



# Social Security Code 2020: An Analysis

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## Abstract

Social security has been viewed in numerous countries as one of the most efficient ways of mitigating the economic insecurities of the working population. The sectors and people to whom such social security schemes apply have been a subject of much debate ever since the inception of the policies in India. In 2020, the Social Security Code was enacted with a view to amend and consolidate the laws relating to social security in India and to extend social security to all employees, either in the organized or unorganized or any other sector. This paper ventures into a detailed analysis of the Code, intending to lay out its salient features, new incorporations, lacunae, and to what extent the Code may practically serve the purpose of reducing the effects of economic shocks to the poor and the needy of the country. The paper also intends to analyze the various provisions of the Code with respect to the unorganized, gig, and platform workers and seeks to highlight its various shortcomings.

**Keywords:** Economic Insecurity, Gig Workers, Platform Workers, Social Security Code, Unorganized Sector

## 1. Introduction

The Indian labour market has been predominantly unorganized. In the year 2018-19, the nature of employment for around 90% of workers in India's labour market was unorganized. These workers

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are either inadequately or not at all covered under existing labour legislation, social protection schemes, and other employment benefits. Due to the lack of governmental oversight, a large proportion of these workers work in exploitative and precarious conditions. According to International Trade Union Confederation<sup>1</sup> India is amongst the ten worst countries in the world in terms of worker rights in 2020 (ITUC, 2020). The first Sustainable Development Goal<sup>2</sup> seeks to end poverty, and among its targets is a formulation of national social protection floors and the implementation of comprehensive social welfare programmes. Similarly, International Labour Organization Recommendation 204<sup>3</sup> suggests the implementation of minimum social security guarantees to facilitate the transition from an informal to a formal economy. In the context of the widespread chronic poverty and the unrelenting wealth inequality, social security can offer resilience against socio-economic shocks, such as the one we are faced with today because of the COVID-19 pandemic<sup>4</sup>. In this context, the author attempts to analyze the important provisions of the Social Security Code, 2020<sup>5</sup>, to verify the extent and scope of providing comprehensive social security measures and how to ameliorate the conditions of the poor and needy. Further, the paper also identifies

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<sup>1</sup> International Trade Union Confederation, *2020 ITUC Global Rights Index: violations of workers' rights at seven-year high*, <https://www.ituc-csi.org/violations-workers-rights-seven-year-high>.

<sup>2</sup> United Nations, *Sustainable Development Goals (SDG 1) United Nations Western Europe*, <https://unric.org/en/sdg-1/>.

<sup>3</sup> *Recommendation R204 - Transition from the Informal to the Formal Economy Recommendation, 2015* (No. 204), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R204](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204).

<sup>4</sup> Mridusmita Bordoloi, Mohammad Hamza Farooqui, Sharad Pandey, *Social Security for Informal Workers in India*, Center for Policy Research, 2020, [https://accountabilityindia.in/wp-content/uploads/2020/11/Brief\\_SocialSecurity\\_InformalWorkers\\_21Nov2020.pdf](https://accountabilityindia.in/wp-content/uploads/2020/11/Brief_SocialSecurity_InformalWorkers_21Nov2020.pdf).

<sup>5</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1.

some shortcomings in the existing Code on Social Security provisions relating to social security for unorganized, gig, and platform workers.

## 2. Concept of Social Security

The quest for social security and freedom from want and distress has been the consistent urge of man through the ages. This urge has assumed several forms, according to the need of people and their level of social consciousness, the advancement of technology, and the pace of economic development.<sup>6</sup> Social Security is a new concept, and it represents society's current answer to the problem of economic insecurity.<sup>7</sup> The importance of social security has been emphasized by different political leaders, social reformers, and economists in different ways. Today the philosophy of the concept is universally acknowledged as it has been accepted in principle that social security is the aim of all social welfare activities of all countries following ideologies, different social and political structures and different economic policies.<sup>8</sup>

The term social security, which originated in the United States, has spread throughout the world.<sup>9</sup> According to the International Labour Organization, Social security is the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security<sup>10</sup>, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or

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<sup>6</sup> *Report of the National Commission on Labour* (1969), p. 62, <https://casi.sas.upenn.edu/sites/default/files/iit/National%20Commission%20on%20Labour%20Report.pdf>.

<sup>7</sup> VICTOR GEORGE, *SOCIAL SECURITY: BEVERIDGE AND AFTER* 1 (Routledge, 2018).

<sup>8</sup> VIVEK RANJAN BHATTACHARYA, *SOME ASPECTS OF SOCIAL SECURITY MEASURES IN INDIA* 1 (Metropolitan Book Company, 1970).

<sup>9</sup> *Social Security - Developments since c. 1900* (Britannica), <https://www.britannica.com/topic/social-security-government-program/Historical-evolution>.

