Labour Law Reforms

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2021

Centre for Transparency and Accountability in Governance
National Law University, Delhi

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Preface

Labour Laws is that branch of law which deals with administrative rulings, precedents which address the legal rights of, and restrictions on, working people and their organizations. The empowerment of workers/labourers is imperative for an empowered and prosperous country. Various Legislations on Labour laws are largely a result of social and economic conditions prevalent in that country. These laws regulate various aspects of work including the conditions of employment, wages, number of working hours, regulation of adolescent labour, social security and other facilities provided.

All the labour legislations are enacted to fulfil certain roles, to establish a legal system facilitating productive individual and collective employment relationships and thereby constructing a fruitful economy, to offer a framework within which employers, employees and their respective representatives can interact and discuss work related issues, thereby achieving harmonious industrial relations and making for a safe ambience at work, it also gives an assurance of existence of basic fundamental principles at work, which have, over the years received extensive social acceptance and also establishes a process by which these rights can be enforced if not implemented.

International Labour Organization (ILO) was one of the first organizations which dealt with issues regarding the labour. It was established subsequent to the Treaty of Versailles as an agency of the League of Nations. Protection of labour unions, post-World War I engaged the attention of several nations. International Labour Conference which was the first annual conference adopted six International Labour Conventions, which dealt with hours of work in industry, unemployment, maternity protection, night work for

women, minimum age and night work for young persons in industry. The ILO became a member of the United Nations system after the demise of the League in 1946.

In the Indian Constitution, the relevance of the dignity of human labour and the need for protecting and safeguarding the interest of labour as human beings has been enshrined in Chapter-III (Articles 16, 19, 23 & 24) and Chapter IV (Articles 39, 41, 42, 43, 43A & 54) of the Constitution of India keeping in line with Fundamental Rights and Directive Principles of State Policy. The entries related to labour laws are majorly provided under List III of Schedule VII of the Constitution to enable both the union and the state government to collectively make laws for the betterment of the work force. The Indian Labour laws are influenced by various sources including international conventions, reports of various Indian and International Labour Conferences, recommendations of National Committees and Commissions and various judicial pronouncements on the said topic.

Despite having over 50 central & state legislations regarding labour law, still the reality is that the workers are facing uncertainty of employment and denial of various benefits such as social security. Even after 73 years of Independence, approximately 90% of workers work in the unorganized sector that do not have access to all the social securities. The issue isn't dearth of laws rather reforms are needed in existing laws to make them simpler and increase their efficiency.

This book is collection of 19 articles contributed by various writers on varied relevant topics regarding labour laws. Research article No. 1 deals with new and emerging forms of labour those should be included within the new Code. It also deals with unorganized sector of India which constitute a

major part of the total workforce and it is the most exploited one. No laws governing labours are in practice for the unorganized sector. There is only a single legislation which deals with unorganized workers i.e., the Unorganized Workers Social Security Act, 2008, but even that has limited coverage. The Chapter also provides a reasoned critique of the newly enacted Code on social security as the provisions therein aren't mandatory but merely recommendatory in nature.

Research article No. 2 gives us a comparative analysis and talks about European Labour policies. The European model follows a unique approach which consists of stringent laws and has regulatory interventions at various levels which are often supported by creative decisions given by the European Courts which favours the extensive application of social legislation by the national legal systems. Apart from such differences, the European Model also faces issues that are common to other developed countries. Recently, the policies have given emphasis on protecting financial stability, even at the cost of policies that support economic growth, thereby causing social repercussions in other countries.

Research article No. 3 touches upon the current topic with which most of the countries are dealing, impact of the pandemic on the workers employed in Organized and unorganized Sector. The pandemic bought to light an already prevalent conditions of the labourers, in India. The effect of COVID-19 on employment was significant, in both the sectors, as a consequence of which employees were laid off, job cuts, reduction in pay, the lockdowns that were imposed had a severe impact on economic activities. This chapter discusses the challenges that are faced by the unorganized sector as most of India's labour workforce contributes to the unorganized sector. Social security brings certain kind of stability and

protection, The National Commission on Labour recognized that in 1969 but the laws and policies governing them are still inadequate. The basic human rights must be upheld irrespective of the crisis the country is undergoing.

Research article No. 4 deals with another topic which saw the light of the day during the pandemic, the violations of rights of domestic workers. During the lockdown, the conditions of domestic workers, working in contemporary households deteriorated as 91% of them didn't receive their wages and most of them lost their jobs as well. This Article talks about the constitutional provisions that are in place for domestic workers, the international perspective on domestic workers and the rights of workers. The under-estimated, unreported statistics and the gendered nature of work make the domestic women workers invisible. COVID-19 bought to the forefront the dire need of amending the existing labour laws and also creating a new comprehensive and uniformly applicable law dealing with fair terms of employment.

Research article No. 5 talks about social security in relation to future availability of work. The Unorganized sector is volatile in respect of availability of work. This Chapter deals with problems faced in unorganized sector, the future availability of work due to advent of technology and now even Artificial Intelligence. The social security schemes excluded the unorganized sector workers without them having any scope for improving their skills, efficiency or wages until the enactment of Unorganized Workers Social Security Act, 2008, so this Chapter further focusses on critically analyzing the said Act as according to the author it hasn't done complete justice to the purpose for which it was enacted. The issue of social security should be addressed within time as it has the potential to lead to a

situation wherein the working class will be denied social justice and basic human rights and would continue to be socially deprived.

Research article No. 6 critically analyses the reforms on labour laws in India. Labour laws in India are governed by numerous legislations both by the Central and the State Government. Implementation of plethora of labour laws becomes extremely difficult as a result of which the labour class suffers, the effectiveness of laws diminishes due to weak enforcement. To do away with this, 29 legislations have been amalgamated into 4 Codes. This chapter also talks about including the Migrant Workers in the postal voting policy, as due to change in their work state, they don't get the chance to vote and also provides an insight into postal voting rules of other countries.

Research article No. 7 talks about the recent initiatives taken to reform the labour laws, by various amendments and codification of laws. Reforming of laws should be a continuous process, to adapt to the changing needs of the society, if the laws don't change with time, they will create a hindrance for development rather than supplementing it. The author points out the need to reduce the complexity of labour laws so as to actually benefit the strata for which it is enacted. The beneficiaries of law should understand it in order to assert their rights. This Chapter briefly talks about the initiatives taken by the central and state governments to reform various labour laws, in the form of codification of existing labour legislations into 4 major codes and the provisions therein, the Codes have now come into force, crucial amendments made by various state governments and other reforms.

Research article No. 8 talks about role of judiciary in access to justice during the pandemic. When the complete lockdown was announced, migrants were

left to hang in the dry by the government, with no provisions for food, shelter or transportation in place, the apex court took suo-moto cognizance of the situation and directed the state government to take measures for the migrants. This is the finest example of judicial activism, where Apex Court has played a pro-active role in issuing directions thereby breathing in life to the rights of workers and making justice accessible to the lower strata of the society. The author has discussed various cases including the *Gujrat Mazdoor Sabha v. State of Gujrat* (W.P(civil) 708/2020), wherein the apex court has taken a pragmatic approach to defend the constitutional principles.

Research article No. 9 critically analyses the Industrial Relations Code, 2020 which is consolidation of the Industrial Disputes Act, 1947, Trade Unions Act, 1926 and the Industrial Employment (Standing Orders) Act, 1946. These reforms are aimed to provide flexibility of labour, regulate trade unions. The chapter in depth discusses about various provisions of the said code including the jurisdiction of civil courts, disputes relating to trade unions and critically analyses them by even mentioning the shortcomings of the code like certain important terms not being defined under the code. It further discusses about fixed term employment, which was earlier unregulated under legislations and a new concept of 'Worker Re-Skilling Fund' which has been introduced in the code, this fund aims to provide employment again to workers who had been laid off. The chapter also discusses about the grievance redressal committee.

Research article No. 10 speaks about how technology has impacted labour law. With the advent of technology, new jobs have been created which wasn't there earlier. This chapter deals with one such example of mobile applications related to transportation, this chapter focusses on the usage and impact of such applications in Indonesia. This application-based

transportation is based upon a partnership agreement between the driver and the platform. Herein, the driver doesn't have much bargaining power. This chapter focusses on the legal protection that needs to be in place to protect the needs of driver, as in this business model the driver is construed as an individual entrepreneur who own their own vehicles. With growing usage of such applications, it is imperative, even in other nations that such laws protecting the person at the weaker end of the agreement.

Research article No. 11 deals with the lien of ship owners who are engaged in maritime employment. It discusses maritime employment laws, international rules and conventions related to the same. The chapter further talks about in detail about various types of liens, namely common law lien and statutory lien and its importance in the shipping business. In maritime employment charter party clauses eventually becomes the terms of contract. Ship-owner's lien is exercised both under the implied rights in common law principles as well as under explicit conditions laid out in an express contractual agreement. The various judicial pronouncements have cleared the scope of ship owner's lien.

Research article No. 12 is based on the ugly reality of manual scavenging. Even after more than 7 decades of independence, we haven't been able to abolish scavenging and replace it with machines. The conditions in which manual scavengers work are beyond deplorable. According to reports, 1.68 lakh households are engaged in manual scavenging in India. Other people of the society look down upon them as they belong to the lowest strata of society and because of the work they are employed in, in this regard the government has failed to respect the provisions regarding equality of status and opportunity provided under the Constitution. This chapter deals with steps taken by the administration to abolish manual scavenging and

launching the Swachh Bharat Mission in 2014 to control manual scavenging and the actual ground level result of the scheme.

Research article No. 13 speaks of regulating fixed term employment contracts in India and critically analyses the legal regulations regarding contractual employment. The demand of fixed term employment was initially used to meet the sudden and temporary demand, but now it has become very common. Most of the employers are resorting to fixed term employment as they get more freedom and to shift the employer and employee relation outside the scope of legal protection and in turn misusing the power. This paper, additionally, provides for judicial interpretation and suggestions to provide safeguards and for better regulation of fixed term employment.

Research article No. 14 explores the various possible outcomes regarding work, labour policy and the employer-employee relationship. The factors of production namely, Land, Labour, Capital and Entrepreneurship, have and are undergoing significant changes. Labour force is gradually being replaced by machines in many developed countries and in developing countries the labour has to constantly upgrade and adopt new skills to keep themselves afloat. It makes us ponder on new avenues and future of the factors of production, also about balancing of interest between labour and technology and makes us question that whether they'll be a workplace in the future with most of the work being online. Indian labour force being under educated and unskilled has to face a lot of challenges, lack of information and inadequate data regarding labour force have led to inaccurate determination of rates of unemployment.

Research article No. 15 analyses the amendment to the Consolidation of labour laws regarding innovations in collective negotiation. This Article talks about types of collective negotiation and provides for a comparative analysis in that aspect. It also sought to historically scrutinize the issue of proactivity of collective negotiations, i.e., the incorporation of the rights provided in collective agreements and collective conventions, before and after the legislative modification and discuss the modification brought by laws in the sphere of collective negotiation.

Research article No. 16 provides a discussion on health and safety of workers and the future of occupational health protection with main focus on India and Tanzania. Improvements have been made and welfare legislations have been drafted but still the working conditions have continued to be hazardous posing a serious threat to life of workers. This is a serious human rights concern as well. Workers Health & Safety (WHS) is often left out of discussions rather it being a fundamental human right. This chapter discusses WHS in detail with covering the international perspective and national policies as well.

Research article No. 17 explains the sociological significance of migrant workers in unorganized sector and highlights the challenges faced by migrant works in the country. The migrant workers were the worst affected during the lockdown in the pandemic, this highlights a need for discussing the reasons behind them being disproportionately affected. This chapter also analyses the adequacy of existing legal provisions governing the welfare of migrant workers, in respect of which it deals with various Codes which were recently passed and argues that these legislations aren't sufficient to mitigate the concerns of migrant workers. The paper also offers a policy framework to address the unique predicaments faced by migrant workers.

Research article No. 18 assesses the challenges faced in the MGNREGA due to gender difference. The position of women in the labour market is a matter of concern even at global level. In India, women face difficulties in gaining access to paid employment, thereby violating right to work provided under UDHR. MGNREGA was a great initiative in providing employment and thereby uplifting rural women but despite the opportunities that this scheme provides, it hasn't been completely successful in upliftment of rural women. This chapter analyses the shortcomings that exist in the scheme and also the issues faced by women in taking up paid employment. The chapter also recommends suggestions that should be implemented to let the scheme have far-reaching effect.

Research article No. 19 talks about exploitation of ASHAs i.e., India's community health workers. They play a major role in country's public health delivery system, act as a bridge between the community and the formal health system and increases accessibility of health care in rural areas. State has tapped their potential but also is eager to exploit them as their services are available at lower costs and refuses to recognize them as workers. This paper examines various aspects relating to engagement of ASHA workers with the state, their nature of employment, working conditions and wages.

This book, "Labour Law Reforms", discusses some of the key issues related to labour laws, reforms which should be incorporated in the forthcoming legislations and the provisions of the new Code. It also touches upon the provisions which cater to the needs of emerging forms of labour such as gig workers. It is a timely contribution in the field of labour laws as the legislature is contemplating and discussing about consolidating and amending various labour laws into Codes. This book is an anthology of

research papers and articles which have been contributed by various distinguished scholars, dealing with varied topics relating to impact of the pandemic on the workforce sector both organized and unorganized.

I would also like to express my appreciation to Prof S Sachidanandam, Prof. Tiziano Treu, Prof SC Srivastava, Prof BT Kaul, Prof Sudesh, Prof Suresh, Prof D Patel, Mr. B.K Sahu, Dr. Sanjay Upadhyaya, Dr Anuja S, Dr. Balwinder Kaur, Dr Pravin, Mayank Francis Dias, Carolina Tupinambá & Isabela Reimão Gentile, Mr. Mathias Sylvester Nkuhi, Dr. M.S. Benjamin, Willy Farianto, Annisa Fathima Zahra, Lorita Fadianty, and other teachers and research scholars for subscribing and supporting the publication of this book.

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Jeet Singh Mann,

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LABOUR LAW REFORMS ON UNORGANIZED, GIG AND PLATFORM WORKERS UNDER THE CODE ON SOCIAL SECURITY: ISSUES AND CHALLENGES

Prof S.C. Srivastava*

Abstract

The workers in the unorganised sector in India constitute more than 91% of the workforce in the unorganised sector. They are facing serious problems of the uncertainty of employment, security of tenure and denial of social security. Most of the social security legislation does not apply to workers in the unorganized sector. The Unorganised Workers Social Security Act, 2008 is the first and only legislation that seeks to provide for social security for unorganised workers but even this legislation has extremely limited coverage and lacks enforcement. The Code on Social Security, 2020 has been enacted to amend and consolidate the laws relating to social security for employees/ workers in the organized and unorganised sector including gig workers and platform workers. However, like the Unorganised Workers Social Security Act ,2008 no concrete steps have been spelled out. Indeed, provisions have been framed in a recommendatory manner showing the legislator's intention instead of making it a mandate for its enforcement. Further the Code has failed to provide a right-based universal social protection floor for the unorganized sector.

This paper identifies the issues, shortcomings, and lacunae in the existing provisions in the Code on Social Security relating to social security for unorganised, gig and platform workers. The paper also examines how the Code

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has missed the opportunity to provide a right-based universal social protection floor for the unorganized sector. The author argues as to why we should have a law that is only on paper.

1. INTRODUCTION

Workers in the unorganised sector, who constitute 91% of the workforce, have been the most neglected and exploited class of human labour. There are no fixed working hours, holidays, leave, medical facility, occupational safety provisions and adequate social security. In practice they are sometimes denied even minimum wages. While there are 38 Central legislation and more than 100 State legislation, which seeks to regulate workers in the organized sector most. If not, all do not apply to a worker engaged in an unorganized sector. Even, these legislations have extremely limited coverage and lack enforcement.

As per the periodic Labour Force Survey carried out by the National Sample Survey Organization of the Ministry of Statistics & Programme Implementation in 2017-18, the total employment in both organized and unorganized sectors in the country was of the order of 47 crores. Out of this, about 9 crores are engaged in the unorganized sector and the balance is 38 crores in the unorganized sector[1]. The workers in the unorganized sector constitute more than 81 percent as per the Annual Report of the Ministry of Labour, Government of India of Labour of 2020-21 of the total employment in the country. However, this number is expected to have gone up due to Covid-19 and lockdown thereon[2]. A large number of unorganized workers are home based and are engaged in occupations such as beedi rolling, agarbatti making, papad making, tailoring and embroidery work, street vendors, mid-day meal workers, head loaders, brick kiln workers, cobblers, rag pickers, domestic workers, washermen, rickshaw pullers, landless

[1] Ministry of Labour & Employment, Government of India, *Annual Report* 2020-21, available at https://labour.gov.in/sites/default/files/Annual_Report_202021_English.pdf
[2] Ibid at 78

labourers, own account workers, agricultural workers, construction workers, handloom workers, leather workers, audio- visual workers and those engaged in similar occupations.

In recent years, a new category of gig workers and platform workers set its foot on India soil and received legal recognition under the Code of Social Security, 2020. In India, there are about 3 million gig workers that include temporary workers including independent contractors, online platform workers, contract firm workers, and on-call workers[3].

In order to provide social security to workers in the unorganized sector the Unorganised Workers' Social Security Act, 2008 (UWSS Act) was enacted. The Act came into force with effect from 16.05.2009. The Act seeks to provide social security and welfare to the unorganized workers and for other matters connected therewith or incidental thereto. The aforesaid Act has been subsumed in the Code on Social Security, 2020. The Code received the assent of the President on 29.09.2020. However, it has not yet come into force. The Code on Social Security, 2020 (CSS) not only seeks to provide social security and welfare for unorganized workers who were covered under the Unorganized Workers Social Security Act, 2008 but also specifically brought gig workers and platform workers under the ambit of social security schemes framed under CSS. Thus, for the first time in India the CSS defines and provides social security for gig and platform workers along with workers of the unorganised sector.

This paper seeks to examine the labour law reforms brought by the Code on Social Security, 2020 in regard to unorganized, gig and platform workers.

[3] *Gig Economy and platform workers under labor laws in India*, Forumias, available at https://blog.forumias.com/gig-and-platform-workers-under-labor-laws-in-india.

2. WHO IS AN UNORGANISED WORKER?

Section 2(86) of CSS defines “unorganised worker" means a home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organized sector who is not covered by the Industrial Disputes Act, 1947 or Chapters III to VII of CSS.

A perusal of the aforesaid definition reveals that the CSS adopted the definition of the same term under section 2 (m) of the Unorganised Workers Social Security Act, 2008 except that the words “any of the Acts mentioned in Schedule II of this Act” has substituted by “the Industrial Disputes Act, 1947 or Chapters III to VII of this Code”. Here it may be mentioned that as and when the four Labour Code would come into force the Industrial Disputes Act, 1947 would be subsumed into the Industrial Relations Code, 2020 and would then require further amendment.

A perusal of the aforesaid definition also requires description and analysis of:

- home-based worker,
- self-employed workers,
- wage worker,
- unorganized sector.

The inclusive part of the definition requires determination of the scope and coverage of the Industrial Disputes Act, 1947 and Chapters III to VII of this Code. Let us turn to examine them.

2.1. Home–based workers

Section 2(36) CSS has adopted the definition of "home-based worker" provided under section 2(e) of the UWSS Act except that in place of “his or her” it has

used only used “his” and, therefore, has provided a scope for argument based on gender issue Be that as it may "home-based worker" means a person engaged in the production of goods or services for an employer in his home or other premises of his choice other than the workplace of the employer, for remuneration, irrespective of whether or not the employer provides the equipment, materials or other inputs.

2.2. Self-employed workers

Section 2(75) of the CSC retained the definition of “self-employed worker" under section 2 (f) of the UWSS Act. It means any person who is not employed by an employer but engages himself in any occupation in the unorganised sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government, as the case may be, from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government.

2.3. Wage worker

Section 2 (90) of the CSC also retained the definition of "wage worker" under section 2 (n) of the UWSS Act. It means a person employed for remuneration in the unorganised sector, directly by an employer or through any contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home-based worker, or as a temporary or casual worker, or as a migrant worker, or workers employed by households including domestic workers, with a monthly wage of an amount as may be notified by the Central Government and the State Government, as the case may be.

Inclusive part of the definition:

The definition of unorganized workers also includes a worker in the organized sector who is not covered by any of the Acts mentioned in Schedule I to this Act, namely:

Industrial Disputes Act, 1947 or Chapters III to VII of this Code.

- Chapters III – Employees Provident Fund
- Chapters IV Employees State Insurance Corporation
- Chapters V- Gratuity
- Chapter VI- Maternity Benefit
- Chapter VII -Employee's Compensation

The aforesaid provision, in substance, has been adopted from section 2 (m) of the Unorganised Workers Social Security Act, 2008 (UWSS Act) except that Schedule I of the CSS unlike Schedule II of the UWSS Act has added Employees Compensation also. From this it appears that the provisions of the CSS in respect to unorganized workers would include those who are not covered by the Employees' Compensation. Thus, the provisions of the employee's compensation are not available to unorganized workers. This, in effect, curtails the scope of unorganized workers compared to the UWSS Act.

3. SCOPE AND APPLICABILITY OF THE CODE ON SOCIAL SECURITY IN UNORGANIZED SECTOR

The Code on Security Code, 2020 expands the scope of social security by providing for the registration of all types of workers including gig workers, unorganised workers, and platform workers.

As mentioned in part II the unorganised workers must be employed in the unorganised sector. It is, therefore, necessary to examine the concept and

definition of "unorganised sector". Section 2 (85) defines "unorganised sector" to mean an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.

An analysis of the aforesaid definition reveals that in order to be covered by the unorganised sector" there must be:

- An enterprise
- Such enterprise must be owned by:
  - Individuals or
  - Self-employed workers
- Such enterprises must be engaged in the
  - production or
  - sale of goods or
  - providing service of any kind whatsoever
- Where the enterprise employs workers, the number of such workers is less than ten. The aforesaid definition has been adopted from section 2 (l)[4] of the UWSS Act.

4. FRAMING OF SCHEMES FOR UNORGANISED WORKERS

4.1. By the Central Government

The CSS seeks to provide for the framing of schemes for unorganised workers. It imposes a duty upon the Central Government to formulate and notify, from

[4] According to Section 2 (l) of the Unorganised Workers Social Security Act, 2008 "unorganised sector" means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.

time to time, suitable welfare schemes for unorganised workers on matters relating to:

- life and disability cover.
- health and maternity benefits.
- old age protection.
- education; and
- any other benefit as may be determined by the Central Government.[5]

4.2. By the State Government

The CSS also imposes an obligation upon the State Government to formulate and notify, from time to time, suitable welfare schemes for unorganised workers, including schemes relating to

- provident fund.
- employment injury benefit.
- housing.
- educational schemes for children.
    - skill upgradation of workers
    - funeral assistance; and
- old age homes.[6]

Key Issues involved in the formulation of social security schemes for unorganized workers under section sub-section (1) and (2) of section 109

A perusal of the aforesaid provisions reveals that the aforesaid provisions merely enumerate the welfare schemes but have not specified the extent and procedure to enforce the same.

[5] S.109(1), The Code on Social Security, 2020.
[6] S.109(2), The Code on Social Security,2020.

A perusal of sub-sections (1) and (2) of section 109 of CSS also reveals that the Code assigns the subject on which Central and State governments will formulate social security schemes for unorganized workers. However, there are some overlapping of the welfare schemes to be notified between the Central Government on areas pertaining to old age protection and education.

A perusal of the aforesaid sub-sections further reveals that the CSS retains the provisions of section 3 (1) of the UWSS Act. But unlike UWSS Act it has added a new clause (iv) relating to education under section 109(1). This is a progressive measure on the subject.

A close examination of the aforesaid provisions also reveals that even though the title of the chapter is "Social Security to unorganized workers, gig Workers and platform Workers "the aforesaid sub-section, as mentioned therein, deals with the formulation of welfare scheme and not specifically the social security scheme. It is true that broadly speaking welfare provisions includes social security but in order to avoid any confusion and to be more precise it is felt that it should clearly specify social security or use both social security and welfare.

5. FUNDING OF SCHEME

5.1. By the Central Government

The scheme notified by the Central Government may be (i) wholly funded by the Central Government or (ii) partly funded by the Central Government and partly funded by the State Government or (iii) partly funded by the Central Government, partly funded by the State Government and partly funded through contributions collected from the beneficiaries of the scheme or the employers as may be specified in the scheme by the Central Government; or (iv) funded from any source including corporate social responsibility fund within the meaning of

the Companies Act, 2013 or (v) any other such source as may be specified in the scheme[7].

5.2. By the State Government

Like Central Government any scheme notified by the State Government[8] under section 109(2) may be (a) wholly funded by the State Government; or (b) partly funded by the State Government, partly funded through contributions collected from the beneficiaries of the scheme or the employers as may be specified in the scheme by the State Government; or (c) funded from any source including corporate social responsibility fund referred to in clause (iv) of sub-section (3) of section 109 or (d) any other such source as may be specified in the scheme. The State Government may also seek financial assistance from the Central Government for the schemes formulated by it and the Central Government may provide such financial assistance to the State Governments for the purpose of schemes for such period and on such terms and conditions as it may deem fit[9].

Key issues involved in funding from corporate social responsibility fund

Out of above clause (c) requires special consideration. Here it may be mentioned that under the Companies Act, 2013 every company having a net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.[10] Further every company, on which corporate social responsibility is applicable, shall ensure that it spends, in every financial

[7] Ibid, S. 109 (3).
[8] Supra 6.
[9] S.110, The Code on Social Security, 2020.
[10] Ibid, S. 135.

year, at least 2% of the average net profits of the company made during the 3 immediately preceding financial years.

The aforesaid provision was the subject-matter of debate before the Parliamentary Standing Committee on Labour while dealing with the Code in Social Security Bill. 2019. On the provisions of Clause 109(3)(iv) it was suggested that the Companies Act 2013 should be amended to levy an extra 1-2% over and above their CSR to contribute to the Fund for the Unorganised Workers directly and/or indirectly. It was further suggested that the Government should also consider levying a cess from the public. Both should finance unemployment assistance to the workers registered under the Social Security Organization as suitable. These are the policy matter to be determined by the government. However, there is a need to widen the scope of funding and to include specifically the amount collected by way of fine recovered in the process of composition of offences.

6. IMPLEMENTATION OF THE SCHEME

Every scheme notified by the Central Government[11] shall provide for such matters that are necessary for the efficient implementation of the scheme including the matters relating to all or any of the following:

- scope of the scheme.
- authority to implement the scheme.
- beneficiaries of the scheme.
- resources of the scheme.
- agency or agencies that will implement the scheme.
- redressal of grievances; and

[11] Ibid, S.109(1).

- any other relevant matter.[12]

The CSS also authorizes the Central Government to constitute a special purpose vehicle for the purpose of implementation of such scheme.

Key issues involved in the implementation of the social security schemes for unorganized workers

A perusal of section 110 of CSS reveals that it merely provides the matters that are necessary for the efficient implementation of the scheme. But it is felt that without any legal machinery to enforce the same it will neither bring the intended benefits for the unorganized workers nor widen the existing social security coverage. Thus, there is a need to ensure a legally binding universal social protection for all the workers in the unorganized sector within a definite time frame.[13] Further there is a need to specify the implementing authority at the State levels.

7. ADMINISTRATION OF SOCIAL SECURITY SCHEME FOR UNORGANISED WORKERS

The CSS imposes a duty upon the Central Government to administer the social security scheme for unorganised workers at the national level. Likewise, State Government is required to administer the social security scheme for unorganised workers at the State level.

7.1. Administration at National Level

In order to administer the social security scheme the Central Government is required to constitute the National Social Security Board for unorganised workers to (a) recommend to the Central Government for formulating suitable schemes for different sections of unorganised workers, gig workers and platform

[12] S.109 (4) The Code on Social Security, 2020.
[13] Standing Committee on Labour, Lok Sabha, *Code on Social Security*, 2019.

workers; (b) advise the Central Government on such matters arising out of the administration of this Code as may be referred to it; (c) monitor such social welfare schemes for unorganised workers, gig workers and platform workers as are administered by the Central Government (d) review the record keeping functions performed at the State level (e) review the expenditure from the fund and account; and (f) undertake such other functions as are assigned to it by the Central Government from time to time.[14]

The Central Government is also required to constitute one or more advisory committees to advise it upon matters arising out of the administration of this Code relating to unorganised workers and such other matters as referred to it for advice.[15]

7.1.1. Composition of the National Social Security Board

The National Social Security Board shall consist of (a) Union Minister for Labour and Employment as Chairperson; (b) Secretary, Ministry of Labour and Employment as Vice-Chairperson; and (c) forty members to be nominated by the Central Government, out of whom (i) seven members representing unorganised sector workers; (ii) seven members representing employers of the unorganised sector; (iii) seven members representing eminent persons from civil society; (iv) two members representing the Lok Sabha and one from the Rajya Sabha; (v) ten members representing Central Government Ministries and Departments concerned; (vi) five members representing State Governments; (vii) one member representing the Union territories; and (d)the Director General Labour Welfare, as Member Secretary, ex officio.[16]

7.1.2. Who may be nominated as members?

[14] S. 6(7) The Code on Social Security, 2020.
[15] Ibid, S. 6(8).
[16] S. 6(2) The Code on Social Security, 2020.

All forty members to be nominated by the Central Government, except Chairperson of the National Social Security Board shall be from amongst persons of eminence in the fields of labour welfare, management, finance, law, and administration.[17] However adequate representation must be given to persons belonging to the Scheduled Castes, the Scheduled Tribes, the minorities, and women[18].

7.1.3. Terms and conditions of appointment as members

The term of office and other conditions of service of members, the procedure to be followed in the discharge of their functions by, and the manner of filling vacancies among the members of, the National Social Security Board shall be such as may be prescribed by the Central Government[19].

The term of the National Social Security Board shall be three years[20]. The National Social Security Board shall meet at least thrice a year, at such time and place and shall observe such rules of procedure relating to the transaction of business at its meetings, as may be prescribed by the Central Government.[21]

7.2. ADMINISTRATION AT STATE LEVEL

At the State level every State Government is required to constitute a State Unorganised Workers' Social Security Board to:

- recommend the State Government in formulating suitable schemes for different sections of the unorganised sector workers.
- advise the State Government on such matters arising out of the administration of this Code as may be referred to it.

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[17] Ibid, S. 6(3).
[18] Ibid, S. 6(4) proviso.
[19] S. 6(4) The Code on Social Security, 2020.
[20] Ibid, S. 6(5).
[21] Ibid, S. 6(6).

- monitor such social welfare schemes for unorganised workers as are administered by the State Government.
- review the record keeping functions performed at the district level.
- review the progress of registration and issue of cards to unorganised sector workers.
- review the expenditure from the funds under various schemes; and
- undertake such other functions as are assigned to it by the State Government from time to time[22].

7.2.1. Composition of State Unorganised Workers' Board

Every State Unorganised Workers' Board shall consist of:

- Minister of Labour and Employment of the concerned State as Chairperson, ex officio
- Principal Secretary or Secretary (Labour) as Vice-Chairperson
- one member representing the Central Government in the Ministry of Labour and Employment
- thirty-one members to be nominated by the State Government, out of whom:
- seven representing the unorganised workers.
- seven representing employers of unorganised workers.
- two members representing the Legislative Assembly of the concerned State.
- five members representing eminent persons from civil society.

