

## Introduction

### The Law of Labour

#### *Evaluating the Labour Law Reforms\**

#### Introduction

This book argues that the 2020 labour law reforms in India, where Parliament consolidated twenty-nine federal statutes into four labour codes, fail to meet the Indian Constitution's labour mandate. In so failing to meet the constitutional mandate, the reforms have far-reaching consequences for labour rights in the country. Labour, understood broadly as an individual's personal undertaking contributing to broader socio-economic pursuits, occupies a prominent position in the constitutional framework in India. As a category, labour is pivotal to the social justice agenda envisaged under the Constitution. The Preamble to the Constitution of India, 1950, aspires to social, economic and political justice. The other values fundamental to the foundation of the republic are freedom, equality and solidarity. While the latter values are inherently important for the constitutional framework of the nation, they are also the conceptual and programmatic components of the constitutional social justice agenda.

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On the basis of its social justice agenda, India's Constitution could be positioned somewhere between classical liberalism and social democracy.<sup>1</sup> In classical liberalism, on the one hand, the constitution stipulates basic rules of contract, property and tort to regulate market exchanges, which are the primary means of distributing goods and services.<sup>2</sup> In social democracy, on the other hand, the constitution catalogues extensive rules of redistribution that secure citizens' legal entitlements, such as education, nutrition, work, healthcare, social security, unionisation, maternity benefit, legal aid, and so on.<sup>3</sup> Mark Tushnet notes that in classical liberalism, the distribution of goods and the principles of such distribution are primarily the concern of private law, whereas in social democracy, they are primarily a public law issue.<sup>4</sup> The Indian Constitution uses – balances – both of these approaches by simultaneously allocating a role for the market (structured through private law) and guaranteeing welfare rights (secured through public law).

### **The Constitutional Social Justice Agenda**

The Indian Constitution's social justice agenda is furthered through a combination of individual freedom, social solidarity and participatory democracy. It is the balance among these three aspects of the social justice agenda that captures the uniqueness of the agenda for Indian society. The Constitution guarantees every citizen of India the individual freedom to practise their chosen occupation and engage in a trade or business of their choice without undue interference.<sup>5</sup> Alongside the right to formal equality – non-discrimination on the grounds of religion, race, caste, sex, place of birth – the right to individual freedom safeguards workers' autonomy to participate in the labour market. By means of justiciable constitutional rights to equality and freedom, the Constitution prioritises workers' choice and autonomy without limiting the extent of worker engagement in the market or dictating the economic goals of such engagement. These safeguards are how the Constitution removes impediments to worker participation in the market without being paternalistic in the process. At the same time, the state could restrict freedom of trade – market freedom – in the public interest, including in the interest of safeguarding individual freedoms and social justice.<sup>6</sup> This restriction recognises that inviolable market freedom may be inimical to the cause of social justice.

In any case, worker participation in the market, while important, is only one component of the multidimensional social justice framework envisaged under the Constitution. The market-focused distribution of economic resources is supplemented by the solidarity-based social welfare provisioning mandated under the Constitution, drawing its strength from the socialist ambition of the Constitution. The constitutional aspiration to promote ‘fraternity’ in ensuring a dignified life for the citizens is detailed in the constitutionally mandated duties of the state.<sup>7</sup> Since the Indian Constitution is based on the ideals of individual freedom and social solidarity, workers who are unable to meaningfully participate in market exchanges or are systematically disadvantaged from market participation are supported by the ‘social state’, which has a responsibility – a constitutional one – towards such workers.<sup>8</sup> A just social order secured by the state should minimise inequalities of income, social status and opportunities among individuals and groups, including workers engaged in different occupations. The state’s ‘fundamental’ duty includes resource redistribution and securing work for the citizenry.<sup>9</sup> Just social outcomes are, then, a combination of market-based distribution and state-based redistribution of rights, resources and opportunities.