<sup>10</sup> *Facts on Social Security*, (International Labour Organisation, Dec. 8, 2021), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067588.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf).

loss of a breadwinner.<sup>11</sup> However, the term has been used in such a variety of ways and so broadly as to sometimes lose any value as a term of precise meaning.<sup>12</sup>

### 3. Evolution of Social Security Code 2020

The Code on Social Security, 2020 was developed as a result of recommendations of the Second National Commission on Labour, 2002<sup>13</sup> that stated that the current set of labour laws must be unified based on the subject matter. The draft of the labour code on social security and welfare in 2017 was placed before the Ministry for consultation and review. The Social Security Code, gazetted on 29th September 2020, is a diluted version of its earlier comprehensive draft presented before the Parliament in 2018.<sup>14</sup> The Code was introduced in December 2019, and its report was prepared on 31st July 2020 by the Parliamentary Standing Committee. Thereafter, a new bill was introduced, which is the current Code on Social Security 2020, which aims to facilitate the implementation of social security laws, streamline the number of authorities under various laws, reduce the multiplicity of definitions and ensure basic concepts of welfare to workers are preserved. Another objective of the Code is to encourage technology for ensuring compliance and enforcement of the provisions is achieved with ease.<sup>15</sup>

The Social Security Code 2020 replaces the Code of 2019, which has consolidated and amended laws relating to employees' social security with the aim of extending social security to all

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<sup>11</sup> *supra* note 6.

<sup>12</sup> William Haber & Wibur J. Cohen, *Social Security: Programmes, Problems & Policies*, 36 SOCIAL SERVICE REVIEW, 28 (1960).

<sup>13</sup> *Report of the Second National Commission for labour*, [https://labour.gov.in/sites/default/files/39ilcagenda\\_1.pdf](https://labour.gov.in/sites/default/files/39ilcagenda_1.pdf)

<sup>14</sup> K R Shyam Sundar & Rahul Suresh Sapkal, *Social Security Code: Another Historic Opportunity Missed*, (May 25, 2021), <https://www.theleaflet.in/social-security-code-another-historic-opportunity-missed>.

<sup>15</sup> Monar, *Brief - Social Security Code, 2020*, (May 25, 2021), <http://www.legalserviceindia.com/legal/article-4078-brief-social-security-code-2020.html>.

employees and workers, whether organized /unorganized or any other sector<sup>16</sup>. The Code on Social Security 2020 combines the provisions of nine central labour laws, including the Employees Compensation Act, 1923, The Employees Provident Funds and Miscellaneous Provision Act, 1952, The Employees' State Insurance Act, 1948,<sup>17</sup> The Maternity Benefit Act, 1961, The Employment Exchange (Compulsory Notification of Vacancies) Act, 1959, The Payment of Gratuity Act, 1972, Cine Workers Welfare Fund Act, 1961, The Unorganized Workers' Social Security Act, 2008, The Building and Other Construction Workers Welfare Cess Act, 1996.<sup>18</sup> The present Social Security Code, 2020, consists of 164 Sections encased in 14 Chapters beside 7 Schedules.<sup>19</sup> The salient features of the Social Security Code are:

- i. Definitions: Insertion of the definition of “career centre as any office including employment exchange, portal or place established by the Government of India for providing career services”. Its main purpose is to connect persons seeking jobs with those who seek to employ by giving information about vacancies and giving vocational guidance.
- ii. Insertion of the definition of aggregator, which signifies “marketplace or a digital intermediary for a user or buyer of a service to connect with the seller or the service provider”. The inclusion of this definition is connected to the ushering in of two more terms, namely - the platform worker and the

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<sup>16</sup> Trishal Jeet Singh, *The Code on Social Security, 2020* (May 25, 2021), <https://www.lawrbit.com/article/code-on-social-security/>.

<sup>17</sup> Santhosh & Sarkar, *Social Security Code, 2020 and Rules*, 56 *ECONOMIC AND POLITICAL WEEKLY*, 12 (2021), <https://www.epw.in/journal/2021/12/commentary/social-security-code-2020-and-rules.html>.

<sup>18</sup> *Code on Social Security, 2020: Salient Features & Compliance Changes* (May 25, 2021), <https://www.simpliance.in/blog/code-on-social-security-2020/>.

<sup>19</sup> *Code on Social Security & allied laws*, (May 24, 2021), <https://www.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-presentation-social-security-and-allied-laws-20Dec-noexp.pdf>.

gig worker. Gig worker is the new term introduced in the Code. The Code defines a "gig worker as a person who performs work or participates in a work arrangement, earns from such activities outside of a traditional employer-employee relationship"<sup>20</sup>. In general, a gig worker is someone who works part-time or on an hourly basis for a limited period of time. For the first time, the phrase "gig labourers" has been included in the scope of labour laws.<sup>21</sup> It was imperative to identify a category of workers that includes a large number of freelancers who work on a contract basis. A platform worker is defined in the Code as someone who engages in or does platform work.<sup>22</sup> Workers most typically earn money by delivering certain services or solving specific problems through an online platform<sup>23</sup> such as Flipkart, Amazon, Myntra, Zomato, etc.

- iii. The Code permits an establishment to voluntarily furnish the coverage of the Employees' Provident Fund in Chapter three and the Employees' State Insurance Corporation in Chapter four even if it has fewer than the required number of employees.
- iv. The Code gives power to the Central Government to formulate the social security schemes for informal workers, platform workers, and gig workers, as well as their families under the Employees State Insurance Corporation. The Central Government also has the authority to create plans to provide social security benefits to self-employed workers and any other group of people it deems fit.

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<sup>20</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §2 (35).

<sup>21</sup> Nancy Garg, *Salient Features of Code on Social Security 2020*, (June 5, 2021), <https://taxguru.in/corporate-law/salient-features-code-social-security-2020.html>.

<sup>22</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §2 (61).

<sup>23</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §2 (60).

