i.e. compensation for lay-off, retrenchment etc.) besides protection of Chapter V-B if the establishment employs more than 100 workmen. The enforcement of this law has been weak throughout the country. State governments have been content if health insurance (under Employee State Insurance Corporation-ESIC) and provident fund coverage of contract labour is achieved and have not enforced the abolition provisions for fear of investor flight from their states. In practice, employers have used multiple contractors, and often multiple names and identities for the same person to escape from the burden of accepting responsibility for work of a perennial nature or from claims against permanency.

It is partly because employers are not willing to raise labour standards across worker categories to standard threshold levels that the situation of different definitions under different labour laws is tolerated. The definition of "wages" should be possible to standardize across all labour laws without controversy and that would introduce administrative and accounting simplification although no one can seriously show any harm caused by differences in definitions in laws made for different purposes. Establishments employing less than 40 workers have already been exempted from the burden of maintaining registers or furnishing returns under 16 scheduled Acts since December 2014.

2.4 Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act, 1970

Known by its acronym, MRTU & PULP, this legislation had the object of providing statutory protection for freedom of association and collective bargaining by conferring rights on trade unions to prove their majority in a secret ballot process supervised by the Labour Department and be recognized. The purpose was to encourage unions that were truly representative of the majority of workmen. In states that do not have anything equivalent of this, unions are at the mercy of employers who can play one union against another or support weak pliable unions on the basis of check-off system involving deduction of union dues at the time of receiving pay and handing over collected dues to the union supported as a "recognized" union. MRTU & PULP takes away the management prerogative of deciding which union to recognize and even the mode of such determination. Employers hate this because MRTU & PULP can bring militant unions. In Maharashtra, for example, the Socialist Unions were ousted first by the

more militant Shiv Sena Unions and then Shiv Sena Unions were replaced by even more militant unions under pressure from Red Flag Unions, communist-marxist unions and Dr Datta Samant until the late 1980s. Whichever union can prove majority in secret ballot earns the right as collective bargaining agent on behalf of workmen under this legislation. This makes the employer's position less free but the fairness of the representative status cannot be faulted.

On balance, healthy industrial relations on the principle of "one unit, one union" is possible only if there are periodic secret ballot elections that enable representative unions to function. The weakening of unions or virtual demise of countervailing power is never a cause for celeberation because nature abhors vacuum and outlawed forms of countervailing power can arise in the form of extortionists, terrorists, extremists if regulated unions enjoying conditional immunities against charges of civil conspiracy, criminal conspiracy and restraint of trade are not tolerated as part of civil society. In Rajasthan, a trade union is no longer permitted until 30 % of the workforce joins the membership in the first instance-a formidable barrier in a country where average union density is below 25%.

3. The case for under-regulation

The most important principles of the ILO's functioning concern its Charter itself. As a Founder Member of ILO since 1919, India is committed to observing at least the minimal conditions, besides adhering to conventions it has ratified. The minimal conditions are:

No Slave Labour, Forced Labour, Prison Labour, Bonded Labour, Child labour

Freedom of Association to Trade Unions

Right to Collective Bargaining

In a labour surplus economy, the first rung of the social security ladder is income security and in the absence of a national system of protecting a minimum threshold of income, this is achievable only through work security even if the wages offered are below statutory minima. Indeed, this is often the case. Take the case of production and marketing of Mangaldeep Agarbattis, an ITC Brand. The production in Munger is done in self-help groups of a women's cooperative, SEWA where the women workers work at piece rates. Converted to time rates, these would be below the statutory minimum wage. So self-exploitation is offered and accepted. No one can claim that labour regulations are coming in the way of such farmed out production which seems to be quite common involving partnerships between the formal and informal sector. In a country where

work security for the income security it offers is considered enough, very few employers offer jobs or job security. Guy Standing now calls such workers as the "Precariat" eking out a precarious existence (Standing, 2011). In 1989, I called them "working non-employees", a term that the ILO's World Labour Report accepted in 1990.