[22] S. 6(15) The Code on Social Security, 2020.

- ten members representing the State Government Departments concerned and (e) Member Secretary as notified by the State Government.[23]

7.2.2. Nomination, Representation, Terms of office and procedure for holding a meeting

All members (except Chairperson) of the State Unorganised Workers' Board shall be nominated from amongst persons of eminence in the fields of labour welfare, management, finance, law, and administration[24]. However adequate representation should be given to persons belonging to the Scheduled Castes, the Scheduled Tribes, the minorities, and women[25]. The term of the State Unorganised Workers' Board shall be three years[26]. The State Unorganised Workers' Board shall meet at least once in a quarter at such time and place and shall observe such rules of procedure relating to the transaction of business at its meetings, as may be prescribed by the State Government.[27]

Disqualification, removal, the resignation of a member and supersession and re-constitution of Social Security Organization at national and State levels

A member of any Social Security Organization (i) would be disqualified to hold such office (ii) removed (iii) shall cease to hold office (iv) resign and (v) are the prohibition to take part in any proceeding or decision of the Social Security Organization or a Committee. Further the CSS prescribes the procedure for transaction of business of Social Security Organization, etc. Moreover, CSS

[23] Ibid, S. 6(10).
[24] Ibid, S. 6(11).
[25] Ibid, S. 6(12) proviso
[26] S. 6(13) The Code on Social Security, 2020.
[27] S. 6(14) The Code on Social Security, 2020.

further provides for supersession and re-constitution of Social Security Organization at national and State levels. Let us turn to examine them.

7.2.3. Disqualification of a member of any Social Security Organization

No person shall be chosen as, or continue to be, a member of a Social Security Organization, or any Committee thereof who:

- is or at any time has been adjudged an insolvent or
- is found to be a lunatic or becomes of unsound mind; or
- is or has been convicted of any offence involving moral turpitude or
- is an employer in an establishment and has defaulted in the payment of any dues under this Code?
- is a member of a Social Security Organization a member of the Parliament or a member of a State Legislative Assembly, when he ceases to be such member of the Parliament or State Legislative Assembly, as the case may be or
- is a member of Social Security Organization being a member of the Parliament or a member of a State Legislative Assembly, and he becomes a?
    - Minister of Central or State Government; or
    - Speaker/Deputy Speaker of House of the People or State Legislative Assembly; or
    - Deputy Chairman of the Council of States.[28]

The aforesaid disqualification shall not apply in the case of persons who are members of the Social Security Organization ex officio, by virtue of being a Minister.[29]

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[28] Ibid, S. 8.
[29] Ibid, S. 8 Exp 2.

If any question arises whether any person is disqualified under clause (d), it shall be referred to the appropriate Government and the decision of the appropriate Government on any such question shall be final[30].

7.2.4. When can a member be removed?

The CSS empowers the Central Government to remove a member of the National Social Security Board from his office who:

- remains absent without leave of the Social Security Organization of which he is a member for more than three consecutive meetings of the Social Security Organization or a Committee thereof or.
- has abused the position of his office so as to render that member's continuation in the office detrimental to the public interest or.
- is otherwise unfit or unsuitable to continue as such member in the opinion of such Government.[31]

However, no person shall be removed under clauses (b) and (c), unless that person has been given an opportunity to show cause as to why he should not be removed.[32]

7.2.5. When a member would cease to hold office

If in a Social Security Organization or a Committee thereof, the Central Government or the State Government, as the case may be, is of the opinion that:

- any member thereof representing employers or the employees or the unorganised workers, as the case may be, ceases to adequately represent so; or

[30] S. 8, Exp 1 The Code on Social Security, 2020.
[31] Ibid, S 8(2).
[32] Ibid, S 8(2) first proviso.

- any member thereof representing to be an expert in a specified area, is, later on, found not to possess sufficient expertise in that area; or
- having regard to exigencies of circumstances or services in such Government, the member thereof representing such Government cannot continue to represent the Government; then, such Government may, by order, remove such member from his office.[33]

But such person shall, however, not be removed under clause (a) or clause (b), unless that person has been given an opportunity to show cause as to why he should not be removed.[34]

7.2.6. When a member of the Executive Committee of the Central Board or the Standing Committee of the Corporation shall cease to hold office

A member of the Executive Committee of the Central Board or the Standing Committee of the Corporation shall cease to hold office if he ceases to be a member of the Central Board or the Corporation, as the case may be.[35]

7.2.7. Resignation by members

Any member of a Social Security Organization or a Committee thereof may at any time resign from his office in writing under his hand addressed to the Central Government or the State Government, as the case may be, which had made his appointment and on acceptance of such resignation, his office shall become vacant[36].

7.2.8. Prohibition to take part by a member in any proceeding or decision of the Social Security Organization or a Committee

[33] S. 8(4), The Code on Social Security, 2020.
[34] Ibid, S. 8(3) proviso.
[35] S. 8(2) second proviso, The Code on Social Security, 2020.
[36] S. 8(3), The Code on Social Security,2020

If any member of a Social Security Organization or a Committee thereof, who is a director of a company and who as such director, has any direct or indirect pecuniary interest in any matter coming up for consideration of the Social Security Organization or a Committee thereof, then, he shall, as soon as may be possible after such fact of interest has come to his knowledge, disclose the nature of the interest and such disclosure shall be recorded in the proceedings of the Social Security Organization or the Committee thereof, as the case may be, and such member, thereafter, shall not take part in any proceeding or decision of the Social Security Organization, or a Committee thereof relating to that matter[37].

7.2.9. Procedure for the transaction of business of Social Security Organization

- A Social Security Organization or any Committee thereof shall meet at such intervals and follow such procedure in regard to the transaction of business at its meetings (including the quorum at such meetings) as may be prescribed by the Central Government.[38]

- All orders and decisions of the Social Security Organization shall be authenticated by such officer as may be notified by the appropriate Government and all other instruments issued by the Social Security Organization shall be authenticated by the signature of such officer as may be authorized by an order by the respective Social Security Organizations.[39]

- No act done or proceeding taken by a Social Security Organization or any Committee thereof shall be questioned on the ground merely of the

[37] Ibid, S. 8(5).
[38] Ibid, S. 9(1).
[39] Ibid, S. 9(2).

existence of any vacancy in, or any defect in the constitution of the Social Security Organization or the Committee thereof, as the case may be. [40]

- The members of a Social Security Organization or any Committee thereof shall be entitled to such fee and allowances as may be prescribed by the Central Government.[41]

7.2.10. Supersession and Re-constitution of Corporation, Central Board, National Social Security Board or State Unorganised Workers' Board

The CSS authorizes the Central Government in case of the National Social Security Board and the State Government in case of the State Unorganised Workers' Board to supersede the National Social Security Board or the State Unorganised Workers' Board if it is:

- unable to perform its functions, or,
- has persistently made delay in the discharge of its functions or
- has exceeded or abused its powers or jurisdiction.

However, before issuing a notification such Government is required to give an opportunity to such National Social Security Board or the State Unorganised Workers Board or any Committee thereof, as the case may be, to show cause as to why it should not be superseded and consider the explanations and objections raised by it and take appropriate action thereon.[42]

After the supersession of the National Social Security Board, the State Unorganised Workers' Board as the case may be, and until it is reconstituted, the Central Government or the State Government, as the case may be, shall make

[40] Ibid, S. 9(3).
[41] S. 9(4), The Code on Social Security, 2020.
[42] Ibid, S. 11(1).

such alternate arrangements for the purpose of administration of the relevant provisions of this Code, as may be prescribed by the Central Government.[43]

In the aforesaid situation the Central Government or the State Government, as the case may be, shall cause, a full report of any action taken by it under this section and the circumstances leading to such action, to be laid before each House of Parliament or the State Legislature, as the case may be, at the earliest opportunity and in any case not later than three months from the date of the notification of supersession issued.[44]

7.2.11. Entrustment of additional functions to Social Security Organizations

The CSS empowers the Central Government to assign additional functions to a Social Security Organization including administration of any other Act or scheme relating to social security subject to such provisions as may be specified on this behalf in the notification.[45] Where the Central Government assign additional functions it may specify:

- the terms and conditions of discharging the functions by the Social Security Organization.
- the expenditure incurred in discharging the functions including appointment or engagement of personnel necessary for the proper discharge of such functions shall be borne by the Central Government.

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[43] Ibid, S. 11(2).
[44] Ibid, S. 11(3).
[45] A Social Security Organization, the officer or authority of such organization, to whom such function has been assigned, shall exercise the powers under the enactment or scheme required for discharging such function in the manner as may be specified in the notification. Further, the Social Security Organizations may assign such additional functions to existing officers or appoint or engage new officers necessary for such purpose, if such functions may not be performed and completed with the assistance of its personnel as existing immediately before the assignment of the additional functions.

- the powers which the Social Security Organization shall exercise while discharging the functions specified in clause (i).

In the aforesaid situation any expenditure incurred for the aforesaid purposes shall be made by the Social Security Organization after prior approval of the Central Government[46].

The CSS like UWSS Act confers upon the National Social Security Board a limited power to recommend suitable schemes, advise monitor the social welfare scheme or review the progress of registration. However, it is not empowered to implement or enforce social security

7.3. Gig workers and Platform Workers

The gig and platform economy in recent years has occupied a significant place in the Indian economy and gig and platform workers have formed part of the work force in India since 2018. The nature of engagement of gig workers and platform workers is similar to short term contracts or freelance work as opposed to permanent jobs. It often involves connecting with customers through an online platform such as delivery boys of app-based food, consultants, bloggers. The platform work economy is sometimes referred to as the gig worker economy, but gig economy is a broader term that includes platforms. The platform economy is also known as the digital economy. Here the distribution of, and access to work is made through websites and apps.

In India, there are about 3 million gig workers that include temporary workers including independent contractors, online platform workers, contract firm workers, and on-call workers.[47] The Associated Chambers of Commerce and Industry in India (ASSOCHAM) has projected that India's gig economy would

[46] S. 13 The Code on Social Security, 2020.
[47] Supra 3.

grow at a compounded annual rate of 17% to reach $455 billion by 2023, according to Economic Times[48]. However, gig and platform workers constitute a very small percentage of the labour force in the unorganized sector but have occupied an equal if not better place under the Code of Social Security, 2020. Maybe this is not solely because they are not getting adequate wages or social security benefits but because they are more united than unorganized workers. This is all the more so when there are no traditional employer employee relations. Moreover, the Unorganized Workers Social Security Act, 2008 is not applicable to gig and platform workers. Nevertheless, gig workers and platform workers for the first time received legal recognition under the Code on Social Security, 2020.

7.3.1. Who are gig worker and platform worker?

Section 2 (35) of CSS defines "gig worker" to mean a person who performs work or participates in a work arrangement and earns from such activities outside of the traditional employer-employee relationship.

Section 2 (61) defines "platform worker" to mean a person engaged in or undertaking platform work.

The platform work means a work arrangement outside of a traditional employer employee relationship in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment[49].

7.3.2. Who is aggregator?

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[48] Sumathi Bala, *Already under massive stress from the virus, more Indian workers turn to 'gig economy' livelihoods*, CNBC (13/05/2021), available at https://www.cnbc.com/2021/05/14/india-jobs-workers-turn-to-gig-economy-jobs-amid-coronavirus-crisis.html

[49] S. 2 (60) The Code on Social Security,2020

Section 2(2) defines "aggregator" to mean a digital intermediary or a marketplace for a buyer or user of a service to connect with the seller or the service provider.

7.3.3. Schemes for gig workers and platform workers

The CSS[50] empowers the Central Government to formulate and notify, from time to time, suitable social security schemes for gig workers and platform workers relating to:

- life and disability cover.
- accident insurance.
- health and maternity benefits.
- old age protection.
- crèche; and
- any other benefit as may be determined by the Central Government.

7.3.3.1. Provisions to be incorporated in the social security schemes

Under CSS every scheme formulated and notified as mentioned above may provide for:

- the manner of administration of the scheme.
- the agency or agencies for implementing the scheme.
- the role of aggregators in the scheme.
- the sources of funding of the scheme; and
- any other matter as the Central Government may consider necessary for the efficient administration of the scheme.[51]

[50] Ibid, S. 114(1).
[51] S. 114(2), The Code on Social Security,2020.

7.3.3.2. Funding of Social security schemes

Any scheme notified by the Central Government for gig and platform workers may be:

- wholly funded by the Central Government; or
- partly funded by the Central Government and partly funded by the State Government; or
- wholly funded by the contributions of the aggregators; or
- partly funded by the Central Government, partly funded by the State Government, and partly funded through contributions collected from the beneficiaries of the scheme or the aggregators, as may be specified in the scheme formulated by the Central Government; or
- funded from corporate social responsibility fund within the meaning of Companies Act, 2013; or
- any other source.

7.3.3.3. Scope of clauses (c) and (d)

A perusal of the aforesaid provisions reveals that the source of funds for gig workers and platform workers unlike unorganised workers also include funds received wholly funded by the contributions of the aggregators and partly funded through contributions collected from the beneficiaries of the scheme or the aggregators. The contribution to be paid by the aggregators for the funding to social security schemes for gig workers and platform workers shall be at such rate not exceeding two per cent, but not less than one per cent, as may be notified by the Central Government, of the annual turnover[52] of every such aggregator who falls within a category of aggregator specified in the Seventh Schedule[53].

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[52] See Explanation to S. 114(4) The Code on Social Security,2020

[53] The Seventh Schedule of The Code on Social Security,2020 specifies following classification of Aggregator:

However, the contribution by an aggregator shall not exceed five percent of the amount paid or payable by an aggregator to gig workers and platform workers[54]. The date of commencement of contribution from aggregator shall be notified by the Central Government. [55]

7.4. Administration of Social security schemes for gig workers and platform workers

The Social security schemes for gig workers and platform workers are required to be administered by the National Social Security Board constituted under sub-section (1) of section 6, but for the purposes of the welfare of gig workers and platform workers the following members shall constitute the Board instead of the members specified in clauses (c) and (d) of sub-section (2) of section 6, namely: —

- five representatives of the aggregators as the Central Government may nominate.
- five representatives of the gig workers and platform workers as the Central Government may nominate.
- Director General of the Corporation; (d) Central Provident Fund Commissioner of the Central Board.

Sl. No. Classification of Aggregator

1. Ride sharing services
2. Food and grocery delivery services
3. Logistic services
4. E-Market place (both market place and inventory model) for wholesale/ retail sale of goods and/or services (B2B/B2C)
5. Professional services provider
6. Healthcare
7. Travel and hospitality
8. Content and media services
9. Any other goods and service provider platform

[54] S. 114(4), The Code on Social Security, 2020.
[55] Ibid, S. 114(5).

- such expert members as the Central Government may consider appropriate.
- five representatives of the State Governments by such rotation as the Central Government may consider appropriate.
- Joint Secretary to the Government of India in the Ministry of Labour and Employment, who shall be the member secretary to the Board.[56]

The aforesaid provisions show that CSS provides for a separate board for unorganised workers and gig/platform workers. A close examination of the relevant provisions of CSS shows that there is overlapping.

7.5. Duty of Central Government to provide details for the functioning of the social security scheme

The CSS imposes a duty upon the Central Government to provide for:

- the authority to collect and to expend the proceeds of contribution collected.
- the rate of interest to be paid by an aggregator in case of delayed payment, less payment or non-payment of contribution.
- self-assessment of contribution by aggregators.
- conditions for the cessation of a gig worker or a platform worker; and
- any other matter relating to the smooth functioning of the social security scheme notified by the Government.[57]

[56] Ibid, S. 114(6).
[57] S. 114(7) (i) The Code on Social Security,2020.

7.6. Powers of the Central Government to exempt aggregator or class of aggregators

The CSS empowers the Central Government to exempt an aggregator or class of aggregators from paying of contribution under section 114 (4), subject to such conditions as may be specified in the notification.[58]

7.7. Determination of a separate business entity of aggregator

For the purposes of section 114 of CSS, an aggregator having more than one business shall be treated as a separate business entity of aggregator.[59]

7.8. Application of Employees' State Insurance Act, 1948 and CSS to gig and platform workers

The Government's policy to extend the provisions of the Employees' Estate Insurance Corporation and payment of minimum wages to gig workers and platform workers is best stated by the Finance Minister Mrs. Nirmala Sitharaman while presenting a budget speech for the year 2020-21 when she observed that" for the first time globally, social security benefits will extend to gig and platform workers, and they will be covered by the Employees State Insurance Corporation. Accordingly, 50 lakh gig workers under ESIC are to be brought under the social security net.[60].

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[58] Ibid, S. 114(7) (ii).
[59] Ibid, S. 114 Explanation.
[60] *50 lakh gig workers under ESIC to be brought under social security net*, Financial Express (13/03/2021) https://www.financialexpress.com/economy/50-lakh-gig-workers-under-esic-to-be-brought-under-social-security-net/2211492

7.9. Registration of unorganised workers, gig workers and platform workers.

The CSS mandates for compulsory registration of unorganised workers, gig workers and platform workers for the purposes of Chapter IX.

7.9.1. Conditions for registration of unorganised worker, gig workers and platform

The registration of unorganised worker, gig workers and platform workers shall be made on the fulfilment of the following conditions, namely:

- he has completed sixteen years of age, or such age as may be prescribed by the Central Government,
- he has submitted a self-declaration electronically or otherwise in such form and in such manner containing such information as may be prescribed by the Central Government.[61]

7.9.2. Procedure for obtaining registration

The CSS provides that every eligible unorganized worker, gig worker or platform worker shall make an application for registration in the form prescribed by the Central Government along with such documents including Aadhaar numbers as may be prescribed by the Central Government, to the registering authority.

On receipt of the application such unorganised worker shall be registered by registering authority and be assigned a distinguishable number to his application or link the application to the Aadhaar number.

7.9.3. Portability

[61] S. 113 The Code on Social Security, 2020.

As regard portability, the same is to be maintained through Aadhaar number which is to be obtained at the time of registration of a member/beneficiary or at the time of availing of benefits. Through the seeding of Aadhaar in the registration database, portability can be achieved.

7.9.4. Self-Registration

The system of electronic registration maintained by the appropriate Government shall also provide for self-registration by any such worker in such manner as may be prescribed by the Central Government. On registration a registered unorganised worker, gig worker or platform worker shall be eligible to avail the benefit of the scheme (i) framed under CSS, (ii) framed the Central Government, or the State Government.

7.10. Helpline, facilitation center, etc., for unorganised workers, gig workers and platform workers

In order to (i) facilitate filing, processing and forwarding of application forms for registration of unorganised workers, gig workers and platform workers, (ii) assist unorganised workers, gig workers and platform workers to obtain registration; and (d) to facilitate the enrolment of the registered unorganised workers, gig workers and platform workers in the social security schemes the CSS empowers the appropriate Government to set up a toll free call center or helpline or such facilitation centers.[62]

7.11. Key issues relating to registration of unorganized workers

Under the Unorganized Workers Social Security Act, 2008 in several States, unorganised workers are registered on the State portal. A question, therefore, arises whether on the commencement of the Code on Social Security, 2020 registered unorganized workers' data on the State portal will be transferred to

[62] S.112 The Code on Social Security, 2020.

the Central portal to be set up under CSS or unorganized workers would be required again to register themselves under CSS. The CSS is silent on this issue.

The second issue relates to difficulties faced by most of the unorganized workers who do not possess the skill or knowledge to make online registration.

The third issue relates to linking Aadhar to the registration of workers. It has been asserted by some stakeholders that the linking of the application for registration solely with Aadhaar cards may pose challenges. They also suggested that it should be the responsibility of the Central Government to provide and maintain a database for the registration of the unorganised workers. Further, it has often been condensed by some stakeholders that portability of the benefits of the unorganised workers in case of their movement from one State to other and promoting a single point of contact for beneficiaries to avail social security benefit should be ensured by the Central government. In response, the Ministry of Labour and Employment, Government of India stated as under:

"Clause 113 (2) of the Code provides that every eligible unorganized worker under sub-section (1) of clause 113 shall make an application for registration in such form along with such documents, to such registering authority as may be prescribed by the Central Government and such unorganised worker shall be registered by such registering authority by assigning a distinguishable number to his application or by linking the application to the Aadhaar number. As regard portability, the same is to be maintained through the Aadhaar number which is to be obtained at the time of registration of a member/beneficiary or at the time of availing of benefits. Through the seeding of Aadhaar in the registration database, portability can be achieved."[63]

[63] Supra 13 at paras 13.32 & 13 .37.

The fourth issue relates to the delay involved in the process of registration p by several State Governments. This is so because in order to avail the social security and welfare facilities registration of unorganised workers is mandatory. But despite the direction issued by the Supreme Court[64] the State Government did not take adequate measures to comply with the orders. In view of this the apex Court directed the Centre not to disburse any grants to the states which have not registered domestic workers under the Unorganised Workers Social Security Act. The directions to the Centre came on a petition filed by NGO Shramjeevi Mahila Samiti, which had told the court that despite the Act coming into force in 2008 and framing of several schemes, no domestic worker had enjoyed their benefits.

8. MANDATORY REQUIREMENT OF AADHAR CARD FOR AVAILING VARIOUS BENEFITS

The CSS,[65] as observed earlier, imposes an obligation upon an employee , unorganised worker or any other person, to establish his identity or, as the case may be, to establish the identity of his family members or dependents through Aadhaar number not only for registration but also for seeking benefit whether in cash or kind for medical/ sickness, pension, gratuity or maternity benefit or any other benefit or for withdrawal of fund or availing services of career center; or receiving any payment or medical attendance as insured person himself or for his dependents, under CSS or rules, regulations or schemes made or framed thereunder.

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[64] *Domestic Workers Registration: Supreme Court ask Government not to give funds to States,* Economic Times (31/05/2018) available at https://economictimes.indiatimes.com/news/politics-and-nation/domestic-workers-registration-supreme-court-asks-govt-not-to-give-funds-to-states/articleshow/64404124.cms

[65] S.142 The Code on Social Security, 2020.

The aforesaid provision of CSS unlike other provisions contained therein has come into effect with effect from 3rd May,2021.[66]

The validity of linking the application for registration with Aadhaar cards was upheld by the Constitution Bench of the Supreme Court in *K.S. Puttaswamy (Retd.) v. Union of India.*[67] The Court ruled that

(i) the requirement of mandatorily linking Aadhaar with PAN is valid on the basis of legitimate State interest and satisfying the proportionality principle.

(ii) The requirement of mandatorily linking Aadhaar to the bank account numbers was held not to be valid as didn't satisfy the proportionality test.

(iii) The requirement of mandatorily linking Aadhaar to mobile numbers was also held invalid as served as an encroachment on individual liberties.

(iv) Aadhar is not mandatory for digital wallets.

9. RIGHTS BASED UNIVERSAL SOCIAL SECURITY SYSTEM

We now turn to examine whether the Code on Social Security provides rights based universal social security system. This is necessary because unorganised workers constitute 91 per cent of India's workforce. This issue was raised before the Parliamentary Standing Committee on Labour to whom the reference was made by the Lok Sabha to consider the Code on Social Security Bill, 2019. When the Standing Committee asked the Ministry of Labour and Employment, Government of India to explain the specific reasons for omitting the aforesaid

[66] The Central Government has notified section 142 of the Social Security Code, 2020 with effect from 3.5.2021. The extension of date for Aadhaar number requirement would not have been possible unless the representation was made by Labour Law Reporter on 3rd June 2021 followed with writ petition filed in Delhi High Court by Association of Industries & Institutions. Consequently, EPFO has amended ECR filing protocol and from 1.9.2021. [See llr@jditech.in via sendpulse. email dated 20 June,2021]

[67] *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

commitment towards rights based universal social security system the Ministry clarified as under:

The exercise of codification of social security legislations has been going on since the beginning of the year 2017. The 1st draft on Social Security was placed on the website for inviting comments/suggestions of various stakeholders including of general public on 16th March 2017. After considering the comments from various stakeholders, a revised draft Code was uploaded on the website of the Ministry on 1st March 2018 (called 2nd draft). This draft essentially sought to delegate the functions of Employees Provident Fund Organization (EPFO) and Employees State Insurance Corporation (ESIC) to the State Governments. This was opposed by trade unions as they were not in agreement for dismantling the existing structure of EPFO and ESIC but wanted universalization of social security to all, as proposed in the Code. After opposition of trade unions and revisiting of matter in the Ministry, 3rd draft was circulated on 16th November 2018 excluding EPFO and ESIC. Representatives of trade unions again objected that with the exclusion of EPF and ESIC, the draft Code has no meaning. Finally, the current draft was circulated to all State Governments and Union Territories on 17th September 2019 and was also placed on the website for seeking comments of all stakeholders, including from the public. This Code has different provisions from all the previous codes as it retains Employees Provident Fund Organization and Employees State Insurance Corporation in the central sphere as it exists today.

Whatever may the explanation the CSS failed to provide universal social security. In India although the Constitution does not recognize it as a fundamental right, the Supreme Court[68] has ruled that the right to livelihood is inherent in the right to life which is a fundamental right. As the ultimate object

[68] *Paschim Bangla Khet Mazoor Samiti v. State of West Bengal* 1996(4) SCC 37.

of social security is to assure everyone the means of livelihood it follows that the right to social security is also inherent in the right to life. In *Paschim Bangla Khet Mazdoor Samiti v. State of West Bengal*[69] the Supreme Court held that Article 21 of the Constitution imposes an obligation on the State to safeguard the right to life of every person and, therefore, failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21 of the Constitution. Further, the Court ordered that primary health care centers be equipped to deal with medical emergencies

Dealing with the ratification of the ILO Convention the Study Group on Social Security constituted by the Second National Commission on Labour felt that it might not be possible to ratify all the Conventions of the ILO immediately, but it is desirable to plan for their eventual ratification by upgrading laws and practices, beginning with the Minimum Standard Convention. The Second National Commission on labour endorses the view of the Study Group. The Study Group on Social Security also felt that in view of the fact that the right to social security is regarded as one of the basic human rights the Government of India had recognized it as such by ratifying the Covenant on Social Economic and Cultural Rights social security it should be given the status of a fundamental right under the Constitution of India and necessary resources should be allocated to it. The Study Group accordingly suggested that the National Commission on Labour should make a strong recommendation for amendment of the Constitution so as to make it a fundamental right[70].

In view of the above it is felt that a right based universal social protection floor for the unorganized sector should be put in place, which was envisaged in the

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[69] Ibid.

[70] Ministry of Labour and Employment, Government of India, *Report by National Commission on Labour on Social Security,* 2002 at para 13.3

second draft version of the Social Security Code Bill which the Government withdrew for reasons not known after soliciting public comments. To begin with minimum standards of social security be identified and be given as a matter of right. This is all the more so because "since 2018, India's working age population (people between 15 and 64 years of age) has grown larger than the dependent population-children aged 14 or below as well as people above 65 years. This bulge in the working population is going to last till 2055".[71]

10. ROAD MAP TOWARDS A RIGHT BASED SOCIAL SECURITY

Having said that the Code on Social Security, 2020 failed to provide rights based universal social security system it is necessary to examine whether there is a road map towards a right based social security for all workers. The social security schemes currently operating in India are the Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY) and Pradhan Mantri Suraksha Bima Yojana (PMSBY) which provide insurance cover to a set of unorganised workers, Pradhan Mantri Shram Yogi Maan-dhan (PMSYM) provides a pension scheme to the Unorganised Workers and National Pension Scheme for Traders, Shopkeeper and Self-Employed Persons is a voluntary and contributory pension scheme.

The Pradhan Mantri Suraksha Bima Yojana (PMSBY) provide insurance cover to a set of unorganised workers. It provides life insurance cover of Rs. 2 lakhs on payment of premium of Rs. 330 per annum for the age group of 18 to 50 years. The insurance coverage covers accidental death or full disability. The scheme also provides insurance coverage of Rs. 1 lakh on partial disability on payment of a premium of Rs. 12 per annum for the age group 18 to 70 years. It

[71] Atul Thakur, *India enters 37-year period of Demographic Dividend*, Economic Times (22/07/2019), available at https://economictimes.indiatimes.com/news/economy/indicators/india-enters-37-year-period-of-demographic-dividend/articleshow/70324782.cms.

has been reported that around 2.66 Crore beneficiaries were covered under these schemes during the Insurance cycle year 2019-20.[72]

Pradhan Mantri Shram Yogi Maan-dhan (PMSYM) is a pension scheme for unorganised workers which has been introduced by the Government of India to provide old age protection to Unorganised Workers. The enrolment under the scheme started on 15 February 2019 and was formally launched by the Hon'ble Prime Minister on 5 March 2019. As of 20.01.2021, over 45 Lakhs beneficiaries have been registered under the scheme. It is a voluntary contributory pension scheme.[73]

The National Pension Scheme for Traders, Shopkeepers and Self-Employed Persons was launched on 12.09.2019. It is also a voluntary and contributory pension scheme. In this scheme the annual turnover should not exceed Rs. 1.5 Crore and the subscribers should not be a member of EPFO/ESIC/NPS/ PM-SYM. As of 20.01.2021 around 43,000 beneficiaries have been registered under the prescribed scheme. The Scheme is being implemented through the LIC of India and Common Services Centers.[74]

The aforesaid scheme no doubt provides social security but the scope and coverage of even such schemes are extremely limited and that too without any legal framework.

11. CONCLUSION

Making social security schemes accessible to the unorganized sector is a major challenge. This is all the more so because about 91 percent of the workforce are in an unorganized sector and to whom there is no legally enforceable social protection and social security. Thus, there is an urgent need to provide social

[72] Ministry of Labour & Employment, Government of India, *Annual Report*, 2020-21 at 80.
[73] Ibid.
[74] Id. at 81.

security to all the unorganized workers subject to certain ceilings on income specified from time to time. It is all the more so because, social security and minimum standards of employment are inherent in the "right to life" which includes the right to livelihood. Further, social security is based on the ideal of human dignity and social justice. It provides for social security against risks of want, disease, ignorance, squalor and idealness by social insurance and social assistance or a combination of all or any of these devises. Thus, denial of social security would be against human rights, the right to life, human dignity, and social justice.[75]

The Code on Social Security, 2020 aims to provide social security to unorganised workers but like the Unorganised Workers Social Security Act, 2008 no concrete steps have been spelt out. Indeed, provisions made in CSS are of a recommendatory nature instead of a mandatory one.

Experience shows that the Unorganised Workers Act, 2008 failed to provide social security to unorganised workers. As per the report of the Parliamentary Standing Committee on Labour even after 12 years of the enactment of the UWSS Act, only six percent of the unorganized workers are covered under one or another form of social security.[76] The Code on Social Security, 2008, by and large retains the provisions contained therein in regard to unorganised workers. It has also largely retained usual administrative clauses of the UWSSA 2008 in Chapter IX and Chapter II of the CSS without any legal framework. Further it has not brought legally enforceable social security benefits for the unorganized workers. This creates an apprehension in one's mind that the CSS may not see a fate similar to one under the UWSS Act regarding the coverage of social security for unorganised workers.

