LABOUR REFORM AND THE CONSTITUTION OF INDIA[*]

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Nani Palkhivala begins his book, "We, the People" with these inspirational words:

To the people of India, Who gave into themselves the Constitution but not the ability to keep it, who inherited a resplendent heritage but not the wisdom to cherish it, who suffer and endure in patience without perception of their potential.

These words underscore a far deeper concern – has the Constitution served the neediest, and the most vulnerable in India, or is it the preserve of those with access to the legal system? What is clear is that the truth lies somewhere between these extreme assertions. It is, however, our duty to engage in a constant attempt to redress that balance, so that the Constitution moves closer and closer to a document with real meaning to the vast majority of India's populace, rather than just remain a legal artifact of undoubted beauty and deep sophistication, which it undoubtedly is.

Nowhere is this need more apparent than in the context of labour legislation. A cursory perusal of history tells us that labour laws evolved to prevent industrial excesses, committed by those with means against those in need of those means. Although the modern economy has fundamentally reshaped this balance, a lot remains unchanged – the poorest workers are arguably as badly off as those exploited in the infancy of the Industrial Revolution, and those better off have no need of labour laws, for they rely on their bargaining power, and their ability to find alternative employment. Thus, it is to India's most needy that labour law addresses itself. It is also the most needy that the Constitution was most anxious to protect. The relationship between labour law and the Constitution is, therefore natural.

It is apposite to begin by examining the constitutional framework for economic reform in general, before attempting to answer a particular component of that reform. In 1983, Justice Chinnappa Reddy remarked that "*[w]hen Article 39(b) refers to material resources of the community it does not refer only to resources owned by the community as a whole but it refers also to resources owned by individual members of the community. Resources of the community do not mean public resources only but include private resources as well."* Part III of the Constitution protects fundamental rights, and is rightly seen as the "soul" of the Constitution. But Part IV is often what is more meaningful to the needy and the vulnerable, creating as it does a solemn commitment on the part of the Government to accelerate social reform and establish a more equitable distribution of wealth. In 1951, the Supreme Court held that Part III prevails over Part IV in the event of a conflict between the two. The Court reiterated this view in 1958, but noted that Part IV cannot be entirely ignored, and evolved the doctrine of harmonious construction. The saga has continued since.

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One can take a number of positions on the relationship between Parts III and IV and on the relative importance of fundamental rights *vis a vis* directive principles. However, this does not entirely answer a question that is at least as important, and perhaps even more dispositive of the present difficulty – what substantive changes do we require in our labour laws to advance towards this goal of egalitarian and equitable society at a faster pace than we are presently? Unsurprisingly, there is neither an easy answer nor a definitive one to this question, but I will offer a few pointers on areas for legislative intervention.

We will begin, as we must, with the building blocks – what is it that one looks for in any labour legislation? The answer, to me, is that there are at least three elements – the *range* of persons it applies to, the *standard* of protection it offers, and the *enforcement* of those standards for persons in that range. I will start with the third of these questions. Under the Industrial Disputes Act, a Tribunal has no jurisdiction unless an "industrial dispute" is *referred* to it by the "appropriate Government." In *Heavy Engineering Mazdoor Union v. State of Bihar*, the Supreme Court adopted a narrow view of the term with reference to the Central Government, and respected the form of a corporate structure although all its shares were held by the Centre. In *Hindustan Aeronautics*, the Supreme Court was motivated by concerns of law and order, and held that the appropriate Government is a State Government that is more closely affected by the industrial dispute than another State Government. Thus, the legal controversy has continued, and has generated several discussions and engendered substantial disagreement. The upshot of this is that there is a great deal of inclarity on *which* Government is competent to refer a matter for industrial adjudication – a particularly serious handicap considering that such reference is a precondition for an industrial Tribunal to assume jurisdiction and adjudicate on a dispute. There is little doubt to me that this is a ripe area for legislative intervention. That intervention can take one of three forms – either provide that reference is *not* necessary to activate or engage the jurisdiction of the Tribunal, or clearly define what the appropriate Government is, or retain the requirement for a reference but specify that *either* Government may make the reference.