While the fundamental duties of the state are to be furthered through legislative action rather than constitutional litigation, the Constitution does not advance justice merely through substantive legislative entitlements; the very access to the legal system on an equal basis is also part of the just constitutional order.<sup>10</sup> Equal opportunity to participate in formulating and accessing the legal framework of entitlements is, then, part of the just economic democracy<sup>11</sup> that the Constitution seeks to further. Accordingly, the third component of the multidimensional agenda of justice, one that permeates all the other components of the constitutional ideal of social justice, is participatory citizenship. In particular, the labour-focused social justice agenda of the Constitution recognises the prominent role of workers’ participation in the management of their workplace and collective action in a dynamic social justice framework. The Constitution safeguards workers’ rights to form associations, unions and cooperative societies.<sup>12</sup> Although the Supreme Court decrees – incorrectly, as we will argue in Chapter 4 – that the right to unionise does not include collective bargaining or work cessation in furthering the bargaining agenda, the state is duty-bound to ensure worker participation in management as a legal right.<sup>13</sup> The state is also mandated to promote participatory control and autonomous functioning of cooperative societies, including workers’ cooperatives.<sup>14</sup>

The ideal of social justice facilitated through participatory democracy is an unalterable part of the Constitution's basic structure.<sup>15</sup> Depending on the nature of political demands, Parliament may amend specific constitutional entitlements, but it cannot abandon the ideal of social justice. Although the welfare state plays a leading role in promoting social justice, social welfare cannot come at the cost of curbing individual freedom. '[T]he whole scheme underlying the Constitution is to bring about economic and social changes without taking away the dignity of the individual.'<sup>16</sup> Individual freedom to engage in activities and pursuits that one values, including the desire to participate in collective action, occupies a place of eminence in the country's constitutional framework.<sup>17</sup> That individual agency – the freedom and initiative of conceiving and executing one's life plan – occupies a prominent position in the constitutional social justice agenda is evident from the fact that the agenda is premised on socio-economic redistribution by means of *labour*, which requires an active commitment to participate in the social justice project. In other words, since the constitutional social justice narrative, in the regular course (that is, not considering individuals who are incapable of agency for a range of reasons), unfolds primarily through labour relations, it demands citizens' active participation – agency – in labour exchanges. To emphasise, the overarching components of social justice in India are threefold: individual freedom, social welfare and democratic participation. In the context of workers, it is their voice and (collective) participation that connect the other two components of social justice, allowing them to transform the constitutional ideal into concrete and detailed legal entitlements. They do so by means of the participatory law-making process envisaged under the Constitution.<sup>18</sup>

Evidently, then, the constitutional social justice agenda unfolds through two simultaneous realms – private markets and public social welfare – corresponding with the two dimensions of social justice: individual freedom and social solidarity. While the private market operates through the logic of self-interested autonomous individuals making decisions on their own behalf, social welfare operates on the ideal of solidarity – fraternity – in 'assuring the dignity'<sup>19</sup> of fellow citizens. The Constitution, thus, seeks to strike a harmonious balance between market-based individual freedom and solidarity-based social welfare.<sup>20</sup> Since the constitutional scheme entrusts the state to realise constitutional ideals through law, we should evaluate legislated entitlements using these constitutional ideals. Note that evaluating enacted legislation is not the same thing as adjudicating the 'authority' of such

legislation. The aim of constitutionally evaluating legislation is to understand whether the legislation properly realises constitutional goals rather than whether such legislation is beyond the constitutional authority of the body that enacts it (that is, *ultra vires* the Constitution).