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[75] S.C. Srivastava, *Legal Protection and Social Security in unorganized sector*, 230-231(The Book Line, 2017).
[76] Supra 13 at para 13.3.

The social security fund for workers in the unorganised sector lack firm commitment on the part of the Government. Thus, there is a need to specify the amount or percentage of contributions to be made by the Central Government or State Governments. The Code may also provide the guidelines for diversion of funds from corporate social responsibility, donations and other sources. Further the amount collected from a compounding of fines for offences committed under the provisions of the CSS should form part of the funding and be specifically included in CSS or else be brought under any other source, as recommended by the Parliamentary Standing Committee on Labour.

The Central Government should upkeep the database at the national level for all the unorganised sector workers and in particular ensure that in case of movement of unorganised workers from one State to another, the projected benefits are actually extended to them. Further, this data base should be technologically linked with the data base of such workers whether they are self-employed such as street vendors, casual and daily wagers.

There is a need to make provisions for unemployment insurance for unorganized workers.[77] This is the need of the hour particularly during lock down due to the Covid-19 pandemic.

[77] Ibid.

EUROPEAN LABOUR POLICIES FOR CHANGE: UNIVERSALITIES AND PECULIARITIES

Prof. Tiziano Treu* [1]

Abstract

This paper talks about the approach of the European Union towards the challenges to the labour policies. The European model represents a quite unique approach to supranational labour regulations, legally more stringent than other forms, bilateral treaties, and the like. This peculiar approach allows for multilevel regulatory interventions, national and European, on most labour and social policy issues. Apart from these differences the major problems faced by European policy makers are common to other developed countries. This paper highlights the challenges and discusses the application of the European model approach that can deal with the challenges of the traditional labour policies. To sum up, the whole range of public policies must be finalized to the objective of creating a more inclusive and sustainable growth.

1. THE EUROPEAN UNION: A UNIQUE APPROACH TO SUPRANATIONAL LABOUR REGULATION

The European Union in the sixty years of its existence has shaped a social dimension characterized by high levels of social protection. It has approved a series of directives aimed at harmonizing the national regulation of some critical areas of labour law. The most significant directives regulate major social issues:

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[1] *2nd Tokyo Comparative Labor Policy Seminar 2018*, JILPT, available at https://www.jil.go.jp/english/events/seminar/20180327/index.html

the principle of gender equality and parity of treatment, basic standards on health and safety at work, equality of treatment between different types of contract, (part time, contract for fixed term, temporary work and contract for indefinite period), right of workers' representatives to be informed timely on major firms decisions impinging on working conditions and specifically on enterprise transfers and collective dismissals, right of workers representatives to participate in the European company.

1.1. Basic Standards and Charter of Fundamental Rights

The European charter of fundamental rights has solemnly confirmed the commitment of the Community and of its member states to observe and implement the basic social standards which are internationally recognized, and which are a necessary component of "decent work".

The constitutional recognition of these individual and collective rights, supported by often creative decisions of the European court of justice, has contributed to promote the diffusion of most basic work standards in the continent, to set up a well-established IR system, and to favor an extensive application of the social legislation by the national legal systems.

This historical evolution has shaped in the European Union as a supranational social model legally supported by specific common institutions. Such a social set of policies was to be developed in parallel with the economic integration of the community, according with the principle of the Treaty (art. 9) which states that all major economic decisions, national and European, should take into account their impact on social and individual welfare.

The European model represents a quite unique approach to supranational labour regulations, legally more stringent than other forms, bilateral treaties, and the like. This peculiar approach allows for multilevel regulatory interventions, national and European, on most labour and social policy issues.

Apart from these differences the major problems faced by European policy makers are common to other developed countries.

2. COMMON CHALLENGES TO TRADITIONAL LABOUR POLICIES

In the last years, a common challenge has come from the economic crisis that has seriously hit most countries and their citizens. In this period the European institutions and the national governments have been mainly occupied, with uneven results, to respond to the problem arising from the crisis.

These responses have affected all major public policies in social and labour matters. They have implied quite a few modifications of the preexisting legislations including the acquired set of social rights. Looking ahead beyond the crisis, other and more profound challenges to the European social model, like to other national systems derive from the great transformations of the world economy and of the societal order.

2.1. Digital technologies and global competition

At the basis of this challenge is the disruptive impact of the two major structural factors of transformation, namely the pervasive innovations of the digital technologies and the equally pervasive pressures of global competition.

Labour law and industrial relations are, directly hit, even more than other policies, because these factors change the very basis on which our field was built in the last century. For this reason, no minor adaptation is sufficient to restore the role of labour law and industrial relations as effective instruments of social justice and economic progress.

The innovative measures which can contribute to respond to the new challenges go well beyond the areas of labour and social policies. They cover the whole range of public policies and private initiatives necessary for creating an

economic and social context favorable to a job rich growth and to sustainable development.

Throughout our history State policies have always been important, if not decisive, in shaping employment relations and to regulate the power relations between labour and capital. My assumption is that their capacity to respond to the new challenges is still important for the future of work. The role of national States, although limited by globalization, remains essential in regulating major social issues, and also in influencing the trend and impact of globalization.[2]

3. THE VARIOUS MEASURES OF FLEXIBILITY

The European countries have followed different strategies to respond to these challenges, depending on their social and political conditions. Some policy measures have been convergent, other divergent. On the whole they have met with an uneven degree of success. A common remark by comparatists is that the search for effective innovative policies is still open and proceeds with more uncertainties than with defined targets.

Most issues receive controversial answers or contradictory opinions and solutions. I will analyze here only a few of these issues and answers, with the focus on some critical areas for the future of our discipline, where the European experience may be useful to other countries.

A first controversial area has to do with the scope and content of protective labour legislation. The intensity and rigidity of labour legislations of most European countries have been accused of producing negative effects on economic efficiency and dynamism, even though the evidence is controversial and far from conclusive.

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[2] J. Cruz Villaton, *The role of the State and Labor relations*, 293 in *Transformations of work, Challenges for the institutions and social actors* (G. Casale, T. Treu, Wolter Kluwers, 2019).

One reaction of many national legislators has been to try to simplify labour regulations and make them more selective and tailored to the different needs and positions of the employees, including those working with non-standards contracts.[3]

The need of the enterprises to adapt to the new competitive and technological scenarios has been recognized by many national legislators, not only European, which have introduced and regulated various forms of flexibility aimed at facilitating this adaptation.

3.1. Impact On Workers Stability and On Labour Unions

Numerical and external flexibility has been increased in two main directions: by reducing the sanctions for unjust dismissals and consequently their cost, by recognizing flexible types of employment contracts different from the typical employment contract for indefinite period. The extent of these changes and their impact on workers stability has been different according to the measures adopted by the various states to regulate the forms of flexibility (sheer deregulation has not been the rule).

Another important variable has been the capacity of the unions to control the exercise of flexibility by the employers.

The power of the Unions has been affected to a different degree by the economic and political context of the various States; indeed, it has been reduced even in the countries, where it was traditionally entrenched, by the main relevant

[3] Prof. Tiziano Treu, *Labour law and social policies: an agenda for transnational research*, presented at the 21th World congress of ISLSSL, Capetown, 2015, WP, M. D'Antona, INT 128/2016. Atypical types of work are spreading in different forms both in advanced and emerging countries; often their informality escape the traditional controls of the law and borders on illegality.

indicators: decreasing Union density and reduced rate of conflict, shrinking collective bargaining coverage and decentralization of bargaining structure.[4]

But still major differences persist among countries. The rate of unionization varies from a maximum of 67-70% of the Northern Countries to a low of 7.7 % (France); and the dispersion around the average rate has been growing.[5]

4. THE EUROPEAN POLICY OF FLEXICURITY

The risk of the increased flexibility and its impact on workers stability have been denounced by the unions of many countries and by international organizations like the ILO.

A major policy suggested by the EU in a specific set of guidelines on "flexicurity", which may be interesting for other systems, has been intended to compensate the negative effects of flexibility by introducing or reinforcing various measures aimed at protecting and assisting all displaced workers. The measures consist not only in monetary subsides to these workers but in active policies (placement services, training, and retraining), intended to facilitate their reentry into the labour market.

The effectiveness of these measures to keep the balance between flexibility and security has been uneven. The balance has been better maintained in some countries (central - Northern Europe) well equipped with active labour policies and with strong welfare systems. Lacking these conditions, the balance has been precarious, and the measures aimed at workers security have not protected them from the risks of unemployment.

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[4] Industrial Relations in Europe, 2014-2015, according to the data the average rate of unionization has decreased from 27% of 2000 to 23.4% of 2008.

[5] R. Pedersini, *European Industrial Relations*. *Between old and new Trends*, 102(3) Stato e Mercato, 345 (2014) ff. J. Visser, *Database 5.0*, Amsterdam Institute for advanced labor studies, AIAS, 2015

4.1. Difficult Balance Between Flexibility and Work Security

The economic crisis of the last decade has increased the difficulty to keep this balance, particularly to protect and assist-the displaced workers for the time necessary for their reinstatement. For this reason, the European Parliament has proposed a reframing of the policy of flexicurity. Here too some of these new policies may offer suggestions to other national systems.

Some European countries have introduced, or reinforced measures aimed at preventing as much as possible the dismissals of employees by firms hit by economic crisis and or involved in restructuring processes. A major provision has been to guarantee the payment of an indemnity, up to 60- 60% of the salary by social security institutions to the employees suspended by their employer for those reasons. This financed suspension, which is some cases could last up to 3-4 years, has allowed the employer to pass the bad times or to restructure their firms without mass dismissals.

Another measure adopted has been to grant the employers a wide discretion to introduce flexible working time and to change job assignments to their employees, accompanied by the duty to retrain them to the new posts.

This form of functional flexibility, particularly when introduced in agreement with workers representatives, has proved useful in reducing the recourse to measures of external flexibility such as outsourcing and use of temporary or fixed term contracts. In a few cases it has also contributed to improve both the working conditions and productivity.

4.2. The Management of Mobility

The actual implementation of these principles and the management of mobility are better left to the practice of labour management relations in the workplace,

through consultation and agreement between employers and workers representatives.

In some countries employers have been obliged to include in their business plans for the expected trends of employment including the impact of possible downturns. The plans are also requested to implement in due time the measures necessary to reduce this impact: training and retraining programs for the employees most at risk of unemployment, mobility and reorganization of work finalized to adapt the use of workforce to the new business needs.[6]

5. CHALLENGES TO NATIONAL WELFARE SYSTEMS

A redefinition of scope and contents is necessary not only for the institutions dealing with labour problems but also for those present in the area of social security and welfare.[7] A more active set of policies is needed both to reduce the increasing costs of social benefits and to mobilize the capacities of users, in order to promote their personal development and not simply to assist them in case of need.

This new approach to welfare measures may facilitate their extension beyond the traditional coverage of core employees to nonstandard workers and to the growing number of migrant workers which have been so far excluded from protection and mostly ignored.

A major challenge to the welfare systems even of the rich countries is posed by the growth of inequalities and of poverty among the various sectors of the population, including many workers.

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[6] See T. Araky, S. Laulom, *Organization, productivity and well-being at work*, 317 in T*ransformations of work* (G. Casale, T. Treu).
[7] F. Marhold, *News forms of labour: new solidarities?* 49 in T*ransformations of work* (G. Casale, T. Treu).

Specific measures of income support and of personal assistance for poor workers and families have been introduced in many European countries, combined with targeted labour and training policies aimed at activating the beneficiaries. Proposals of extending assistance measures or provisions of "basic income" have been deemed inacceptable for their costs but also because they tend to obscure the value of work and the importance of employment policies.

Many European countries have organized a complex network of labour market institutions in order to ensure people against the increased risks linked to globalization. Implementing a comprehensive system of labour policies has required a widespread consensus on the need and on the ways to promote good employment opportunities for workers and indeed a new labour market governance based on the active participation of public institutions and of social parties.[8] Now it needs to be enriched by more personalized services and by increased social investments in order to meet the needs of a diversified working population and to promote their active presence in the "transitional markets" of modern economies. Employment and welfare services should follow individual workers rather than be tied to specific jobs and industries.

6. THE UNCERTAIN IMPACT OF THE DIGITAL REVOLUTION ON THE QUANTITY OF WORK

These measures, like most employment practices, have now to face the challenges posed by the digital revolution which is introducing profound transformations both in the organization of work (telework, on demand employment via digital platforms) and in the structure of the enterprises.

[8] P. Auer, S. Cazes, *Transnational markets and employment stability*, in *Labor market gender and institutional change*, (M. Mosley, J. O'Reilley, Edward Elgar, 2002); *Building bridges. Shaping the future of public employment services towards 2020*, (F. Leroy, L. Sruyven, G. Schmid, 2014).

Like most innovations industry 4.0 implies new risks and opportunities: risks for the conditions of work (increasing stress and psychological diseases, deskilling, etc.) but also opportunities for better work- life balance and for improving the autonomy and the personalization of work.[9]

The impact of digital revolution on the future quantity of jobs is quite controversial, (as you all know). Platform- based work has still limited applications. In Europe it accounts for no more than 1% of employment; in the US, this percentage is already higher. In any case this digital work has great potential to grow. Already a significant number of jobs have been made redundant by the spreading of ICT, particularly in some sectors like banking once considered to be the home of stability. The strategies necessary to respond to job killing technologies are complex and far from effectively implemented.

6.1. Impact on working time

But it is worth mentioning that the digital threat has reopened, at least in Europe, the debate not only on work time flexibility but also on the reduction of working time.

Part time is increasing (not always voluntary) and becoming a common way of redistributing work, often within the family. In the Netherlands it accounts for around half of the working population. A recent German collective agreement has recognized the right of all employees to reduce their weekly working time to 28 hours (with some wage reduction). The employers in exchange are allowed greater flexibility in the distribution of weekly working time. This agreement is

[9] European Economic and social committee 2017, *Impact of digitalization and on demand economy on labor market and the consequences for employment and industrial relations*, (www.eesc. Europa.eu).

considered not only in Germany an example of flexibility beneficial to both parties.

Other collective agreements, particularly in the sectors most exposed to the digital revolution, have provided that a certain number of working hours, paid, must be devoted to training, and retaining in order to prevent technological obsolescence.

This indeed is a requirement necessary for all sectors of any country to cope with technological innovations. More time and resources will have to be devoted to education and training of employees, not only at the early stages of their working career and during the apprenticeship, but in the entire course of their life.

Some European countries, in order to promote this policy, are combining strong fiscal incentives to the introduction of new technologies in the enterprise with parallel incentives to the training of the workers exposed to these technologies.

An objective advocated in the European debate but worth considering also in other countries, is that all employment contracts should become also educational contacts, i.e., should enrich the basic exchange of the contract: work versus wage, with a further element, namely with a certain amount of specific training.

7. THE IMPACT OF NEW TECHNOLOGIES ON WORKING PATTERNS

Whatever the quantitative evolution of work might be in the near future, certainly most working patterns, including the flexible patterns adopted so far, will have to change; and equally widespread changes will be necessary for the personal skills required for the new jobs.

The very concept of working time as traditionally framed is being altered in the digital organization of work. The online connection necessary for the digital

employees may blur the distinction between time for work and time for life, with negative implications for the personal wellbeing (risk for the health and danger of self-exploitation). Rigid legal limitations of working time may be unfeasible or easy to be circumvented. New measures, legal and collective, may be necessary. Some suggestions may come from recent European practices.

7.1. New skills and new rights

Some collective agreements in Germany and the legislators in France and Italy have introduced the so called “right to disconnection”, i.e., the right of employees to cease to be available online in certain period of the day and of the night (taking into account the different time zones where digital workers may operate) and have provided the consequent duty of the employer to disconnect the server.

The digitalization of the work process requires innovations in two other critical areas of labour law and labour policies: health and safety regulation, protection of employee’s privacy. Both represent common challenges to all advanced economies. The protective legislation on health and safety will have to be reframed in order to prevent and remedy not only the physical risks known to the industrial reduction but other psychological disorders and work stress which are already increasing in the information society.

8. NEW RISK FOR HEALTH AND SAFETY AND FOR PERSONAL PRIVACY

The national institutes in charge of work accidents will have to adapt the requisites and the tariffs for the relevant insurance to the peculiar conditions of

remote work. Moreover, some national legislators have enacted specific regulations to protect workers privacy, business operations and secrecy.[10]

All enterprises are required to implement procedural rules, under the responsibility of plant managers, aimed at preventing any use of digital devices capable of violating employee's privacy (violations are severely sanctioned). Any use of devices which can control employee's activity must be approved by workers representatives and/ or by the labour inspectors. Moreover, the data collected through these devices cannot be ground for disciplinary sanctions against the employees. A controversial issue is how to regulate the use of devices which are necessary for performing the job and at the same time may indirectly control employee's activity. The management practices will have to be carefully monitored in order to clarify this issue and possibly to adapt the regulations.

The conditions of work created by the new forms of business organization which are often more demanding and on the other hand the new needs and aspirations of present employees have stimulated an increased demand of quality in working life.

9. NEED OF BETTER WORK-LIFE BALANCE

In response to this demand many collective agreements signed at the firm level in quite a few European countries have devoted greater attention not only to preventing the negative impact of technological innovations but also to promoting a better work-life balance.

[10] The Italian Act 15/2015 revising art. 4 of Act 300/1970, and the Code on data protection (Act 196/2003).

The impact of these collective regulations has been favored by various forms of workers participation to the process of innovation, which in some countries have been supported by legislation.[11]

Quite a few collective regulations have introduced personal and family friendly working time, and various kind of benefits supplementing public welfare aimed at fostering the wellbeing of people at work (care services for kids and aged relatives, support to children education and leisure, medical assistance, and pensions more generous that those provided by the state).

The number of these agreements has been growing (in Italy they are counted by the thousands) also because they have been promoted by fiscal advantages which exempt from taxation most welfare benefits agreed upon with the unions.

9.1. Productivity bonuses and welfare benefits

A reduced taxation has also been provided on wages linked to various indicators of productivity indicated by collective agreements (see the Italian Act 2018/2015 and subsequent similar norms). The rationale is to promote a wage structure less rigid than in the past and more conducive to productivity.

Moreover, the same Italian legislation has provided a further fiscal prize when these productivity bonuses and welfare benefits are accompanied with forms of workers participation in the organization of work within the plants, through bilateral committee composed of management and employer's representatives. This promotional legislation has contributed to diffuse workers participation within the enterprise. This kind of participation is quite common in countries like Germany and France and is promoted by a specific European directive

[11] M. Weiss, *Worker's participation in the enterprise, in Germany, 293* in *Enterprise and social rights* (A. Perulli, T. Treu, Wolters Kluwer, 2017) & T. Treu, *Worker's participation in the firm, Trends and insights*, 271

(2001/8 and regulation 2157/2001); but has been so far resisted in Italy, mainly for ideological reasons.

10. THE WORKERS OF THE GIG ECONOMY: PROBLEMS OF CATEGORIZATION AND OF PROTECTION

The information technologies and the digital economy have contributed to multiply the forms of work, which have required new legal and contractual regulations. The rules adopted in the European countries are variable but have in common the tendency mentioned above to give more space than in the past to flexibility. Equally common is the recognition that the traditional categorization of employment contracts is not adequate to fully reflect the content of many "atypical" contracts which have emerged in the mobile labour market of today. Even the basic demarcation between subordinate employment and self-employment is becoming less and less clear.[12] The platform -based work is an exemplar case.

European legislators have introduced various measures to regulate the new contracts, most often-with the aim of mitigating the fragmentation and dualism of the labour market. The criteria for identifying subordination have been loosely interpreted by some courts; quite a few social protections are being extended to atypical contracts; various mechanisms, mixed of incentives and controls, have been experimented in order to formalize informal work, (which is widely present also in our countries).[13]

10.1. Uncertain legal nature of platform- based work

[12] See B. Hepple, B. Veneziani, *The transformation of labor law in Europe: a comparative analysis.* (Hart Publishing, 2009); E. Ales, O. Deiuert, J. Kenver, *Core and contingent work in the European Union, a comparative analysis*, (Hart Publ., 2017); *New forms of employment*, (Eurofound 2015).

[13] *Transition from the informal to the formal company* ,2015, ILO, 204 available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204

A relatively new type of workers has been growing who are not legally subordinate, but neither are fully autonomous, because they are economically dependent on one or a few principals. The legislators of some countries have created a new intermediate category of contracts with various names: quasi subordinate employees (Italy), employee -like persons (Germany) or workers (UK). To these employees some but not all the rules of labour law apply: mainly those concerning social security, health and safety, minimum wages and other minimum standards, rights of association and of collective bargaining.

The various forms of digital works present in the gig economy have posed new problems of categorization, because most of these employees often combine traits typical of both dependent and independent work. These problems have been so far mostly handled by the national courts in hundreds of cases, which have received divergent solutions.[14]

10.2. Different regulations by courts and legislations

In quite a few cases, mainly involving Uber drivers or the "riders", the courts have considered them has employees, even when not all traditional indicators of subordination were present. Other courts have included them in the intermediate category mentioned above. Sometime the judges have recognized the hybrid character of their work in order to grant some protections of labour law. The need to recognize a few basic protections to these workers has prevailed over the uncertainty of the legal qualification of the contract.

A similar approach has been adopted by the French legislator in 2016 (Act. August 8, 2016, n. 1088, art. 6). While giving a rather general definition of digital workers, it has provided that they are entitled to some basic rights such

[14] See B. Rogers, *Employment rights in the Platform economy: getting back to basic*, 10 Harvard law and policy review 479 (2016); A.M. Cherry, *Beyond misclassification: the digital transformation of work*, 37 CLLPJ, 577 (2016).

as the right to continuous education and training, to the protection against work accidents, the right of association, of collective bargaining and of strike. The European court of justice (case C.434/15) has stated that Uber is not a mere platform for the intermediation of work, but an enterprise involved in transport and logistic activities. Consequently, it is obliged to follow the national rules on these activities, not necessarily those concerning labour matters (but the road is open to also consider labour regulations).

The issue is still controversial, particularly because the typology of activities organized in the gig economy is highly differentiated and variable. E.g., the criteria applied to Uber drivers do not fit to many crowd workers who perform minute and short tasks through personal access to digital platforms, which do not exercise any kind of interference nor direction of their activities.

The changes of the economic context and the diversification of work require a reappraisal not only of employment policies but also of collective bargaining and industrial relations.

Collective agreement has been shaped, like statutory law, according to the dominant patterns of standard employment and mostly based on the experience of industrialized countries. If they are to remain a major source of regulation of employment, they too must revise their objectives and practices so as to respond to the diversification of employment patterns, and on the other hand to the globalization of markets.

A specific form of promotional legislation of collective labour relations has been adopted by some countries (Germany in the first place) and endorsed by an EU directive which grants consultation and participation rights to workers representatives on major enterprise decisions affecting working conditions. The experience of countries where this participation is widely adopted, has shown

positive results not only in facilitating employment relations, but also in improving both the welfare of workers and the productivity of firms.

11. GLOBAL TRADE AND FUNDAMENTAL RIGHTS

A different type of challenge to traditional labour regulations comes from the diffusion of work and of the enterprises on a global scale. This challenge is often combined with, or intensified by, the innovation coming from the new technologies, because these technologies multiply the possibility to expand most activities beyond the national borders.

The challenge goes to the roots of our discipline because our legal systems, and labour relations, have been nationally based and have been created and supported by national policies and regulations. This has occurred often in agreement with the social parties which are also organized within national borders.

The need to face this new scenario and to project labour regulations and social policies internationally is widely recognized. The objective is not only to protect the increasing number of people who work across the borders, but also to defend the national standards of work from unfair competition of the firms operating in foreign countries.

All the national actors, public institutions, employers' associations and labour unions, together with the competent international organizations – ILO in the first place - have been trying to respond to this challenge and have adopted different techniques to shape supranational principles and regulations. But the results obtained in this international search are still partial.[15]

11.1. Social clauses in international trade

[15] A. Perulli, *The perspective of social clauses in international Trade*, 105 in *Transformation of work*, (G. Casale, T. Treu).

The European Union and its member states have attempted to promote the international respect at least of some basic labour standards, through the insertion of social clauses in multinational trade agreements and with other instruments such as the general system of preference (GSP).

A similar objective is pursued by other multilateral agreements signed in different areas of the world: the TPP for the pacific countries and the agreement between the European Union and Japan (EPA). Interesting innovations are present in a recent trade agreement signed between the European Union and Canada (Cete). The CETA commits the parties, with rather assertive language, to observe the fundamental principles and rules stated by the ILO conference of 1998, and also the right to strike (a rather unique case in trade agreements).[16]

An innovative solution is provided concerning the procedures for the implementation of the social clause, which is usually the weakest part of trade agreements. The CETA establishes not only bilateral consultations among the parties to solve the disputes, like in most, other agreements, but also a review panel of experts and civil society advisory groups entitled to submit opinions and recommendations. Moreover, national labour inspectors are charged to control the implementation of the social clause. In case of non-acceptance of the judgment of the experts the claimant can suspend the obligations of the treaty of equivalent importance or ask for monetary compensation as indicated by the panel. The CETA has set up a specialized tribunal composed of impartial members enabled to adjudicate the disputes with private investors arising under the treaty. This innovation is meant to correct the common procedures under the ISDS clauses which have proved to be rather biased in favor of the investors.

[16] M. Faioli, *The Quest for a New Generation of Labor Chapter in the TTIP,* 103-120 in *TTIP and Jobs* (Economia & Lavoro, 49, 2015),

12. OTHER VEHICLES OF SUPRANATIONAL REGULATIONS: CODES OF CONDUCT AND TRANSNATIONAL COLLECTIVE AGREEMENTS (TEA)

Another set of supranational rules has been adopted by many multinational enterprises of European origin which have formalized codes of conduct referring to the fundamental rights and standards approved by the ILO. Similar codes are being adopted by multinationals of different nationality. These codes have in common that they are legally not binding, but they set guidelines to be observed by all the units of the company and of the enterprise group, including those operating in countries different from the home country. In some cases, the respect of the guidelines is subject to external monitoring, even though but the independence of the monitoring is often uncertain. The effectiveness of the codes may depend more than on their force on the pressures of public opinion and of social organizations which often denounce the violations of the codes and so put in danger the reputation of the company.[17]

12.1. Growing importance of TCAS

Some European multinationals, influenced by the continental social model, have decided to consult the unions or to negotiate with them the content of the codes. In a few cases formal agreements have been signed with the European works councils which are the workers representative body present in many countries and promoted by a specific European directive (2009/38).

The number of transnational agreements signed with the works councils and with the unions has been growing. These agreements have expanded their contents so as to improve the fundamental labour standards and to regulate broad social and welfare issues.

[17] J. Waddington, V. Putignano, J. Turk, *Managers Business Europe and the development of European works council,* ETUI, Work Paper (2016).

The multiplication of these agreements has been favored by the trend to decentralize industrial relations to the company level which is common to many countries, not only European. The accords concluded with the works councils may be more effective than the sectional agreements signed with the unions, because they can be implemented directly also across the borders by the decision of the company which is party to the agreement.

12.2. Effectiveness and enforcement of TCAS

A limit of all these agreements is that they do not have a common legal status in the different European countries. Moreover, the employers' associations and the unions who sign the agreements do not have sufficient supranational powers to monitor and to enforce them. This limit is common to the representative associations operating in most countries of the world.[18]

The collective bargaining undertaken in groups of enterprises may be fertile ground for experimenting with innovative solutions in this area. Group agreements can influence the behavior of the various group units, even if located in different countries.

These experiments may take advantage of the tendency already present in many legal systems to ascribe unitary legal status to a group of enterprises, and in particular to attribute responsibility for the behavior of the group companies to the dominant enterprise.

The most explicit example of this trend is the French law of March 27, 2017, which requires a parent company (and also a main contractor) to supervise the activities of its peripheral units, subcontractors and suppliers, and to establish

[18] E. Ales, *Transnational collective bargaining. Past, present and future*, Final Report, European Commission, (2006); G. Casale, *Collective bargaining at transnational level*, 161 in *Enterprise and social rights,* (A. Perulli, T. Treu, Wolter Kluwers, 2017); F. Guarriello, *Transnational collective agreements*, 203 in *Transformations of work* (G. Casale, T. Treu)

the liability of these companies for damages caused by violations of human rights and environmental standards, even if committed abroad.

The question of the legal enforcement of supranational agreements has received hardly any direct test because the parties tend to solve the disputes arising under the agreement through their own channels (grievance procedures or the like). The tribunals have been so far reluctant to decide labour cases arising in other countries, i.e., to admit an extraterritorial application of national labour laws. A few pilot cases, mainly originated in the USA, are interesting as possible examples of a new courts attitude.[19]

A suit was brought by a Korean Union against a firm for a dismissal decided in violation of a collective agreement and was taken to a court in New York where the mother company of the Korean firm was accused of interference with the local management. The court acknowledged the violation of the agreement but did not sanction the mother company alleging a procedural exception. Despite this unsatisfactory result the court decision many open the way to the possible enforcement of contractual obligations against multinational companies located in a country other than that where the violation occurred.

The enforcement might be easier when the supranational agreements are concluded by European multinationals operating in Europe. The courts of European states might be inclined to consider favorably cases concerning contracts or facts occurred in nearby countries, if linked to events relevant their territory, because they have been used to enforce regulations which derive from the authorities of the Union and which compose a supranational legal order.

[19] L. Compa, *Pursing International Labor rights in US Courts, New Uses for Old Tools*, 57 (1), Industrial Relations, 48 (2002).

13. EUROPEAN DIRECTIVE AGAINST SOCIAL DUMPING

A recent example of the European supranational order comes from a directive which is intended to fight social dumping among member states. Also, this problem is common to countries of other areas of the world.

The Europe and solution may be interesting. In fact, the directive (96/71 revised on June 21, 2018) provides that the employees working in a country different from the home country of the employer are entitled to the same basic standards applied to the local employees (wages, social security, main working conditions).

The European interventions in favor of the member states are not limited to legal regulations such as the directives. Various forms of social policies which are expression of supranational solidarity are in place.

It is worth mentioning in particular quite a few programs financed by European funds aimed at responding to the most serious social problems present by Europe but also in other countries: a program for supporting youth employment; a number of "structural funds" aimed at promoting local development, particularly in the least developed areas; a special fund which can support financially and with personal assistance the employees who are "victims' of globalization"; the program "industry 4.0" which promotes private and public investments in technological innovation and in the necessary training of employees. [20]

These measures, which have been experimented in other regional areas, have proved useful in improving the relations among different nations, with concrete

[20] On the use European Funds in general, *The Social Investment package*, Communication of the EU Commission, (COM 2013) 83 final. Particularly important for our field is the European Social Fund now regulated by reg. 1303 and 1304/2013.

aids (financial and institutional). They have the advantage that can be implemented gradually and be adopted to the policy priorities of the interested communities.

14. CONCLUDING REMARKS

The policies of the European Union have been changing in the years. Recently they have given priority to safeguarding financial stability with austerity measures even at the expenses of policies necessary to support economic growth.

The reactions of the public opinion to these policies have provoked social and political repercussions in many countries (including the rise of anti- European movements). These reactions may have contributed to the recent proposals of the European Commission envisaging a reorientation of its priority towards growth enhancing policies.