- v. The SS Code mandates the registration of every platform worker, gig worker, and unorganized worker based on a self-declaration submitted in the form and manner prescribed by the Central Government, either electronically or otherwise, along with the Aadhar number.
- vi. The SS Code stipulates that, in the event of fixed-term employees, the employer must pay the gratuity on a pro-rata basis rather than based on the pre-existing minimum of five years of continuous service.<sup>24</sup>
- vii. Chapter six of the Social Security Code deals with maternity benefits, and there is much clarity with regards to creche facilities. For a period of six weeks after delivery, miscarriage or medical termination of pregnancy, a woman is not permitted to work. A woman is entitled to maternity benefits for a maximum of 26 weeks, with no more than eight weeks preceding the scheduled delivery date; Woman will be entitled to get a medical bonus of Rs. 3,500/- or such amount according to the notification of the Government of India by the employer, if no post-natal care or pre-natal confinement is provided free of cost by the employer.<sup>25</sup>
- viii. Currently, there is no time restriction on when the provident fund office and the state insurance corporation can bring legal action against employers to recover outstanding contributions. The Social Security Code gives relief to employers by ensuring a five-year limitation period for such proceedings.<sup>26</sup>
- ix. The offences and penalties scheme under the Code has changed drastically.<sup>27</sup> It permits employers a chance to

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<sup>24</sup> *supra*, note 6.

<sup>25</sup> Lakshmikumarn & Shridharan, *Code on Social Security, 2020* (June 3, 2021), <https://lakshmisri.com/insights/articles/code-on-social-security-2020-an-overview/>.

<sup>26</sup> *Id.*

<sup>27</sup> Ashima Obhan & Akanksha Dua, *Code does not reflect this thrust. India: The Social Security Code, 2020* (June 1, 2021),

address noncompliance for any offence under the act done before the beginning of proceedings or before prosecution. Failure to deposit employees' contributions carries a penalty of Rs. 1,00,000 as well as a sentence of one to three years imprisonment. However, repeat offenders face severe punishments U/s134, and corporate offences are subject to harsher penalties that extend beyond the corporate veil.<sup>28</sup>

#### **4. Comparison Between Earlier Acts and Current Social Security Code 2020**

The introduction of the Social Security Code 2020 has made the scope of social security legislation comprehensively easier. It aims to introduce several new aspects which are excluded from the scope of the old labour legislations. The implications of the Social Security Code can be observed as follows:

- A. The existing Acts does not provide for the formation of Social Security Organisations; however, the Code of Social Security ensures for the composition of Social Security Organizations for the administration of finance for the workers who are covered under the Code.<sup>29</sup>
- B. As per rule-7 of Employee Provident Fund Appellate Tribunal Rules, 1997, the Tribunal will not consider the employer's appeal unless they deposit a Demand Draft payable to the fund, bearing 75% of the cash due from them. As per the present Code, the Tribunal shall not consider an employer's appeal until he/she has deposited 25% of the cash due with the Social Security Organization is concerned.<sup>30</sup>

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<https://www.mondaq.com/india/employee-benefits-compensation/998964/the-social-security-code-2020>.

<sup>28</sup> *Social Security Code* (May 28, 2021),

<https://www.drishtias.com/daily-updates/daily-news-analysis/social-security-code-2020>.

<sup>29</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §4.

<sup>30</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §24.



- C. No provision for Excessive Sickness Benefit was found in previous labour laws. The Code provides for additional expenses, such as illness benefits, in the event of insanitary working conditions in the factory or accommodations as a result of the owner's negligence.<sup>31</sup>
- D. Unorganized workers, gig workers, and platform workers were not identified in the current Acts; hence, there were no benefits for them. However, Employees State Insurance benefits are provided to unorganised workers, gig workers, and platform workers, as well as their families under the new Code.<sup>32</sup>
- E. In the existing labour legislation, there is an absence of funded schemes for unorganised workers, platform workers or gig workers. The SS Code provides for welfare programmes for gig workers, unorganised workers, and platform workers at the national and state level on issues relating to accidents, education, health, life insurance, skill up-gradation, especially on old age home provisions.<sup>33</sup>
- F. The Social Security Code provides for the establishment of a toll-free call centre or helpline to provide information on present social security scheme availability, the procedure for filing of applications and assistance to these workers in obtaining registration etc.
- G. The Code is drafted in a way so as to comprise the widest range of workers across the nation, including gig workers, unorganised labour, platform workers, construction workers, home-based workers, and organised labour. In light of the same, it can be stated that the present Code protects and provides for various social security benefits by

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<sup>31</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §43.

<sup>32</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §45.

<sup>33</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, § 109 & 114.

framing schemes and also ensures accurate records of such workers by maintaining the registers.<sup>34</sup>

## **5. Merits of the Social Security Code**

The Social Security Code 2020 is definitely going to create positive vibes from the perspective of employers and employees on certain aspects, which are discussed below:

### **5.1. Employer's point of view**

The current law holds the contractor responsible for gratuity, and now contractor being included as an employer may undergo a change. However, in the case of maternity benefit, both contractor and principal employer can be held liable if the terms between the principal employer and contractor are not properly defined in the contract. Employee connected either directly or indirectly is responsible for compliance towards the contract employer or principal employer. The second provision to Sec.67 specifies that an establishment may use general creche facility of State and central government, municipality or private entity, NGO or any other organization.<sup>35</sup> Further, fixed-term employment is now an explicit provision under the present Code. The employer is required to pay gratuity and other statutory benefits irrespective of whether they qualify as per the statute or not. Hence, they cannot escape from liability. Furthermore, web-based randomized selection of inspection and seeking information electronically will now be a reality. The government is required to lay down an inspection scheme to implement these provisions, which will lead to faceless inspection and reduce difficulties for employers due to bureaucratic processes. Limitation for recovery of dues from the employer is now fixed at five years for all the dues under the Code; therefore, it becomes a big relief for the employer. There needs to be a prior opportunity for employers before prosecution to set right the noncompliance within a specified time period. Under the social security code now, employer's offences may be compounded as

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<sup>34</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §112.