## The Role of Legislation

The ideal of social justice as a common political framework for a plural community, of necessity, is articulated at a higher level of abstractness. The authority of law rests on its ability to act as an instrument for coordinating citizens' behaviour in furthering the mandates of the common political framework.<sup>21</sup> In this instrumental sense, law captures the essence of the abstract ideal and converts it into concrete formulations to be carried out in quotidian practice, including negotiating the deliberative space for the citizenry. To be sure, even when law should fit and further the ideal of social justice, it must also negotiate the disagreements citizens have about the ideal itself in actual communities.<sup>22</sup> Jeremy Waldron notes that since legislation – as collective political action – is the principal tool for guaranteeing entitlements for the citizenry, its task is to find practicable ways (under conditions of disagreements) to realise the ideal of social justice in actual contexts.<sup>23</sup> Legislation, thus, should be accountable on two fronts: its commitment to the ideal of justice and its sensitivity to actual contexts. As will be elaborated in Chapter 1, these two components are not separate concerns; they converge in (some) conceptual imaginations of social justice. Although politics may require periodic legislative enactments, amendments and repeals, in all its iterations legislation should always adhere to the constitutive principles of society.<sup>24</sup> In principle, then, the role of legislation is to realise social justice in all its political complexities.

Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller and Francisco J. Urbina demonstrate the advantage of enacted legislation over constitutional adjudication in actually realising constitutional human rights safeguards.<sup>25</sup> According to them, legislation specifies and clarifies the contours of a bill of rights with a precision absent in the judicial review process.<sup>26</sup> In well-functioning democracies, legislation signifies responsiveness to social evolution.<sup>27</sup> It is the legislature in its representative capacity that is entrusted with understanding the details of effective legal intervention, devising a reasoned justification for such an

intervention, widely circulating the reasoning, scrutinising their reasoning and intervention through criticism and debate, and approving the legislation through representative bodies.<sup>28</sup> Webber, Yowell, Ekins, Köpcke, Miller and Urbina note that '[r]ights can only be realised if they are specified' through enacted legislation.<sup>29</sup> Even without an absolute conviction in the efficacy of legislation, it is uncontroversial that legislation creates a network of entitlements and specific duties – actions and abstentions – involving individuals and institutions that are generally acceptable to society at large.<sup>30</sup> The role of legislation, therefore, is to create a dynamic and coherent scheme of 'just relations' within a distinct area of social interaction.<sup>31</sup>

In particular, it is the role of the legislature to make sure that everyone, not only a selected few, can access certain common goods, including 'life, liberty, security, equality, privacy, family life, property, religion, expression, association, and assembly', so that every individual and group can fulfil their aspirations.<sup>32</sup> Legislative intervention in realising the bill of rights operates through a broad range of social interactions shaped inter alia by the law of contract, tort law, property law and criminal law.<sup>33</sup> Because of its core concern with the distribution of economic power and resources, labour relations are an area of continued political conflict and compromises.<sup>34</sup> Labour relations, therefore, are an area of social interaction that requires the responsiveness of the legislative process.<sup>35</sup> Since labour as a category occupies a central position in the redistribution of the common good in the Indian context, labour law as a legislative domain holds – ought to hold – a disproportionately large influence over the Indian population. This influence will be assessed in this book, not by examining every specific aspect of the 2020 labour law reforms (for example, the Industrial Relations Code [hereinafter, 'IR Code'], 2020) in their capacity to realise specific constitutional rights (for example, the right to occupation or trade), but by examining the reforms collectively in their ability to further the justiciable and non-justiciable constitutional rights that comprise the constitutional framework of social justice. In this holistic way of analysing the latest labour law reforms, our gaze is not merely fixated on the different labour codes; we also pay specific attention to the trade-offs between the different legal entitlements specified in these codes. It is these trade-offs – say, between freedom of (employment) contract and social protection – that will help ascertain whether Indian labour law meets its constitutional mandate.

The bill of rights in Part III and the directive principles of governance in Part IV of the Indian Constitution aim to further social justice for the

country's citizens. The approach adopted in this book is that it is through a subtle, contextually (and historically) determined 'balance' between the bill of rights and the policy directives that the Constitution seeks to advance an egalitarian society. This balance is not formulaic and, thus, not conditional on an absolute priority of certain rights (including justiciable rights) over others. Instead, the right measure of balance is dependent on the de facto realisation of social justice in actual contexts, and actual contexts in the Indian workforce are remarkably diverse. Since the Constitution mandates that the social justice mission be realised through legislative initiatives, we should evaluate the labour law reforms of 2020 using the constitutional metric. Accordingly, the book's central question is whether the 2020 labour law reforms in India, insofar as actually realising workers' rights, securing their socio-economic well-being and structuring social institutions wherein workers are able to satisfy their aspirations, strike a balance between individual freedom (Part III) and social solidarity (Part IV) in furthering the normative goal of social justice.