The controversy over the social clause in trade negotiations is worth recapitulating. Labour cost arbitrage is one of the drivers not only of outsourcing within a country between the formal and informal sector but it is also the springboard for offshoring. Developed countries had demanded that certain minimum threshold of labour standards must be universally agreed as fair trade conditions in the form of a social clause . Underdeveloped countries whose mainstay in export trade or trade substituting investments was wage cost arbitrage had opposed this. Thus, underregulation had government blessings in national causes for mitigating trade deficits and augmenting trade balances. So the logic that supported sweatshops as spearheads of industrialization translated into under-regulation.

Pro-employer governments have taken such a stance much further-each in their own way. Since labour in India is a state subject involving discretion in enacting labour legislation, in enforcement of labour protection laws and in the exercise of discretionary power when the tripartite machinery is invoked, there are huge differences in how pro-employer states in the Indian Union differ. Let me cite a few examples. In Tamil Nadu, under a state labour law governing the conferment of permanent status to workmen the Government allows workmen to be engaged as "learners" for a year or two, then be classified as "improvers" and after some time be redesignated as "junior trainees" who will progress to become "trainees" until a few acquire the status of becoming "probationers" before being called "workers" or "employees". In Enfield, this went on for ten years. Another example is Nokia at Sriperumbudur that engaged Diploma Holders in engineering and skilled tradesmen (who no longer qualified to be eligible under the apprenticeship Act) as apprentices in clear violation of the Apprentices Act and received subventions from the government towards part of the wages of such so-called "apprentices".

The brutal treatment accorded to workmen of Maruti by the Government of Haryana after the gruesome murderous attack on a manager in the Maruti factory was a reminder of

underregulated barbarism from all sides, including the tripartite frame where government can resort to state power, arrest workers, and subject them to "treatments" reserved for criminals. The recent violence in Sanand at the Tata Nano plant in 2016 involved the time honored employer tactic of initiating suspensions and disciplinary actions on a large scale and then negotiating and taking back half of them. This was proof if any were needed that overregulation has hardly constrained employers in exercise of power to buttress their authority.

If a state government does not prohibit a lockout or refer an industrial dispute for adjudication for fear of losing an investor and is willing to use the police force to break up countervailing power action of unions representing workmen, the acknowledged immunities that enable trade unions to be distinguished from welfare societies get diluted and the dividing line between industrial action and capitulation on whatever terms gets blurred.

4. The Paradox of Over-regulation coexisting with under-regulation

Under-regulation is as serious a problem as overregulation and either can trigger or escalate conflict. Employers escape overregulation by organization partitioning to escape the limits of applicability, by recourse to secondary and tertiary labour market segments through arms' length principal to principal partnerships with entities such as cooperatives, contractors, labour suppliers, temphelp companies etc. There is no escape from overregulation where tasks cannot be partitioned to reduce the number below 300 or 100 or 20 or 10 to escape the requirements of coverage under different labour laws. From the perils of underregulation there is no escape because market power is clearly in favour of employers who have considerable degrees of freedom to determine how employment would be structured or engagement contracted.

There are also differences between manufacturing and services. Mazumdar and Sarkar (2013) have discussed how manufacturing employment in India exhibits a modal group employing 6 to 9 workers and another modal group employing over 500 workers with a conspicuous "missing middle" and argued that this has to do with reservations for the small sector rather than with labour regulations being onerous. The bulk of Labour Laws in India were designed for employment in manufacturing. The expansive interpretation to the term "Industry"

in 1978 (in the case Bangalore Water Supply and Sewerage Board versus Rajappa and Others, AIR 548 SC) to mean any systematic activity for satisfying wants that engaged people brought almost every service business (including clubs, panjrapols, temple trusts, laboratories, educational institutions, hospitals) within the definition of "industry". No seismic shifts occurred then and its unlikely that any seismic shifts would occur now from relaxations in laws that Secki (2015) fears because employment in services has a much lower union density and for a worker to lose a place of work is like encountering "economic death".

5. Recent Labour Law Amendments

Ease of compliance for employers has been brought about by doing away with inspections in favour of self-certification. Since periodic returns have also been abolished for establishments employing less than 40 workers, safeguards for enforcement of labour standards under ILO Convention 81 have been compromised.

