# UNFAIR LABOUR PRACTICES — AN OVERVIEW

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THE pattern of employer-employee relations has changed considerably in the last several decades. After moving from an era of unrestricted *laissez faire* to a more regulated labour market operating within the confines of legal framework, it is once again moving towards greater deregulation, which has brought about tremendous changes in the individual employment contract and the labour market as a whole.

Collective bargaining, which developed in the industrialised countries as the method of regulating employment relations, requires the existence of two parties, the employer and the workers. The collectives of workers ranged on one side, would in most cases, be organised into trade unions. The need for the existence of trade unions and in turn, the right of trade unions to function freely and further, the right of individual members to freely join and participate in the affairs of the trade union then would, *a fortiori*, be an indisputable and necessary condition for the efficient functioning of collective bargaining. Viewed in this light, any action of either party to the collective bargaining process which interferes with the formation or existence of unions or in the participation of individuals in these organisations would hamper the collective bargaining process and would merit being termed an unfair labour practice. At the same time collective bargaining also requires that the collective bargaining agent be identified from among several available collectives of workers — be they trade unions or groups of workers—and further that this bargaining agent has the right, and also the duty, to negotiate on behalf of the workers, in short be an exclusive bargaining agent. The need to evolve criteria for determining what have been variously termed as a bargaining agent or a recognised union is a prerequisite for collective bargaining and the failure to do so or irregularities in these procedures could also be treated as an unfair labour practice.

In the USA where the expression 'unfair labour practices' was first used, there have been legislations since 1926 in favour of collective bargaining. The National Labour Relations Act 1935, also known as the Wagner Act noted that the "refusal of the employer to accept collective bargaining causes strikes and other forms of industrial strife or unrest, which have the effect of burdening or obstructing commerce". The

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Labour Management Relations Act 1947 (the Taft-Hartley Act) which replaced the earlier Act, apart from listing unfair labour practices on the part of the employers, in addition, listed those on the part of the trade unions too — the idea being to place employers and employees on an equal footing as far as collective bargaining was concerned.

## The ILO Approach

The ILO has considered protection against anti-union discrimination[1] to be an integral part of the protection of freedom of association. This term covers restriction or prohibition directed against individual workers by reasons of their involvement in trade union activities; it may also be directed against the trade union(s) as a whole by interfering in the functioning of workers' organisations or by refusal to enter into collective bargaining with the union(s) and other such unfair labour practices. The protection of workers against threats to their functioning by employers and employer's organisations is dealt with under the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) of the ILO. Article 2 (1) of the Convention provides that, "Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."

The guarantee against interference has been further elaborated in paragraph 2 of the same article by specifying that acts designed to promote the establishment of workers' organisations under the domination of the employers or the support of workers' organisations by financial or other means with the object of placing such organisations under the control of the employers' or employers' organisations, also constitute *acts of interference.*

By virtue of article 1 of the Convention the workers must be adequately protected against anti-union discrimination. Protection from anti-union discrimination would cover not only hiring and dismissal but also any other discriminatory measure such as transfers, refusal of employment, demotions, disciplinary measures, deprivation of or limitation on wages or social benefits, or other acts prejudicial to the worker.

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1. The bundle of rights contained in articles 1 and 2 of Convention No. 98 are often referred to by the ILO as protection against anti-union discrjmination. Actions that violate the guarantees in articles 1 and 2 of Convention No. 98 were referred to in the Indian Trade Unions (Amendment) Act, 1947 as "unfair practices", and subsequently in the Industrial Disputes Act 1947 as "unfair labour practices". We shall refer to them by the two terms 'anti-union discrimination' and 'unfair labour practices'.

Protection against acts of anti-union discrimination in respect of employment is particularly desirable for trade union leaders. The Workers' Representatives Convention, 1971 (No. 135) and Workers' Representatives Recommendation, 1971 (No. 143) establish that workers representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or based on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. Where trade union representatives and elected representatives exist side by side, the Workers Representatives Convention provides that, wherever necessary, appropriate measures shall be taken to ensure that the position of the trade unions or their representatives in the undertaking is not undermined by the existence of elected representatives. The recommendation which supplements the Convention provides that (i) the workers must be provided precise reasons justifying termination of employment, (ii) the availability of special procedures for the workers' representative to challenge any termination or act of anti-union discrimination, (iii) the provision of an effective remedy including reinstatement with payment of unpaid wages in case of unjustified termination of employment, and (iv) the preference in the matter of retention in employment in case of reduction of the work force. Articles 4 and 5 of the Labour Relations (Public Service) Convention, 1978 (No. 151) extends similar protection to public employees just as the Rural Workers' Organisations Convention, 1975 (No. 141) in article 3 (2) provides such protection to rural workers and their organizations.[2] The Termination of Employment Convention, 1982 (No. 158) also contains similar prohibition.[3]

Traditionally, therefore, the expression unfair labour practice has been used synonymously with such actions which interfere in the collective bargaining process. This has been the common understanding in much of the western world and also the understanding developed by the ILO itself. However, in India, the expression 'unfair labour practices' has not always been used to mean only activities which hinder the

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2. It states that "the principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression".