<sup>35</sup> *supra*, note 6.

seen in Indian Penal Legislation.<sup>36</sup> Social security schemes can now be formulated with the source of corporate social responsibility (CSR) funds. Therefore, the contribution to any such schemes where the CSR funds are accepted as a source, employers can utilize this opportunity to discharge their responsibility on CSR funding.

## 5.2. Employee's point of view

Firstly, the Code aims to provide social security to all employees, whether in the organized or any other sector. Employment is not a major criterion to all the employees, whether permanent, contract or supervisory or managerial or fixed-term or unconventional employments such as gig workers and platform workers. Earlier minimum liability was fixed to the employer, now the portion of the wage for the coverage of social security benefits, i.e., Basic salaries like Provident Fund (PF) and gratuity, will increase due to the revised definition of wage, so now the liability is more on the employer. Secondly, the utilized ESI hospitals can be made available to the general public or other beneficiaries on payment of certain user charges. The scope for coverage of ESI is extended to hazardous or life-threatening occupations irrespective of the number of employees in such occupations. Thirdly, the fixed-term employees are eligible for gratuity on Pro-rata basis along with all other statutory benefits. The Code covers all unorganized workers along with platform and gig workers. Fourthly, it is pertinent to note that by mentioning the limitation period, the Code seeks to prevent corruption in enforcement, which brings in clarity on the liability obligation of employers for past dues, thus easing their compliance obligations<sup>37</sup>. Finally, Aadhar (identity proof) will become more valuable and important as this becomes mandatory for these schemes and benefits. The Code protects and provides for

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<sup>36</sup> The Code of Criminal Procedure, 1973 Act No. 2 of 1974, INDIA CODE (1973), §320.

<sup>37</sup> Minu Dwivedi & Shreya Chowdhary, *India: Evaluating The Code On Social Security, 2020* (June 1, 2021), <https://www.mondaq.com/india/employee-benefits-compensation/1001268/evaluating-the-code-on-social-security-2020>.

various social security benefits by framing schemes and also ensures accurate records of such workers by maintaining registers.

### 5.3. Puttaswamy Judgement

With respect to the Aadhar card, the Supreme Court in the *Puttaswamy case*<sup>38</sup> passed a historical judgement on the issue of the right to privacy. Privacy is, however, a concomitant of the right of the individual to thereby exercise control over his or her personality.

It derives from the idea that human beings possess certain rights that are inherent in them. Natural rights are, however, inalienable because they are inseparable from the human personality.

“It is most widely debated that Life and personal liberty are not creations of the Indian Constitution. According to the Constitution, these rights are inherent to every individual as an integral and inseparable part of their human nature”.<sup>39</sup> Privacy has a close nexus with the Aadhar card; issued by the Unique Identification Authority of India (UIDAI).<sup>40</sup> The Aadhar card is a smart card on which the person’s details, including beneficiary status and benefits received, could be stored. It has also been claimed that the Aadhar will not be a citizenship card and only an identity card.<sup>41</sup> The eight-judge bench decision in *M. P. Sharma v Satish Chandra*<sup>42</sup>, which held that the Right to Privacy is not protected by the Constitution, stands over-ruled. The Court's subsequent decision in *Kharak Singh v. State of UP*<sup>43</sup> also stands over-ruled to the extent that it holds that

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<sup>38</sup> Justice K S Puttaswamy (Retd) & Anr. v. Union of India & Ors, (2017) 10 SCC 1.

<sup>39</sup> *Id.*

<sup>40</sup> Ravi Srivastava, *Vulnerable Internal Migrants in India & Portability of Social Security & Entitlements*, Centre for Employment Studies Working Paper Series (WP 02/2020, Institute for Human Development, Delhi), [https://www.ihdindia.org/Working%20Papers/2020/IHD-CES\\_WP\\_02\\_2020.pdf](https://www.ihdindia.org/Working%20Papers/2020/IHD-CES_WP_02_2020.pdf).

<sup>41</sup> See working papers at UIDAI website, <http://uidai.gov.in/>.

<sup>42</sup> M P Sharma v. Satish Chandra, AIR 1954 SC 300.

<sup>43</sup> Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332.

the Right to Privacy is not protected under the Constitution. (It is ironically the minority opinion in *Kharak Singh*, where Justice Subba Rao laid down that, "it was true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty, which cannot be rejected except through a procedure established by law"<sup>44</sup>). It was finally in *Govind v. State of Madhya Pradesh*<sup>45</sup> that the Court held that the Right to Privacy falls under fundamental rights enshrined under Art.21 of the Constitution. This verdict, by a smaller three-judge bench, had held that the right is not absolute and can be interfered by the procedure established under the law.

