



Changing Scenario of Indian Labour and New Labour Codes: A Critical Analysis

Tanya Chaudhary* & Babu Remesh†

Abstract

The penetrating debate on Indian labour laws obstructing the flexibility of the labour market has taken centre stage in the last two decades, post the period of liberalisation of the economy. With the purpose of rationalizing and simplifying labour laws to facilitate ‘ease of doing business’, the Indian government has formulated new labour codes, which is considered the most important step towards reforming labour laws in the past three decades. On the other hand, it is emphatically stressed by the labour unions that the Indian labour market continues to be ‘flexible’ to the advantage of employers, despite the presence of allegedly ‘constricting labour laws’ and any further dilution of extant labour law framework will adversely affect the working class. In this context, this paper discusses the implications of the current shift in the labour-law paradigm in India, brought out by the new labour codes. The paper also highlights the need for duly addressing the most recent insecurities in the labour market, in the context of the COVID-19 pandemic, while moving towards a new framework of labour governance, as envisaged by the labour codes.

Keywords: COVID-19, Employment, Labour Codes, Labour Welfare, Unorganized Workers

* Institute for Human Development, New Delhi; tanya.16@stu.aud.ac.in

† School of Development Studies, Ambedkar University, New Delhi; babu@aud.ac.in

1. Introduction

In India, Labour law reforms have been on the cards for quite a long time. Simplification and rationalization of labour laws have been a long-standing demand of employers to effectively realize 'ease of doing business'. The basic argument in favour of the reforms was that they would support industrial/economic growth by removing the rigidities imposed by innumerable labour laws. It is in response to this hue and cry of employers that the government of India is now enthusiastically moving towards simplification and integration of all labour laws into a few labour codes, which was one of the important recommendations of the Report of the Second National Commission on Labour, submitted in 2002.¹ Subsequently, four labour codes were formulated and got passed in the Indian Parliament in 2020. These new labour codes - Industrial Relations Code, 2020 (IRC); Code on Occupational Safety and Working Conditions Code, 2020 (OSHWCC); Social Security Code, 2020 (SSC); and Code on Wages, 2019 (WC) - together consolidate a total of 44 pre-existing labour laws. It is envisaged that relaxations and flexibilities envisaged through new labour codes will improve the performance of the Indian Economy by providing a more conducive environment for carrying out business in India. Notwithstanding this, the labour unions and other collectives working for labour kept on opposing this move towards labour reforms, as they fear a considerable erosion of the protective provisions existing hitherto vide a number of labour laws, many of which came into existence in their present form, after decades of struggles by concerned stakeholders.

Adoption of each of the four codes implies redundancy of a number of protective legislations, which are already in place. This obviously brings in the sense of loss of hard-earned labour rights, laws, and welfare measures. Detractors of labour reforms view that a simple amalgamation or consolidation of various laws into labour codes does not seem convincing enough to: (a) bring all the

¹ *Report of the Second National Commission on Labour With Emphasis on Rationalization of Labour Laws & Unorganized Labour, 2002*, (Thirty-Ninth Session of the Indian Labour Conference New Delhi - October 16-18, 2003),

https://labour.gov.in/sites/default/files/39ilcagenda_1.pdf.

workers across various sectors into the regulatory framework of labour laws; (b) simplify the legal framework to ensure approachability of legal pursuits in employment-related matters, and (c) ensure easy compliance and more transparency of the labour laws. Further, it is also pointed out that these codes would lead to the erosion of some of the rights of workers at workplaces².