3. Article 5 (a) of the Convention stipulates that "union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours" are not valid grounds for termination. The Discrimination (Employment & Occupation) Convention, 1958 (No. 111) which India has ratified provides protection against discrimination on the basis of political view, membership of political party or political activities.

smooth functioning of collective bargaining. The expression as used in legislation and in the decisions of the courts is used in a wider and looser sense to cover unjust dismissals, unmerited promotions and every form of victimisation, whatever be the cause.[4] The reason for this appears to be that collective bargaining has never been the central feature of the framework of employer-employee relations in India.

## Indian Policy

Several commentators have noted the Indian labour policy's uneasy attitude towards collective bargaining as a method of regulating employment relations.[5] The Royal Commission reporting in 1931 found very little evidence of collective bargaining in India. The commission rejected a demand made for making recognition obligatory in certain cases.[6] During the period of State autonomy in 1937-40, the Congress government tried to introduce legislation for encouraging collective bargaining and curbing unfair labour practices. The Bombay Industrial Disputes Act, 1939, the precursor to the present Bombay Industrial Relations Act, 1946 was a result of this policy.

The Industrial Disputes Bill introduced in the Central Legislative Assembly on 28th October, 1946 and which became a law on lst April, 1947 retained, *inter alia*, the essential principles of Rule 81-A of the Defence of India Rules which empowered the government to refer industrial disputes to adjudication and to enforce their awards. Explaining the government's policy in the Central Legislative Assembly Mr. Jagjivan Ram, labour minister, stated:

> I must make it clear that in providing for compulsory adjudication our intention is not to oust or in any way minimise the importance of the methods of voluntary negotiation and conciliation in the settlement of disputes.[7]

At around the same time, the Trade Unions (Amendment) Act 1947 introduced what it termed as 'unfair practices' which should be eschewed by trade unions and employers alike in their relations with each other. These included activities such as the majority of the members of the

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4. Government of Maharashtra, *Report of the Committee on Unfair Labour Practices* 40 (1969).

5. See for instance, E.A. Ramaswamy, *Power and Justice: The State in Industrial Relations* (1984) and V.D. Kennedy, *Unions, Employers and Government: Essays on the Indian Labour Questions* (1966).

6. *Report of the Royal Commission on Labour in India* 323 (1931).

7. *Legislative Assembly Debates*, 1.11.46, 404-5. Similar views were echoed in the Select Committee to which the Bill was referred. See Report of the Select Committee, *Gazette of India* 33 (1947).

trade unions taking part in an illegal strike, and on the part of the employer, interference with or restraint on or coercion of his workmen in the exercise of their right to organise. The Act provided for compulsory recognition of representative unions by employers and for arbitration of disputes over certification of unions. It is interesting to note that these measures (which have yet to come into effect more than 50 years later) deal only with the issues of non-interference by the employer in trade union matters and protection of the workers against victimisation on the basis of their trade union activities, and not with the criterion for determining a bargaining agent.

Mr. Jagjivan Ram's approach, of balance between collective bargaining and compulsory adjudication, found reflection in the Labour Relations Bill, 1950 and the Trade Unions Bill, 1950 introduced in the Parliament of India. Under the Labour Relations Bill, 1950, collective bargaining was made compulsory for both employers and unions under stipulated conditions. The Bill provided for a procedure for collective bargaining, which included the prohibition of strikes and lock-outs until the parties had resorted to collective bargaining and obligation on both the employers and workers to observe collective agreements. The conclusion of written agreements to be registered with the appropriate government office was declared to be the purpose of collective bargaining.

Mr. V.V. Giri who took over as the new labour minister in 1952 sought to completely overhaul the existing scheme of compulsory adjudication. At the Indian Labour Conference at Nainital, Mr. Giri tried, with moderate success to win support for shifting emphasis towards collective bargaining. Following the resignation of Mr. Giri in 1954, Mr. Khandubhai Desai took over as labour minister. While acknowledging that the shift from compulsory adjudication to collective bargaining was essential he emphasised that compulsory adjudication has to be retained as a reserve weapon in the armoury of the state for tackling labour-management relations.

Thus, despite attempts like the voluntary Code of Discipline in Industry adopted by the Indian Labour Conference in 1958 obliging management and unions not to take unilateral action and to settle all future disputes through conciliation, negotiation and voluntary arbitration, collective bargaining progressively took a back seat. The Code of Discipline in Industry which was ratified by representatives of the All-India organizations of employers and workers in March 1958, enumerated what constituted acts of interference and declared that there has to be a just recognition by employers and workers of the rights and responsibilities of either party and that neither party will have recourse to coercion, intimidation or victimisation. The Code of Discipline is a

non-statutory measure and over the years it has lost much of its importance.