Of these, it is perhaps best to provide that either Government may make the reference, but retain the requirement that a reference is necessary. This does seem somewhat counterintuitive - is it, after all, not in the best interests of the workers to allow unfettered access to a dispute resolution forum? The answer is that it is not. For one, the efficacy of the dispute resolution forum cannot be undermined if it is to seriously protect workers. Dispensing entirely with a reference requirement makes it possible that a reference is used as a bargaining chip in labour negotiations, rather than as a true device of resolving disputes. That will in turn undermine the credibility of claims brought to the forum, and adversely affect claims that are *bona fide.* However, providing that *either* the State or the Central Government may make the reference is an adequate safeguard in this regard.

The *standard* of protection is one of the more controversial areas in labour reform discourse. While there is no doubt that labour laws must be strong enough to protect vulnerable workers, it is important to ensure that it does not act as a disincentive for industry. For example, the Industrial Disputes Act makes it next to impossible for an employer to fire an employee. This protects honest employees for capricious employers, no doubt. But it *also* protects inefficient employees from honest employers who, having

given workers a fair opportunity, make the understandable decision that the slot will be better filled elsewhere. As with our discussion on the question of a reference, it is necessary to strike a balance between these two equally important goals. Indeed, India's labour laws are among the most rigid in the world, and may even be a factor in the rising unemployment in the country, for firms that cannot fire workers in times of recession are unlikely to hire with as much vigour as they might otherwise. Recently, the World Bank examined labour legislations across the world and assessed these on a scale of 100 for rigidity, with 100 being the most rigid. India, with a score of 48, is one of the highest in the world, and even countries like China have a lower score. More efficient economies like Singapore have a score that approximates to zero.

However, the other side of the picture makes for stark reading too. The *unorganised* sector in India is home to workers that need the protection of labour law the most, and yet cannot access it. As is obvious, the unorganized sector consists of workers whose pattern of employment, remuneration and connected details are neither known publicly nor even documented privately. The question of engaging labour legislation often does not arise for these workers. The problem, clearly, is less of legislation and more of enforcement. Some important measures to enforce labour legislation consist in perhaps setting up enforcement mechanisms with decentralization. This may help ensure that those who enforce labour laws are fully conversant with the areas where they enforce it.

Another interesting feature of our labour laws is that labour is found in the Concurrent List in the Constitution. This has represented one of the most controversial areas of constitutional law in recent times. Article 254 of our Constitution provides that a State legislation that is repugnant to a Central legislation is void to that extent, except with Presidential consent. However, in *Vijay Kumar Sharma* v. *State of Karnataka* (AIR 1990 SC 2072), the Supreme Court held that the doctrine of repugnance is limited to conflicts between laws passed under the *same entry* in the Concurrent List. This means that a Central law passed under List I that conflicts with a State law passed under List II/III is not subject to Art. 254(1). This has enormous implications for labour law, because the Special Economic Zones Act, 2005, is a Central legislation, and conflicts between labour legislation and the SEZ Act are a distinct possibility, especially in view of the generous benefits that industries in the SEZ get. In that eventuality, a Court will be forced to conclude that the State legislation is not merely void to the *extent* of inconsistency, but void in its entirety, in accordance with Art. 246(2) of the Constitution. Since it is axiomatic that two inconsistent laws cannot operate simultaneously, resort must be had to this provision, which indicates that the Central law will prevail. It is apposite for the Supreme Court to therefore clarify the true import of its judgment in *VK Sharma's* case.