2. Perceived Worries and Vulnerabilities for Labour

Most of the labour unions and supporters of the working class view the codes as 'anti-worker', as some of the changes that are included in the new labour codes are with far-reaching implications. For instance, the new Code on Industrial Relations, 2020 (IRC) prohibits strikes without 60 days' notice and within 14 days of giving such notice and during the pendency of conciliation, arbitration and proceedings before a Tribunal. It is viewed that such rigid processes to organize a strike would further weaken the trade unions' efforts towards mobilizing the workers and their collective bargaining capabilities. Notwithstanding this apprehension of worker associations/unions, the new Code mandates every industrial establishment to have a negotiating council or a negotiating union, thereby statutorily acknowledging and recognizing the existence of trade unions at the central level. The efficacy of such proposals and mandates will only be evident once these regulatory structures are implemented³. The Supreme Court judgement of *Syndicate Bank and Ors. vs K. Umesh Nayak*⁴

² Gopal Guru, *New Labour Codes & their Loopholes*, 40 (2020), <https://www.epw.in/journal/2020/40/editorials/new-labour-codes-and-their-loopholes.html>;

Shyam Sundar, *Critiquing the Industrial Relations Code Bill 2019*, 55 ECONOMIC AND POLITICAL WEEKLY, 32-33(2020).

³ Soumya Jha & Ulka Bhattacharya, *With New 'Industrial Relations' Code, What Does the Future Look Like for India's Trade Unions?*, (September 20, 2021), <https://thewire.in/labour/with-new-industrial-relations-code-what-does-the-future-look-like-for-indias-trade-unions>;

Shyam Sundar, *Critiquing the Industrial Relations Code Bill 2019*, 55 ECONOMIC AND POLITICAL WEEKLY, 32-33(2020).

⁴ *Syndicate Bank & Ors. v. K. Umesh Nayak*, AIR 1995 SC 319.

stated that the strike is a result of a long struggle between the employer and the employee, and the Industrial Disputes Act, 1947 (ID Act) seeks to regulate the concept of strike while not denying the workmen's right to strike. The new IRC, 2020, almost dilutes the provisions for a legal strike. At the same time, Industrial Dispute Act's focus is on employees' welfare, and in the new Code, the same has shifted towards ease of business.

The current trend in the labour market with increasing contractualisation and casual employment in both formal and informal sectors may be exacerbated because of this regulatory framework, which facilitates short-term employment. The evident increase of the share of workers in the sectors devoid of social security and benefits is visible from the analysis of Periodic Labour Force Survey (PLFS) dataset 2018-19 by Kapoor⁵, which shows that out of 24% of regular wage salaried workers (RWS), there is a large proportion of workers (68.8%) who had no written job contract and did not qualify for social security benefits, which is showing an increasing trend, with the share being 57 per cent in 2004-05⁶. Therefore, recognizing the fixed-term employment and mandating the statutory benefits to them, similar to those of permanent workers, would make the workers eligible for availing some form of benefits, while it may also reduce the incentives for the companies to hire permanent workers, thus affecting the job security of workers. With no written contracts, many workers, even within the formal sectors, become vulnerable and can be easily laid off. IRC 2020 does very little to address this issue. In fact, it has now increased the threshold for standing orders from 100 workers to 300 workers. In such a scenario, not only the social security but also the job security of a vast majority of the workforce in India is likely to be severely impacted.

⁵ Radhicka Kapoor, *COVID-19 & the State of India's Labour Market*.

(ICRIER Policy Series, No. 18. June 2020),

icrier.org/pdf/Policy_Series_18.pdf;

Radhicka Kapoor, *The grim reality hidden by recent decline in unemployment rates*, (August 9, 2021),

<https://indianexpress.com/article/opinion/columns/the-grim-reality-hidden-by-recent-decline-in-unemployment-rates-7444792/>.

⁶ Radhicka Kapoor (2020) *supra* note 7.

Until now, it has been the State government's responsibility to formulate social security schemes for the sector of unorganized workers. With the introduction of the Social Security Code, 2020 (SSC), this responsibility is now partially and arbitrarily being shared with the Central government. Section 109 (1) states: "The Central Government shall frame and notify, from time to time, suitable welfare schemes for unorganized workers on matters relating to— (i) life and disability cover; (ii) health and maternity benefits; (iii) old age protection; (iv) education; and (v) any other benefit as may be determined by the Central Government." While Section 109 (2) states, "The State Government shall frame and notify, from time to time, suitable welfare schemes for unorganized workers, including schemes relating to— (i) provident fund; (ii) employment injury benefit; (iii) housing; (iv) educational schemes for children; (v) skill up-gradation of workers; (vi) funeral assistance; and (vii) old age homes". While this Code could have simplified the process of provision of social security and assistance to the workers, by the proliferation of organizational structure with the constitution of social security boards at the centre and state level along with a separate board for gig/platform workers⁷, it has instead created a space for obscurity.