This context-sensitive evaluation of labour law should also take into account workers' participation, including through collective action, in evaluating the strength of the reforms. Participation plays a multifaceted role in the legislative realisation of constitutional principles. As we will discuss in Chapter 4, workers' participation in the labour law discourse supplies legitimacy to legal entitlements, validates the congruity of reforms to actual needs, ensures the effectiveness of enforcement and encourages wider compliance with the legislative agenda. Worker participation is also important for inclusivity, an underlying promise of the redistributive goal of the Constitution. Since the inclusive social justice mission of the Constitution seeks to recognise the dignity of every individual, it is to be expected that a legislative initiative realising the mission should not exclude certain groups and communities from its legislative purview. In a democratic society, dignity demands that people have a say over decisions meant to affect them, or else the decisions suffer from a legitimacy deficit (this issue will be explored in Chapters 1 and 4).

At the same time, we must be cognisant that the orthodox (post-independence) labour law framework has largely excluded informal workers – workers who do not belong to the traditional formal contractual employment structure – from its coverage, even though they constitute the overwhelming majority of the Indian workforce. Informal workers' working arrangements and relationships to patrons, clients and institutions are

variously constituted. This diversity is difficult to capture in any a priori legal formulation. Therefore, direct participation of informal workers is essential in order for the law to facilitate distributive justice for informal workers. Unless the labour law discourse integrates continued worker participation, including by informal workers, there is a risk that a significant percentage of the workforce will remain excluded from the labour-centric social justice mission. And since the labour law reforms ought to be evaluated on a holistic basis, not only from the point of view of industrial employees, inclusive participation itself remains a factor in assessing the legislative balance – that is, in weighing the multidimensional legal entitlements advanced to promote labour justice through the latest reforms.

### **A Contextual Evaluation of Labour Law**

As noted, this book adopts a holistic approach to evaluate labour law in India as shaped by the latest reforms. The holistic approach signifies that instead of focusing on specific aspects of the labour law reforms or pursuing particular interpretations, a contextual assessment of the overall character of labour law in the country is the need of the day, which this book seeks to accomplish. This book primarily offers a conceptual and doctrinal account of labour law. While the book does provide statutory interpretation, it is not merely an exercise in statutory analysis, offering commentary on specific statutes after their consolidation through reforms. Its engagement with statutes furthers the overall analysis of labour law as a coherent regulatory approach in the aforementioned constitutional context. By evaluating the potential influence of the different components of post-reform labour law on divergent worker groups, this book unearths the capacity of Indian labour law to become an instrument furthering the constitutional social justice agenda.<sup>36</sup> In offering a conceptual account of labour law, the book engages in interdisciplinary analysis that is tethered to its constitutional context. The book not only engages in a doctrinal evaluation of legal principles but also examines how law works – and ought to work – in society. It draws on political theory, anthropological narratives and quantitative and qualitative data to comment on the essential qualities and impact of the recent labour law reforms. That said, some chapters offer a more intensive doctrinal scrutiny of labour law, focusing on whether the law is normatively thorough and internally coherent.