After a gap of several years, the Industrial Disputes Act 1947 (IDA) was amended in 1982 to provide for unfair labour practices, which cover broadly all the categories of anti-union discrimination to be found in articles 1 and 2 of Convention No. 98 of the ILO. Broadly speaking, interference by the employer in the trade union rights of the workmen and victimisation on these grounds have been termed as unfair labour practice on the part of employers. Proceeding on illegal strikes, refusal to bargain collectively in good faith on the part of the recognised union (notwithstanding the fact that there are no provisions dealing with recognition of trade unions under the IDA) and indulging in violence and acts of coercion have been treated as unfair labour practice under the Act. Committing an unfair labour practice has been made an offence for which a criminal complaint could be filed, after seeking permission from the appropriate government, and which can be punished with imprisonment and fine. The amendment does not provide for any civil remedy such as issuing a cease and desist order to the employer in the case of a continuing unfair labour practice or empower the labour court to award damages. The 1982 amendment to the IDA incorporating a new Chapter on Unfair Labour Practices has no doubt provided a framework for encouraging collective bargaining by specifying certain activities as unfair labour practices; yet it must be noted that the vexed question of the need to have recognised unions and pre-determined recognition procedures has been side-stepped once again. However, as already noted above, the description of what constitutes an unfair labour practice under this Act is not confined to acts which hamper collective bargaining. Actions on the part of the employers to employ workmen as *'badlis'*, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen has also been regarded as an unfair labour practice.

However, it is not as if the IDA has recognised some form of unfair labour practices for the first time in 1982. The IDA has, right from its enactment in 1947 afforded specific protection against dismissals under certain conditions.[8] Any violation of this provision can be challenged by the aggrieved workman filing an application before the authority where the dispute is pending.[9] The IDA was amended by the Industrial Disputes (Amendment and Miscellaneous) Provisions Act, 1956 to provide protection to 'protected workmen', who were given additional protection against

8. Section 33. These would include, *inter alia*, the dismissal of a worker in connection with a pending dispute.

9. Section 33 A, IDA.

arbitrary dismissals.[10] One per cent of the total number of workmen employed in an establishment, subject to a minimum of five and a maximum of one hundred, are to be recognised as protected workmen. The Rules framed under the IDA provide for the distribution of such protected workmen among the various trade unions connected with the establishment roughly in proportion to the membership figures of the unions.[11] It must be noted that the limitation of these provisions, including those relating to unfair labour practices under this Act, is that it is available only when the dismissal has actually taken place and not when it is anticipated or feared by the concerned workman.[12] Thus, in practice, a charge sheeted employee fearing his dismissal is unable to make use of Chapter V-C of the IDA.[13]

Apart from section 33, an industrial dispute can be raised regarding the dismissal of any workmen under the IDA.[14] Till 1964 any such dispute had to be espoused by a trade union or a substantial number of workmen to be treated as an industrial dispute under the IDA. Following an amendment in 1964, the IDA permits an individual who is aggrieved over his dismissal or termination to raise an industrial dispute.[15] The

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10. Section 33 (4). Under section 33(3) of the Act, no action can be taken against protected workmen by way of altering their conditions of service to their prejudice or by discharging or punishing them otherwise during the pendency of any conciliation or arbitration proceedings in respect of an industrial dispute in regard to matters connected with such dispute except with the express permission of the authority before which the proceedings are pending. It must be noted that the protected workmen would cover only workmen being officers of a registered trade union connected with the establishment, and who are recognised as protected workmen. This excludes workers representatives elected by the workmen, other members of the trade unions and officers of unregistered trade unions.

11. Once the union(s) make their choice of protected workmen under R. 66 of the rules under the IDA, there is a mandatory obligation on the employer to recognise these workmen. See *R. Balasubramanian and others v. Carborandum Universal Ltd., Okha,* 1978 I LLJ 432 (Guj) and *M.S.R.T.C., Akola* v. *Conciliation Officers,* 1994 2 LLJ 41 (Bom).

12. In *Hindustan Lever* v. *Ashok Vishnu Kate,* 1996 I LLJ 899, the Supreme Court observed that neither the IDA nor the BIRA had provision for preventing any proposed discharge or dismisal by way of an unfair labour practice which the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 has.

13 *Chaman Singh* v. *Registrar, Coop. Societies Punjab,* 1976 II LLJ 98 (SC).

14. Section 2(k) of the IDA which defines an industrial dispute covers "any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or the conditions of labour of any person".