The gig work/platform economy has gained a separate mention in the SSC 2020. However, its lack of mention in the other codes is problematic, and therefore the matters of contestation between the employer and employee in the platform economy remain unaddressed. The issues of health insurance, paid leaves, untimely termination and other conflicts pertaining to platform workers are not covered in the codes. Further, the e-registration of unorganized workers, gig workers and platform workers (section 113) raises concerns over the existing resources and infrastructure of the government to implement the process⁸. While this digitization may

⁷ Santosh Mehrotra & Kingshuk Sarkar, *Social Security Code, 2020 & Rules, A Critique*, 56 ECONOMIC AND POLITICAL WEEKLY, 17-20 (2021), <https://www.epw.in/journal/2021/12/commentary/social-security-code-2020-and-rules.html>.

⁸ Ronak Chhabra, 'Glitches' in e-SHRAM Portal Mar Process of Registration of Informal Workers, (September 21, 2021),

give an estimate of a large number of previously unrecorded unorganized workers, it also excludes diverse forms of home-based work. The mandatory link of Aadhar⁹ is further problematic because of the absence of linkages of mobile numbers with Aadhar cards in most cases, making the Aadhar card verification process cumbersome. These processes eventually turn out to be time-consuming for a daily wage worker and hence seem like a hassle from the viewpoint of the workers, even if the concern of misuse of worker's data and increased fraudulence by the 'agents', because of poor financial and digital literacy in most parts of the country.

While there exists a nuanced labour market in the gig work employment, it is more or less a subset of the unorganized sector and therefore separate National Social Security Boards for unorganized and gig work would only provide for overlapping of schemes, given that most of the workers move across the jobs in unorganized sector and gig work. The changes in the procedure of registering workers from all the sectors, including building workers and unorganized workers for availing benefits, would take time¹⁰ and therefore, what would be the provisions in the interim period is also unclear from the given Code. Moreover, the Code ignores the difficulties of securing employment on a daily basis faced by the workers and instead puts the burden of registration on the workers.

Mehrotra and Sarkar also highlight that the current Code does not recognize the large percentage of unregistered establishments (67.7%) within the unorganized sector and merely states that 'every establishment to which the code applies' is to be registered¹¹. Since

<https://www.newsclick.in/glitches-e-SHRAM-portal-mar-process-registration-informal-workers>.

⁹ The Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits & Services) Act, 2016, INDIA CODE NO. 18 of 2016.

¹⁰ *FE Bureau Labour codes: Draft rules released by 15 states, yet reforms may not be rolled out in FY22*, (September 25, 2021),

<https://www.financialexpress.com/industry/labour-codes-draft-rules-released-by-15-states-yet-reforms-may-not-be-rolled-out-in-fy22/2337176/>.

¹¹ Mehrotra, Sarkar (2021) *supra* note 9.

there is no provision stated for promoting the registration of these establishments, the workers working in such establishments are likely to be outside the purview of the Code. The effort to universalize the social security provisions seems lost while formulating the new Code. While witnessing the shift from regular salaried work, we concomitantly see an increase in self-employed work, and within this group, there are more people who are becoming unpaid family helpers, which is the most vulnerable type of employment and mostly performed by women. Hence there is a regression in terms of types of employment. During the pandemic, we have seen the share of increasing Own Account Workers (OAW) and unpaid family workers, which does not necessarily paint a positive picture. It also shows another side of the story, where the workers are sacked or laid off from their jobs and are bound to create employment opportunities for themselves¹².