However, a nine-judge bench of the Supreme Court upheld the right to Privacy<sup>46</sup> in *Justice K. S. Puttaswamy v. The Union of India*. In the year 2017, on 24<sup>th</sup> August, it was declared that privacy has to be an integral component of Part III of the Indian Constitution, which lays down Fundamental Rights, ranging from rights relating to equality (Articles 14 to 18); the Right to Freedom of Speech and Expression (Article 19(1)(a)); Freedom of Movement (Article 19(1)(d)); Protection of Life and Personal Liberty (Article 21) and others. However, these Fundamental Rights cannot be given or taken away by law, and all laws and executive actions must abide by them. This judgement of the apex court was then referred to by a Five judge Constitutional bench of the Supreme Court in the *Case Concerning the Validity of the Aadhar Act, 2016*<sup>47</sup>; in this judgement, Justice Chandrachud, who strongly expressed his dissenting opinion, stated that it is very difficult to live without Aadhaar in India, but at the same time, there is a violation of Article 14 of the Indian Constitution. It was further stated that there would be an infringement of the Right to Privacy if Aadhaar is made as a requirement in every database. Finally, the Supreme Court upheld

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<sup>44</sup> See INDIA CONST, art. 21.

<sup>45</sup> *Govind v. State of Madhya Pradesh*, 1975 AIR 1378, 1975 SCR (3) 946.

<sup>46</sup> *Justice Puttaswamy (Retd.) & Anr. v. Union of India & Ors*, (2017) 10 SCC 1.

<sup>47</sup> *K. S. Puttaswamy v. Union of India (Aadhaar-5 Judge)*, (2019) 1 SCC 1.

the validity of it and stated that the Aadhaar Act, 2016 does not infringe the Right to Privacy when a person agrees to share his biometric data.

Further, it can be analyzed that the 2020 Code mandates and states that the worker or employee (including an unorganized worker) to furnish his Aadhaar number in order to get the social security benefits or even to use the services from a career.<sup>48</sup> The Supreme Court had stated clearly in its verdict that the Aadhaar number/card may only be made compulsory for expenditure on the service or benefit, a subsidy which is spent out of Consolidated Fund of India.<sup>49</sup> Applying the principle, the Court has struck down mandatory linking of the bank accounts with Aadhaar. Since certain entitlements, including provident fund (PF) and gratuity, are contributed by employees and employers and not out of the Consolidated Fund of India, making Aadhaar compulsory for accessing such entitlements may violate the Supreme Court verdict. Further, the logic for requiring compulsory Aadhaar linkage in order to get the benefit of career centre services is ambiguous.<sup>50</sup>

#### **5.4. Impact of Social Security Code 2020 on Workforce**

India's labour economy is changing drastically, and there has been a huge rise in unemployment due to the pandemic. Unemployment rose post-pandemic to nearly 25% in May 2020, more than three

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<sup>48</sup> Govt gets mandate to seek Aadhaar from beneficiaries under Social Security Code, (mint),

<https://www.livemint.com/news/india/govt-gets-mandate-to-see-aadhaar-from-beneficiaries-under-social-security-code-11620214996570.html>.

<sup>49</sup> K. S. Puttaswamy v. Union of India (Aadhaar-5 Judge), (2019) 1 SCC 1; See Also Supreme Court rules Aadhaar not mandatory for bank accounts, mobile numbers, school admissions (The Indian Express), <https://indianexpress.com/article/india/aadhaar-verdict-supreme-court-judgment-uidai-5374829/>.

<sup>50</sup> Statement of Objects & Reasons, The Occupational Safety, Health & Working Conditions Code, 2020,

[https://labour.gov.in/sites/default/files/OSH\\_Gazette.pdf](https://labour.gov.in/sites/default/files/OSH_Gazette.pdf).

times what it was in 2018.<sup>51</sup> Although it felt post-lockdown, it is likely to stabilize at a much higher level than what was witnessed in the year 2018, given that the economy would contract in the financial year 2021 and is really felt unlikely to recover its erstwhile growth trajectory for several years. At the same time, the share of informal workers remained stuck at nearly 90% for decades.<sup>52</sup>

The 2020 Code is inadequate, and definitely, in the coming 20 years, India will become an ageing society, with 140 million persons over the age of 60<sup>53</sup> who are bound to stop working. India should now attempt to lay out a proper roadmap well before the year 2040, when India's demographic dividend would end, and also social security for all must be looked upon to be assured. Those not working will also be living longer. The Code does not demonstrate an understanding of these issues, and the current Code could not properly lay the ground for the rapid evolution of a system of Social Security for the country. But from being one of the younger countries of the world currently, an ageing society must build a system of social security that covers the entire working population. That vision needs to be articulated in the Code, as it is currently missing.<sup>54</sup>

It is, however, pertinent to note that the migrant workforce in the unorganized sector in India majorly comprises agriculture workers,

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<sup>51</sup> *Unemployment, Centre for Monitoring Indian Economy*, <https://unemploymentinindia.cmie.com/>.

<sup>52</sup> Santosh Mehrotra, *Informal Employment Trends in the Indian Economy: Persistent informality, but growing positive development*, INTERNATIONAL LABOUR ORGANISATION (2019).

<sup>53</sup> Jinoy Jose P, 'India will become an ageing society by 2040', (The Hindu: Business Line, April 27, 2020), <https://www.thehindubusinessline.com/opinion/books/india-is-expected-to-will-become-an-ageing-society-by-2040/article31438532.ece>.