To put all of this in perspective, let us briefly consider the relationship between a democratic form of Government and economic prosperity, particularly of those at the bottom of the economic chain. It is beyond peradventure that a *particular* non-democratic form of Government may be more successful at alleviating poverty than a *particular* democracy. But that is the wrong question to ask. The correct question to ask is whether the relationship between a democracy and economic prosperity is *more* robust, on *average*, than the converse relationship. To this, the answer is but in the affirmative. Seymour Martin Lipset famously argued that *"the more well to do a nation, the greater the chances it will sustain democracy."* While we are asking the reverse question, it is relevant to note that Lipset's thesis was challenged, especially with the rapid proliferation of poor democracies. The argument that dictatorships are able to

better utilise scarce resources was prominent in these circles. Cuba was the example most often cited, and not without reason. According to the 2003 Human Development Report, Cuba was fifty third and outranked countries like Mexico. The 2003 HRD also revealed that only 4% of Cuban children were underweight, that from 1990 to 1992, only 5% of the entire population was undernourished, that the net primary education enrollment ratio was 97%, and so on. In Hernandez- Truyol's words, Cuba challenged the assumption that *"free markets and democracy are dovetailing concepts"*, and strongly suggested that *"sometimes the states that reject democracy and rely on strong government may be more able to implement policies that promote human development."* However, isolated instances of poverty alleviation cannot mask the inherent instability of authoritarian regimes, making a sustained attack on poverty extremely unlikely. Some form of separation of powers is indispensable to *sustained* poverty alleviation.

This is evident from examples from across the world. Most of these have been empirically verified in the context of the failed African dictatorships. *First,* an authoritarian regime has astronomical levels of corruption, since there is no transparency in institutional functioning. For example, Nigeria's General Abacha had amassed between $3 and 6 billion at the time of his death, while his Zaire counterpart had $10 billion. The only beneficiaries were offshore banks, to which about $ 200 billion were entrusted by African dictators in 1991 alone. Incredibly, this accounted for ninety percent of Sub Saharan Africa's GDP. This even questions the very premise on which the 'dictatorships are efficient' argument is based, since such levels of corruption mean that the question of poverty alleviation does not arise at all. The *second* reason is the obvious - dictatorships are more often home to civil unrest, violent repression and wars. As a result, foreign investment becomes a remote possibility, as the war stricken 1987 demonstrated, when net investment in Sub Saharan Africa fell from $ 1.22 billion to $498 million. It affects aid packages as well, as the episode of the IMF withdrawing a proposed $205 million aid package to corruption ridden Kenya illustrates. Kenya incidentally lost a further $280 million that year from tourists who stayed away. Closer to home, it usually becomes the seat of brutal repression, or subtle dismemberment of disfavoured social groups. A sobering example is Chile, where the failure of the post-Pinochet regime to sufficiently open up the democratic process *"silenced social movements"* and *"subordinated grass roots organisations."* This shows us that when dictatorships fail, they fail spectacularly. As Ashutosh Varshney, a renowned scholar, put it, *"authoritarian countries have either exhibited spectacular success at attacking poverty (South Korea, Taiwan and Singapore) or they have failed miserably (in much of Sub-Saharan Africa and Latin America), and many are in between."* He rightly identifies the crux of the issue: though democracies have prevented the *worst* outcomes from occurring, they have not achieved the *best* results either, while authoritarian regimes exhibit the whole range of outcomes.

What does all of this have to do with labour reform? Simply this - it reminds us of the enduring value of democracy, and is a stark warning that resorting to undemocratic, violent or oppressive means of protest is certain to cause more harm than good in the long run. As the recent episode of Jet Airways pilots striking work shows us, what is just to a few is unjust to the many, and the concededly legitimate demands of a few held an entire nation to ransom. While the argument is often that workers have no alternative, this is simply not the case, and labour law reform will ensure that the few cases where it is are also obviated. Forcing management to compulsory but independent and fair arbitration removes any need for a strike, and also incentivises management to set fair terms and conditions, and workers to make fair demands. The device of

arbitration is likely to succeed more by the threat of its use than by its actual use, but that, after all, is the greatest testament to the success of alternative dispute resolution.

In short, India has taken rapid steps since its birth as an emerging democracy in 1950. In 2010, it stands at the crossroads to two worlds, and *could* choose the path that leads to its arrival as a nation to be reckoned with by the powers that be. The choices it makes now will indelibly mark its destiny, and historians will no doubt bear witness to the wisdom of the choice. In this larger matrix, India's immediate need is to get its labour-industry balance right, and one hopes it will do so with haste.

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