People working in sectors of agriculture, manufacturing, hotels, construction, and trade have been the most perniciously affected segments of the workforce after the COVID-19 pandemic. While at this time the recommendation that a) universal and national minimum social security to cover life, death, disability, old age and maternity benefits shall be given to all the workers in informal work; and b) set standards of work for eight hours workday and setting a national minimum wage; made from the National Commission for Enterprises in the Unorganized Sector¹³ is all the more important to revive the Indian Economy and its workforce, but unfortunately, the SSC does not provide a regulatory structure and mechanism for universal social security. The coverage of women workers under the Social security code in the chapter on maternity benefit remains restricted to cash transfers in the unorganized sector through respective boards conditional upon institutional delivery¹⁴. The Wage Code, 2019 (WC) does, however, set a national floor wage of a mere Rs. 178, below which the states

¹² Kapoor (2020; 2021) *supra* note 7.

¹³ *National Commission for Enterprises in the Unorganized Sector, Social Security for Unorganized Workers*, (2006), <http://dcmsme.gov.in/Social%20security%20report.pdf>.

¹⁴ Mazumdar & Neetha, *Crossroads & Boundaries*, 54 ECONOMIC AND POLITICAL WEEKLY, 67 (2020).

cannot set their minimum wages. The Supreme Court had used a formula for calculating minimum wages as per the need-based criteria suggested by the ILC in 1957, 2012 and 2015 while giving a ruling in *Raptakos Brett* case of 1992¹⁵. The MWC, 2020 has yet again ignored and not defined any methodology to define an acceptable minimum wage for workers besides dismantling the mechanisms for enforcement and workers' rights to approach courts. Nivedita Jayaram¹⁶ writes:

The Wage Code also takes away the jurisdiction of courts in providing justice to workers who have faced violations with respect to their wages. This means that workers can no longer access courts to contest the wages paid to them by their employers, but can only approach the quasi-judicial body and appellate authority set up under the provisions of the Wage Code.

This shows that the national floor wage is itself ridiculously low, while no clear methodology is stipulated in the wage code, which also opens caveat for a 'race to the bottom' amongst the states to set minimum wages to draw investment¹⁷. All codes define the worker in relation to the establishment or industry or gig work or having an employer-employee relationship, but it precludes private households as establishments that are currently on the rise, especially after the pandemic, as also discussed in the above discussion. Therefore, universal coverage is already barred and seems surreal.

While the universalization of social security appears statutorily unachieved, the protection is given to specific sectors of employment by eleven laws and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Services) Act, 1979 and Contract Labour (Regulation and Abolition) Act, 1970 which are amalgamated into OSHWCC. The specificity of these sectors of

¹⁵ *Workmen Represented by Secretary v. Management of Reptakos Brett*, 1992 AIR 504.

¹⁶ Jayaram, N, *Protection of Workers' Wages in India: An Analysis of the Labour Code on Wages 2019*, 54 ECONOMIC AND POLITICAL WEEKLY, 49 (2019).

¹⁷ Jayaram (2019) *supra* note 18.

employment was translated in terms of vulnerability and the weaker bargaining power of the workers working in harsh and poor conditions of work, along with the complex socio-economic and cultural realities of working-class society. The poor amalgamation and the intended simplification of these laws into OSHWCC have dropped out many important provisions for the protection of workers, which were previously present for the specific industry identified for indentured labour, family labour and even neo-bondage conditions.¹⁸ Moreover, it allows the employment of women in all establishments irrespective of their hazardous work. It also prohibits employing women within six weeks of delivery, miscarriage, and medical termination of pregnancy. In unorganized sectors, particularly construction and agricultural work, women are often seen to be working during and immediately after their pregnancies. In such cases, prohibiting employment without any immediate and easily available incentives to women workers would only increase their problems and create space for hiding such occurrences, which, if caught, may eventually open litigation for the employer. In such cases, the employability of women workers may become a liability for many employers. Similarly, maternity benefit can only be claimed if the worker puts in a minimum of eighty days of employment preceding her delivery, which puts the employability of many pregnant women at risk besides keeping her out of social protection. The Code also does not recognize the microscale and agricultural sector and therefore does not have a universal coverage besides eliminating the previously identified sectors which were categorically 'dangerous' and hence needed special legal protection. Sundar explains in detail the serious shortcomings of this Code to address protection to workers from occupational accidents and hazards.¹⁹ Besides, it does not address the issue of sexual harassment at the workplace, nor does it integrate and reformulate the laws on bondage and trafficking into the social security provisions and occupational safety codes.