<sup>54</sup> Santosh Mehrotra, CSE Working Paper Number 28, *Building a Social Security Architecture for Informal Workers in India, finally!* Centre for Sustainable Employment (2020), [https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2020/07/Mehrotra\\_Social\\_Security\\_Code\\_Unorganised\\_Sector\\_July\\_2020.pdf](https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2020/07/Mehrotra_Social_Security_Code_Unorganised_Sector_July_2020.pdf).

domestic help, construction workers, potters, street vendors, rag pickers, and drivers. Nearly 93% of the workforce in India is dependent on the informal sector for occupation<sup>55</sup>, and many of the existing labour laws disregard them as workers confining them to provisional status. The informal sector is no longer the least attractive for migrants. Over decades this sector has developed in productive economic activities and is vital for the economic development of the nation. The loss of each and every migrant labourer is an economic loss, as this segment is a decisive contributor to the industry. India should not wait for another devastation to strike but learn from the COVID-19 pandemic and formulate policies that reach the beneficiaries.<sup>56</sup> Many of the migrant workers tend to be hired and fired according to the need of the moment, are paid cheaply for their low-skilled drudgery and have to work without minimum social security.<sup>57</sup> For instance, under the Maternity Benefit Act, 1961, organized workers are entitled to 26 weeks of paid maternity leave at full wages, protection from dismissal, provision for a worksite crèche, in addition to a cash entitlement. Under the Code on Social Security, however, maternity benefits only apply to registered factories, mines, plantations, and shops and establishments, which mostly have thresholds of 10 workers. As a result, unorganized sector workers, who are often found at smaller units and worksites, would be excluded from these benefits.<sup>58</sup>

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<sup>55</sup> Economic Survey, 2018-19, Government of India, Volume 1, <https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/echapter.pdf>.

<sup>56</sup> Pillai & Dam, *Saga of Migrant Workers in India: Measures to Strengthen Social Security*, 12 TOWARDS EXCELLENCE: JOURNAL OF HIGHER EDUCATION, 183 (2020), <https://hrdc.gujaratuniversity.ac.in>.

<sup>57</sup> Breman, *The Pandemic in India & Its Impact on Footloose Labour*, 63 IND. J. LABOUR ECON, 901-919 (2020).

<sup>58</sup> Divya Varma, Kavya Bharadkar, Raghav Mehrotra, *India's new labour codes fail migrant workers whose vulnerability was highlighted by lockdown crisis*, (Oct. 26, 2021), <https://scroll.in/article/974137/indias-new-labour-codes-fail>



Further, most of the significant socio-economic and cultural changes have occurred within India in the last 70 years.<sup>59</sup> The Gig Economy is booming day by day, and the change herein is such that the formal nature of employment is transformed to an informal one. The rise in Gig Economy reflects the emergence of new ways of work.<sup>60</sup> In India, the Gig Economy has come into existence only very recently, but still, it is growing rapidly in the Indian Labour market. As per the Research Report made in the year 2018 by "Payoneer", India is the second-largest freelancing market in the world, after the US. Also, it was estimated that in the year 2020, 50% of the Indian workforce would-be freelancers, out of which 85% of the workers would be between the age of 21-39 years.<sup>61</sup> Since an online platform is used here, it becomes easier to connect the workers and the client on a global basis.<sup>62</sup> However, the protection is extended for the gig and the platform workers through the Social Security Code of 2020, and definitely more people would be inclined to enter the Gig Economy.<sup>63</sup> Apart from the Gig Workers, the Code has also covered the building workers, commissioning mothers, contractors, dock-work employees, home-based workers, unorganized workers, and wage workers. This shows the holistic coverage of loopholes that are present in the labour legislation in India in furtherance of the promotion of social

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migrant-workers-whose-vulnerability-was-highlighted-by-lockdown-crisis.

<sup>59</sup> Chatterjee, Kumar, Dayma, "Income security, social comparisons & materialism: Determinants of subjective financial well-being among Indian adults", 37 INTERNATIONAL JOURNAL OF BANK MARKETING, 1041-1061, (2019).

<sup>60</sup> Hitender Mehta, "The Rise of GIG Economy in India", ASSOCHAM,

<https://www.assochem.org/uploads/files/1628143386.pdf>

<sup>61</sup> Anto Robert G , *Gig Economy: Prospects & Challenges under Social Security Code*, 4 IJLMH, 3863 - 3874 (2021).

<sup>62</sup> Dagnino, *Uber law: prospettivegiuslavoristiche sulla sharing/on-demand economy*, 26 DIRITTODELLE RELAZIONIINDUSTRIALI, 137-163.

<sup>63</sup> The Code on Social Security, Act No. 38 of 2020, INDIA CODE (2020), Vol. 1, §2 (35).

security.<sup>64</sup> Therefore, when the Social Security Code provides any benefits and protections to the unorganized sector, it should rightly be hailed as a measure towards achieving universal social security as a matter of right. However, it is not as simple as that, and the Code may not transform into the portrayed knight in shining armour for the unorganized sector in India and deliver the promises made.<sup>65</sup>

### 5.5. Critical Analysis of Social Security Code 2020

Under the Code on Social Security, the definition of wages is the same as that of the Employees Provident Fund Act, 1952, where a new phrase called "deemed wages" has been added. It indicates that if an employee receives more than 50% of the total salary in the form of allowances and other amounts not covered by the definition of wages, then additional income will be considered wages for the purposes of EPF contributions. From the point of view of social security, the higher contributions would be beneficial, as a most urgent repercussion, it would increase the financial burden on the employer and worsen the financial condition of the employees. Moreover, this could be reduced if the Central Government prescribes a lower rate of contribution for employees as part of rules framed under the Code on Social Security<sup>66</sup>.