15. Section 2A provides that a dispute or difference between an individual workman and his employer connected with or arising out of (i) discharge, (ii) dismissal, (iii) retrenchment, (iv) or otherwise termination of service of an individual workman, shall be deemed to be an industrial dispute even though no fellow workmen or any union of workmen is a party to the said dispute.

powers of the labour court examining such a dispute have been considerately widened in 1971 to allow it to re-appraise all the evidence on the basis of which the employer decided to terminate the services of a workman and to independently decide on the adequacy of reasons for the termination.[16] The Supreme Court of India has in a number of cases laid down that the management must act in good faith, without *mala fides* nor victimise the workmen. Termination of employees on the ground of "loss of confidence in the workman" so that it be treated as a case of *termination simpliciter* and not as dismissal for a misconduct is not permitted. The courts have "lifted the veil" in such cases to find out the true reason for the termination. The courts have held that termination of services on the ground of loss of confidence is stigmatic and it calls for a domestic enquiry or the leading of evidence before the labour court in order to justify the dismissal. Termination in such cases is *mala fide* and is definitely not in good faith but is a colourable exercise of the employer's right to terminate the services of their workmen. The labour court can order reinstatement of the worker with back wages in such cases.[17] These principles have been valuable in reducing the arbitrariness in the termination of workmen, *inter alia,* for their trade union activities.

## State-level Initiatives

What the Parliament had hesitated long in doing, some states had achieved by providing for protection guaranteed to workmen and trade unions against anti-union discrimination. The Madhya Pradesh Industrial Relations Act, 1960 specifically provides that no employee shall be victimised by reason of the circumstances that he is an office bearer of any union or that he has taken part in any trade union activity or has gone on strike which is not illegal or has appeared or intends to appear as a witness in any proceeding.[18] Similar provisions are to be found in the Bombay Industrial Relations Act, 1946 (BIRA).[19] The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (MRTUPULPA) provides for detailed protection against anti-union discrimination. As already noted above, some of the unfair labour practices pertain to matters wider than merely ensuring the success of

16. The statement of objects and reasons accompanying the Bill which amended the IDA stated that this modification in the Act was sought to bring the Indian law in line with the Termination of Employment Recommendation No. 119.

17. *L. Michael* v. *Johnston Pumps Ltd.*, AIR 1975 SC 661; *Kamal Kishore Lakshman* v. *The Management of Pan Am,* 1987 I LLJ 107 (SC); *Gujarat Steel Tubes* v. *Gujarat Steel Tubes Mazdoor Sangh,* AIR 1980 SC 1896; *Tata Engineering and Locomotive Company Ltd.* v. *S. C. Prasad,* 1969 II LLJ 779 (SC).

18. Section 83.

19 Section 101.

collective bargaining procedures. In the MRTUPULPA just as in the IDA there are provisions making the appointment of *badlis* or temporary workers for long years with a view to denying them their benefits, an unfair labour practice. We have already adverted to the wider meaning given to unfair labour practices in the Indian context. Going by the case law generated under the MRTUPULPA, we note several cases which relate to the demand for regularisation of workmen or the absorption of contract labour by the principal employer. Thus, the fact that the demand for abolition of contract labour may not be raised directly under the IDA is sought to be achieved in this manner through the MRTUPULPA by alleging an unfair labour practice.

However, the real point of departure from the central law is with respect to the power of the courts to give relief. The industrial court has the civil power to issue a cease and desist order to the employer to prevent them from continuing to commit an unfair labour practice and in the case of a dismissal to reinstate the workman forthwith in his original position with continuity of service and full back wages in a proceeding relating to unfair labour practice.[20] The labour court under the MRTUPULPA has the power to try offences relating to unfair labour practices, making a departure from the usual pattern of the other labour laws that require moving the magistrates' courts as also taking the prior permission of the appropriate government before prosecution is launched. It is *ironic* that when the IDA was amended in 1982 the wider powers of providing a civil remedy for an unfair labour practice were not provided. Further, since the amendment did not provide for recognition of trade unions, the provision under the Maharashtra law that permitted only a recognised union to raise a complaint relating to an unfair labour practice was not provided.[21]

The rich body of case law that has developed under the Maharashtra law stands testimony to the fact that that law is frequently used to curb unfair labour practices, in contrast to the virtually non-existent litigation of a similar nature under the IDA. The need to suitably modify the central law in order that it can be of greater utility appears all the more relevant in the present context when sea changes are taking place in the economy and labour market in India following the process of liberalisation and de-regulation. Greater casualisation of the work force even in the organised sectors and a diminished role of trade unions has set the stage for an increased incidence of unfair labour practices. The need to increase the access and scope of the remedies under the central law appears to be an urgent necessity.

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20. For instance, see *Sanjiv P. Jathan* v. *Larsen & Tuobro Ltd.*, 1989 II LLJ 194 (Bom.).

21. Section 28, MRTUPULPA.