¹⁸ Jayaram (2019) *supra* note 18.

¹⁹ Sundar (2020) *supra* note 5.

3. Shifting Framework: Some Emerging Concerns

Apart from the above-mentioned issues, there are also many specific concerns about the shift in the labour law framework brought out by the new labour codes. In this section, an attempt is made to discuss and dissect some of these concerns.

3.1. Absence of Social Dialogue

Trade unions accuse that this drastic step is taken without having the required consensus from all relevant stakeholders, especially the workers and worker unions. Already, ten trade unions have approached the International Labour Organization (ILO), accusing that it is a violation of basic norms assured in ILO Convention No. 144, to which India is a signatory. This convention directs to effective tripartite consultations including government, workers and employers to promote social dialogue and industrial harmony.²⁰

Bhatia points out that there was a visible hastiness in the passage of these new labour codes, and there was not any dialogue, debate or consensus-building among the stakeholders²¹. It is also widely pointed out that the new labour codes will adversely affect the collective bargaining of workers. Erosion of many of the benefits ensured in the already existing labour welfare-oriented legislations (prior to the advent of labour codes). Exclusion of trade union's concerns while formulating the new labour codes indicates the weakening of tripartism and social dialogue process.

²⁰ Zia Haq, *States' labour law changes under central govt scanner*, (Hindustan Times, June 1, 2020), <https://www.hindustantimes.com/india-news/states-labour-law-changes-under-central-govt-scanner/story-WkLJEydeF0H44IugZ8wkAK.html>.

²¹ Akriti Bhatia, *New Labour Codes: After Rushing Them Through Parliament, why is the Govt. Delaying Implementation?* (The Wire, October 1, 2021), <https://thewire.in/labour/new-labour-codes-after-rushing-them-through-parliament-why-is-the-govt-delaying-implementation>.

3.2. Delayed Implementation and its Implications

Delayed implementation of new labour codes is yet another issue of concern. Despite the hastiness in passing the bills related to the codes in Parliament, there has been a visible delay in terms of implementing the new labour codes. The unexpected advent of COVID-19 and the resultant lockdowns have obviously slowed down the pace of realization of these new codes, as explained by the government representatives while responding on the matter of delay in implementing labour codes. However, some critiques opine that there are other dimensions also for this delay. For instance, Bhatia reviews the situation of implementation of labour codes and holds the view that there are political and electoral concerns that prevent the government from implementing these codes instantly²². It is viewed that the ruling party apparently thinks that the implementation of labour codes before some of the crucial state assembly elections will have a backlash, as these codes may bring displeasure among the working poor, who have a major stake in vote banks.

Obviously, the entire process of nullification of the extant labour laws through the introduction of new labour codes and the subsequent delay in implementing the latter has led to a situation of 'limbo' in terms of effective execution of labour laws. Accordingly, neither the old laws are followed diligently nor the new codes are applied. Although the case of 'In RE: Problems and Miseries of Migrant Labourers'²³ decided by the Supreme Court of India highlighting the conditions of migrant labourers during COVID-19, the SC had thoroughly stated that the registration of workers for unorganized workers for availing benefits of social security scheme would be as per the old legislations (Unorganized Workers Social Security Act, 2008 and The Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996), until the new CSS, 2020 is enforced. Such a situation, especially during the uncertain period of the pandemic, had resulted in a visible laxity on the part of the state mechanism in

²² Bhatia (2021) *supra* note 23.