In conclusion, I am convinced that labour regulations are an important element of the social order. If well framed they can positively contribute to economic competitiveness and to sustainable development. But as already mentioned good regulations and social policies are only one contributing factor to this end. The whole range of public policies must be finalized to the objective of creating a more inclusive and sustainable growth. The economic and financial strategies adopted by the States and by the European Union will have a decisive influence also on our field.

IMPACT OF COVID-19 ON EMPLOYMENT OF WORKERS IN ORGANISED AND UNORGANISED SECTOR

Prof. Dr. Suresh.V. Nadagoudar [*] ***& Rajashree Patil*** [**]

The state itself should provide support to the poor, pregnant women to their newborn offspring, to orphans, to the aged, the infirm, the afflicted, and helpless.

-Kautilya

Abstract

The Corona Virus has taken the world by storm, nearly all the countries have been economically affected by it. Covid-19 has led to retrenchment and has severely impacted employment of workers in both organized and unorganized sector leading to layoffs, job cuts. Both the sectors play a prominent role in boosting the economy of the countries and in India the workforce working under unorganized sector is more than the organized one, so the challenges faced by people working under unorganized sector also increases as there is no social security or paid leaves or any other job benefit. Covid-19 has bought so many changes in the working sector be it normalizing working from home or reduction in salaries. This chapter categorically discusses the impact created by Covid-19 on both the sectors and the government schemes governing the same.

1. INTRODUCTION

The COVID-19 pandemic has a significant impact on employment. The organized sector in India was badly affected, leading to layoffs and job cuts mainly due to the coronavirus pandemic lockdown that have severely impacted

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the economic activities. Job loss is the severe immediate impact of the COVID-19 crisis, while lower economic growth and rise in inequality would be the long-term effects. The Government of India has announced a special financial package viz**.** Aatma Nirbhar Bharat Abhiyaan, Garib Kalyan for boosting the country's economy and making India self-reliant and recently new labour codes passed during Covid19. The judges during Covid-19 had taken suo moto action which is reflection of active judicial activism.

2. ROLE OF ORGANIZED AND UNORGANISED SECTOR IN INDIA

Organized and unorganized sectors play a prominent role in the progress of an economy. Country's growth is mainly based on these two sectors and out of these, the unorganized sectors contribution is more in terms of workforce participation. Like any other country, India has also witnessed the growth of these two sectors. These sectors have their own rules and regulations and thus make them unique. Traditionally, unskilled workers are moving towards unorganized sectors and skilled workers are moving towards organized sectors[1]. In India, a significant chunk of labour force is working in the informal sector. The unorganized employment consists of causal and contributing family workers; self-employed persons in informal sector and private households, and other employed in unorganized and formal enterprises that are not eligible either for sick, paid, or annual leave or for any social security benefits given by the employer.[2]

The unorganized workers are a large component in agriculture and related activities. However, equally important is their presence in other activities like

[1] Dr. Ipseeta Satpathy, Dr. B.C.M. Patnaik and Sri. Narayan Tripathy, *A Study on workers in organized and unorganized sectors in Automobile Industry: A Review of Literature*, 9(5), International Journal of Mechanical Engineering and Technology, 481, (2018), available at http: // www. iaeme. com / IJMET / issues. asp JType=IJMET&VType=9&IType=5(last visited on 1/02/2021)

[2] C. Tholkappian, *Organised and Unorganised Sector Employment in India*: *Macro Standpoint*, 1, Issue-4, International Journal of Research (IJR) 295 (2014).

handloom, power loom, beedi making, brick kiln, construction labour in urban and semi-urban areas[3]. In today's globalizing economy, a growing proportion of the workforce is being pushed into an insecure, unsafe, and unprotected labour-intensive unorganized sector and being subjected to typical, non-formal, non-standard employment practices.[4] It is nearly a century and a half ago that modern industry and the corporate form of the organization began in India. But still, these two are the main components of the organized sector in terms of their share in the GDP. Thus, despite its large, substantial place in the economy, the unorganized sector is a neglected sector in the public policy arena support and academic discourse.

However, with a large social role in production and employment, the unorganized sector reaches nowhere near the corporate and organized sector in power and access to and control over resources.[5] There is a requirement to improve the skill to enhance the competitiveness of products and not to reduce the labour cost.[6] Further, according to the report of the 2019 Economic Survey, 93% of the total labour force of the nation is from the unorganized sector,[7] but there are no adequate provisions to protect it.[8] During pandemic, daily wage labourers were the worst-hit as 94% of them lost their source of income and which affected the quality of life of 69% of people. Majority of the people either

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[3] Ibid, at 9.
[4] A M Sarma, *Welfare of Unorganised Labour*, 3 (2nd ed., 2018).
[5] Kamal Nayan Kabra, *The Unorganised Sector in India: Some Issues Bearing on the Search for Alternatives*, 31, No.11/12, Social Scientist 23, 46 (2003) available at https ://www .jstor. org/stable /3517948, last visited on 31-01-2021.
[6] Dr. Saikat Sinha Roy, Unorganised Sector, available at http://sri.nic.in/unorganised-sector last visited on 1-02-2021.
[7] Madhu Damodaran, Animay Singh, Formalization of Unorganized Workers: The Need of the Hour, available at https://www.simpliance.in/blog/unorganized-workers, last visited on 1-02-2021.
[8] Riya Rana, India Lockdown: Most Affected Is Unorganized Sector; It is 93% Of the Total Workforce, 41 Crore People Lack Economic Security, available at https://www.inventiva.co.in/stories/riyarana/india-lockdown-most-affected-is-unorganized-sector-it-is-93-of-the-total-workforce-41-crore-people-lack-economic-security, last visited on 1-02-2021.

work on a contract or are employees who give daily wages to their families.[9]It was pointed out that 62% of people were forced to borrow money for their daily expenses. Some others reduced their expenses or used their savings.[10]

3. KEY CHALLENGES FOR THE UNORGANISED SECTOR

Following are key challenges for unorganised sector.

3.1. Urban Unorganised Labour

- Working in very small, scattered units making the mobilization and organization of such workers extremely difficult.
- Most of the workers are employed in low-technology, low-productivity, and low-earning occupations.
- A large section of these workers has little education and poor skills or are unskilled.
- Many of the workers, mostly women workers, are exploited in several ways.
- Prevalence of child labour and its exploitation is a characteristic feature.
- Low living and unhygienic conditions are a characteristic feature of the urban poor[11].

3.2. Rural Unorganized Labour*:* The jobs in rural areas, which are mostly agro-based are scattered, seasonal and sequential in nature.

- Due to their typical nature of work, it is difficult to organize them.

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[9] Ayush Verma, Unorganised sector, problems of facilities, wages and job security, available at https ://blog.ipleaders.in/unorganised-sector-problems-facilities-wages-job-security/, last visited on 1-02-2021.
[10] A.S. Jayanth, Pandemic hits unorganised sector hard, The Hindu (07/05/2020), available at http://www.thehindu.com, last seen on 2-02-2021)
[11]Supra 6, at 9.

- Dependence of rural labour on big landowners and money lenders for credit, which results in bonded labour.
- There are wide urban-rural disparities regarding education, health, working and living conditions, and essential commodities available at the fair price shops.
- There is no scheduled work and hence no fixed hours for any job.
- Lastly, the crucial issues arise primarily due to inadequate legal documentation and agreements between the informal sector employer and employee.[12]

4. IMPACT OF COVID19 ON EMPLOYMENT OF WORKERS

4.1. Impact on salaried employees:

Centre for Monitoring Indian Economy is an independent body that measures and tracks economic indicators, has reported that salaried jobs took a big hit during the COVID-19 lockdown, with the estimation of total loss of 18.9 million during April 2020-July 2020. Firstly, as per corporate filings from 40 reputed BSE 100 companies for the quarter ended June 2020, employee costs reduced sharply in the services sector and non-essential manufacturing. Secondly, a closely related data point was a sharp rise in withdrawals by Employees' Provident Fund Organization which is again limited to organized sector employees[13].

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[12]*Mohit Tanwar, Aman Agnihotri & Dev Sareen, The Tragic Status Quo of Unorganised Labour Sector in India*, available at https://www.latestlaws.com/articles/the-tragic-status-quo-of-unorganised-labour-sector-in-india-by-mohit-tanwar-aman-agnihotri-dev-sareen/, last seen on 1/02/2021.

[13]*What Job Losses in the Formal Sector Tell Us About the Lockdown's Impact on Economy*, The Wire available at https://thewire.in/economy/job-losses-formal-sector-lockdown-impact-economy-coronavirus-cmie, last seen on 12/02/2021.

4.2. Culture of Work from Home*:*

The term work from home is not new in the Indian employment statutes and businesses are silent about the work from home concept. Due to the nature of COVID-19 lockdown and to promote social distancing, various state governments and central governments had issued various advisories for promoting work from home. Accordingly, there is the flexibility provided with the employers to allow or not allow its employee to work from home, and they particularly specify their own guidelines for the same.

4.3. Reduction in Pay

During Covid19 pandemic, employers had reduced the pay of employees, which is an irreparable loss to many families. Therefore, it is fair on the part of the employer to implement pay-cuts universally, without any discrimination and especially not in the form of punishment to any specific employee.[14]

4.4. Layoff and Retrenchment

The COVID-19 pandemic had a massive impact on the Indian aviation sector in 2020 and major airlines facing losses and challenging times laid-off employees, sent them on leave without pay/cut their salaries[15]. During lay-off, the workman continues to be in the employer's employment but at reduced pay. Eligible workman category employees can get compensation at up to 50% of basic salary

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[14] Rudra Srivastava, *COVID-19: Our Take on Employment Issues in India*, S&P blog, available at https:// singhania.in/blog/covid-19-our-take-on-employment-issues-in-india, last seen on 12/02/2021.

[15] *COVID-19 had massive impact on Indian aviation sector in 2020* Business Insider, available at https :// www .businessinsider in/india/news/covid-19-had-massive-impact-on-aviation - sector-in-2020, last seen on 21/02/2021.

and dearness allowances for lay-off. There was also a lot of government advisory against the retrenchment of employees due to COVID-19.[16]

5. COVID19 IMPACT ON UNORGANISED SECTOR:

5.1. Migrant workers

During the COVID-19 lockdown, migrant workers had suffered many hardships. With economic activities being virtually out of gear due to the lockdown, almost four crores of workers went jobless[17]. They also had to face the problems of shortages of food, suffered from a sense of isolation at their places of residence. Hence, they thought to return their homes by whatever transportation means they had. Some of them caught unsafe transportation means such as trucks and lorries and thus met with a series of accidents on their way to homes[18]. Although the movement of Shramik trains to various destinations and special buses by the government, the plight of workers did not end as they still underwent harrowing conditions of their journey. The healthcare facilities to the migrant workers at their workplaces have been very poor[19].

5.2. Asha (Accredited Social Health Activist) workers and Anganwadi workers*:*

Asha workers and *Anganwadi* workers have been indispensable during the pandemic. The Code on Social Security, 2020 aims to cover formal and informal

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[16] Ibid

[17] *Lockdown in India has impacted 40 million internal migrants: World Bank*, The Hindu (23/04/2020) available at: https://www.thehindu.com/news/international/lockdown-in-india-has-impacted-40-million-internal-migrants-world- bank/article31411618.ece, last seen on 6/ 03/ 2021.

[18] *A Policy Framework for India's Covid-19 Migration*, Bloomberg Quint, available at https ://www. bloombergquint. com/ coronavi us-outbreak/a-policy-framework-for-indias-covid-19-migration, last seen on 6/03/2020.

[19] *SC can't 'monitor' walking migrants, but 12HCs have issued orders on food and shelter*, The Print, available at https://theprint.in/judiciary/sc-cant-monitor-walking-migrants-but-12-hcs-have-issued-orders-on-food-and-shelter/424241/, last seen on 6/03/2021.

sectors under a social safety net, but it has not covered several categories of workers, including Asha and *Anganwadi* workers. The Code on Wages also has left this constituency out of its coverage, depriving employees of a fixed minimum wage. Asha workers and *Anganwadi* workers has more potential to generate employment, especially for women.[20]

5.3. Domestic Workers and Agriculture workers*:*

Domestic workers are the most vulnerable and invisible group amid the unorganized workers. They are faceless and voiceless and also, they had suffered a pay cut during the pandemic. Further, another problem with domestic and other informal workers was not having enough ration, with only few workers received free ration and direct benefit transfers from the government. Many of these workers faced domestic violence while being confined at home, unable to contribute to household resources[21]. On the other hand, agriculture workers were being forced to sell their wares at low prices because of non-availability of proper markets and as a result of which farmers suffered huge loss.[22]

5.4. Street vendors and Home-based workers*:*

Street vendors have been severely hit across states. During the pandemic lockdown, markets being shut down, and no means of income, so they had become mobile vendors. On the other hand, home-based workers are concerned about money and income during pandemic which massively affected on their life and livelihood. Hence health is always less concern for them.)

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[20] *Code red: labour, wages, security*, Telegraph, available at https://www.telegraphindia.com/ /opinion/code-red-labour-wages-security/cid/1800437, last seen on 21/02/2021)

[21] Jeemol Unni, *Impact of Lockdown Relief Measures on Informal Enterprises and Workers*, available at https://www.epw.in/engage/article/impact-lockdown-relief-measures-informal-enterprises-workers, last seen on 21/02/2021.

[22] *Sewa: Impact of Coronavirus on The Informal Economy*, available at https: // www. wiego. org//sites/default/files/resources/file/SEWA-Delhi-Covid-19-Impact.pdf, last seen on 21/02/2021

5.5. Sex Workers*:*

The National Human Rights Commission identified sex workers as informal workers in their advisory dated 7-10-2021 on "Human Rights of Women in the context of COVID 19". The National Human Rights Commission, in an attempt to secure the rights of all women who have not been included and marginalized during the Covid-19 pandemic, included sex workers as informal workers in their advisory on 'Women at Work.' The advisory asked the Ministries of Women, Labour, Social Justice, Health, and Consumer Affairs in all states and UTs to recognize sex workers as informal workers and register to avail the benefits of a worker. This advisory is an important milestone in achieving constitutional rights for sex workers[23].

5.6. Transgender Workers*:*

The Covid19 lockdown has drastically affected the by India's transgender community because they were dependent on public spaces for earning money. Since 2014, the hijra has been legally considered as a third gender, but crippling stigma continues, and the community lives on the margins of society. The Government of India announced various financial packages for its citizens during the pandemic to meet financial crisis. However, the transgender workers have been largely excluded, which is a clear violation of human rights.[24]

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[23] *National Human Rights Commission recognised sex workers as informal workers*, available at https://www.gkseries.com/blog/national-human-rights-commission-recognised-sex-workers-as-informal-workers/, last seen on 20/02/2021.

[24] Joe Wallen Broke, *Sick and Stigmatised: India's 'third gender' hijra in fight for survival during pandemic*, The Telegraph, available at https://www.telegraph.co.uk/ /global-health/science-and-disease/broke-sick-stigmatised-indias-third-gender-hijra-fight-survival/, last seen on 22/02/2021.

6. SOCIAL SECURITY TO ORGANIZED AND UNORGANIZED WORKERS:

6.1. Importance of Social Security:

Social Security is an important and essential concept or design of human society[25]. In every society and at every time, some unfortunate persons suffer for various reasons. They may not be having sufficient means to cover their dependents, food, clothing, and shelter due to unemployment, etc. such persons are to be protected or secured in their difficulties by society[26]. The Indian National Commission on labour, in its report (1969) says that "social security has become a fact of life, and these measures have introduced an element of stability and protection in modern life[27]. As far as the coverage of social security schemes are concerned, estimates from the survey show that 85 percent of workers from non-farm sector belonging to the category of SC/ST and OBCs do not have social security benefits. For the other category, the same works out to 75 percent and among the unorganized segment of the workforce, there is hardly any coverage of social security schemes. Further, it is noted that the same for SC/ST and OBCs are lower, and particularly in the latter, the coverage is less than 80 percent[28].

Organized Sector: On the basis of the Constitution of India and ILO Convention on Social Security (ratified by India in 1964), some of the legislations have been enacted for social security for the organized sector such

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[25] Vishnu Murhy Koormachalan, *Law and social Security in India (Organised and unorganised labour)* 19 (2015).
[26] V.Manmohan Reddy, *The future of India*, Quarterly Journal of India's Resurgence (1997).
[27] Ministry of Labour and Employment, Government of India, *Report by National Commission on Labour, 1969*
[28] S. Sakthivel and Pinaki Joddar, *Unorganised Sector Workforce in India: Trends, Patterns and Social Security Coverage*, 41, No. 21, Economic and Political Weekly, 2107, 2114 (2006), available at https://www.jstor.org/stable/4418266, last seen on 31/01/2021

as Employees Compensation Act, 1923,[29] Employees' State Insurance Act, 1948, Maternity Benefit Act, 1961, Employees' Provident Fund and Miscellaneous Provisions Act, 1952, Payment of Gratuity Act, 1972 etc.[30]

6.2. Following are the various labour legislations which provides social security to the workers:

6.2.1. Unorganized Workers Social Security Act 2008:

In the era of globalization, liberalization, privatization, the country has been a crucial change in the business environment and nature of employment. These changes created many issues in social security measures. The Ministry of Labour and Employment, to ensure the welfare of workers in the unorganized sector, which, inter-alia, includes handloom workers, fishermen, and fisherwomen, toddy tappers, weavers leather workers, plantation labourers, beedi workers, has enacted the Unorganized Workers' Social Security Act, 2008.[31]

6.2.2. The Contract Labour (Regulation and Abolition) Act, 1970:

The Contract Labour (Regulation and Abolition) Act, 1970 (CLA) aims to protect the interests of contract labourers who indulge in all forms of contract labour in individual establishments and its abolition in certain circumstances.

6.2.3. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979:

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[29] Palak Lotiya , *Social security legislations in India*, available at https : // paycheck . in / career tips / work and pay /social-security-legislations-in India #: ~: text = Drawing % 2 0 from % 20 the % 20 Constitution % 20 of, and %20Miscellaneous%20Provisions%20Act%2C%201952%2C, last seen on 4/02/2021.

[30] *Employmen*t, Vikas pedia, available at http:www.vikaspedia.in, last seen on 12/02/2021.

[31] *Unorganised Sector*, Vikas Pedia, available at https://vikaspedia.in/social-welfare/unorganised-sector-1/unorganized-sector-informal-sector, last seen on 1/02/2021.

The ISMW Act1979 was brought as the Contract Labour (Regulation and Abolition) Act, 1970 witnessed as insufficient with respect to contract workers and failed to curb the malpractices of principal employer /sardar//contractor khatedars, etc.

6.2.4. Building and Other Construction Workers Welfare Fund under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996(BOCW (Relief to Construction workers):

During pandemic, the government announced relief package for construction workers of Rs 1 lakh 70 thousand crores under Pradhan Mantri Garib Kalyan Yojana. It aimed to provide financial assistance to ease people's suffering, especially farmers, women, construction workers, old age, etc., and to reduce the risks of the construction workers, the Government directed the use of the BOCW Act.[32]

6.2.5. New Labour Codes:

The four labour legislations were replaced by The Code on Wages Act 2019**[33]** , which are namely Minimum Wages Act, 1948; Payment of Bonus Act, 1965; Payment of Wages Act, 1936 and Equal Remuneration Act, 1976.[34]Recently, the Parliament has passed three Labour Codes, namely Code on Social Security 2020, Industrial Relations Code 2020, Occupational Safety, Health and Working Conditions Code 2020. While the government proposes to increase the scope of

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[32] Animesh Upadhyay & Shashank Pandey, *Labour Laws And Migrant Workers During Covid-19*, SCC Online, available at https://www.scconline.com/blog/post/2020/04/15/labour-laws-and-migrant-workers-during-covid-19, last seen on 1/02/2021)

[33] The Code on Wages Act 2019 prohibits employers from paying workers less than the stipulated minimum wage. Further, minimum wages must be reviewed and revised by the central and state government at an interval of not more than five years.

[34] *A guide to minimum wage India 2021*, Indian Briefing, available at https://www.india-briefing.com/ /news/guide-minimum-wage-india-2021-19406.html/, last seen on 22/02/2021.

social security by including inter-state migrant workers and gig workers and it has also proposed measures that will provide greater flexibility to employers to hire and fire workers without permission of government. In the changed economic scenario post-COVID-19 pandemic, these codes make significant changes to the regulation of labour and the employer-employee relationship in many ways[35].

7. GOVERNMENT POLICIES AND SCHEMES:

Following are some Government Policies and schemes:

i. National Policy on Skill Development: Knowledge and skills are the driving forces of social development and economic growth for any country. Countries with better and higher levels of skills adjust more effectively to the challenges and opportunities of the world of work.

ii. Safety, Health, and Environment at Workplace: The Constitution of India incorporated provisions for the citizens' rights under fundamental rights. On the basis of the Directive Principles as well as international instruments, Government is taking measures to regulate all economic activities for the health risks and management of safety at workplaces.

iii. National Policy on HIV AIDS: The HIV/AIDS epidemic forms one of the most formidable challenges to development and social progress. The epidemic exacerbates inequality and poverty and increases the burden on the most affected people in society, i.e., women, the elderly, children, and the poor.

iv. Occupational Safety, Health, and Working Conditions Code 2020: OSH Code has expanded the scope of inter-state migrant workers to cover

[35] C.S. Megha, *New Labour Codes, 2020,* available at http:www.legalserviceindia.com, last seen on 12/02/2021.

therein the workers engaged or recruited by an employer directly, from one state to another state for employment in his establishment.[36]

v. The National Child Labour Policy: The policy was proposed to rehabilitate the children withdrawn from employment, thereby decreasing the incidence of child labour in areas of known concentration of child labour[37].

vi. Atmanirbhar Bharat Abhiyan Yojana**:** During pandemic, the central government had announced the Self Dependent Plan Package. This package launched throughout the nation to fight against the ongoing COVID 19 epidemic crises[38].

8. JUDICIAL ACTIVISM DURING COVID19 PANDEMIC:

Indian Judiciary played a crucial role in the progress of modern jurisprudence and made a significant contribution in protecting the interests of vulnerable sections of society which reflects from several decisions in suo moto action, by interpreting the right to life liberally which are as follows:

8.1. Rights to Livelihood*:*

Livelihood includes basic shelter, food, education, occupation, and medical care. The right to livelihood can have broad meaning to it as it is the most crucial right when it comes to human life and dignity. In *Olga Tellis v. Bombay Municipal*

[36] S. 2(zd), Occupational Safety, Health & Working Conditions Code, 2020, defines "inter-state migrant worker" means any person who is recruited by— (i) an employer in one state for employment in his establishment situated in another state; or (ii) through a contractor in one state for employment in an establishment in another state, under an agreement or other arrangement for such employment and draws wages not exceeding the amount notified by the Central Government from time to time.

[37] *Policies for Unorganised sector*, Vikas Pedia, available at https://vikaspedia.in/social-welfare/unorganised-sector-1/policies-for-unorganised-sector, last seen on 5/02/2021.

[38] *Aatm Nirbhar Bharat Abhiyan Yojana 2021: Online Application, Benefits, Eligibility*, available at http://www.sarkariyoujana.in, last seen on 12/02/2021.

Corporation,[39] the court ruled that the right to life under Article 21 of the Constitution includes the right to livelihood; therefore, no person can live without the means of livelihood. This case has settled principle on right to livelihood. During pandemic, the court pointed out that workers migrate because they have no means of livelihood in the villages, and there is nexus between life and the means of livelihood. However, it is a hard reality in case of the migrant who were deprived of such rights.

8.2. Abolition of Bonded Labour:

Bonded labour flourishes because of poverty and widespread caste-based discrimination. Limited access to justice, education, and jobs for discriminated groups makes it difficult to get out of poverty.[40] Judiciary has played important role in releasing bonded labours, and further, court has also highlighted on right to live with human dignity in *Bandhua Mukti Morcha v. Union of India*[41]. The court held that whenever the PIL is initiated alleging the practice of bonded labour, then government requires to accept it as the circumstances and to examine the crucial issues of labour and make attempts to protect the labours and eradicate the practice of bonded labour.[42]Further, the bonded labourers should be identified and released and on release they must be suitably rehabilitated.[43]Even during pandemic many PIL were filed and big challenge before court was protecting the rights of labours. The Uttar Pradesh had suspended the labour laws by passing ordinance temporarily during pandemic. Hence it can be said that Bonded Labour case is well established on concept of

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[39] *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180. See: Delhi Development Horticulture. Delhi Administration Delhi AIR 1992 SC 789 the Supreme court ruled that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work.

[40] *What is bonded labour*? available at https://www.antislavery.org/ slavery-today/bonded-labour/, last seen on 21/02/2021.

[41] *Bandhua Mukti Morcha v. Union of India* 1984 SCR (2)67.

[42] Art. 23, the Constitution of India.

[43] *Neerja Choudhary v. State of MP* 1984 3 SCC 243.

right to live with human dignity which directly flows from Art.21 of the Indian Constitution.

8.3. Right to Minimum Wage*:*

Migrant and contract labourers do not have choice but to accept any work that come in their way, even if the remuneration offered is less than the minimum wage. But now the new Code on Wages Act 2019 is the ray of hope for many labourers. The Code on Wages Act 2019 prohibits employers from paying workers less than the stipulated minimum wage. Further, minimum wages must be reviewed and revised by the central and state government at an interval of not more than five years[44]. In *Peoples' Union for Democratic Rights v. Union of India*[45], it was held that service or taking of labour of any person for payment less than the mentioned minimum wages is an infringement of fundamental rights to such labourer while excising the scope and ambit of Article 23 of the Constitution of India. In *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers*,[46] the Hon'ble Apex Court focuses the fact that "neither the legislators nor those entrusted with the responsibility of implementing laws for safety of informal workers have put in place sufficient mechanism for contractors or the protection of persons employed to whom services meant public at large are outsourced by State and/or its Agencies/Instrumentalities for making workers, which are dangerous and harmful to life nor have they made provision for reasonable or payment , compensation in the event of death". Furthermore, the approach of the Hon'ble judiciary shall be taken into the consideration by referring to one more drastic judicial pronouncement in the case of *N Krishna Devi v. Vishnu Mitra*[47], it was

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[44] Supra 33.
[45] P*eoples' Union for Democratic Rights v. Union of India* AIR 1982 SC 1473.
[46] *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers* (2011) 8 SCC 568.
[47] *N Krishna Devi v. Vishnu Mitra* AIR 1982 Raj 281.

held that "the concern of judiciary for protecting the labour rights and to enforce the socio-economic justice is very well expressed in different cases relating to informal sector. However, during Covid19 lockdown judiciary was silent on the suspension of labour laws in the U.P. wherein such situation force labourers into bonded labour as employers were able to pay them below minimum wage amount.

8.4. Right to Health*:*

The right to health includes the right to live in a clean, hygienic, and safe environment, and medical care to protect the health and vigor of a worker while in service or post-retirement have been held to be a fundamental right under article 21 of the Constitution and therefore this right cannot be taken away by labour legislation. [48] Amid Covid, fundamental right to health includes affordable treatment[49] hence every state has a responsibility to provide the minimum condition ensuring human dignity. Moreover, it can be said that covid19 test must be done at the option of citizens irrespective of private hospital or government hospital as it is a fundamental right wherein state cannot interfere in such matters. In *Ganta Jai Kumar v. State of Telangana*[50], PIL wherein the petitioner challenged the Government Order wherein the State of Telangana did not permit well equipped private hospitals and diagnostic centers to conduct diagnostic tests for COVID-19 and to accept patients for isolation and treatment, the Division Bench of M.S. Ramchandra Rao and K. Lakshman, JJ**.**, held that the Government Order is not only violative of Arts. 14 and 21 of the Constitution and also the principles of natural justice, as it is not a reasoned Order. Further,

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[48] *Occupational Health and Safety Association v. Union of India* (2014) 3 SCC 547.

[49] The Supreme Court said it is a war against Covid-19, which needs government-public partnership to make Covid treatment affordable for the common people. The top court emphasised that fundamental right to health includes affordable treatment. Right to health is a fundamental right guaranteed under Article 21 of the Constitution of India.

[50] *Ganta Jai Kumar v. State of Telangana* 2020 SCC Online TS 482.

it was also held that the State cannot force its residents to make their testing done only in Government designated hospitals, especially when the people are willing to pay for the tests conducted by ICMR approved private hospitals.

8.5. Right to Food*:*

The right to food is a basic human right. It protects the right of all human beings to live with dignity, malnutrition, food insecurity, and freedom from hunger. The right to food is protected under humanitarian law, and international human rights and the correlative state obligations are well-established under international law.[51] In *Human Rights Alert & another v. State of Manipur & others,*[52] the main issue involved in this case was the distribution of Essential Commodities to beneficiaries. The court highlighted that all the fair shop owners-maintained records in the form of entries made in the ration card to show the actual distribution of food, and all noncard holders also shall be given rice free of cost; therefore, it can be said that human right includes right to food too.

8.6. Migrant Workers Right*:*

All persons, irrespective of their nationality, legal, race or status, are entitled to basic human rights and basic labour protections including migrant workers and their families. Migrants are also entitled to certain human rights and protections specifically linked to their vulnerable status. Lockdown in India had impact on millions of migrant's workers. Lack of food, basic amenities, fear of unknown, loss of employment and lack of social support were major reasons for struggle in this huge part of population[53]. The judiciary has also not protected itself in

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[51] Jean Ziegler, *Right to food*, available at http://www.righttofood.org/work-of-jean-ziegler-at-the-un/what-is-the-right-to-food/, last seen on 21/02/2021.

[52] *Human Rights Alert & Anr. v. State of Manipur & Ors.*, High Court of Manipur, PIL No. 11/2020 (Manipur High Court, 13/05/2020)

[53] *Human Rights and Migrant Workers* available at https://www.pdhre.org/rights/migrants.htm, last seen on 21/02/2021

glory by failing in its duty to safeguard the dignity and rights of migrant labour, citing the ground of non-interference in the policy during pandemic.[54]*In re Problems and Miseries of Migrant Labourers*[55], Court took suo moto cognizance of the problems and miseries of migrant labourers who had been stranded in different parts of the country.' The three-judge bench of Justices Ashok Bhushan, Sanjay Kishan Kaul, and MR Shah issued directions to the Central and State Governments to protect fundamental rights of migrant workers. Further the Supreme Court allowed Human Rights body NHRC to intervene and to elevate the plight and miseries of standard migrant workers due to pandemic induced nationwide lockdown and also to ensure that their Human Rights are not violated. NHRC sought a direction for implementation of the Interstate Migrant Workmen Regulation of Employment and Conditions of Service Act, 1979 to ensure that migrant workers are provided with the journey allowance and it was urged that medical facilities and nutritious food should be made available in shelter homes and state should be directed to identify the industry in which the migrant labour is working. However, NHRC said that the identification of industry will aid the state in creating schemes for the migrant workers and in the preparation of a state wide database. The NHRC in its long-term suggested measures proposed that a special provision be inserted in the law on interstate migrant workers to deal with emergency situations like covid-19, natural disasters[56].

8.7. Right to Freedom of Movement*:*

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[54] Chitranjali Negi**,** *Human Rights Violations of Migrants Workers in India During COVID-19 Pandemic,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629773, last seen on 21/02/2021.