Legislative power on the subject matter of labour is constitutionally distributed between Parliament and the state legislatures.<sup>37</sup> The general subject matter of labour welfare is listed in the ‘Concurrent List’ of the constitutional scheme of law-making power, on which Parliament and state legislatures concurrently legislate.<sup>38</sup> While Parliament is empowered to enact legislation for the territory of India, state legislatures exercise the power within their respective territories.<sup>39</sup> Thus, within the territory of a state, federal and state legislation (or state amendments) can exist on subject matters of ‘[t]rade unions, industrial and labour disputes’, ‘[s]ocial security and social insurance; employment and unemployment’ and ‘[w]elfare of labour including conditions of work, provident funds, employers’ liability, workmen’s compensation, invalidity and old age pensions and maternity benefits’.<sup>40</sup> It should be noted, however, that Parliament enjoys a certain degree of prominence in this constitutional division of legislative power. For example, if statutory provisions enacted by Parliament and the state legislatures are found to be incompatible, it is the parliamentary law that will prevail over state legislation in general.<sup>41</sup> Additionally, Parliament has exclusive power to legislate on any subject matter that is not listed in the ‘Concurrent List’ or the ‘State List’.<sup>42</sup> It also enjoys exclusive law-making power in order to implement the country’s international obligations.<sup>43</sup> And under exceptional circumstances (‘national interest’ or ‘emergency’), Parliament can legislate on subject matters in the ‘State List’.<sup>44</sup>

Employing its superior constitutional power to legislate on labour welfare, the Indian Parliament thoroughly amended labour law for the country during 2019–2020; the majority of amendments were introduced in 2020 (hereinafter, ‘2020 reforms’). As the book will show, the 2020 labour law reforms introduced numerous changes to the country’s labour law scheme, thereby forcing a permanent and far-reaching revision of the nature of labour law and workers’ rights. The changes range from diminishing the government’s role in industrial ‘employment’ relations to extending social protection for informal workers and others in-between. This book analyses the different legislative amendments from three broad perspectives: market-based employment relations, solidarity-based worker welfare and participatory industrial democracy. These three facets of the reforms are then weighed together in their combined ability to further social justice for Indian workers. Accordingly, this book undertakes a critical constitutional and legislative analysis, including that of judicial interpretations of the different components of the labour law regime. Documentary research of the

social science literature to situate the legal regime in its actual social context complements this analysis. The combined methods – of doctrinal analysis and contextual evaluation – are employed simultaneously throughout the book.

The Indian Parliament instituted the labour law reforms of 2020 through four codes: the IR Code, 2020;<sup>45</sup> the Code on Wages, 2019;<sup>46</sup> the Occupational Safety, Health and Working Conditions Code, 2020;<sup>47</sup> and the Code on Social Security, 2020.<sup>48</sup> One of the remarkable features of the labour law reforms has been organised labour's sustained and widespread opposition to them. Trade unions across the country, including the trade union wing of the Bharatiya Janata Party (BJP) (the political party in power), the Bharatiya Mazdoor Sangh, have called for multiple general (that is, political) strikes and protests against the labour law reforms. The intensity of protests against the reforms, yet the eventual adoption of them, would easily qualify the reforms as 'hard reforms' wherein labour and capital are unrelenting in their respective positions on the core values of labour regulation.<sup>49</sup> Worker organisations protested the lack of consultation and meaningful participation in enacting the reforms. Insofar as participation in the law-making process and wider community engagement are concerned, the reforms are alleged to be deficient.<sup>50</sup> It is also alleged that Parliament bypassed broad consultation and democratic participation during the reform process in order to force the 'ease of doing business' at the cost of promoting labour welfare in the country.<sup>51</sup> Indeed, some prominent features of the reforms *prima facie* lend themselves to such criticism.<sup>52</sup>

Traditionally, industrial relations in India have largely involved a tripartite relationship between employers, employees and the government. While the relationship was – is – based on a formal employment contract between the employer and the employee, the government acted as an interested party monitoring these contractual relationships. The law substantially limited the contracting parties' (that is, the employer and the employee) freedom in employment contracts through the requirements to report to the governmental authority and obtain prior approval for contractual (managerial) decision-making, particularly in decisions about laying off and terminating employees.<sup>53</sup> Pre-reform labour law in India looked past both the narratives of formal 'freedom of contract' in the labour market and the 'permissible inequality' of the employment relationship inherent in the employer's legal (common law) right to control her business and employees. The legal regime recognised with Max Weber that the 'formal