²³ In Re: Problems & Miseries of Migrant Labourers, Suo Motu Writ Petition (civil) No(s).6/2020.

terms of safeguarding the interests of the working class. Given this confused state of affairs until the implementation of codes, effectively, through a fairly laid down mechanism, there is a chance that the employers will be benefitted due to the absence of protective laws and norms.

3.3. Dilution of Protective Legislations, Alteration of Schemes

During the time of COVID-19, there has been some visible weakening in labour standards due to the dilution of the protective legislative frameworks. Amidst the crisis brought by the pandemic, the Government of Uttar Pradesh nullified all labour rights for a period of three years. Many other state governments - like Rajasthan, Madhya Pradesh and Gujarat - followed the same path and relaxed many of the existing labour laws. The most important thing that the state governments did was the enhancement of the working time from 8 hours to 12 hours. Later on, with the intervention of the Allahabad High Court, the UP government had to restore the 8 hours working time.²⁴ Therefore, some states are also known to pass ordinances that have made the situation worse for workers; few state governments have also framed legislation to ensure the dignity of workers at workplaces²⁵. Hence, for ensuring dignity, good health and security of workers, the codes should have a suggested framework for standardizing dignified conditions of work across the nation.

It is viewed that many of the provisions in the new labour codes are already being practised, despite the delay in the formal implementation of codes²⁶. For instance, Rajasthan has already

²⁴ Somesh Jha, *UP govt withdraws order increasing daily working hours to 12 from 8*, (Business Standard, May 16, 2020), https://www.business-standard.com/article/economy-policy/up-govt-withdraws-order-increasing-daily-working-hours-to-12-from-8-120051600706_1.html.

²⁵ Firstpost Staff, *Workers Got Right to Sit*, (Firstpost, September 7, 2021), <https://www.firstpost.com/india/after-kerala-tamil-nadu-set-to-make-right-to-sit-a-workplace-law-a-look-at-how-kerala-women-won-battle-three-years-back-9943671.html>.

²⁶ Bhatia (2021) *supra* note 23.

enhanced the threshold limit for hire and fire of employees with prior notice from 100 to 300, even before the implementation of the new labour code. Similarly, in the recent past, many states have proceeded with dilutions and amendments of extant labour laws. Also, there have been many new schemes that have replaced or effectively paralyzed the efficacy of some of the extant schemes, which ensured some modicum level of protection, social security or welfare to the working poor. A good example for this is the Rashtriya Swasthya Bima Yojana (RSBY) programme, which was replaced by the Ayushman Bharat Programme / Pradhan Mantri Jan Arogya Yojana (PM-JAY) (which is considered to be superior in many ways– but yet not become fully effective till now, in terms of achieving the envisaged goals)²⁷.

With the advent of relaxations in the labour framework, which helped engagement of contractual workers and apprentices without much long term implications for employers, easy retrenchment has become a norm than the exemption in many sectors. It has been widely noted that contractualisation has become a norm during this period of limbo across all industries and enterprises. All these developments inter alia added to the informalization of the workforce, with intensified vulnerability and precariousness in the world of work.

All these, which are marked by an all-time low level of collective bargaining during a phase, have brought in a situation of helplessness among the workers and an unprecedented situation of hegemony for the employers while dealing with matters regarding recruitment, engagement, and repatriation of workers.

3.4. Declining Quality of Employment and New Challenges

Bhatia opines that some of the recent measures facilitating fixed-term employment and policies promoting large scale hire and fire and engagement of trainees for works done by permanent workers

²⁷Aman Sharma, *Ayushman Bharat: Centre's colossal push for health scheme after PM Modi's Red Fort prod*, (Money Control, August 18, 2021), <https://www.moneycontrol.com/news/india/ayushman-bharat-centres-colossal-push-for-health-scheme-after-pm-modis-red-fort-prod-7357491.html>.

result in deterioration of quality of employment and decline of labour standards²⁸. For instance, with the amendment of the Railway Apprentice Act, 1961, open market recruitments have effectively been introduced in railways, stalling the prospects of entry of trained apprentices. Such amendments, which provides the employers with the freedom to form terms of employment in a way, are also paving the way to privatization of railways and similar public enterprises in future²⁹. Growing insecurity in the labour market is palpable through the visible increase in unemployment, instances of retrenchments and growing contractualisation and informalization of jobs. Trade unions and researchers view that even programmes like National Employability Enhancement Mission (NEEM) are all adding to the decline of quality of employment.