[55] In re Problems and Miseries of Migrant Labourers, Writ Petition (Civil) No(s). 6/2020, (Supreme Court 26/05/2020).

[56] Suman Doval, *Covid-19: Define social security for migrant workers Opinion*, Hindustan Times (04/04/2020), available at https://www.hindustantimes.com/analysis/address-the-gaps-to-help-migrant-workers-during-this-crisis-opinion/story-1TTIFickk6Ix5L4nGYDZBN.html, last seen on 27/08/2020.

Freedom of movement is a human right protected by domestic laws and international treaties, in *M.L. Ravi v. The Chief Secretary, Govt. of TN & Others*[57], Petition filed under Article 226 of the Constitution of India asking for a Writ of Mandamus directing to issue guidelines to the police personnel not to infringe the human rights during the curfew for COVID-19 control. Freedom of movement is a basic right under Indian Constitution which has been curtailed during health emergencies, and police had treated the common people inhuman way. Therefore, it can be said that police must be aware of duties in case of emergencies without violating human rights.

8.8. Rights of Transgender:

Bombay high court had directed the social justice department of the state government to consider a representation by the transgender community to decrease their physical and financial sufferings during the Covid-19 lockdown. A transgender activist from Mumbai, Vikram Shinde had filed a PIL for judicial interference contending default of the state and Centre to acknowledge and remedy the deplorable living condition of many members of the already marginalized community. The PIL stated that no welfare scheme has been announced by the Centre or state for the transgender people.[58]

8.9. Right to Decent Burial*:*

[57] *M.L. Ravi v. The Chief Secretary, Govt. of TN & Ors*., Writ Petition No. 7418/2020 & 7426/2020 (05/05/2020).

[58] Swati Deshpande, *Maharashtra to decide on representation from transgender community during pandemic: Bombay HC*, Times of India (30/06/2020), available at https://timesofindia.indiatimes.com//city/mumbai/maharashtra-to-decide-on-representation-from-transgender-community-during-pandemic-bombay-hc/articleshow/76713141.cms, last seen on 22/02/2021.

The COVID-19 pandemic has not only presented a financial crisis, health, and safety but also a crisis of faith in the final journey of humans[59]. Meghalaya High Court directed the state government to sensitise public, especially where the burial or cremation grounds are situated, to avoid any further unfortunate incidents. Our judiciary, on several occasions, stood for right to burial with 'dignity' and further clarified that a corpse must be treated with the same dignity as a living being[60].

9. CONCLUSION

The majority of employees in the country are from an unorganized sector who work without adequate facilities in extreme conditions. For economic and social growth, support and security for unorganized sector workers are significant. The existing social security laws in India are not adequate to cover the entire working force in the organized sector in terms of their recognition or protection, however in regard to the informal sector of workers they should be granted with pension during the rainy season, accidents relief, natural mortality allowance, maternity leave benefits education assistance for children for higher education. Indeed, it is a well-settled principle that the rule of law must be respected. The human rights and dignity of the organized and unorganized labours must be upheld and protected to ensure social security during this pandemic.

[59] The Right to Life is a broad concept, which states that no person shall be deprived of his/her life or liberty or property, except according to procedure established by law.

[60] *COVID-19 Let's not deny the right to a decent burial*, money control, available at https://www.moneycontrol.com /news/ opinion/covid-19-lets-not-deny-the-right-to-a-decent-burial-5218391 .html, last seen on 21/02/2021.

DOMESTIC WORKER RIGHTS VIOLATION DURING COVID-19 LOCKDOWN: NEED FOR LABOUR LAW PROTECTION

Prof. V. Sudesh*

Abstract

The lockdown saw rise in the atrocities against women. The conditions of domestic workers majorly of which are women deteriorated considerably. 91% of the workers didn't receive their wages during the lockdown. The domestic workers fall under the unorganized sector, so the working of the unorganized sector needs a revisit, in order to secure them their rights and to avoid a similar situation arising in future. The problems faced by domestic workers aren't new, they have always been subjected to exploitation, forced to work at reduced prices, poor working conditions, lack of welfare benefits, Covid-19 just added to the ever-existing problem. Constitutional protection is given to domestic workers, on the international front, the ILO is also consistently working to realize rights of domestic workers. Several legislations have come into force but the need of comprehensive and uniform legislations is the need of time.

1. INTRODUCTION

An accepted norm in the contemporary household is the employment of domestic workers as daily help to assist the family members. However, an unprecedented pandemic situation caused by the covid-19 virus has brought untold miseries to the domestic workforce in the informal workforce. Several NGOs have now narrated the problems faced by domestic workers during the covid-19 lockdown. As per a survey conducted, 91 % of workers did not receive their wages during the covid -19 pandemic lockdown, and 50 % of the domestic

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workers above the age of 50 lost their jobs in Bengaluru.[1] Needless to mention that the situation may not be any better elsewhere in India. This unprecedented situation calls for a re-look at applying the existing labour laws *vis-a-vis* the domestic workers.

2. UNDERSTANDING DOMESTIC WORK SECTOR: ITS ROLE & SIGNIFICANCE

Among the various segments of the informal sector in India, the workers who receive a meagre income and suffer from numerous problems are domestic workers[2]. In informal sector activities, the occupation that gets many women and girls into employment is the domestic work sector. The domestic workers are the ones who substitute homemaker's unpaid repetitious, routine, mind-numbing domestic obligations. Development in science and technology, change in attitudes and aspirations, social structures, family living patterns, and education has played a pivotal role in transforming womens' work. Women who are juggling at work with hectic schedules, stress, and tension to balance both work and home would be relieved if someone could offer a little help and that someone is the domestic women worker who substitutes them for paid employment.[3] The domestic workers perform various tasks such as cleaning, washing clothes, dusting, mopping the floor with toxic chemicals, caring for children, cooking, caring for the elderly and the disabled, and often more. Globally domestic workers account for more than 90 % of the total workforce, in a large proportion dominated by women and girls.

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[1] *Domestic Workers' Rights Union, Bruhat Bangalore Gruhakarmika Sangha*, and the *Manegelasa Kaarmikara Union,* The Hindu (16/06/2020), available at https://www.thhindu.com, last seen on 12/4/2021

[2] Dr. Madhumathi. M., *Migration for Domestic Work: A Case of Female Domestic Workers in Bangalore*, 2(1) International Journal of Social Science and Interdisciplinary Research 48 (2013)

[3] Vinita Singh, *Women Domestics- workers within Households*, 15 (1st ed, 2008).

'Work' in the domestic work sector does happen in a private household, conventional place, or the owners' homes. The term 'workplace' is defined as a location or building where people perform physical or mental work to earn a living. The work environment in the domestic work sector is highly informal, characterized by the casual contractual relationship between the employer and the domestic women worker. The domestic work sector is also a handful supplier of migrant workers within and outside the country.[4] As a migrant worker, she is subject to all forms of problems such as immigration issues, seizing of passport, ill-treatment by the employers, confinement within the household, health issues, verbal abuses, socio-economic and psychological issues at the workplace in one or the other form. The migrant workers flowing from rural parts of India to metropolitan cities find employment in the domestic work sector for low wages within the country. They are subject to endless violations of their fundamental human rights as workers are often trafficked and exploited by the placement agencies.

Domestic work has increasingly become part of the global division of labour and is inextricably integrated within it. Domestic work in India, as elsewhere, is characterized by poor working conditions, precarious employment arrangements, class, caste and gender discrimination, lack of employment benefits, lack of social security measures, lack of welfare and health benefits, fear of losing jobs as contracts are informal. The above factors have severely influenced the living and working conditions, thus depriving them of a decent work environment by ensuring a guarantee for their rights, which ease the burden of many households by taking up the jobs as domestic help. The domestic servants hired by the houses, most commonly urban (poor, middle class, or wealthy) households, give a large source of employment to the significant chunk

[4] Philippa Smales., T*he Right to Unite, A Handbook on Domestic workers Rights Across Asia*, Asia Pacific Forum on Women, Law and Development 14 (2010).

of the workforces who are primarily unskilled, illiterate, and suffer from poverty. The kind of improper working and living conditions that the domestic workers are exposed to, demands a need for the study to understand their labour rights and design an appropriate labour legislation to protect and promote the rights of domestic women workers in India.

3. INTERNATIONAL LAW AND DOMESTIC WORKERS

The International labour jurisprudence has incorporated the core values of labour rights in various international instruments and conventions adopted to ensure protection to labourers against violation of their labour rights. International labour human rights instruments proclaim fundamental labour rights. Internationally the labour rights that find recognition in the international Labour jurisprudence should be incorporated into the domestic system of every nation to meaningfully protect and promote the rights of workers in both the formal and informal sector employment.

The rights of domestic workers are protected through an international mechanism such as Convention No 189[5] and Recommendation No 201 that ensures the role of the state in promoting and protecting the rights of domestic workers who make up a large part of the informal sector in the developing countries.

4. CONSTITUTIONAL PROVISIONS FOR PROTECTION OF DOMESTIC WORKERS IN INDIA

In the line of international principles, the Indian Constitution has also embedded the principles of socio-economic justice in its fundamental rights and directive principles of state policy.[6]Under Article 15(3) of the Indian

[5] *Domestic Workers Convention (No. 189)*, International Labour Organization, www.ilo.org.
[6]Art.14, Art. 15, Art. 16, Art. 39(a), Art. 39(d), Art. 42 & Art. 51(A) (e), the Constitution of India.

Constitution, special protection is accorded to women because they belong to weaker and the most vulnerable section of the society. Accordingly, women workers in general and domestic women workers shall be provided with basic rights to entail special protection to be treated with due respect and dignity as per the provisions of the Indian Constitution. The worth and value of their work should be recognized and rewarded. However, domestic work, largely dominated by women and girls, is denied recognition as workers, afforded no legal protection, and thus deprived of their rights as workers.

5. WORKERS' RIGHTS

Consistent efforts by the International Labour Organization (ILO) since its establishment in 1919 have realized several rights of workers transplanted into several domestic labour legislation among ILO member nations. Though there is no unanimity on considering all workers' rights as a human right, ILO has recognized four labour rights as core or fundamental labour rights such as i) freedom of association and bargain collectively, ii) freedom from forced labour, iii) freedom from discrimination at work and iv) freedom from child labour.[7] In so far as domestic workers are concerned, all of the above core rights are generally violated. In recent times a few NGOs and associations have been pressing for a legal solution to the violation of the rights of domestic workers. However, in the absence of any legal force to bargain, the domestic workers, in general, remain without any legal support. In the backdrop of the ILO core labour rights, the violation of the following rights of domestic workers is identified viz., lack of job security, no timely payment of wages, non-payment of minimum wages, no leave or holiday, no medical care, no protection against discrimination and sexual exploitation.

[7] *Introduction Labour Rights, human rights* 137(2) International Labour Review 127 (1998)

6. THE DOMESTIC WORKFORCE AND THE DOMESTIC WORKER

The enormity of domestic workers' problems can only be realized if we look into the statistics of the domestic workforce. According to ILO, the total workforce of migrant domestic workers is 11.5 million (based on "Global estimates on migrant workers," 2015, by Maria Gallotti, ILO Labour Migration Branch).[8] Despite the government not maintaining any data on the total domestic workers in India, it is estimated, according to some reports available on the web, that 39 lakh people are employed as domestic workers.[9] Therefore, it is natural to deliberate on the legal status of domestic workers, the majority of whom are undoubtedly women.

Domestic workers are part of the informal work sector in both developed and developing countries. Therefore, the applicability of labour laws is a problematic issue, leaving the domestic workforce without any legal protection of their rights. A problem identified in extending the application of labour laws in the Indian context covering the domestic worker is the definition of domestic work and domestic worker. The challenge in defining domestic workers arises from the fact that employment is the private household of the employer. The opinion expressed by researchers in the area of the domestic workforce indicates that the term 'domestic work' is being understood as employment for work, which is based upon the nature of the place of employment. In this regard, the Unorganised Workers' Social Security Act, 2008 (Act No. 33 of 2008)[10] under section 2 (n) defines a 'wage worker,' which includes a domestic worker. The definition is as follows:

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[8] Maria Gallotti, *ILO Labour Migration Branch, Migrant Domestic Workers Across the World: Global & regional estimates*, 2015, https://www/ilo.org, last seen on 12/04/2021.

[9] Ministry of Labour & Employment, Government of India, *National Policy on Domestic Workers*, available at www.pib.gov.in, last seen on 07/01/2019.

[10] Unorganised Workers' Social Security Act, 2008- An Act to provide for the social security and welfare of unorganised workers and for other matters connected therewith or incidental thereto.

(n) "wage worker" means a person employed for remuneration in the unorganized sector, directly by an employer or through any contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or in-kind, whether as a home-based worker, or as a temporary or casual worker, or as a migrant worker, or workers employed by households including domestic workers, with a monthly wage of an amount as may be notified by the Central Government and State Government, as the case may be.

A comprehensive definition of domestic worker and domestic work is perhaps provided under the "*Domestic Workers Regulation of Work and Social Security Bill 2017*", prepared by National Platform for Domestic Workers, New Delhi, (NPDW)[11] , which is as follows:

"*Domestic worker means any person engaged in domestic within the employment relationship (Article 1(b) of the ILO definition Convention-189)*

"Domestic *work means work performed in or for household or households.*"

From the above definitions, it is stated that the fundamental nature of domestic work and the domestic worker is that it is informal employment in a private household, and the terms and conditions of work are not fixed. Domestic workers, especially women workers, are the marginalized section of society. They are unheard, unprotected, and uncovered by various pre-existing labour laws due to certain fundamental innate constraints in interpreting provisions relating to the employer and employee relationship, the ownership of the enterprises, the workplace, and so on. During the covid-19 induced lockdown, it was common to find that domestic workers who, until the pandemic stuck, made the life of many households comfortable, were fired at will without any monetary compensation for losing the job. Even before the covid-19 lockdown,

[11]See. https://www.nirmane.org, last seen on 12/04/2021.

Domestic workers in India, as elsewhere is characterized by poor working conditions, precarious employment arrangements, class, caste and gender discrimination, lack of employment benefits, lack of social security measures, lack of welfare and health benefits, fear of losing jobs as contracts are informal.

The above factors have severely influenced the living and working conditions, thus depriving them of a decent work environment by ensuring a guarantee for their rights, which ease the burden of many households by taking up the jobs as domestic help. The challenges to address the problems of domestic workers post covid-19 pandemic may be identified as follows:

- Contractual identification of terms and conditions of employment with particular emphasis on employer-employee workplace relationships.
- Extending health and social security safeguards.
- Preventing gender discrimination and abuse at the workplace.
- Method of guaranteeing a timely wage and calculating minimum wage.
- Establishing a welfare board
- Dispute resolution mechanism.

The existing labour legislation such as the Maternity Benefits Act, 1961; Industrial Disputes Act, 1948, the Factories Act 1948, Trade Unions Act, 1926, Employees Compensation Act, 1923, the payment of Gratuity Act, etc., are framed in a manner extending protection only for formal sector workers and do not apply to the domestic workers.

7. CONCLUSION

The domestic work sector that primarily comprises of women who ease many households' burden by substituting their unpaid work at home is mercilessly deprived of status and dignity and any legal protection. The labour jurisprudence has its parameters for defining the term 'workman,' 'Industry' and the formal relationship between employer and domestic worker. This block

prevents the application of labour laws to domestic women workers in India. The under-estimated, unreported statistics and the gendered nature of work make the domestic women workers invisible. Domestic women workers lack organizational strength and voice to claim and exercise their labour rights. In the absence of adequate and effective legislation for the regulation of protection of rights of domestic women workers, they are dependent on their employer's sense of fairness rather than on an accepted legal norm that recognizes their work as decent work. Though several legislations such as the Unorganized Social Security Act, 2008, Sexual Harassment against women at workplace (Prevention, Prohibition and Redressal) Act, 2013 and Minimum wages schedules notified in various states refers to domestic workers, there remains an absence of comprehensive, uniformly applicable national legislation that guarantees fair terms of employment and decent working conditions. The latest in a series of efforts to address domestic workers' concerns are the two draft bills brought out in 2008 by the National Commission for Women and the National Campaign Committee of Unorganized Sector Workers in 2008. The latest report prepared by Platform for Domestic Workers, Delhi, in the form of Domestic Workers Regulation of Work and Social Security Bill, 2017, is also an important step in the right direction. The policymakers, legislative bodies, and people need to recognize an employment relationship in domestic work.

SOCIAL SECURITY *VIS-À-VIS* FUTURE OF WORK: ISSUES AND CHALLENGES

Prof Durgambini Patel[1]

Abstract

Social Security being a wide encompassing term, the paper attempts to interpret its meaning when used in statutory reference to unorganized workers, the constitutional provisions and judicial decisions concerned therewith. Undeniably, addressing the problems and issues of the unorganized sector in light of challenges in future to the system of work is the foremost concern of the time. The author mainly focuses on the enactment- the Unorganized Workers Social Security Act, 2008 and critically evaluates the Act for not doing enough justice to the purpose for which it came into force. The author concludes by highlighting the importance of social security and suggesting how labour legislations must be implemented for the benefit of the workers in anticipation of changing nature of the future of work due to driving forces emerging from technological revolutions and ever-changing nature of globalization.

1. INTRODUCTION

In India, out of the total workforce in labour, the unorganized sector is more in number than the organized sector, which is quite evident. This paper traces the evolution of the concept along with compiling various definitions and types of the said term. Social Security being a wide encompassing term, the paper attempts to interpret its meaning when used in statutory reference to unorganized workers, the constitutional provisions and judicial decisions concerned therewith. Undeniably, addressing the problems and issues of the unorganized

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sector in light of challenges in future to the system of work is the foremost concern of the time.

Apart from the constitutional provisions and judicial decisions, the author mainly focuses on the enactment- the Unorganized Workers Social Security Act, 2008 and critically evaluates the Act for not doing enough justice to the purpose for which it came into force. The task of a critical study of existing laws on social security is needed due to the fact that we are slowly but steadily proceeding towards a mass casualization of the workforce and the future of work is full of complex problems and challenges.

The author concludes by highlighting the importance of social security and suggesting how labour legislations must be implemented for the benefit of the workers in anticipation of changing nature of the future of work due to driving forces emerging from technological revolutions and ever-changing nature of globalization. The industrial revolution is predominantly information and digitization based but has certain underpinnings namely first, contractual labour in both standard and non-standard jobs, secondly, out shoring- outsourcing-reshoring of labour, thirdly, adoption of 'crowd work' or gig work/ on-demand work and lastly the impetus to regulatory Darwinism (evolution and change) through market dictated self- regulation. The above-mentioned factors significantly impact the formalization of the unorganized sector leading to a major crisis in the economy in future. If this issue is not addressed in time it will lead to a grave situation wherein the working class will be denied social justice, basic human rights and will remain economically vulnerable and socially deprived. There will be concentration of wealth in the hands of few, leading to a chaotic condition and stagnate circulation of money, which is needed for a sound economic system.

The workforce of the unorganized sector is dominant in number as compared to the workforce of the organized sector in India. Out of the total workforce comprising of 47 crore workers, 8 crore workers are in the organized sector while the remaining 39 crore are in the unorganized sector.[2]The characteristics of this sector usually include non-ability to pursue basic interests due to economic, social, or seasonal employment constraints. They are also not exposed to the employment benefits and social security which are available to the organized sector under various legislations.[3]

The process of socio-economic development of India though depends on the organized sector quantitatively but its qualitative aspect of development depends largely on the unorganized sector. The unorganized sector is also known as informal, unregulated, unprotected, sweated or traditional or household or enumerated sector.[4]In today's time, social security is being viewed as a major part of the development of industrialization to an increasing extent, as it undoubtedly helps to cater a more involving attitude to face the consequent structural and technological changes of globalization.

With globalization, the new class that emerged called as 'precariat'[5] faces threats from being unemployed, marginalization, lack of 'decent work,' casualization of labour and changing contours of 'future of work.' The existing social welfare schemes need to advance the rights of the precariat class in a particular sense of social security protection i.e., social risks such as sickness, injury, etc. and risks that may cause unwarranted destitution. The social security schemes in India primarily exclude the unorganized sector workers directly impacting the

[2] Ministry of Labour & Employment, Government of India, *Report of the Working Group on Social Security for Twelfth Five Year Plan (2012-2017)*, www.planningcommission.nic.in.
[3] Ibid.
[4] International Labour Organization, *Employment, Income and Equality - A Strategy for Increasing Productive Employment in Kenya*, Geneva, 1972.
[5] People whose employment and income are insecure, especially when considered as a class.

unorganized workforce, without them having any substantial improvement in skills, efficiency, wages, working conditions or any improved welfare measures to this sector. Under these circumstances, the goal of reaching the status of a developed economy would remain a mirage for India.

In spite of these constant reminders, the fact remains that till the framing of the much-awaited Unorganized Workers' Social Security Act, 2008, the dream of providing social security to an overwhelming amount of poor and vulnerable, unorganized working population was farfetched and is still not wholly fulfilled to its spirit. The necessity of social security is implicit specifically in the Directive Principles of State Policy of the Constitution of Indian, where labour welfare legislations emanate.

2. THE CONCEPT OF AN UNORGANIZED SECTOR

The concept of an unorganized sector was not as popular and spoken of until the early 1970s. The World Employment Programme Missions conducted by the International Labour Organization (ILO) in various countries aided this study.[6] These efforts primarily underlined and focused on the development strategy based on the economic growth of a country, considering employment conditions as a pathway to achieve the goal of economic upliftment.[7]British economist, Keith Hart in his detailed study on urban Ghana highlighted the plight of the rural workforce in the urban scenario and how they had to work in an unorganized setup due to lack of necessary skill.[8] He then devised the term informal sector in 1971.[9]Ever since then the unorganized sector and its

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[6] *Unorganized workers in India: Issues and Concerns*, Shodhganga, http://shodhganga.inflibnet.ac.in/bitstream/10603/76677/12/12_chapter%205.pdf, last seen on 2/11/2018.
[7] R.S. Tiwari, *Informal Sector Workers: Problems and Prospects,* (2005).
[8] Kishore.C. Samal, *Growth of Informal Sector in India* (2013).
[9] Kanak Kanthi Bagchi and Nirupam Gobi, *Social Security for Unorganised Workers in India*, 22 (2012).

conditions have been a crucial and inevitable topic of discussion in the area of labour laws.[10]

The term unorganized sector when used in the Indian context refers to the definition given by the National Commission for Enterprises in the Unorganized Sector (NCEUS)[11]- "*Unorganized workers consist of those working in the unorganized enterprise or households, excluding regular workers with social security benefits and the workers in the formal sector without any employment/ social security benefits provided by the employer."*

According to The Unorganized Workers' Social Security Act, 2008 'Unorganized Sector' is defined as: "*an enterprise owned by individuals or self-employed workers and engaged in production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten."*[12]

Unorganized sector can be further broadly divided into the following:

Agriculture workers-The First Agricultural Labour Enquiry Committee (1950-51) classified them into two categories- attached and casual labourers. The first category is the people who are attached to some cultivator household on the basis of a written or oral agreement of permanent and regular nature.[13] They have no freedom to work other than what the landlord directs those workers, similar to domestic workers in the household set-up.

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[10] Ministry of Labour and Employment, Government of India, *Report by Second National Commission on Labour*, 596-597 (2002).
[11] National Commission for enterprises in the Unorganised Sector, Government of India, *Report on Conditions of Work and Promotion of Livelihoods in The Unorganised Sector 2007,* available at http://dcmsme.gov.in/Condition_of_workers_sep_2007.pdf.
[12] S. 2(l), Unorganised Workers' Social Security Act, 2008.
[13] *jagranjosh.com*, available at https://www.jagranjosh.com/general-knowledge/overview-of-agricultural-labour-1446805160-1, last seen on 14/11/2018.

- Child Workers-This term is commonly interpreted in two different forms. One is economic practice and the other is social evil. The former is a gainful occupation which adds to the income of the family. The latter emphasizes the social evil in the society where they were denied the opportunities of education and other aspects to grow up as a balanced adult and are made to work in harmful places.[14] This is a result of their vulnerability and powerlessness.

- Contract Labour-It is one of the smaller forms of the unorganized sector where a worker is employed through a contractor on a contract basis with or without the knowledge of the principal employer.[15]Contract labourers are usually hired for a specific task and are thus bound by the contractual terms. The term 'contract labour' covers both labour and job contract.

- Domestic Workers-The work discharged either by women or children in any form is also included in the unorganized sector. They are the most neglected class of labour as they are rarely identifiable and mostly exploited by their employers and least protected by the law. The system of low wages, extended and undefined hours of work and difficult working conditions throughout the work period are some of the predominant features of this nature of employment. There is an absolute absence of social security and other welfare benefits. The condition is similar to the hire and fire system.

[14] J.C. Kulshreshtha, *Child Labour in India*, (1978).
[15] S. 2(b), Contract Labour (Regulation and Abolition) Act, 1970.

3. PROBLEMS FACED BY THE UNORGANIZED SECTOR

3.1. Problems of the Workforce

Approximately 90% of the total workforce is in the unorganized sector.[16] There is minimal awareness of workplace hazards, extended work hours, and exploitation by employers. The living areas are close to the work areas and there is no concept of occupational safety/services. Moreover, there is a lack of implementation of Health & Safety legislation in addition to the non-existence of the concept of Trade/Labour Union.

3.2. Insecurity of job

The informal sector workers do not have a stable and secured work description, due to which they end up doing multiple jobs at the same time. This clearly depicts insecurity of job but at the same time does not guarantee a payment enough to meet one's basic needs.

3.3. Inability to secure minimum wages

Several studies related to unorganized workers have time and again indicated and reiterated the obvious fact that the earnings and wage levels of the unorganized sector are below the prescribed minimum wage limit. Moreover, the reach and extent of and application of the Minimum Wages Act is questionable.[17]As a consequence of no fixed contract and unstable job description the inability to secure minimum wages prevails. The workers cannot bring about a significant change in their existing problem, due to the lack of power to collectively bargain. The employers take undue advantage of this very fact and pay the workers, wages that are less than the bare minimum. The interplay between future of work issues and challenges and unorganized sector

[16] Ministry of Labour and Employment, Government of India, *Annual Report 2017-18*, available at https://labour.gov.in/sites/default/files/ANNUAL_REPORT_2017-18-ENGLISH.pdf
[17] Supra 10 at 4.

is well explained- *"a multitude of insecure people living bits and pieces lives, in and out of short-term jobs, without a narrative of occupational development including millions of frustrated youths…, millions of women abused in oppressive labour, …and migrants in the hundreds of millions around the world. They are denizens; they have a more restricted range of social, cultural, political and economic rights than the citizens around them."*[18]

In *Peoples' Union for Democratic Rights v. Union of India,*[19]the Supreme Court ruled that

"…even though economic compulsion might subject a worker to work below the statutory minimum wage, but actually employing workers at wage rates below the statutory minimum wage levels was equivalent to forced labour and is explicitly prohibited under Article 23 of The Constitution of India."

Thus, this casts a duty upon the employer to ensure that workers are paid what they are entitled to. The wages for the unorganized sector which constitutes a considerable amount of the workforce must be fixed and followed by the government and must not be left to the economic influences created by the market.[20]

3.4. Undefined hours of Work

Another prominent problem faced by the unorganized sector is the undefined hours of a day put into work. Since a notable lot of unorganized workers get paid on an hourly basis, they tend to work overtime for which they are not paid more than average wages. These long and tedious working hours have severe

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[18] His Excellency Michael D. Higgins, President of Ireland, *The Future of Work*, Edward Phelan Lecture (2015).
[19] *Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.
[20]Government of India, *Report of the Working Group on Social Security for the Twelfth Five Year Plan*, (2012-17)

outcomes on the social and cultural lives of workers exposing them to various diseases at early ages.

3.5. Occupational Hazards and Health Issues

The undefined nature and hours put into work in an unorganized setup is the main cause of occupational hazards and health issues prevalent in this sector. Lack of nutrition is a bigger problem that needs to be dealt with seriously. Low nutrition intake due to low income and constant exposure to physical labour in extreme conditions increases the health problems in this sector of workers, resulting in risks of life. Life of workers working in industries manufacturing fireworks, tanning, constructions, etc. is further in jeopardy as loss of limbs and amputations when machines are operated unguarded, these laws relating to the health and safety of the workers is not effectively applicable. The laws for health, safety and welfare of the workers are not applicable and are not effective.

3.6. Problems faced by Government

The unorganized sector contributes to more than half of the country's GDP apart from providing livelihood to the population. Therefore, this sector of workers must be secured adequately, but the same labour laws cannot be applied. The Government faces a major problem of definition and identification of unorganized workers due to the scattered nature of the sector. The workforce of the unorganized sector is uneducated about the benefits of the organized sector moreover the employer does not want to attract any form of regulation while employing workers and for which he does not face any sanction of law.

3.7. Non-applicability of social security measures

As discussed above, the workers in the unorganized sector face more risks at their workplace as compared to the workers in the organized sector, but these workers in the unorganized sector have less protection of social security

measures as compared to the latter. Situations such as natural calamities such as flood, earthquake, etc. lead to loss of earning capacity of the workers and personal calamities such as maternity, accident, causes economic impairment to the workers which expose them to higher risks. It is evident that there are no social security measures to ensure risk coverage and provide minimum standard of living at the time of such crisis.

4. SOCIAL SECURITY TO THE UNORGANIZED SECTOR: ITS SIGNIFICANCE

The International Labour Organization (ILO)

ILO define social security as- "The security that the society furnishes through appropriate organizations against certain risks to which its members are exposed.[21] These risks are essentially contingencies against which the individual of small means cannot effectively provide by his own ability or foresight alone or even in private combination with fellows."[22]

Social security as defined by the International Social Security Association, lays down that- "Social Security can include social insurance programmes, social assistance programmes, universal programmes, mutual benefit schemes, national provident funds, and other arrangements including market-oriented approaches that, in accordance with national law or practice, form part of a country's social security system." According to another report of the International Labour Organization social security may be defined as- "any programme of social protection established by legislation, or any other mandatory arrangement, that provides individuals with a degree of income security when faced with the contingencies of old age, survivorship, incapacity,

[21] *Approaches to Social Security, 1942,* International Labour Organization., 83.
[22] Ibid.

disability, unemployment or rearing children. It may also offer access to curative or preventive medical care."[23]

The Universal Declaration of Human Rights propounds that-

"Everyone has the right to standard of living adequate for health and well-being of himself and family including food, clothing, housing, medical care and necessary social services, and the right security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[24]

Thereby the same forms the core tenet of decent work comprising of economics and ethics in the quality of work advancing the notion of human dignity which in itself is the facet of justice- Distributive Justice advanced through deliberative democracy and democratic institutions envisaging social justice too and not only economic justice.

The human rights framework represents the rigid dichotomy between the notions of empowerment- development – regulating the economy vis-a-vis the commoditization of labour fictitious or otherwise.[25] The issues of commoditization and outsourcing are interrelated to wage inequality and unemployment not only at the national frontier but at a globalized level.