The Apprentices Act has been liberalized w.e.f. 22.12.2014 by replacing trade-wise allocation of seats by a minimum and maximum percentage of the total strength of workers. Establishments are free to engage apprentices in undesignated trades and exercise discretion on entry level qualification and syllabus. The scope of apprenticeship has been extended to non-engineering occupations at diploma or degree level. Basic training is now allowed to be outsourced and apprentices can be from other states too.

Employment of children below 14 years of age was completely prohibited w.e.f. 13.5.2015 linking this to the Right of Children to Free and Compulsory Education Act, 2009 with exceptions only for family work after school hours or work as an artist. In hazardous occupations only adults over 18 may work.

There are proposals on the anvil for dispensing with need for appointment letters, regulations on shift working and protection against unfair labour practices in very small factories employing less than 10 workers. Gujarat and Madhya Pradesh have announced their intention to amend a large number of labour laws to make the states more investor –friendly.

Conclusion

The promise by the government of further rationalization and codification of labour laws by condensing 44 central labour laws into four codes on wages, industrial relations, social

security and welfare, and safety and working conditions will simplify many aspects and provide an opportunity to test Basu's claim that more workers would be covered if coverage becomes less cumbersome, less costly. Yet, while all this is welcome, it may not be sufficient to attract investors for three reasons:

First, the nature of implicit "quid pro quo" grant of oligopolistic protection in the product market in the license raj period against reciprocal guarantees of lifelong employment protection has been nullified without being jettisoned from the tripartite frame. Jettisoning it is not a matter only of labour laws. Business failures can never be prohibited or outlawed and there is a need for comprehensive exit policies that provide safety nets to all affected stakeholders. Asset Reconstruction involving shutdowns of irretrievably sick establishments require relevant courts to be functioning to enable transformations and new beginnings. Compensatory mechanisms, wage earner funds to enable redeployment and retraining/reskilling, work searches, and social security provisions are needed. Merely trebling retrenchment compensation from fifteen days' pay for every year of service to 45 days (this is the Central government's proposal) would not mean much because voluntary retirement schemes that are more lucrative have had a modest success at adjusting employment levels quickly. This is probably why the Rajasthan Government has raised the retrenchment compensation to 90 days' pay for every year of service already. According to the All India Manufacturers Organisation, the closure rate of industry is currently more than the rate at which new industries are being set up. This assertion based on AIMO studies made at the 46th Indian Labour Conference (ILC) in 2015 needs to be investigated.

Second, the weakened countervailing power of trade unions has affected the dialogue among social partners required to balance the interests of employers and workers. Laghu Udyog Bharati representing small industries opposes lowering the limit for size of establishment from 20 to 10 for coverage even under employees provident fund. Such is the stubbornness on the employers' side. The recommendations of the 43rd, 44th and 45th sessions of the ILC over three years have remained unimplemented. And that is not all. The conflict between insiders with membership in unions active in the organized and formal sector, however weak, and outsiders – the unorganized workers whose membership is only in cooperatives or general unions such as SEWA is not solvable by labour law reform unless such reform provides for national income

guarantees, work security and national portable safety nets within India and in case of migrant labour, also abroad. Any rural or urban employment guarantee scheme can be effective and sustainable and fundable only if it is productive beyond the strength of transfer payments. The demand side of the National Skills Mission is yet to activated to cater to the annual accretion on the supply side. At the 46th Indian Labour Conference in 2015, the Finance Minister said that benefits will percolate to workers when the country progresses. This reliance on "trickle down" theories is probably the reason for the absence of an active labour market policy.

Thirdly, the failure of successive governments to put employment in mission mode has shrunk the real price of skilled labour due to oversupply to unprecedented lows and in some cases to even below statutory minimum wages. There are only about 300,000 registered apprentices in India and the government has set a target of 2 million. But labour demand is a derived demand based on expansion of the production possibility frontiers for goods and services and mere supply will not create its own demand. Skill premia in wages required for quality cannot be sustained in conditions akin to chattel slavery due to under-regulation and the pace of change required cannot be attained in establishments enjoying scale economies due to overregulation. That is why the labour market, among other challenges, also needs attention if the "Make in India" programme is to succeed.

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