Similarly, the labour code does not address the new and upcoming changes in the forms of employment in the post-pandemic world. The new issues arising from the culture of remote work and work from home is giving rise to new forms of exploitation at workplaces while concomitantly justifying the dismissal of the employer's responsibility of worker's social reproduction. Even the old patterns of labour market such as constant movement of workers between farm and non-farm activities, presence of a large number of agricultural labourers, indentured labour are not mentioned in the codes. The coverage of the population under a social protection scheme is one thing, while their inclusion in the legal safety provision is another. While the government may already have addressed a need of expanding the coverage of people under social protection schemes, the need to expand the coverage under legal protection to all sectors of employment seems questionable by reading the codes. During the pandemic, we have witnessed the surfacing issues of abysmal inequalities and poverty. The local governments adopted some ad-hoc measures to address the crisis but lacked the administrative prowess and resources to assure full coverage. In such cases, the provision of universal social security to the workers needs a legal framework that should have been stated clearly in the codes. The new codes also do not address the

²⁸ Bhatia (2021) *supra* note 23.

²⁹ Bhatia (2021) *supra* note 23.

minimum measures to address the health and social crisis such as that of the COVID-19 pandemic at the workplaces.

3.5. Centre-State Tensions within Indian Federalism

While the 'labour' comes under the concurrent list of the constitution, there are opinions about the new laws appropriating most power in the hand of central government and marginalizing the state government, especially in the matters of labour administration and implementation of codes³⁰. Sarkar explains while this seems true that the labour codes have shown the tendency of centralization with respect to the organizational structure, which may cause hindrance in the successful implementation of the schemes, the state governments are now given the responsibility of administering a State Social Security Fund as well as of maintaining workers' records³¹. But the criteria for such decentralization seems ambiguous because there is yet no mention of the implementing authority and institutional structure/organization at the level of state with regards to mandates of the Code, especially in the case of protection of workers migrating from one state to another. The Supreme Court judgements of *Steel Authority of India Ltd. vs National Union Water Front Workers* and *Hindustan Aeronautics Ltd. vs Workmen*³² were two rulings that were in response to litigation raised to decide who the appropriate government is. The new labour codes nevertheless did not take an opportunity to clearly define the jurisdiction of the appropriate government, which is seen to vary from Code to Code.

With a differing opinion, Jha³³ writes that given the fact that labour is a subject of the concurrent list, the choice of ensuring protection

³⁰ Mathew (2020) *supra* note 3.

³¹ Sarkar, *Amalgamation of Existing Laws or Labour Reform*, 54 ECONOMIC AND POLITICAL WEEKLY, 33 (2019).

³² *Steel Authority of India Ltd. v. National Union Water Front Workers*, AIR 2001 SC 3527; *Hindustan Aeronautics Ltd. v. Workmen*, AIR 1975 SC 1737.