5. THE SOCIAL SECURITY CONCEPT IS REFLECTED IN THE PROVISIONS OF THE CONSTITUTION OF INDIA, 1950

The Indian Constitution contains a plethora of provisions that portray India as a "Social Welfare State." To begin with, "labour" as a specific subject fall within

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[23] *World Day for Safety and Health at Work 2013: Case Study: Karoshi: Death from Overwork*, International Labour Organization, available at www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm, last seen on 14/11/2018.
[24] Art. 25 (1) Universal Declaration of Human Rights.
[25] *Declaration concerning the aims and purposes of the International Labour Organization*, 1944, International Labour Organization Declaration of Philadelphia.

the Concurrent List which means that both, the Central and State Governments, can enact legislation in this regard subject to specific issues being held for the Centre.

"Entry No. 22 which deals with Trade Unions; industrial and labour disputes, Entry No. 23 which deals with Social Security and insurance, employment and unemployment, and Entry No. 24 which deals with Welfare of Labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old-age pension and maternity benefits."

In addition to these provisions, the Preamble of the Constitution has secured social, economic, political justice, along with equality of status and opportunity to all the citizens irrespective of their nature of employment and social status and has reinstated these through various case laws time and again.

In *Bandhua Mukti Morcha v. Union of India,*[26] the Supreme Court held that

"Both the Central Government and State Governments are bound to ensure observance of social welfare and labour laws enacted by the Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State policy."

In *D. S. Nakara v. Union of India,*[27] the Supreme Court has held that

"…the principle aim of a socialist state is to eliminate inequality in income, status and standards of life and that socialism must aim to ensure adequate standard of living to people and must focus specially on security from cradle to grave."

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[26] *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.
[27] *D. S. Nakara v. Union of India*, (1983)1 SCC 305.

Recently, the Supreme Court of India in *National Campaign Committee for Central Legislation on Construction Labour v. Union of India and Ors.,*[28] directed the implementation of the building and other Construction Workers (Regulation and Employment) Act, 1996, as well as the building and other Construction Workers' Welfare Cess Act, 1996, noting that, despite the 12 years lapse since the Acts came into force, their provisions had not been implemented.

6. FUTURE OF WORK IN THE INDIAN SCENARIO

The debate regarding growing digitalization and its impacts on the labour markets all over the world has been ever-existent and constantly growing since the first industrial revolution which happened in the 18th Century. The digital revolution or the third industrial revolution happened in the mid-20th century which saw the invention of computers, the widespread use of electronics, the swift transition from mobile phones to 'smart' phones and the creation and destruction of jobs as an inevitable result of the same.[29]The Fourth Industrial Revolution as a concept was introduced at the trade fair in Hanover in the year 2013 and the core aim of this concept is to introduce the idea of 'smart factories' which will involve the use of automated- physical systems.[30]But, the Fourth Industrial Revolution as opposed to the third revolution is often considered as a new era of revolution and not merely as a continuance to the digital revolution due to its breakthrough and disruptive nature. It inculcates technologies and trends such as robotics, artificial intelligence, machine learning, Internet of Things (IoT), virtual reality, cloud computing, etc. and is transforming the future

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[28] *National Campaign Committee for Central Legislation on Construction Labour v. Union of India & Ors*., 2018 (3) Bom.CR 347.

[29] *What is the Fourth Industrial Revolution?* World Economic Forums, available at https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution, last seen on 01/02/2019.

[30] Pavel Kohout, *impacts of digitization on employment and social security of employees*, available at https://www.Digitalization%20of%20LM/1_IMPACTS_OF_DIGITALIZATION_2017.pdf, last seen on 01/02/2019.

of work and way of living profoundly.[31] Many jobs and ways of working will definitely change, while some will become old, the others will be created to make the life of the working class easy.

There are also studies which suggest that with digitalization there exists a process of job destruction and construction, which usually affects the traditional businesses and industries. Undoubtedly, the impacts of this revolution will be seen on not only the labour markets but also the society as a whole.[32]This is the main reason why the future of work and labour still remains unsure in addition to the speed and spread of technological change which is unparalleled.

Generally, with digitalization hitting the market several pre-existing techniques of working apparently change and are replaced by automated technologies which reduce the time and cost of work. This change demands new skills to carry out the tasks which mean that the existent workforce has to be trained to this extent or be replaced by workers who already possess the required skill set. Estimates suggest that low and middle-skilled jobs are amongst the ones that are most likely to be automated.[33]

In the Indian context, the impact seems a little hazy as the majority of our country's workforce is in the unorganized sector and a bulk of these workers are engaged in unskilled or low skilled work which generates a low level of income. The unorganized sector comprises of small-scale enterprises, daily wage, and self-employed workers, which evidently lacks the financial capital and necessary skills to support the adoption of advanced technologies. Adding up to this is the fact that less than 2 million jobs are being created every year for a

[31] Ibid.
[32] *Emerging technologies and the future of work in India 2018*, International Labour Organization.
[33] Supra 3.

workforce exceeding 8 million people with declining participation of women.[34] Micro-technologies for example digital banking, along with upgrades in transport and connectivity services, can improve labour productively to a noticeable extent.

The research and development relating to Artificial Intelligence (AI) in the public sector in India is headed by the Centre for Artificial Intelligence and Robotics (CAIR) at Defence Research and Development Organization (DRDO) and the various Indian Institutes of Technology (IIT) whereas, the research and development in the private sector is led by multinational corporations, including Infosys and Intel. Several other leading companies like Amazon, Flipkart, Uber, Ola, etc. which have gained mass popularity, make use of applications which are network-based and can be operated through smartphones or tablets. This has given a serious jolt to the traditional system of calling and employing workforce and manner of functioning of work. Advanced automation with the use of Artificial Intelligence (AI) and robots are already disrupting jobs in the market in the world.

However, in case of India, the difference between potential of automation and adoption of automation is to be noted closely as not many industries have the basic infrastructure to adopt such automation, therefore, they will be susceptible to potential automation but not immediate adoption. Approximately 300 million Indians live without power while only 25% have access to the internet.[35]Jobs requiring low- medium skills that are routine and rule-based can be the first ones among the lot to be technically automated but again, their adoption will depend upon the various socio-economic conditions such as relative cost and availability

[34] McKinsey & Company, *India's labour market: a new emphasis on gainful employment* (2017).
[35] World Bank, *Access to electricity 2017, www.worldbank.org*, last seen on 31/12/2018.

of skilled labour. Thus, the wave of advanced automation may only hit selected industries and work processes, not leading to complete job displacement.[36]

According to studies, the estimated automation in India, only based on the task content of various occupations ranges between 52-62%[37] whereas, the impact is greater if considered in terms of skill level as less than 20% of the working population is engaged in high-skills occupations requiring analytical skills.[38]Having said this, the Indian labour market offering jobs that need such low-medium skills has a lot of potential for automation of jobs as the task content of various occupations such as cashier, travel agents, etc. can be easily automated. But such jobs are very less in number in India. Such automation of jobs is more likely to affect the unorganized sector than the organized sector as these are the jobs that most unorganized sector workers aspire for. The educated and skilled labour in the unorganized workers rely upon jobs to pave the way out of poverty and hence such automation can pose a serious challenge especially in the context of the Indian labour market and reduce the mobility of low skilled-middle skilled labourers to jobs requiring higher skills and providing higher income. Thus, the government initiatives on skill development, public and private education sector need to be revamped therein.

Thus, analysis-based tasks include expertise-driven tasks which involve developing, planning, decision making, creative works, etc. are most likely to be affected by Artificial Intelligence (AI) and augmented reality but are difficult to be automated. Rule-based tasks including routine processing tasks like cashiers, receptionists, travel agents, etc. are likely to be transformed by sensors and cloud

[36] McKinsey & Company, *Jobs lost, jobs gained: workforce transitions in a time of automation*, (2017)
[37] McKinsey Global Institute, *A future that works: Automation, employment and productivity* (2017).
[38] Ibid.

computing. Whereas, skill-based tasks include such tasks which require creativity and innovation and are least susceptible to automation.

Another very important part of the digitalization of the labour market is the adoption of automation caused by digitalization. While reports suggest that manufacturing tasks in the organized sector have the maximum potential to be automated, with a recent study showing that 69% of the tasks in this particular line are susceptible to automation,[39] it does pose a question on the future of workers working in the manufacturing sector. However, the adoption of automation will be affected by the relative cost of technological up-gradation to labour, among other social and economic varying conflicts of interests.

Recent trends also indicate the fact that manufacturing industries requiring a large amount of capital investment and are capital intensive in nature are more likely to submit themselves to changes of the 4th industrial revolution and adopt advanced automation and robotics. The same is reflected in the shift in the automobile sector, which is reportedly estimated to buy 60% of the industrial robots sold in India.[40]These robots have taken up routine jobs like welding, painting, etc. in various manufacturing units, shrinking the manual labour force, and this is expected to happen on a large scale in this industry provided the high number of existing and inevitable routine jobs. Though the shift is already prevailing in the manufacturing sector, more precisely the automobile sector, this sector has contributed the most to growing employment rates over the last

[39] World Bank Group Foresight Report, *World Development Report 2016, digital dividends*, available at http://documents.worldbank.org/curated/en/896971468194972881/pdf/102725-PUBReplacement-PUBLIC.pdf, last seen on 04/01/2019.

[40] J. Srikant, *Robots are no hazard but beneficial, says auto industry expert*, Economic Times (09/07/2015), available at https://auto.economictimes.indiatimes.com/news/industry/robots-are-no-hazard-but-beneficialsay-auto-industry-experts/48008181.

decade, which in the coming time will be affected by the adoption of automated technologies and advanced robotics.

The industries such as textile, leather, paper manufacturing, etc. which require high proficiency and are labour intensive, will experience automation at a comparatively slower pace. But certain processes in such industries, e.g., textile, are experiencing automation in routine jobs and have replaced 20 workers with 2 workers. Due to such automation, the expected target of the government to create 1 million jobs in the textile sector is likely to remain unfulfilled.[41]

7. DOES THE UNORGANIZED WORKERS' SOCIAL SECURITY ACT, GUARANTEE AN EFFICIENT PROTECTION OF SOCIAL SECURITY?

This Act came into force on the 16th of May, 2009. This Act was passed by the Parliament to protect and provide social security to the unorganized workforce. The recommendations and suggestions of the Second National Labour Commission, the Report of the Petitions Committee of Lok Sabha, and the Report of the Parliamentary Standing Committee for Labour, were very crucial in giving shape to the much-awaited 'Comprehensive' legislation namely the Unorganized Workers' Social Security Act, (UWSSA) which came into force in 2008. However, even after 10 years since the advent of this Act, its provisions remain largely unimplemented. This is yet another example of a fragmented empowerment scenario for the unorganized or informal sector workers, which are characteristic of Indian social policies throughout the post-Independence period. The preamble of the Act reads as: "An Act to provide for the social security and welfare of unorganized workers and for other matters connected therewith or incidental thereto. "No doubt that the existing legislation which we have is a mitigated version of the proposed social security bill by the

[41] *India labour market update*, The Hindu (07/07/2016).

NCEUS, the Act is commendable on the front that it has made an effort to define the term Unorganized Workers for the first time thereby giving them a certain recognition in the eyes of the law.[42] The Act enlists various welfare schemes for the workers which include their registration along with the issuance of smart cards with unique identification numbers. The UWSSA 2008 can be considered as a foundation stone to give importance to the struggles of the working class by bringing unorganized workers under one defined umbrella. But the Act at hand is not up to the mark as the NCEUS proposal.[43]In its present form however, the Act falls short of ensuring the workers their rights. Therefore, the following are the drawbacks of the legislation:

7.1. No clarity on what is meant by 'social security':

The Act does not provide for a definition of minimum standard of social security which is enforceable by the law. Additionally, these existing schemes are for the Below Poverty Line (BPL) category and by dividing the unorganized workers into BPL and non-BPL categories, the Act commits grave injustice against the latter. No institution power is vested with the power of monitoring the implementation of the Act. The role National Security Board constituted under the Act is limited to advise but not to implement, monitor or enforce social security.

7.2. Merely a compilation of the existing Schemes:

A close reading of the Act will make it evident that the Act is merely a compilation of the existing schemes applicable to the persons who live Below the Poverty Line (BPL). The Act mentions 10 of the existing schemes in its schedule and additionally mentions that any new scheme related to any social

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[42] Supra 5.

[43] Planning Commission, Government of India, *Eleventh Five Year plan, Social Sector 2012 Volume II* available at http://14.139.60.153/handle/123456789/65.

security or benefit in regards thereto will be notified by the Central Government from time to time. The state governments have been put at liberty to devise their own schemes related to employment injury benefits, skill up-gradation, education, funeral expenses, etc. It can be noted that it is not mandatory for the government to provide any of these benefits. Additionally, the Act does not cast any mandate upon the government to enact new schemes with the changing times, therefore posing a question as to do we need a whole new Act at all when all these Schemes are already formulated by the government and are in existence.

7.3. Unknown Resources and Notional Schemes:

The Act falls short in explaining its scope, targeted beneficiaries, a detailed plan for implementation of existing provisions, and mechanisms for addressing grievances arising out of the implementation of this Act. The Act is also expected to mention clear penalties for the contravention of its provisions. However, it simply states that all of it will be done according to the notional schemes notified by the government. The question as to the funding of the notional schemes is left unanswered by the Act; moreover, the Act is also vague and unclear on the grounds for pointing towards the practicable sources of funding.

7.4. Wage Issues:

Non-payment of wages and inordinate delays are far more rampant than is acknowledged by the policymakers. No scheme or law can ensure security to the worker unless it assures timely payment of wages, this Act however failed to do so. This was the basic security that the act should have ensured. The present system of expecting the worker who is not paid by the employer to go to the labour court against powerful employers when they do not even have the money to buy the next meal is a mockery of justice. The Act does not provide for any

penal provisions to check and do away with the malpractice of non-payment of wages, paying a worker less than the prescribed minimum wage limit, unequal remuneration, etc. The Act should have acknowledged the fact of this particular sector, being powerless and unaware of their rights cannot raise voice to get their due. Moreover, it should have emphasized on this fact and enacted special provisions for the protection of wages related to issues of the workers as all other social security measures can be assured and enjoyed by a worker only when they have ensured the wage earned by them.

In fact, the issue of dispute resolution through tripartite boards as suggested by the *Shramshakti report of 1988* should have been considered. Also, no government has the right to ask for workers' contribution for welfare schemes when it fails to ensure the timely payment of rightful wages.

7.5. Grievance Redressal Mechanism:

The Act has come up with an impractical provision of redressing grievances. The Act lays down that the Government shall include a mechanism of grievance redressal in every scheme it enacts. Practical implementation of this in Maharashtra shows that women beneficiaries of the *NiradharYojanas* (social assistance schemes for destitute persons with a large percentage of women amongst the beneficiaries) face a number of problems like corruption, inordinate delays, and harassment in the government offices as well as banks and post offices. No official forum exists to ensure that grievances like these are heard and addressed. In the future, these will not be dealt with seriously unless the approach of the government is that in these situations it is ensuring the rights of the citizen-workers and not doing a favour by coming up with schemes. It was expected of the Act to come up with a cheap, quick and accessible forum for

workers' grievance but there is only a half-hearted and self-defeating attempt in this direction.[44]

7.6. Work Conditions:

It is difficult to understand why our parliamentarians did not show even a modicum of consideration for the inhuman working conditions and long working hours that these workers face. While it might be argued that an eight-hour working day, even if legislated, would have remained on paper (which is true of most social justice legislation in the country), such provisions should have been included as a basic norm of fair principles. A Legislation enacted for the workers gives them strength and backup to demand the enforcements of their rights and thus law should try to empower them to fight for their rights.

7.7. Workers' Facilitation Centers (WFC) and Panchayati Raj Institutions:

The Act fails to extract the full potential of two of the existing structures, which when put together could have given a stronghold to the enactment. These are:

(a) The workers' facilitation centers (WFC), and
(b) Panchayati raj institutions.

Instead of restricting the activities of the WFC to clear applications and generate awareness, it could have instead been given the authority to register the names of workers and maintain their records at a local level. The WFC should have been set up at the block level and connected with the gram panchayats or municipal bodies for taking the benefits closer to the workers. Most importantly, it should have been given the task of maintaining the record of licensed labour

[44] Rekha Mehta, *Women Workers in Unorganised Sector*, 4, Jharkhand Journal of Social Development, (2012).

contractors in the area as this would have gone a long way in curbing human trafficking and exploitation of labour by unlicensed contractors.

Similarly, the gram panchayat should have been empowered to maintain the records of the contractors who procure labourers from the villages to work outside and the labourers who are taken away to work in a different place. In a situation where a migrant labourer or woman labourer is harassed, tortured or not paid wages and in normal circumstances has nowhere to go, the WFC could have played a crucial role in helping them.

7.8. Women Workers:

The existing schemes for women formulated by the government look into the needs of women merely as mothers or widows. Whereas, the agony of women in the arena of labour and their needs, demand a special consideration which was highly expected of this Act. This Act would have been an ideal and sure way to ensure solutions to the problems faced by women working in the unorganized sector, like decent work conditions, protection from sexual harassment at the workplace, equal and fair remuneration. This could have been done by the inclusion of the recommendations of the *Shramshakti Report (1988)* and the inclusion of the Supreme Court guidelines laid down in the case of *Vishaka v. State of Rajasthan*[45] which addressed the issue of sexual harassment at the workplace. The outstanding witness of the Indian Social Security scheme is that nothing has been done towards unemployment insurance of the workers which is the most important cause of industrial unrest and a sense of insecurity among the workers in the country.[46]

[45] *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.
[46] Sundharam M. Paul, *Labour Problems and Social Welfare* (1st edn, 1948).

8. CONCLUSION

As rightly put by Leo Killbmann- *"There is no lasting peace without social justice no social justice without social security"*

It can be seen that the unorganized sector occupies a significant position in the Indian economy as can be deduced and is also a major provider of urban jobs. This sector of labour is being hit by uncertainty and poor wages at the grass-root level and the dynamics of the future of work. A number of legislations relating to social security have been passed to operationalize the vision of the Constitution for the working class to ensure adequate livelihood security, i.e., freedom from exploitation, but in reality, only the workers in the organized sector are able to secure social security benefits for themselves and their families and these measures are not reaching the eligible beneficiaries in an adequate level which is not justified.[47]

The global economy is on the doorstep of the inevitable 4th industrial revolution and the notion of future of work which would impact the labour markets in India in the coming decades. According to the various researches cited in this paper, this revolution, unlike the previous revolutions is not of a substitutive nature, but of a destructive nature. The inventions of robots and automatable technologies are posing a threat to the existing industrial setup as the tasks which were not automatable are now under the radar of automation. In this regard, this paper has analyzed the impact of such a revolution on the existing labour market setup and the changes which would take place in the future. After analyzing, it can be concluded that routine jobs done by the population are amongst the ones to be automated by machines. Such jobs are mostly done by people having lower educational qualifications who aspire to pave their way out of the minimum

[47] National Commission for Enterprises in the Unorganized Sector, Government of India, *Report on Social Security for unorganized workers*, 2006.

earning limit. Replacing such workers will lead to social security problems, including both societal and economical imbalance, instead, the government must formulate the right policies in the coming times to help mitigate the impact of such replacement. Educating the soon to be replaced worker and inculcating new skills in him/her will help them survive. The Skill India campaign launched by the government in 2015 is a recent example. The campaign which included various initiatives by the government aims to train over 40 million people by 2022 in various skills. While framing laws and policies, the government must also consider the impact of such digitalization on the economic system of India.

Four specific technological advances—ubiquitous high-speed mobile internet; artificial intelligence; widespread adoption of big data analytics; and cloud technology—are set to dominate the 2018–2022 period as drivers positively affecting business growth. The human-machine frontier shall enhance skill, upskilling and re-skilling-based requirement and depletion of manual tasks being done by humans[48] resulting in a large-scale decline in some roles as tasks within these roles become automated or redundant, and large-scale growth in new products and services—and associated new tasks and jobs— generated by the adoption of new technologies and other socio-economic developments such as the rise of middle classes in emerging economies and demographic shifts.

The existing labour laws are under pressure and are impacted by the transition and transformation into the future of work requirements, availability of flexibility, lawyering services to the disputes in unorganized sector and in other contractual labour too. Thus, future of work is solely technology-driven based on *inter alia* automation, user and entity analytics, machine learning, cloud computing, internet of things, Augmented and Virtual reality, Wearable devices,

[48] *The Future of Jobs Report, 2018*, World Economic Forum, available at http://www3.weforum.org/docs/WEF_Future_of_Jobs_2018.pdf.

encryption, 3D printing, non-humanoid robots, block-chain, crypto-currency, and digital trade.

The disruptive nature of technologies will ultimately result in the concentration of wealth only in the hands of the owners of such technological assets, who are not in majority as of today's scenario. This justifies the immense importance of education of the masses and of them in the workforce in the age of rapid digitalization.

Moreover, The Unorganized Workers' Social Security Act can be welcomed as an attempt to legislate social security for unorganized workers, but the only recommendation that it has accepted in *toto* from the commissions is that of registration of workers and issuance of identity cards in the form of a smart card bearing a unique social security number.[49]Human development insists that everyone should enjoy a minimum level of security. Moreover, it is a responsibility cast upon the State to protect its citizens from various contingencies like unemployment, sickness, injury arising out of employment, maternity benefits, etc. Therefore, the primary aim of all labour legislations must be to protect maximum class of labourers without any form of discrimination.

The Parliament by suitable amendment must attempt to remove the inherent drawbacks and must also aim to provide for humane treatment, welfare, well-being and security to make the workforce more efficient and productive. Likewise, social security should also extend to cover safe drinking water, sanitation, health and educational facilities for the society at large and apart from that, it must mandatorily ensure living wages to guarantee workers a dignified life. The various funding provisions in the Union 2019 budget to be implemented through various schemes for the weak and poor must be implemented in letter and spirit. All of this would in turn protect the interest of the industry as well

[49] Supra 29.

and aid to have industrial peace and development. Robust social security schemes and policies will enable us to ease the pressure and serious concerns that are around the corner in light of the dynamic nature of the future of work.

A SCRUTINY OF LABOUR LAW REFORMS IN INDIA

B.K Sahu*

Abstract

Labour laws in India fall under the concurrent list and therefore, are governed by numerous Central and State legislations on plethora of topics. Due to overlapping of so many laws, the implementation, which should be the main focus for any law, becomes difficult as a result the ultimate beneficiary face the brunt of it and suffer. The laws were made keeping in mind the benefit of workers, but unfortunately the desired result isn't achieved. To overcome this problem, 29 labour legislations have been amalgamated into 4 Codes. Along with, the consolidation of laws this chapter also discusses about other labour law reforms such as including the Migrant workers in the postal voting policy as they are unable to cast their vote and thereby exercise their right due to frequent change in their working locations.

1. INTRODUCTION

Labour market in India is defined by an array of labour laws. Labour figures in the Concurrent list of the Constitution of India. By implication, both the Central and State Governments can legislate in this area. As a result, there were about 44 labour laws enacted by the Central Government which were implemented by the Central or State Governments or both as defined in the respective statutes. Besides, there were over 90 labour laws enacted and implemented by the concerned State Governments in their respective jurisdictions. Both the Central and State labour laws cover various broad labour-related areas like wages, social security, labour welfare, occupational safety and health, industrial relations etc.

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Even though each law has been enacted with a purpose aiming at promoting workers' benefits, the general perception was that the plethora of labour laws would be difficult to implement. Maintenance of a number of registers and records, furnishing of various returns and consequently multiple inspections by different law-enforcing agencies might be over-bearing. So, the major concerns relating to labour laws and regulations in India are highlighted below:

- Too many labour laws cause definitional overlaps and difficulty in implementation.
- Labour market in India is characterized by structural dualism i.e., existence of formal and informal sectors catering to about 10 and 90 percent of workers, respectively. However, labour laws are mostly formal sector-centric, leading to exclusion of a large segment of the workforce from their ambit. Hence universalization of benefits, especially of social security, is called for.
- The effectiveness of labour laws become less pronounced due to weak administrative enforcement mechanisms.
- In the context of globalization, in order to face volatile global and domestic markets and for improving productivity, it is necessary to provide certain degree of operational flexibility to employers and social security to workers, including facilities for training and retraining.

These deficiencies are expected to be overcome through labour reform, also called as labour law reform or labour market reform. Labour reform is a continuous process and has been carried out through amendment of labour laws over time. What was considered relevant, however, was to undertake a review of labour laws and carry out their simplification, rationalization and codification, as recommended by the Second National Commission of Labour (NCL:2002).

Accordingly, out of 44 Central Labour laws, 29 have been amalgamated into 4 Labour Codes and notified. 12 laws have been repealed. 1 [Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988] is awaiting repeal. 2 [Child & Adolescent Labour (Prohibition & Regulation) Act, 1986 and Bonded Labour System (Abolition) Act,1976], would remain on stand-alone basis. The names of 29 Acts and 4 Codes in which these are incorporated are given below:

Sl. No	Name of the Act	Code
1	Payment of Wages Act, 1936	W
2	Minimum Wages Act, 1948	W
3	Equal Remuneration Act, 1976	W
4	Payment of Bonus Act, 1965	W
5	Trade Unions Act, 1965	IR
6	Industrial Disputes Act, 1947	IR
7	Industrial Employment (Standing Orders) Act, 1946	IR
8	Employees Compensation Act, 1923	SS
9	Maternity Benefit Act, 1961	SS
10	Employees State Insurance Act, 1948	SS
11	Payment of Gratuity Act, 1972	SS
12	Employees Provident Fund and Misc. Prov. Act, 1952	SS

13	Employment Exchange (Comp. Not. Of Vacancies) Act,1959	SS
14	Unorganised Workers Social Security Act, 2008	SS
15	Cine Workers Welfare Fund Act, 1981	SS
16	Building & other Construction Workers Cess Act, 1996	SS
17	Working Journalists and Other Newspaper Employees (Condition of Service and Misc. Prov.) Act, 1955	OSH
18	Factories Act, 1948	OSH
19	Mines Act, 1952	OSH
20	Contract Labour (Regulation and Abolition Act) Act, 1970	OSH
21	Plantation Labour Act, 1951	OSH
22	Beedi & Cigar Workers (Cond, of Employment) Act, 1966	OSH
23	Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1973	OSH
24	Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996	OSH
25	Child & Adolescent Labour (Prohibition & Reg.) Act, 1986	OSH

26	Motor transport Workers Act,1961	OSH
27	Sales Promotion Employees Act, 1976	OSH
28	Cine and Cinema Theatre Workers (Regulation of Employment) Act, 1981	OSH
29	Dock Workers (Safety, Health and Welfare) Act, 1986	OSH

NB: W= Labour Code on Wages (No. of Acts Incorporated: 4)

IR= Labour Code on Industrial Relations (No. of Acts Incorporated: 3)

SS= Labour Code on Social Security (No. of Acts Incorporated:9)

OSH= Labour Code on Occupational Safety & Health (No. of Acts Incorporated: 13)

Once the Rules are finalized and notified, the Codes will be implemented.

2. A REALITY CHECK INVOLVING LABOUR LAWS IN INDIA

With Plethora of labour laws since Independence which are supposed to be simplified for "Ease of doing Business" through four labour codes as described above. However, it is disturbing to find all such labour laws mostly restricted to organized workers in India which constitute hardly 10% of the total workforce which is about 500 million. Thus, the vast majority of the of workforce- namely informal contract unorganised workers which constitute above 90% of total workforce still remain out of purview of such labour laws.

In fact, the recent lockdown due to covid-19 brought out the grim reality of Theory visa- A-vis practice of labour laws in India when millions of migrant workers engaged in industries/small businesses where suddenly thrown out of employment- leading to deprivation of life & livelihood.

The existing labour laws could not protect any of these contingencies. The reforms should be done by keeping in focus that 40 million informal workers have to be incorporated within the new code.

3. IMPORTANT TAKEAWAYS & SUMMARY OF CONCLUSIONS OF WEBINAR ON MIGRANT WORKERS HELD ON 13TH JULY 2020

1.National Register Data of Migrant workers (State Wise)

2.Compulsarory Registration of their job trade etc. (both at Host & Home states)

3.One Nation One Ration Card for eligibility of food subsidy etc.

4.Portability of Benefits available under various welfare schemes both of central and state governments

5.Voting Rights for Migrant workers

4. BRIEF RECORD NOTE OF IGFP DISCUSSION DATED 14-12-2020 ON OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 DRAFT RULES -PARTICIPANTS

Points proposed for inclusion in the draft Occupational Safety, Health and Working Conditions (Central) Rules, 2020 (Enclosure –I)				
Sl No	Relevant section in the draft rules	Details of the rule as given in the draft	Suggestion of IGFP which need to be included in the final notification	Clarification in support of the proposed suggestion
01	Section 6-Annual Health Examination of	Every employer of factory, dock, mine and building or other construction work	Every employer of factory, dock, mine and building or other construction work shall arrange	Pre-medical examination before deployment and

	employees under clause (c) of sub-section (1) of Section 6.	shall arrange to conduct free of cost, medical examination for every worker annually i.e., within 120 days from the commencement of every calendar year who has completed 45 years of age. The medical examination shall be conducted by a qualified medical practitioner as per proforma in the Form-V. The Medical Certificate shall be submitted by the qualified medical practitioner to the concerned employer and	to conduct free of cost, medical examination for every worker before his first employment and thereafter once annually. Special examination shall be conducted for deployment in hazardous locations. The medical examination shall be conducted by a qualified medical practitioner as per proforma in the Form-V. The Medical Certificate shall be submitted by the qualified medical practitioner to the concerned employer and employee.	subsequent annual examination shall reveal the health status of the employee, which shall reveal the status of occupationa l disease if any.

		employee.		
02	Section 8- Notice of accidents and dangerous occurrences under sub-section (1) Section 10 and Section 11	(2) Where at any place in an establishment which is factory, dock work, mines, building or other construction work, an accident occurs which results in bodily injury by reason of which the person injured is prevented from working for a period of forty eight hours or more immediately following the accident, the employer or occupier or manager of the establishment shall forthwith send a notice in Form-VI within twelve hours after	(2) Where at any place in an establishment which is factory, dock work, mines, building or other construction work, an accident occurs which results in bodily injury, the employer or occupier or manager of the establishment shall forthwith intimate about the incident electronically to the Inspector-cum-Facilitator and by reason of which the person injured is prevented from working for a period of forty eight hours or more immediately following the	First-hand information about any incident shall be helpful for the statutory agencies to reveal the exact cause of the incident and to take emergency actions to prevent its spread and quick mitigation measures.

		the completion of forty eight hours, electronically to the Inspector-cum-Facilitator. (3) Wherein an establishment there is any dangerous occurrence as specified in the schedule annexed hereto, whether causing any bodily injury or disability or not, a notice in Form-VI shall within twelve hours be sent to: (a) The Inspector-cum-facilitator; (b) District Magistrate or Sub-divisional Officer; Provided that if in the case of an accident or	accident, the employer or occupier or manager of the establishment shall forthwith send a notice in Form-VI within twelve hours after the completion of forty eight hours, electronically to the Inspector-cum-Facilitator. (3) Wherein an establishment there is any dangerous occurrence as specified in the schedule annexed hereto, whether causing any bodily injury or disability or not, the employer or occupier or manager of the establishment shall forthwith intimate about the incident electronically to the	

		dangerous occurrence, death occurs to any person injured by such accident or dangerous occurrence after the notices and reports referred to in the foregoing sub-rules have been sent, the employer or occupier or manager of the establishment shall forthwith send a notice thereof by telephone and electronically to the authorities and persons mentioned in sub-rules (1) and (2) and also have this information confirmed in	Inspector-cum-Facilitator and a notice in Form-VI shall within twelve hours be sent to: (a) The Inspector-cum-facilitator; (b) District Magistrate or Sub-divisional Officer; Provided that if in the case of an accident or dangerous occurrence, death occurs to any person injured by such accident or dangerous occurrence after the notices and reports referred to in the foregoing sub-rules have been sent, the employer or occupier or manager of the establishment shall forthwith send	

		writing within 12 hours of the death.	a notice thereof by telephone and electronically to the authorities and persons mentioned in sub-rules (1) and (2) and also have this information confirmed in writing within 12 hours of the death.	
03	Section 9 - Notice of disease under sub-section (1) and (2) of Section 12	A notice in the following format shall be sent forthwith electronically, to the Inspector-Cum Facilitator or Chief Inspector-cum-facilitator, by the employer or occupier or manager of an establishment in which there occurs any disease as notified under the Third	A notice in the following format shall be sent forthwith electronically, to the Inspector-Cum Facilitator or Chief Inspector-cum-facilitator, by the employer or occupier or manager of an establishment in which there occurs any disease as notified under the amended Third Schedule of the	The list in Third Schedule needs to be expanded in line with International Labour Organization (ILO) which has identified 106+ Occupational diseases.