Further, the Code is not clear whether the domestic workers (though included under wage workers), agricultural workers and the bidi workers are included under the rubric of the unorganized workers, as there are no explicit definitions of these akin to those concerning home-based workers, self-employed or gig and platform workers. The conceptual distinction between the self-

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<sup>64</sup> *supra* note 61.

<sup>65</sup> Arjun Sangwan, *Decoding the Code: A Focus on the Language Employed in Chapter IX of the Code on Social Security, 2020*, 4 IJLMH, 2877 - 2886 (2021).

<sup>66</sup> *How 'Code on Social Security 2020' affects employees, employers; new code brings stringent penalties too*, (May 25, 2021), <https://www.financialexpress.com/industry/how-code-on-social-security-2020-affect-employees-employers-new-code-brings-stringent-penalties-too/2098279/>.

employed and gig workers is left unstated, as in the case of a driver working for an App-based taxi aggregator wherein the appointment letters are not issued, the social security benefits are absent, the hours of employment are not controlled by the employer, and the driver has the option of working for a competitive taxi aggregator. As a result, the nature of work falls outside of the scope of a conventional relationship of employer and employee, making him a gig worker.<sup>67</sup> However, the Code needs to be simplified, and multiple authorities need to be avoided, allowing for seamless integration of existing State-run schemes.

Furthermore, the scope of the Central Board seems to be limited. Presently, the States have Unorganized Workers Welfare Board under the Unorganized Workers' Social Security Act, 2008. Most of the States have Boards under this Act. There is no explicit mention, either in the Code or in the Draft Rules, 2020,<sup>68</sup> about the continuation of the existing social security scheme run by the state governments. As and when the Code becomes operational, the unorganized workers need to register themselves on the Central portal. They are presently registered as a beneficiary with the respective state governments. The administration of social security for the unorganized sector has a different landscape in the new Code. There are no directions in the draft rules as to how the existing Social Security schemes will align with new landscapes.

Moreover, many ambiguities still remain in the Social Security Code, which attempts to reconfigure the social security landscape for the informal sector, defined to cover diverse occupations that include self-employment too. Under the Code, State and Central Governments will prepare schemes on clearly demarcated areas. This means dual authority for an individual informal worker. There is no clarity as to who will be implementing authority at the State

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<sup>67</sup> Arya Tripathy & Rishi Sehgal, *Code on social security 2020: an overview*, (May 25, 2021), <https://prsindia.org/billtrack/the-code-on-social-security-2020>.

<sup>68</sup> Draft Rules under Code on Social Security, 2020, Ministry: Labour & Employment, Rules & Regulations: PRS Legislative Research, <https://prsindia.org/billtrack/draft-rules-under-code-on-social-security-2020>.

level. It is pertinent to note that for the unorganized workers across the country, inter-State arrangements and cooperation become imperative. The Code does not provide for this, and the draft rules provide for a nodal officer to be notified by the State government. However, as unorganized construction workers are footloose and move from one State to another in search of livelihood, inter-State coordination still remains unresolved. The draft rules do not provide any roadmap for such coordination. About half of informal workers are self-employed and have no employer-employee relationship. Most unorganized workers are not attached to any specific occupation as they shift from one form of occupation to another based on availability. Most unorganized workers fall within the State's purview rather than the Centre's. In fact, it would be difficult to even define an appropriate government for the unorganized workers since they are mostly employed through layers of intermediaries. The Social Security Code provides for unorganized sector social security boards at the Central and State levels, but a major part of the organization seems to be with States.<sup>69</sup>

It is importantly noted that during the pandemic, Anganwadi and Accredited Social Health Activist (ASHA) workers have been, stridently, though in vain, battling for "worker-identity" status, which the government mechanically was rejecting notwithstanding yeomen services rendered by them in creating and sustaining the human capital. But during COVID-19, they were applauded for the service rendered. Yet, they are being denied social security.<sup>70</sup>

However, apart from the above analysis, the Social Security Code 2020 has some concerns, which can be drawn on the following parameters:

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<sup>69</sup> Santosh Mehrotra & Kingshuk Sarker, *Rework Social Security code for informal workers*, (Sept. 28, 2021), <https://www.thehindubusinessline.com/opinion/rework-social-security-code-for-informal-workers/.ece>.

<sup>70</sup> K R Shyam Sundar & Rahul Suresh Sapkal, *Social Security Code: Another Historic Opportunity Missed!* (May 25, 2021), <https://www.theleaflet.in/social-security-code-another-historic-opportunity-missed>.

- a) Under the present law, a bonus is not included in the definition of 'basic wages' for the purpose of PF contribution. Under the new Code, only the bonuses are payable in the eyes of the law for the time being, which do not form part of remunerations payable during the term of work are excluded in the wage definition for the Provident Fund purpose. Therefore, clarification is required in this regard, especially for the 'performance bonus,' the 'joining bonus,' the 'guaranteed bonus,' etc., generally paid by the company to its employees. Expatriate employees generally receive the assignment-specific allowances such as the Spousal Assistance Allowance, Hardship Allowance, Children Education Allowance, Assignment Premium, etc. and these are not specifically mentioned in the above exclusion list of wages. The treatment of such allowances under the new Code should be analyzed and accordingly the impact on expatriate's salary structure.
- b) The object of the Social Security code is to include a large number of employees. It also incorporates a broad definition of "employee" that covers managerial, administrative capacity and employees in supervisory as well as contract workers. However, the Code makes a distinction between employees based on their scheduled employment or wage ceiling for assessing the eligibility to different social security benefits. Therefore, despite the Social Security Code ensuring to provide social security to a high number of employees, all benefits may not be provided to all the employees.
- c) A wage ceiling of 18,000/- Rupees per month is fixed for workers so as to be eligible for inter-state migrant workers (The importance of 'inter-state migrant workers' has been broadly classified to include those workers who had to move from one state for job in an establishment in a destination state and may subsequently change the establishment within the said destination state, pursuant to an agreement or other employment arrangement). Further, Inter-state migrant workers would qualify as employees under the SS Code and receive benefits as employees

because they are covered in the definition of contract labour. As a result, employers may need to give social security to interstate migrant workers on par with their other employees in the future.