³³ Somesh Jha, *Codes give more power to states to be flexible on labour laws*, (Business Standard, September 25, 2020), <https://www.business-standard.com/article/economy->

to workers or providing flexibilities to employers will eventually get shifted to the state governments. This argument presents a possibility where state governments can introduce state-specific labour legislations in addition to the new labour codes of centre, and it will inter alia lead to a situation where capital investments (and thereby the creation of job opportunities) move towards those states, which take an open capital-friendly attitude, by not supplementing the central codes by labour welfare-oriented state-specific laws and measures. Needless to state, this will also result in an unfriendly competition among states within the Indian federal set-up, where 'race to the bottom' in terms of labour standards will be the decisive factor for industrial growth and economic progress for the concerned state. In such a scenario, If pro-poor and pro-labour states bring in relaxations or continue to have state-specific enabling laws, it will lead to a situation where some states have become more labour-friendly and some others more investor-friendly. This can lead to a situation of flight of capital from one state to another. The recent episode of Kitex industries leaving the state of Kerala, accusing the state's unfavourable position vis-à-vis ease of doing business, is worth mentioning here.³⁴

3.6. Issues of Marginalized Groups

Migration being, a reality of the Indian labour force, has been highlighted during the reverse migration episode during the lockdown; while the government has taken initiatives to record the migrant workers, the efforts to understand the political economy of migration and address that through legislation has been missing. The Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, (ISMWA) 1979 has been the only labour law in India for internal migrants. This has shared purpose with the Bonded Labour Act and the Contract Labour (Regulation and Abolition) Act (CLRAA), 1970. While these legislations ensured

policy/codes-give-more-power-to-states-to-be-flexible-on-labour-laws-120092401255_1.html.

³⁴ Anil Sethumadhavan, *Kitex's Exit from Kerala & the Fallacy of Ease of Doing Business*, (Bodhi Commons, August 17, 2021), http://bodhicommons.org/Kitex_fallacy_of_Ease_of_Doing_Business.

safe migration, they do not address issues with family migration where women and children are mostly used for unpaid work and their employment and identity as the worker is not identified. These conditions of work correlate with that of bondage but are not addressed by the codes. Therefore, the question arises that what would be the legislation governing such cases which were filed to seek relief in case of absolute violations of labour as well as human rights? The civil societies are approaching the courts as they did earlier in the case of *Bandhua Mukti Morcha vs Union of India*, which needs clarity of framework to approach the judicial system in such cases.³⁵

Similarly, issues related to sexual harassment at the workplace and trafficking have received no attention in the codes, and therefore the intended simplification of legal provision into codes have not only addressed continuously emphasized issues in the labour market but has also raised new questions on implementation as raised above. Also, Maternity benefits are only accessible to women working in enterprises with at least ten workers; thus, there is no provision for extending maternity benefits to women in the unorganized sector. There is no additional provision to curb the trafficking of workers, especially women and children, for the purpose of exploitative employment, bondage and sex work and make the process of rehabilitation easy for the workers. Similarly, the provisions for bringing domestic workers into the ambit of legal protection is also not addressed by the new codes. The issues pertaining to migration of women and maintaining safe and hygienic workspace and living space for them should have been a responsibility of local governments or employers yet without any legal mandates or framework or provisions put forward by the Code. The Code, in this manner, ignores the intertwined aspects of labour, migration, employment and gender, which could have been taken note of while formulating a new legislative outline.

4. Conclusion

It is evident that with the advent of labour codes, there is a likelihood of dilution of existing labour protective framework, ensured through various labour welfare-oriented laws. Although

³⁵ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

the codes have had an intention of simplification and bringing the labour reforms for ease of business as well as covering the unorganized sector, the above analysis shows that while the codes seem like an amalgamation of the laws, in any case, there are many aspects of protection of workers which have been overlooked in the new codes. It has also ignored the opportunity to expand into the aspects of employment which needs attention and could have been achieved if proper consultation with the stakeholders had been followed.

As India has an excess pool of labour force and a vast reserve army of labour, even with the new labour codes and reduced protective cover, a large number of workers will be readily accepting the subhuman working conditions without fair labour standards. However, this will be a situation where more and more workers will be forced to work with dismal labour standards, with lower levels of job and income security. Further to this, as the labour code allows considerable freedom for employers to engage workers on short term contracts, eventually this situation can lead to an unprecedented bulging of the workforce who work as casual, temporary and contractual workers or as self-employed workers, who are essentially become 'unprotected labour' and who add to the process of informalization of the erstwhile formalized sector.