		Schedule of the Code.	Code.	
		(2) If any qualified medical practitioner attends on a person who is or has been employed in an establishment and who is or is believed by the qualified medical practitioner to be suffering from any disease specified in the Third Schedule, the qualified medical practitioner shall without delay send a report in writing to the office of the Chief Inspector-cum-facilitator stating- (a) the name and full postal address	(2) If any qualified medical practitioner attends on a person who is or has been employed in an establishment and who is or is believed by the qualified medical practitioner to be suffering from any disease specified in the Third Schedule, the employer or occupier or manager of the establishment shall without delay send a report in writing to the office of the Chief Inspector-cum-facilitator stating- (a) the name and full postal address of the patient, (b) the disease from	Onus on Physician to inform DISH is not practicable since the Physician is employed by the factory and he/she will have job security issues.

		of the patient, (b) the disease from which he believes the patient to be suffering, and (c) the name and address of the establishment in which the patient is or was last employed.	which he believes the patient to be suffering, and (c) the name and address of the establishment in which the patient is or was last employed.	
04	Section 12 - National OSH Advisory Board	(1) the members of the National Board as specified in Section 16(2)(g), (j), (k), (l), (m) and (n) shall be nominated and approved by the Central Government.	(1) the members of the National Board as specified in Section 16(2)(g), (j), (k), (l), (m) and (n) shall be nominated and approved by the Central Government.	It shall include President / Representative of Indian Association of Occupational Health.
05	Section 18 - Collection of statistics and portal	The employer shall submit the details of occupational	The employer shall submit forthwith the details of occupational safety	It will be easier to ensure compliance

	for inter-State migrant workers under sub-sections (1) and (2) of Section 21	safety and health statistics electronically on web portal designated for the purpose.	and health statistics electronically on web portal designated for the purpose.	in case time limit is fixed.
06	Section 19 - Safety Committee and Safety officers under Section 22	(1) Every establishment employing 500 or more workers except for the establishment prescribed under sub-section (1) of Section 22 shall constitute a safety committee consisting of representatives of employers and workers.	(1) Every establishment employing 250 or more workers except for the establishment prescribed under sub-section (1) of Section 22 shall constitute a safety committee consisting of representatives of employers and workers. Provided establishments involving hazardous processes, employing 100 or	

			more workers shall constitute a safety committee.	
		(2) The tenure of the safety committee shall be for three years. The safety committee shall meet at least once in every quarter. In case of mines, the safety committee shall meet at least once in a month.	(2) The tenure of the safety committee shall be for three years. The safety committee shall meet at least once in every month.	
		(3) The representative of the workers shall be chosen by the registered trade Union. In case where there is no registered trade union the members may be chosen by the workers of the	(3) The representative of the workers shall be chosen by the registered trade Union. However, care shall be given for equal representation from each departments/section. In case where there	

		establishment. Provided that there shall be adequate representation of the women workers in the committee.	is no registered trade union the members may be chosen by the workers of the establishment. Provided that there shall be adequate representation of the women workers in the committee.	
07	Section 20 - Composition of Safety Committee	(1) The representatives of the management on Safety Committee, except in mine, shall consist of (a) A senior official, who by his position in the organization can contribute effectively to the functioning of the Committee, shall be the Chairman;	(1) The representatives of the management on Safety Committee, except in mine, shall consist of (The employer or occupier or manager of the establishment and a senior official, who by his position in the organization can contribute effectively to the functioning of the Committee;	Employer or occupier or manager of the establishment has the ultimate control over all the affairs of the establishment and hence his presence shall ensure prompt compliance.

08	Section 24 - Safety Officer	Safety Officer for Dock Works and Building or Other Construction Works. - (1) A person shall not be eligible for appointment as a safety officer relating to dock work or building or other construction work unless he possesses -	Safety Officer for factories, Dock Works and Building or Other Construction Works. - (1) A person shall not be eligible for appointment as a safety officer relating to factories, dock work or building or other construction work unless he possesses Provided for the establishments involving hazardous processes, safety officers shall be deployed @ one officer for 100 employees.	The word “factories” shall be added.
09	Section 25 - Duties of Safety Officers	Duties of Safety Officers in case of Dock Works	Duties of Safety Officers in case of factories, Dock Works and Building or Other Construction Works	The word “factories” shall be added.

10	Section 28	(2) the period of work of a worker shall be so arranged that inclusive of his intervals for rest, shall not spread over for more than twelve hours in a day.	(2) the period of work of a worker shall be so arranged that inclusive of his intervals for rest, shall not spread over for more than ten and half hours in a day.	Spread over up to 12 hours will develop fatigue among the workers, which in turn will lead to accidents.
11	Section 56	(4) the spread over for the workers shall exceed twelve hours in any one day under the following works and circumstances in factories, dock works, mines and building or other construction, namely; … … Provided that no worker shall be allowed to work overtime	(4) the spread over for the workers, inclusive of intervals for rest, shall not exceed thirteen hours in any one day under the following works and circumstances in factories, dock works, mines and building or other construction, namely; … Provided that no worker shall be allowed to work overtime exceeding	Without spread over time limit, the worker may be forced to work for 24 hours on any date subject to the limitation of overtime limit in any quarter.

		exceeding one hundred twenty-five hours in any quarter of a year.	fifty hours in any quarter of a year.	
12	Section 65 - Appointment of Medical officer under sub-section (1) of Section 42	The Medical Officer shall be a medical practitioner who possesses any recognized medical qualification as defined in the National Medical Commission Act, 2019(30 OF 2019) and who is enrolled on an Indian Medical Register as defined in clause (e) and on a State Medical Register as defined in clause (l) of section 35, 36, 37 and 40 of the Act.	Every establishment involving hazardous process and employing 100 or more employees, shall deploy medical officer. Provided for non-hazardous establishments, deployment of medical officer shall be one @ 500 employees. The Medical Officer shall be a medical practitioner who possesses any recognized medical qualification as defined in the National Medical Commission Act, 2019(30 OF 2019)	Number of medical officers needs to be defined. Fresh MBBS without diploma in AFIH shall not accurately diagnose occupational diseases.

			and who is enrolled on an Indian Medical Register as defined in clause (e) and on a State Medical Register as defined in clause (l) of section 35, 36, 37 and 40 of the Act and having a diploma in AFIH.	
13	Section 67 - Employment of Women in establishment under Section 43	(1) (c) adequate transportation facilities shall be provided to women employee to pick-up and drop such employee at her residence;	(1) (c) adequate transportation facilities along with security measures shall be provided to women employee to pick-up and drop such employee at her residence;	
14	Section 75 - Renewal of license under Section 48	(3) The security deposit and the fee chargeable for renewal of the license shall be the same as for the grant of license under rule 74.	(3) The security deposit and the fee chargeable for renewal of the license shall be the same as for the grant of license under rule 74.	This will ensure safety at work.

		Provided that if the application for renewal is not received within the time specified in sub-rule (2), an additional fee of twenty-five per cent, shall be payable for such renewal.	Provided that if the application for renewal is not received within the time specified in sub-rule (2), an additional fee of twenty-five per cent, shall be payable for such renewal. Provided that if any fatal/serious accident results in the preceding year, an additional fee of hundred per cent, shall be charged for such renewal. License shall be blacklisted and not renewed in case of at least one fatality/serious accident consecutively for three years.	

5. POSTAL VOTING RIGHT TO MIGRANT WORKERS IN INDIA

In recent years due to Covid- 19 the plight of the migrant workers has been highlighted in various forums bring out the extent of their distress.

Our organization, Indo German Focal Point (IGFP), has been actively taking various steps and discussing with experts in this field to find out ways and means of preventing the suffering of these workers. IGFP basically works on "activities on occupational safety and health in India with the expertise of German partners, viz., DGUV having MOU with DG FASLI, Ministry of Labour and Employment. Recently, we held a Webinar on migrant workers chaired by Dr. Ajay Dua, former Secretary to Government of India. That Seminar came out with various recommendations to improve the working conditions of the migrant workers and one of those suggestions being that migrants' workers should be given voting right to be exercised away from home.

Migrant workers in our country are of sizable magnitude. The member was 335 million persons in 2001 which is now over 400 million or so, at present. Interstate migration takes place mostly from the States of Utter Pradesh, Odisha, Rajasthan, Uttarakhand, West Bengal, Jharkhand and North Eastern States. The major destinations are Delhi, Maharashtra, Tamil Nadu, Gujarat, Karnataka, Andhra Pradesh, Punjab and Kerala. Most of them move with their families from the villages. The net result is, at the time of election either of the State Assembly or of the Parliament, this sizable chunk of voters is left out as they do not enjoy the privilege of postal voting. According to Election Commission's present policy the following categories are entitled to postal voting: -

- Personnel in Armed forces Including para-military forces
- People working in Govt and posted abroad
- People engaged in election duty

Thus, the category of migrant labour is now not eligible for postal voting but looking at the size of the migrant population spread over various parts of the country, there seems to be a need for making them eligible for postal voting to ensure their participation in democratic processes of the nation. It will be fulfilling the dictum of inclusive democracy which can hardly be overlooked now keeping the example available in other democracies. Briefly speaking, if we look around the globe, we get the following procedures being in vogue which add to our presentation.

In Australia, any voter living at a distance of 24km or more are eligible for postal ballot system since 1866. In Austria, anyone can opt for postal voting. In Canada, this facility is available to all the citizens since 2007.USA citizens have exercised this facility in the recently held Presidential election. In Germany, about 29% of the eligible citizens use this facility. In UK also this facility is available liberally for all eligible citizens. In the birthplace of democracy.ie UK, Postal voting does not require a reason.

By giving migrant labourers the right to cast their vote through postal ballot, the Election Commission of India would be taking a step towards a more inclusive democracy, ensuring that every segment of the adult and eligible Indian population gets to cast their vote and is not excluded for reasons of exigencies of their profession. More importantly, it appears, we should like to be in line with more liberal procedures available in other distinguished democracies of the World.

LABOUR LAW AMENDMENTS, REFORMS AND CODIFICATION IN INDIA: RECENT INITIATIVES

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Abstract

Labour law seeks to cater to the needs of industry and the workers which keep on changing. Accordingly, the law also needs to be changed, reviewed and rationalized. As per the scheme of the Indian Constitution, labour being in the 'Concurrent list' this exercise can be carried out both the Central as well as various State Governments. Accordingly, a number of amendments have been carried out both by Parliament and various State Legislatures in many Labour Legislations in the recent past. In addition, a number of reforms have also been made by way of adopting the method of issuing notifications. This apart, recognizing the long-felt need of the industry and the workers belonging to various sectors and sub-sectors of the economy, the present government initiated a comprehensive process of labour law reforms by undertaking the exercise of codification of a large number of existing labour legislation in 4 major Labour Codes (by way of amalgamation and rationalization of the core features of the various labour legislations) i.e. (i) Labour Code on Wages; (ii) Labour Code on Industrial Relations; (iii) Labour Code on Social Security; and (iv) Labour Code on Occupational Security and Health. This paper provides an overview of some of these initiatives by the Central and various State Governments in this direction. It also briefly discusses the key features of various Labour Codes i.e. 'The Code on Wages, 2019', 'The Industrial Relations Code, 2020', 'The Code on Social Security, 2020 and 'The Occupational Safety, Health and Working

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Conditions Code, 2020'. Finally, it also makes an analytical assessment of all these measures and various other reform initiatives.

1. INTRODUCTION

Continuous supply of goods and services is essential for human survival and existence. Capital and labour both play an equally important role in ensuring the same. The problem however is that the interests of both of these factors of production and supply, if not always divergent are also not congruent. While the employer wants maximum return on the capital invested by him by way of profit, the employees/workers want a maximum reward in terms of wages/salary and conditions of work. Therefore, there is always a chance of tussle between both these human factors of production. So, in order to maintain a balance, the State intervenes. The State does so inter-alia by way of enacting Labour Legislations, providing for the basic rights/entitlements and obligations of the employers and the employees. These Labour enactments touch upon various aspects such as wages, employment relations, conditions of work, occupational safety and health, labour welfare measures and social security etc.

As per the scheme of the Indian Constitution, both Parliament and State Legislatures have the power to make laws with respect to the subjects listed above. This is how over the years 200 + laws have been enacted in the field of labour both by the Centre and States. Parliament alone has enacted more than 40 labour legislations. The labour laws enacted by central and state legislatures over the years may broadly be classified under the categories of Industrial relations laws; Wage laws; Social security laws; Sector-specific laws, and Laws relating to distressed categories of workers.

Laws are enacted to cater to the needs of the society, which keep on changing, and accordingly, the laws also need to be changed and reviewed. This is all the more relevant in case of labour legislation. If the existing laws are not changed,

amended, or rationalized as per the changing needs, they tend to become an obstacle in the way of development. Accordingly, the government keeps on making efforts to review these laws. In the Indian context, the major fora where the issues pertaining to review of labour law are deliberated and discussed include Indian Labour Conference and Standing Labour Committee. At times, the government also constitutes committees/expert groups and commissions to discuss such issues. Some of such important commissions and committees constituted in the past include: the 1st National Commission on Labour (1966)[1], National Commission on Rural Labour (1991), the 2nd National Commission of Labour (2002) and the National Commission for Enterprises in the Unorganized Sector (2004)[2].

2. NEED FOR AMALGAMATION, SIMPLIFICATION AND RATIONALIZATION OF LABOUR LAWS

A number of studies and the realities prevailing at the grassroots level revealed that a substantial proportion of employers and workers, especially the workers engaged in the informal and the unorganized sector remain deprived of most of their legitimate dues in terms of basic labour rights and social security entitlements provided under various labour legislations. Some of the important reasons for this kind of state of affairs include various kinds of ceilings under the existing labour legislation either in terms of an upper limit of wages/salary or a minimum number of employees and minimum duration of employment from the viewpoint of coverage under the laws and the lack of education and awareness among the vast majority of the workers about their rights (and also of their duties) under these legislations. In addition, most of the labour legislations existing so far have a very legalistic and technical language making it virtually impossible for the intended beneficiaries and also for their representatives at the

[1] The 1st National Commission on Labour submitted its report in 1969.
[2] This National Commission for Enterprises in the Unorganized Sector, popularly known as Arjun Sengupta submitted its report in 2007.

grass-root level to understand the same and assert their rights and entitlements under these legislations. Some of the other important reasons responsible for the lack of proper and effective implementation of various labour laws include a large number of labour legislation, the obsolete nature of many of the labour law provisions and the non-deterrent nature of the penalties provided for various violations. Some of the effective means to overcome these obstacles include Amalgamation, Simplification, and Rationalization of these legislations as per the current needs in a comprehensible language so that these legislations can be understood and used by the maximum possible proportion of the beneficiaries.

3. INITIATIVES OF THE CURRENT GOVERNMENT AT THE CENTRE TOWARDS CODIFICATION OF LABOUR LAWS

Recognizing the long-felt need of industry and the workers both in the formal as well as informal sector and in order to duly meet the changing requirements of the employers (in terms of flexibility) and workers (in terms of core labour rights and social security) in the large, medium and the small enterprises (both manufacturing and services), the present government initiated a comprehensive process of labour law reforms by undertaking the exercise of codification of a large number of existing labour legislation in 4 major Labour Codes by way of amalgamation and rationalization of the core features of the various labour legislation in these codes namely: (i) Labour Code on Wages; (ii) Labour Code on Industrial Relations; (iii) Labour Code on Social Security; and (iv) Labour Code on Occupational Security, Health and Working Conditions.

These Codes seek to accommodate the interests of all the social partners likely to be affected by the process of labour law reforms. All these four codes now have finally been enacted and notified, and the task of drafting and finalization the central and state rules is currently in progress. The following section highlights the broad scheme and key features of the various Labour Codes.

4. CODE ON WAGES, 2019

The Code on Wages 2019 amalgamates, simplifies and rationalizes the provisions of Payment of Wages Act, 1936; Minimum Wages Act, 1948; Payment of Bonus Act, 1965 and Equal Remuneration Act, 1976. As regards the broad scheme of the Code, it has a total of nine chapters and sixty-nine sections. The key features of the code are as follows:

- The Code seeks to remove the multiplicity of definitions and authorities under various wage-related legislation leading to ease of compliance without compromising with the wage security and social security to workers.

- It universalizes the provisions of minimum wages and seeks to ensure timely payment of wages to all employees irrespective of the sector of employment and wage ceiling of an individual worker. The provisions of the presently existing Minimum Wages Act, 1948 and the Payment of Wages Act, 1936 leave a sizable and substantial proportion of workers out of their ambit as the applicability of both these Acts is restricted to scheduled employments/establishments. Similarly, in the case of the Payment of Wages Act, the applicability is further restricted to the employees drawing wages up to Rs.24000/- p.m.

- The Code introduces the concept of statutory National Minimum Wage for different geographical areas /locations and seeks to ensure that no state government fixes the minimum wage below the National Minimum Wage notified for that area by the Central Government.

- To ensure effective compliance, the Code envisages the change in the designation and role of the 'Inspector' from mere inspection to that of the 'Facilitator' and also entrusted with the duty to guide and advise the

employers and the workers for effective implementation of laws. To curb arbitrariness and malpractices, the Labour Code on Wages provides that the inspections will be carried out through a transparent web-based inspection scheme.

- It incorporates the provision for payment of wages through cheque/digitally/electronically or through bank accounts with a view to promote digitization and extend wage security to workers.

- It increases the limitation period for filing of various kinds of wage-related claims by a worker to three years as against the existing period of limitation varying from six months to two years and also incorporates the provision of an Appellate Authority between Claim Authority and Judicial Forum in order to ensure speedy, cheaper and efficient redressal of various grievances and settlements of claims.

- It seeks to rationalize the penalties and sanctions for different types of violations and provides for indexation of fines as per increase in the price index (in case of fine) and also a penal provision in the form of imprisonment to make it a deterrent.

- It also incorporates provisions for the compounding of offences. As per the scheme of the code any offence punishable only with a fine, on an application of the accused person may be compounded by the gazette officer notified by the government for a sum of 50% of the maximum fine provided for that offence.

5. THE INDUSTRIAL RELATIONS CODE, 2020

The Industrial Relations Code, 2020 rationalizes and amalgamates the provisions of the Trade Unions Act, 1926, The Industrial Employment (Standing Orders) Act, 1946, and The Industrial Disputes Act, 1947. {Section 104(1) of

the Industrial Relations Code,2020} As regards, the broad scheme of the code, it has total 104 sections spread over 14 chapters and 3 schedules. The schedules included in the Code are Schedule 1: Matters to be provided in Standing Orders under the Code, Schedule 2: Unfair Labour Practices, Schedule 3: Conditions of Service for Change of which Notice is to be given). The key features of the code are as follows:

- The Code contracts the scope of the term The 'industry' by defining the same so as to exclude institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic services; sovereign functions; domestic services; and any other activity as may be notified by the Central Government {Section 2(m) in the Code}.

- It makes a change in the definition of 'wages' (section 2(zq) of the code) so as to exclude a component of house rent allowance, conveyance allowance…… which were included in the definition of 'wages' under section 2(RR) of the Industrial Disputes Act, 1947. The changed definition would have an impact on the quantum of compensation payable to a worker in the event of retrenchment, closure or lay-off.

- It makes modification/ change in the definition of 'strike' so as to include the concerted casual leave on a given day by 50 percent or more workers employed in industry, also within its ambit {Section 2(zf) in the code}.

- It introduces the concept of 'Fixed Term Employment (engagement of a worker on the basis of a written contract of employment for a fixed period) and includes the same as one of the categories of employment in the classification of workers in the Schedule for matters to be provided in Standing Orders {Section 2(l) in the code}. In addition, inserts the provision that a fixed-term employee will get all statutory benefits like

social security, wages, etc., at par with the regular employees who are doing work of same or similar {Section 2(l) in the code}.

- Further, to bring clarity, a clause has been added that termination of the services of a worker as a result of the completion of tenure of fixed-term employment would not fall in the category of retrenchment {2(zc) and First Schedule item 1 in the Code}.

- It enhances the severance compensation from the existing 15 days wages for every completed year of service to 45 days wages before effecting retrenchment, closure and transfer of undertaking etc. This increase in the severance compensation would help the worker in taking care of his/her needs for the period of time, spent in finding another employment or acquire necessary skills to enhance his/her employability.

- It provides for the setting up of a "Re-skilling Fund" for the training of retrenched employees. Employers will pay a contribution of 30 days' wages to this fund in case of retrenchment of workers. The Fund will facilitate in enhancing the skills of the retrenched workers, thereby increasing their employability.

- It provides for the prohibition of outsiders to become office bearers in the Trade Union in the case of trade unions in the organized sector. At present in the Trade Unions Act 1926, the limit of outsiders as office bearers are one-third of the total number of office bearers or five, whichever is less.

- It further provides that in the case of trade unions in the unorganized sector, not more than two or 25% of the total office bearers, whichever is less, can be from outside the establishment or industry, as the case may be. At present, in the case of the trade unions in the unorganized sector,

up to 50% of the office bearers can be from outside the industry. This will make trade unions true representatives of the workers employed in an establishment or industry who will be more inclined towards the welfare of the workers as well as that establishment or industry in relation to the outsiders.

- A new feature of "Recognition of Negotiating Union" has been introduced. A Trade Union will be recognized as a "Negotiating Union" if it has the support of at least 51% of the workers on the muster roll in the establishment. As the negotiating union will have more acceptability among the workers, the negotiation process will be smooth and effective.

- At present, there is a system of reference of the industrial disputes to the Labour Court-cum-Tribunal by the appropriate Government under the Industrial Disputes Act 1947. In the Code on IR, the reference by the Government will not be required for the Industrial Tribunal, except for the National Tribunal. This will reduce the time period in approaching the Tribunal by the aggrieved parties.

- It provides for setting up of two-member Industrial Tribunals with a second member from the administrative side, in place of single-member Labour Court/ Industrial Tribunal at present. Further, it seeks to empower the Tribunal with the power to decree its award. This will facilitate speedy disposal of the disputes.

- It incorporates the requirement of a notice period of 14 days for strikes and lockouts in all sorts of establishments. As per the Industrial Disputes Act 1947, this criterion, at present, is only for public utility services. This would provide enough time for the management to address the issues and reduce the chances of sudden strikes and industrial unrest impacting industrial production.

- It empowers the Industrial Tribunals and National Industrial Tribunals to give appropriate relief in cases of discharge or dismissal of workers. If the tribunal is satisfied that the order of discharge, dismissal or termination was not justified, it may set aside such order and direct reinstatement of the worker on such terms and conditions as deemed fit or give such other relief including the relief of any lesser punishment.

- The penalties under this Code for different types of violations have been rationalized to commensurate with the gravity of the violations. In the case of the defaulting employers, these penalties range from a minimum of Rs.1,00,000/- (one lakh) to Rs.20,00,000/- (twenty lakhs) depending on the nature of the violation. However, in case of a violation by the workers or members of the registered trade union, the minimum penalty (fine) provided is Rs.1000/- and the maximum Rs.50,000/- (fifty thousand) (Section 86 of the Code).

- It also provides for the compounding of offences. The idea behind this provision is to ensure compliance with labour laws rather than increase the number of prolonged prosecutions. The purpose is to provide an opportunity to the employers to rectify the unintentional contraventions of provisions that are not very grave in nature. As per the provisions of the Code, an offence punishable with a fine only can be compounded for a sum of 50% or the maximum fine and the offence punishable with a fine or imprisonment up to one year both, of 75% of the maximum fine.

6. THE CODE ON SOCIAL SECURITY, 2020

The Code on Social Security, 2020, spread over total 164 sections across 14 chapters and 7 schedules seeks to amend and consolidate the laws relating to social security with the goal to extend social security to all employees and workers both in the organized and the unorganized sector. It amalgamates and

rationalizes the provisions of total nine existing labour legislations namely: Employees Compensation Act, 1923; Employees State Insurance Act 1948; Employees Provident Fund and Miscellaneous Provisions Act 1952; Employment Exchange (Compulsory Notification of Vacancies) Act 1959; Maternity Benefit Act 1961; Payment of Gratuity Act 1972; Cine workers Welfare Fund Act 1981; Building and Other Construction Workers Act 1996 and the Unorganised Workers Social Security Act, 2008[3].

The Schedule 1 (First schedule) of the Coe provides for the applicability of the various chapters (dealing with the Employees' Provident Fund, Employees' State Insurance, Gratuity, Maternity Benefit, Employees' Compensation, Social Security and Cess in respect of Building and Other Construction Workers, Social Security for Unorganized Workers and the Employment Information and Monitoring). Schedule 3 (Third Schedule) contains the detailed list of occupational diseases along with the employment name for the purpose of employees' compensation. The Fourth Schedule contains the list of injuries deemed to result in permanent total disablement (Part I) and the list of injuries deemed to result in permanent partial disablement. The Fifth Schedule relates to the matters that have to be provided for in the social security schemes under the EPF. The key features of the Code are as follows:

- It universalizes social security by elaborately defining the same so as to cover all possible categories of marginalized sections of employees and workers including those engaged in new forms of employment (such as gig workers and platform workers) and taking care of aspects like old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner by means of rights conferred on them and schemes framed under the Code [section 2(78) of the Social Security Code, 2020)]

[3] S.164 (1), The Code on Social Security2020.

- It expands the scope of the definition of the wage by including allowances and retaining allowance within its ambit, which would result in an increase in social security contribution payable by the employers.

- The Code provides for the constitution of high powered National Social Security Board at the central level with the Union Minister for Labour and Employment, as Chairperson, Secretary, Ministry of Labour and Employment as Vice-chairperson and 40 other members representing unorganized sector workers, employers of unorganized sector workers, civil society, Parliament, Ministries of Central Government, State Governments and Union Territories with the Director General (Labour Welfare), as Member Secretary.[4]. The Code also provides for State Social Security Board almost on the similar lines[5].

- In order to ensure the effective implementation of the various aspects of social security under the Code, the Code specifically provides that all orders and decisions of the Social Security Organization shall be authenticated by the: Central Provident Fund Commissioner (in case of the provident fund), Director General (in case of the employees state insurance), Director General Labour Welfare (in case of various welfare schemes) and the State Principal Secretary or Secretary (Labour) of the respective Social Security Organizations or such other officer as may be notified by the appropriate Government[6].

- It also contains the provision for constitution of State Building Workers Welfare Boards for the purpose of formulating and implementing the

[4] Ibid, at S. 6(1)-(3).
[5] Ibid, at S. 6(9)-(11).
[6] Ibid, at S. 9(2).

various schemes for the welfare of the workers engaged in building and other construction[7].

- It provides for a contribution of not less than 5% of their annual turnover by the aggregators towards the social security fund. It provides for recovery of expenses by the ESI Corporation in the situation of spiraling up of sickness benefit directly attributable to the fault of owners of establishments/agents.

- It provides for payment of gratuity to fixed-term employees on a pro-rata basis at the time of expiry of their term of employment.

- In the case of working journalists reduces the eligibility limit from 5 to 3 years for the purpose of payment of gratuity.

- It rationalizes the penalties for various kinds of violations and provides for graded penalties and compounding of offences both in cases of first-time offences punishable with fine as well as offences punishable with fine or imprisonment up to one year. As per the provisions of the Code, an offence punishable with a fine only can be compounded for a sum of 50% or the maximum fine and for the offence punishable with a fine or imprisonment up to one year both, of 75% of the maximum fine.

- It empowers the central government to pass orders for deferring of social security contributions (ESI and EPF) during situations of disaster and pandemic.

- It also provides for the compounding of offences. The idea behind this provision is to ensure compliance of labour laws rather than increase the number of prolonged prosecutions. The purpose is to provide an

[7] Ibid, at S. 7(1)-(5).

opportunity to the employers to rectify the unintentional contraventions of provisions which are not very grave in nature. As per the provisions of the Code, an offence punishable with a fine only can be compounded for a sum of 50% or the maximum fine and for the offence punishable with a fine or imprisonment up to one year both, of 75% of the maximum fine.

7. OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE (OSH&WC CODE), 2020

The Occupational Safety , Health and Working Conditions Code, 2020 amalgamates, consolidates and rationalizes the provisions of 13 existing labour legislations namely: The Factories Act 1948; The Mines Act, 1952; The Dock Workers (Safety, Health and Welfare) Act, 1986; The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; The Plantations Labour Act, 1951; The Contract Labour (Regulation and Abolition) Act, 1970; The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; The Working Journalist and other News Paper Employees (Conditions of Service and Miscellaneous Provision) Act, 1955; The Working Journalist (Fixation of Rates of Wages) Act, 1958; The Motor Transport Workers Act, 1961; The Sales Promotion Employees (Conditions of Service) Act, 1976; The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 and The Cine Workers and the Cinema Theatre Workers Act, 1981.{Section 143(1)of the OSH&WC Code,2020}. It has total 143 sections spread over 13 chapters and 3 schedules dealing with list of Industries involving hazardous processes (the First Schedule), laying down of standards in matters pertaining to Occupational safety and health standards (the Second Schedule) and the list of notifiable diseases (the Third Schedule) as per the requirement of section 12(1) of the Code concerning notice of certain diseases. The key features of the code are as follows:

- The Code envisages to prescribe occupational safety standards for different sectors; health and working conditions; hours of work, overtime hours; leaves and holidays; welfare provisions (canteen, creche and restrooms etc.); duties of employers, employees and manufacturers etc.; registration of establishments including deemed registration and license for contract workers, factories and beedi and cigar workers etc.

- It provides a broad legislative framework with enabling provisions for framing rules, regulations, standards etc. and one registration for establishment instead of multiple registrations. At present, separate registration is required to be obtained under 6 Acts, namely: Factories Act, Contract Labour Act, BOCW Act, Motor Transport Workers Act, Plantation Act and Inter-State Migrant Workers Act. It also incorporates the provision of online and deemed registration.