- d) All establishments (the Code elaborately defines 'establishments' to mean, amongst others, places such as motor transport undertakings, factories and newspaper establishments, where a trade, business, industry, manufacture or occupation is carried on) which are included by the Code is required to obtain registration. Furthermore, establishments that have previously been registered under any other labour law (central) in force will not compulsorily obtain such registration because their current registration will be considered registered for the purposes of the Code.
- e) The Social Security Code maintains the currently five-year continuous service requirement for employees (regular) to take gratuity but reduces it to three years for employed journalists and allows fixed-term employees to take gratuity on a pro-rata basis and not of 5 years continuous service. As a result, employers would have to pay the gratuity to employees (fixed term) at the end of their employment.
- f) Social Security Code, with some flexibility, aims to facilitate the provision of these benefits to employees of smaller establishments while providing employers with an option to opt-out of such coverage (Under the Code, the establishments that have a smaller number of employees than the prescribed threshold for coverage under provisions of the Employees' Provident Fund ("EPF") and Employees' State Insurance Fund ("ESI") have option to avail voluntary coverage under the same and subsequently opt-out of such voluntary coverage, subject to the fulfilment of the certain conditions).
- g) The Code expressly highlights that the cash due towards the PF and the State Insurance would be a charge on the assets of establishment and paid on the Code expressly highlights that the cash due towards the PF and the State Insurance

would be a charge on the assets of establishment and paid on the priority base to the Insolvency & Bankruptcy Code (IBC). The preferential payment list under IBC is not clear, in spite of the fact that it stipulates that once bankruptcy proceedings-related payments are paid out, proceeds should be used to pay worker dues for the period of twenty-four months prior to the bankruptcy commencement date. The Code clarified the interpretation of contributions to social security funds as part of employee dues that had been in dispute in the past.

- h) The Code states that Central Government may by order defer or reduce employer and employee contribution obligation towards state insurance and Provident Fund for a period of up to three months at a time in the event of Pandemic, endemic or national disaster (This seems to be encouraged by the economic hardships that the organizations have and are encountering due to the COVID-19 pandemic). The inclusion of this provision will permit the government to suspend contributions, which it could not have done otherwise without analyzing the significant challenges and judicial review.<sup>71</sup>

With rising mechanization and decreasing demand for unskilled labour, economic revival only stands a chance if the ones that are left out are also protected. Social protection schemes must be reshaped to fit citizens who lack a steady income and are subject to financial hardships.<sup>72</sup> It can thus be said that the Social Security Code does not provide uniform security to all the establishments. All the establishments should at least get some basic uniform provision for decent working conditions, social security, safety at

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<sup>71</sup>Arya Tripathy & Rishi Sehgal, *Code on social security 2020: an overview*, (May 25, 2021), <https://prsindia.org/billtrack/the-code-on-social-security-2020>.

<sup>72</sup> Benjami, Sankar, *Labour Law Reforms in the Times of Covid-19*, 1 INDIAN JOURNAL OF LAW & LEGAL RESEARCH (2021).

the workplace and wages.<sup>73</sup> The SS Code 2020 facilitates the use of technology, ensuring transparency and accountability. In the name of 'ease of doing business, the Code is sending a message to the workers to save less and spend more. The overall impression of the Code is to reduce the burden on the State and make the partners of the production responsible for their social security. This indicates the movement from welfare State policy to *laissez faire* policy.<sup>74</sup> Moreover, the Labour and Employment Minister should emphasize more on implementing the Code on Social Security Code 2020 properly to bring the maximum number of workers under the ambit of social security schemes as top priorities and benefits should reach the poor and downtrodden.<sup>75</sup>

## 6. Conclusion

After a detailed analysis, it can be concluded that the Code on Social Security is definitely a milestone from a universal point of view as it includes a major chunk of the working population. However, certain changes can be proposed, such as shifting the workforce from informal to formal modes of work. The Social Security Code has also been criticized for a few of its parameters, as certain provisions are not clear. It is unclear as to how the provisions will be enforced, and if done without adequate safeguards, the transition period can really cause great hardship for businesses. In the Social Security Code, the social security framework for the unorganized workers has become more complex and challenging, and immediate steps have to be taken to implement the same, and several rules need to be framed for effective functioning of various social security schemes proposed under different provisions of the Social Security Code 2020.

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<sup>73</sup> Singh Shikha, *Labour Law Reforms 2020*, 1 INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH, (2020).

<sup>74</sup> Rajendra Kumar Hittangi, *An Appraisal of the Law relating to Social Security in India in the light of Global Labour Market*, 7 KARNATAKA STATE LAW UNIVERSITY JOURNAL, 166 (2019).

<sup>75</sup> Damini Nath, "Implementing social security code a priority, says Minister", (Oct. 20, 2021),

<https://www.thehindu.com/news/national/implementing-social-security-code-a-priority-says-minister/article36363251>. Ece.