- The Code is applicable to all establishments employing 10 or more workers except mine and dock where it is applicable even on a single worker. However, it does not apply to apprentices under the Apprentices Act, offices of the Central Govt., offices of the State Government (contract workers are included), and any ship of war of any nationality.

- The provisions on health and working conditions apply to all employees. For this purpose, employees include workers and all other persons employed on wages to do any skilled, semi-skilled, unskilled, manual, operational, supervisory, managerial, administrative, technical or any other work whether the term of employment is express or implied and a person declared to be an employee by the appropriate government.

- The Code seeks to ensure a workplace that is free from hazards; free annual health checkup; issuing appointment letters to employees; informing relevant authorities in case of an accident at the workplace

leads to death or serious bodily injury of an employee. Accordingly, duties are prescribed for employers in factories, mines, docks, plantations, and building and construction work.

- In addition, the code also provides that the manufacturers, importers, designers and suppliers must ensure that any article created or provided by them for use in an establishment is safe, and provide information on its proper handling; Further, architects, engineers and designers must ensure any structure designed by them can be safely executed and maintained.

- Further, it also casts certain duties on the employees including the duty to take care of their own health and safety, complying with safety and health standards, and reporting unsafe work incidents to the Inspector; Employees also have rights including the right to obtain information on safety and health standards from the employer directly or through a member of Safety Committee.

- The code lays down a number of standards concerning working conditions and welfare facilities, including a hygienic work environment, clean drinking water and toilets, canteens, first aid boxes, and crèches, as per standards notified by the central government.

- The code enables consenting women to work beyond 7 PM and before 6 AM subject to the employer's compliance with the conditions relating to safety, holidays and working hours to be prescribed by the Government. Government can prohibit the employment of women in some operations that are dangerous for their health and safety.

- The code makes specific provisions for protecting the interest of contract workers by providing that every contractor shall issue, on-demand,

experience certificate, in such form as may be prescribed by the appropriate government, to the contract labour giving details of the work performed by such contract labour).

- It also provides that all benefits applicable to contract labour would also be extended to inter-state migrant workmen too. Further, the interstate migrant workman definition has been expanded to include the workers directly engaged by the employers.

- For the purpose of arranging finance to take care of the welfare needs of the workers in the unorganized sector, the code provides that there shall be established by the appropriate government a social security fund for the welfare of the unorganized workers and the amount received from the composition of offences and penalty be credited to this fund. The fund shall be administered and expended for the welfare of the unorganized workers in such manner as may be prescribed by the appropriate government.

- It also provides for the compounding of offences. The idea behind this provision is to ensure compliance with labour laws rather than increase the number of prolonged prosecutions. The purpose is to provide an opportunity to the employers to rectify the unintentional contraventions of provisions which are not very grave in nature. As per the provisions of the Code, an offence punishable with a fine only can be compounded for a sum of 50% or the maximum fine and for the offence punishable with a fine or imprisonment up to one year both, of 75% of the maximum fine.

8. LEGISLATIVE INITIATIVES BY THE STATE GOVERNMENTS

In addition to the above discussed comprehensive exercise of codification of various central labour laws by Parliament, some of the state governments too have made some crucial amendments in various labour laws and have also adopted certain other reform measures. The following sections provide the highlights of some of these amendments and measures by some of the states in the recent past.

8.1. State Amendments in Industrial Disputes Act, 1947

- Most of the states (including Andhra Pradesh, Assam, Bihar, Goa, Gujarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rajasthan and Uttar Pradesh) have amended Section 25K (Chapter V-B) thereby enhancing the numerical limits of applicability of Chapter V. Instead of 100 or more, by amendments in these states, the applicability limit has been raised to 300 or more. As a result, in respect of closure of the undertakings, retrenchment, and lay-offs, the provision for prior permission applies only in respect of industrial establishments employing 300 or more workers in these states. In the state of Himachal Pradesh, the threshold has been raised from 100 to 200 (The Industrial Disputes (Himachal Pradesh Amendment) Ordinance, 2020 promulgated on July 09, 2020). A similar kind of arrangement has now also been made under the Industrial Relations Code, 2020 by raising the threshold to 300.

- In the State of Rajasthan, in addition, Section 25-N (1) (a) and Sub-section 9 of Section 25-N and Section 25 (O) (8) have also been amended to the effect that in cases of retrenchment and closure, the affected workmen shall be entitled to 3 months of wages along with three months' notice.

- Both in the States of Rajasthan and Andhra Pradesh, Section 2-A of Industrial Disputes Act, 1947 has been amended to the effect that industrial dispute or difference between the workman and his employer relating to or arising out of discharge, dismissal, retrenchment or termination shall be deemed industrial dispute only where such dispute is raised in conciliation proceedings within a period of 3 years from the date of cause of action. There is a provision to extend the time limit where the applicant workman satisfies the authority that he had sufficient cause for not raising the dispute within the prescribed time.

- Both in the States of Rajasthan and Andhra Pradesh item no. 5 of part-2 of the fifth schedule to the Industrial Disputes Act, 1947 has been amended and a new para has been added defining "go slow" to mean any such activity by any number of persons employed in any industry, acting in combination or with a common understanding, to slow down or to delay the process of production or work purposely whether called by work to rule or by any other name, so as the fixed or average or normal level of production or work or output of workman or workmen of the establishment is not achieve. It is pertinent in this context that “go slow” also falls under the category of unfair labour practice under the scheme of the Industrial Relations Code, 2020.

- In Rajasthan section 9-D of Industrial Disputes Act, 1947 has also been amended to the effect that for purposes of registration as Representative Union, membership of not less than 30% of the total number of workmen employed in the unit of the industry shall be required.

- The Labour Laws (Gujarat Amendment) Act, 2015 amends the provision of declaring any activity as 'Public Utility Service' from 6 months to initially 1 year and subsequently for 2 years. The argument advanced

while effecting this amendment was that it would help to increase industrial productivity, and the public at large will be benefited from continuous service of various emergency services. However, workers/industries have been given liberty to agitate their issues by way of strike/ lockout as the case may be after giving notice of 14 days. Further, it reduces the limitation for filing complaints of reinstatement from 3 years to 1 year from the date of retrenchment. To strike a balance, it also enhances the retrenchment compensation from 15 days to 45 days. It further amends the provisions of the ID Act, 1947 dealing with Notice of Change in Schedule IV so as to exempt the industries from the requirement of notice of change in cases of change in labour management due to modernization and innovations. It enhances the penalty for various provisions of the ID Act from Rs. 100/- INR to Rs. 21000/- INR. Finally, it also adds the provision relating to compounding of various offences subject to certain conditions, mainly in case of offences punishable with a penalty in terms of fine.

8.2. State Amendments in Contract Labour (Regulation and Abolition) Act, 1970

- Sub-section (4) of Section 1 of Contract Labour (R&A) Act, 1970 has been amended in most of the states (including Andhra Pradesh, Assam, Goa, Gujarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rajasthan and Uttar Pradesh) to the effect that the threshold limit of applicability of the Act, both in respect of contractor as well as the establishment, has been raised to 50 in place of 20 as at present in the Central Act. In Himachal Pradesh, the threshold has been raised from 20 to 30 (The Contract Labour (Regulation and Abolition) Himachal Pradesh Amendment Ordinance, 2020 introduced on July 09, 2020). Under the Occupational Safety, Health and Working Conditions Code,

2020, which subsumes the provisions of the Contract Labour (R&A) Act, 1970, the limit has now been raised to 50.

- The Labour Laws (Gujarat Amendment) Act, 2015 has added the provision of a graded system of compounding for various violations under the Contract Labour (Regulation & Abolition) Act, 1970 by insertion of Section 25A subject to certain conditions. The amount of compounding ranges from an amount of Rs.7000 to 20000 depending on the category-wise number of workmen employed in the establishment. It further provides for the insertion of new Section 29A after Section 29 of CL (R&A) Act, 1970 providing for enrolment under the Self-Certification cum Consolidated Annual Return Scheme by every principal employer or contractor as notified by the State Government. It empowers the State Government to prescribe the audit and assessment norms for compliance with labour law provisions and standards.

8.3. State Amendments in Factories Act, 1948

- In Rajasthan, sub-section (i) and sub-section (ii) of clause (m) of Section 2 of Factories Act, 1948 have been amended to the effect that threshold limits of applicability of the Act have been raised from 10 to 20 and 20 to 40 in respect of factories working with the aid of power and those working without the aid of power, respectively. A similar kind of amendment has now also been made in many other states, including Assam, Bihar, Gujarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rajasthan and Uttar Pradesh etc. Now a similar kind of provision has also been included under The Occupational Safety, Health and Working Conditions Code, 2020.

- Sub-section -1 of Section 85 has also been amended to the same effect. Sub-section-1 of section 105 has also been amended to the effect that

cognizance of any offence under the Act shall be taken by the court on a complaint by an inspector now only with the previous sanction in writing by the State Government.

- Factories (West Bengal) Rules have been amended to the effect that a license under the Factories Act, would now be valid for three years (earlier it was one year) from the date of issuance of the said license.

- In Madhya Pradesh as per Section 8 & 9 of Part V of the Madhya Pradesh Laws (Amendment) and Miscellaneous Provisions Act 2015 in Section 65 of the Factories Act, 1948, subsection 3 has been substituted by the provision to the effect that notwithstanding anything contained in section 51,52,54 and 56, an adult male worker may be allowed to work in a factory for more than 48 hours in a week subject to the conditions that i) total number of hours of work in a week not to exceed 12 hours, ii) the spread over not to exceed 13 hours iii) the total number of hours in a week including hour time not to exceed 60 hours iv) over time over seven days at a stretch not to be allowed and v) total number of hours of overtime in any quarter not to exceed 125 hours. In addition, in section 66 dealing with the employment of women, (clause b) in subsection 1 dealing with a prohibition on employment of women between 7 p.m.to 6 a.m. has been dropped. In addition, after subsection 1, subsection 1A has been inserted, which mandates the state government to specify conditions for ensuring the safety of women who are required or allowed to work in a factory or manufacturing process between 8 p.m. and 6 a.m.

8.4. State Amendments in The Industrial Employment Standing Orders Act, 1946 and Rules Thereunder:

The Industrial Employment (Standing Orders) Central Rules, 1946 were amended in the year 2018 to include "fixed-term employment" in all sectors.

Several states such as Bihar, Goa, Karnataka, and union territory such as Lakshadweep have introduced amendments and included reference to "fixed-term employment" in the state-specific Industrial Employment (Standing Orders) Rules, 1946. The introduction of such amendments 2 years later, especially during the pandemic, shows the intention of the governments to all businesses to hire workforce for a fixed duration and avoid the applicability of ID Act and compliances relating to cessation of employment of such workforce. Workers employed on fixed-term employment will be entitled to the same hours of work, wages, perks, and benefits as that of a permanent workman along with all statutory benefits proportionate to the period of services rendered by a fixed-term worker. This would be applicable even if the period of employment does not extend to the qualifying period of employment required in the statute. However, employers are not allowed to convert the posts of the permanent workmen to a fixed term.

9. OTHER REFORM INITIATIVES

9.1. Online Registration, Renewal under Various Labour Laws and Online Submission of Consolidated Annual Returns by Employers

- Andhra Pradesh (Issuance of Integrated Registration and Furnishing of Combined Return in the Various Labour Laws by Certain Establishments) Act, 2015: This Act provides for online submission of integrated registration under 14 labour laws. As per the scheme of this Act, a Registration Certificate shall be issued instantaneously subject to subsequent verification. The validity of the registration shall be up to 31st March of the third year; wherever renewals are required, the registration shall be renewed for a further period of 3 years. The employer shall submit a combined return under labour laws online.

- Rajasthan Labour Department Management System (Launched On 13.03.2015): This Online portal provides for registration / renewal under 7 major labour laws including: i) Rajasthan Shops and Commercial Establishments Act, 1958; ii) Contract Labour (R&A) Act, 1970; iii) Motor Transport Workers Act, 1961; iv) Beedi & Cigar Workers (CoE) Act, 1966; v) ISMW (RE&CS) Act, 1979; vi) BOCW (RE&CS) Act, 1996 and Trade Unions Act, 1926. The various benefits associated with LDMS include Periodic updates in the form of SMS & Email alerts about the status of online registration/application and renewal; Online payment of Fees; Freedom from periodic visits to the department; Ease in maintenance & compliance of records; Based on 'First-in, First-Out principle; Facility to download license and registration certificate & Facility of online constant/regular monitoring of progress – pendency and disposal at every stage.

9.2. Rajfab WEB PORTAL*:*

This portal of Factories and Boilers Department of Govt. of Rajasthan mandatorily accepts applications for registration, renewal and map approvals of factories and boilers only online with effect from 01.04.2016. The factory's license can be applied for 10 years at a time. Under Section 66 (1) (b), women workers have now been allowed to work in factories even between hours of 10 pm to 5 am. Similar exemption has been granted to women workers in Uttar Pradesh but with a difference that women are allowed to work only between the hours of 7 to 10 pm and 5 to 6 am. This also in addition includes self-certification, third-party certification, online inspections and uploading of inspection notes within 48 hours, third-party verification, complaints, and integrated return under labour laws, online monitoring and review of progress under various Acts. The main features include Online payment of fees; Freedom

from periodic visits to the labour department; Ease in maintenance and compliance of records and Facility to regular online monitoring of progress.

9.3. Transparent and Responsible System of Labour Inspections under Labour Laws*:*

Transparent Inspection Scheme, 2016 of Government of Haryana w.e.f. 24.06.2016: The object of the scheme is to regulate the implementation of statutory provisions under various labour laws in a transparent and accountable manner; to protect the rights of workers in relation to their safety, health, and welfare; to eliminate arbitrariness in the action of inspecting authorities. The scheme exempts from physical inspections: all non-hazardous factories employing less than 50 workers who have opted for self-certification scheme and have submitted single return under labour laws; start-up establishments; establishments having no employees; establishments under SEZ. Manufacturing units are classified into three broad groups viz. major accident hazardous, hazardous and non-hazardous with the provision that major accident hazard units shall be inspected once in a year; all hazardous units once in every 2 years and non-hazardous units once in every 5 years except units in this category employing less than 50 workers. Units for inspection shall be selected through a computerized draw on the basis of pre-determined criteria. 15 days prior notice to the management for inspection. An inspection report is to be uploaded to the departmental website within 48 hours. Action to be taken on inspection report as a last resort where all efforts to secure compliances have failed.

9.4. System of Inspections under Labour Laws in Rajasthan:

Well-defined inspection procedure and checklist published on Departmental website. Establishments selected for purposes of inspection on the basis of computerized risk assessment viz. high-risk establishments to be inspected only once in a year; medium risk establishments allowed third-party certifications

once in 2 years; low-risk establishments to submit under self-certification scheme certified statement and granted exemption from inspections for 5 years. Inspection report online within 48 hours. Computerized allocation of inspectors for purposes of inspections of selected units. The same inspector not to inspect the same establishment twice consecutively. Provision for third-party certification for factories of medium risk category and for all boilers.

9.5. System of Computerized Risk Assessment of the Establishments and Factories in West Bengal:

In West Bengal, an online module has been developed for computerized risk assessment of the establishments and factories. The establishments and factories are classified as per norms. Within these norms low-risk establishments have been exempted from inspections altogether, medium-risk establishments are able to self-certify by themselves and only high-risk establishments are liable to regular inspections albeit under the revised and more investor-friendly norms.

9.6. Andhra Pradesh Online Inspection System of Labour Department:

In Andhra Pradesh revised online inspection procedure under labour laws was initiated in May 2016 with a view to ensuring ease of doing business, simplification, transparency, and ease of compliance of law; covers 19 labour laws. Risk-based assessment and categorization of establishments on the basis of the number of workers, number of contract workers and nature of the activity. Small establishments employing up to 300 workers are categorized as high risk; those are having more than 300 workers, including contract workers categorized medium risk; those having no employees categorized as low risk and totally exempt from inspection. Establishments employing contract labour exceeding 25% of the total labour force categorized as high-risk establishments. Medium risk establishments are allowed third-party certification and not to be subjected to labour inspection provided such employer furnishes every year combined

annual return along with third-party certification. Start-up establishments, low-risk establishments, those under SEZ / EPZ, establishments submitting combined annual returns and having no violations during the last 3 years are exempted from inspections. Units for inspection are identified on the basis of the above criterion through a computer-generated process and allocated to inspectors for purposes of inspection. Inspection order cum notice required to be transmitted to an employer to submit compliance report within 1 month.

- In Uttar Pradesh, inspections under labour laws can be conducted with prior permission from District Magistrate / Divisional Commissioner vide G.O. dated 25.10.1998. For this purpose, list of establishments/factories is prepared and submitted for permission with the recommendation from the District / Regional officer of the Labour Department.

9.7. Self-Certification Schemes:

Self-Certification schemes have been made effective in the states of Rajasthan, Haryana and Uttar Pradesh with the objective of promoting self-compliance and exempting employers submitting self-certified statements from routine physical labour inspections. The Schemes are basically voluntary in nature.

- In Rajasthan and Haryana, employers have to make an application on prescribed proforma along with the deposit of security which may be forfeited where the employer fails to submit the return or where he is found violating the provisions of law.

- In Uttar Pradesh, those employers not opting for self-certification shall be subjected to routine physical inspections but only with prior approval of the District Magistrate / Divisional Commissioner.

- Those submitting self-certified statements within the prescribed time limit are exempt from physical inspections for a period of 5 years subject to verification of 20% of such units, selected on a random basis, through a team of inspectors.

- The purpose is to secure compliance of the provisions of the labour laws, and penal action is resorted to only as a last resort where all efforts to seek compliances have failed.

- Similarly, in West Bengal also, applicants are now allowed to self-certify most of the documents and aspects under various Acts. Most of the routine matters like whether women employees have been given maternity leave would be self-certified by the owner. However, in case of any default, the penal provisions would be more stringent than before, including prosecution under IPC.

9.8. Exemptions to Shops and Commercial Establishments from the Restrictions of Opening/Closing Time:

- Andhra Pradesh Retail Trade Policy 2015-2020: The Government of Andhra Pradesh has granted an exemption to all retail enterprises to the effect that they are allowed to keep open every day of the year between the hours of 6 am and 11 pm subject to certain conditions like working hours limited to 8 hours per day, 48 hours in a week, compensatory weekly holiday with full wages, safety and conveyance facility to women workers.

- Similarly, the Government of U.P. vide notification dated 28.01.2006, have allowed shops and commercial establishments, not related to manufacturing processes, to open up to 11 pm on all days in the week subject to the conditions of payment of an additional 50% of the fee

prescribed for registration/renewal; overtime wages at double the rates; substituted holiday on a rotation basis and in case of women workers transport and refreshment facilities.

9.9. Andhra Pradesh Contracting and Outsourcing of Certain Services in Government Departments- Enhanced Remuneration:

The Government of Andhra Pradesh vide order dated 08.08.2016 has issued comprehensive guidelines for requisitioning outsource services in the Government Departments and has revised the rates of remuneration payable to outsourced functionaries. As per these guidelines, the Departments may outsource certain peripheral functions like catering, housekeeping to a service provider: the functionaries to be selected are employees of the service provider and placed at the disposal of the concerned Department. Outsourcing of such functionaries only against sanctioned posts, at the initial recruitment levels and not promotional levels. Functionaries are required to be covered under EPF and ESI Act and remuneration to be paid through the bank. Vide G.O. dated 08.08.2016 category-wise remuneration has been fixed by the Government according to which payments are to be made to outsourced functionaries.

9.10. Inclusion of deeming provision with regard to registration and license under various labour legislations:

The Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act, 2015 adds a provision in the B.O.C.W. (RE & CS) Act, 1996 by State Amendment to the effect that if no adverse order is passed by the Registering Officer under this Act within the prescribed period from the date of submission of application, the registration would be deemed to have been granted. Similar kind of provision of deemed registration and deemed license under the CL (R&A) Act ,1970 by adding sub-section 3 in Section 7 & Section 13 dealing with registration of establishments and grant or refusal of license respectively

within a period of 30 days from the date of submission of application for registration or license has been made. A similar kind of deeming provision has also been added in case of registration application under the I.S.M.W. (RE&CS) Act, 1979 and the Motor Transport Workers Act, 1961, in case no adverse order is passed by the prescribed authority within 30 days from the date of submission of the application.

9.11. Inclusion of provision of compounding under various labour legislations:

The Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act, 2015 vide Section 16 dealing with Composition of Offences and abatement of trials in certain labour laws provides or compounding of various offences under Payment of Wages Act 1936; Minimum Wages Act 1948; Equal Remuneration Act 1976; Sales Promotion Employees (Conditions of Service) Act 1976 and Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act 1988 mainly in cases of offences punishable with fine or imprisonment up to a maximum of 3 months and further mainly in case of offences committed for the first time or after the expiry of a period of 2 years of commitment of previous offence, subject to certain conditions. The Labour Laws (Gujarat Amendment) Act, 2015 adds the provision of a graded system of compounding in case of various violations under ID Act, 1947(by inserting Section 31A); MW Act,1948(by inserting Section 22A); Motor Transport Act,1961(by inserting Section 34A); Payment of Bonus Act,1965(by inserting Section 26A); Beedi & Cigar Workers(Conditions of Employment)Act,1966(by inserting Section 33A); CLR(R&A)Act,1970(by inserting Section 25A); Payment of Gratuity Act,1972(by inserting Section 10A&10B) and The Equal Remuneration Act,1976(by inserting Section 11A) subject to certain conditions and mainly in cases of minor offences punishable with a penalty in terms of fine.

9.12. Inclusion of Provision Dealing with Exemption from Maintaining Registers and Submission of Multiple Returns:

The Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act, 2015 vide Section 17 dealing with Exemption from Maintaining Registers and Submission of Multiple Returns empowers the State Government to devise or notify forms for maintaining registers and records and furnishing returns by an employer or establishment in lieu of the forms prescribed under the following Acts and the Rules made thereunder: Payment of Wages Act 1936; Industrial Disputes Act 1947; Factories Act 1948; Minimum Wages Act 1948; Maternity Benefit Act 1961; Payment of Bonus Act 1965; C.L (R&A) Act 1970; Payment of Gratuity Act 1972; Equal Remuneration Act 1976; Sales Promotion Employees (Conditions of Service) Act 1976; ISMW(RE&CS Act 1979 and Labour Laws (Exemption from Maintaining Registers by certain Establishment) Act 1988. The Labour Laws (Gujarat Amendment) Act, 2015 adds the provisions of a graded system of compounding in case of Industrial Disputes Act 1947 by way of adding Section 31A in case of offences punishable under Section 25Q (Penalty for lay-off and retrenchment without previous permission); 25R (Penalty for closure); 25U(Penalty for committing unfair labour practices); 26(Penalty for illegal strikes and Lockouts); 27(Penalty for instigation etc.); 28(Penalty for giving financial aid to illegal strikes and Lockouts); 29(Penalty for breach of settlement or awards); 30A(Penalty for closure without notice)and 31(Penalty for other offences). This State amendment further provides that offences committed of the same nature will be compoundable for the first three offences, after the offender has acted to the satisfaction of the officer or authority that such an offence is not continued any further. It also provides that the amount received will be paid to the concerned workman or equally amongst workmen or deposited with Gujarat State Social Security Board constituted under the Unorganized Workers Social Security Act, 2008.

9.13. Time-Bound Delivery of Services:

In West Bengal, necessary notifications have been issued to ensure time-bound delivery of various services offered by the West Bengal State Labour Department. In addition, the State Government has also brought out the Right to Public Services Act, 2013 wherein timelines for delivery of most of the services being offered by the labour department and its directorates have been laid down.

9.14. Simplification of Payment Procedures and Inspections:

In West Bengal, provision has also been made for payment of fees/ charges online. In addition, the inspections system has also been simplified by providing for single inspector performing inspections under various Act/Rules.

10. SOME MORE RECENT INITIATIVES:

Section 5[8] The Factories Act, 1948 allows state governments to exempt any factory or description of factories from all or any of the provisions of the said Act in the case of public emergencies for a period of 3 months. Section 65 (2)[9] of the Act allows to exempt, on such conditions, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of Sections 51 (weekly hours), 52 (Weekly holidays), 54 (daily hours) and 56 (spread over) on the ground that the exemption is required to enable the

[8] S.5, The Factories Act, 1948. Provides for Power to exempt during a public emergency. In any case of public emergency, the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act, [except section 67] for such period and subject to such conditions as it may think fit: Provided that no such notification shall be made for a period exceeding three months at a time. Explanation--For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.

[9] Ibid, at S. 65 (2) The State Government or, subject to the control of the State Government, the Chief Inspector, may by written order exempt, on such conditions as it or he may deem expedient, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

factory or factories to deal with exceptional work pressure. The exemptions granted by the state government in the exercise of its power under Section 65(2) are subject to the conditions laid down in Section 65(3)[10] of the Factories Act, 1948.

Exercising the said power(s) in the recent past, the various state governments carried out temporary amendments to weekly hours (Section 51), daily hours (Section 54), an interval for rest (Section 55), spread-over (Section 56) and extra wages for overtime (Section 59), in respect of adult workers subject to certain conditions for providing impetus to the industrial and economic activities in such states. A glance of changes carried out by some of the states are as follows:

State/Union Territory	**Establishments**	**Maximum weekly working hours**	**Maximum daily working hours**	**Overtime Pay at Double the Rate**
Assam [Under Section 65(2)]	All factories	Not specified	Increased from 9 hours to 12 hours (on a mutual agreement	Required

[10] Ibid, at 65 (3) Any exemption granted under sub-section (2) shall be subject to the following conditions, namely-
(i) the total number of hours of work in any day shall not exceed twelve;
(ii) the spread over, inclusive of intervals for rest, shall not exceed thirteen hours in any one day;
(iii) the total number of hours of work in any week, including overtime, shall not exceed sixty;
(iv) no worker shall be allowed to work overtime for more than seven days at a stretch, and the total number of hours of overtime work in any quarter shall not exceed seventy-five.
Explanation: In this sub-section, "quarter" has the same meaning as in subsection (4) of section 64.

			between employer and employees subject to payment of overtime)	
Chandigarh [Under Section 5]	All factories (No woman worker to work between 7 pm to 6 am)	Increased from 48 hours to 72 hours	Increased from 9 hours to 12 hours	Required
Goa [Under Section 65(2)]	All factories	Increased from 48 hours to 60 hours	Increased from 9 hours to 12 hours	Required
Gujarat	All factories (No woman worker to work between 7 pm to 6 am)	Increased from 48 hours to 72 hours	Increased from 9 hours to 12 hours	Not required

The maximum spread-over allowed under the notifications has also been increased to 13 hours from the earlier limit of 10 ½ hours in a day. The Factories Act, 1948 (under Section 59) prescribes that an adult worker who has worked

for more than 9 hours in a day or 48 hours in a week shall be entitled to wages at the rate of twice the ordinary rate of wages as overtime wages. However, the Government of Gujarat, exercising power under Section 5, has notified that the overtime wages will be paid at a proportionate rate, that is, at the same rate as the ordinary wage rate and not at twice the ordinary rate of wages.

11. ANALYTICAL ASSESSMENT AND CONCLUSION

An analytical assessment of the labour law reform initiatives of the central and various state governments in the form of codification of various labour legislations, state amendments, and other reform measures reveals that these measures have definitely helped in settling many of the long-pending issues. For example, the Code on Wages has extended the ambit and scope of wage security to all possible categories of employees and workers by doing away with various kinds of ceilings and conditions existing under the various wage-related legislations. It has also increased the limitation for filing of claims to three years and also rationalized the penalty to make the same deterrent.

As regards the major changes brought about by the Industrial Relations Code, it has introduced the concept of ‘fixed-term employment’ which may help in inculcating the sense of belongingness among the employees and based on fixed-term employment directly by the employers and the same is also a better employment arrangement as compared to contract labour system, as far as the employees are concerned. The same is also helpful to the industry in terms of providing the required flexibility in the present competitive economic regime. Similarly, the measures like provision of ‘Re-skilling fund’; ‘Prohibition on outsiders to become office bearers of trade unions'; ‘Recognition of negotiating union’; 'Rationalization and indexation' and 'Compounding of offences' are some of the welcome steps beneficial to not only the industry and workers but also the nation as a whole. However, the measures like increasing the threshold for the

purpose of standing orders and seeking permission of the government before resorting to retrenchment and closure, from 100 to 300 workers may have their own implications for different social partners.

As regards the Code on Social Security, 2020, it would certainly help in expanding the scope of social security, as it covers all possible categories of workers/employees (including fixed-term employees, gig workers and platform workers etc.) as well as all possible contingencies. Similarly, the Occupational Safety, Health and Working Conditions Code, 2020 also seeks to ensure a workplace that is free from hazards, provides for free annual health checkups; issuing appointment letters to employees; informing relevant authorities in case an accident at the workplace leads to death or serious bodily injury of an employee. Accordingly, it also prescribes a number of duties for employers in factories, mines, docks, plantations, and building and construction work. Similarly, the code also provides that the manufacturers, importers, designers, and suppliers must ensure that any article created or provided by them for use in an establishment is safe, and provide information on its proper handling. The code also seeks to duly take care of the interest of contract workers and migrant workers, two of the most marginalized and exploited categories of workers. For effective implementation of the provisions of the code, the penalties have also been rationalized and made a deterrent.

Coming to the state amendments in labour laws and other reform initiatives by various states, the analysis reveals that many of the states have increased the threshold under the Contract Labour (Regulation and Abolition) Act, 1970, the Factories Act, 1948, the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946 for the purpose of the applicability of the relevant law or relevant provisions. Most of these changes have now also been incorporated in the newly enacted Labour Codes by the Central Government and may have their own implications for various social partners in

the long run. In addition, some state-specific amendments/changes have also been made to give a boost to the industry, which may prove to be a win-win situation to both the industry and the workers. To conclude, it can be said that the ultimate purpose of any social legislation is to maintain an equitable balance between the genuine needs and interests of various sections, the industry and the workers in case of labour legislation. Now, it would be the duty of the implementers at the central and state level to maintain this balance in the future.

LIFTING THE VEIL THROUGH JUDICIAL ACTIVISM- ACCESS TO JUSTICE MODEL DURING COVID 19

Dr. Anuja.S*

Abstract

Judiciary is the custodian of rights of the citizens of a country. There is always the understanding of Separation of powers, the much-needed checks and balances and the overarching principle of Rule of Law that is ingrained into all kinds of democratic experiments. Judiciary has the specific role to interpret the law that reflects the interface of realization of principles into realities through administration of justice delivery system in India. When it comes to a socio-economic reality of 93% of workforce in a country being categorized under the informal and unorganised economy, the judicial activism that reflects the humane face of public policy assumes all the more significance. The Corona virus has not discriminated between the haves and have-nots but the impact and aftermath has been discriminatory to the vulnerable population. Marred with uncertainties in life, the workers had been toiling across the country due to mobility restrictions, lockdown measures and economic rescission. The efflux of migrants to home states and the connected sufferings of no food, no shelter and no wages coupled with non-accessibility to transportation means has been taken cognizance by the Apex Court while directing the state governments to bear the brunt of the sufferings underwent by the migrants. This scenario raises challenges on the availability, accessibility, adaptability and acceptability of the access to justice concerns of the working class. The situation of workers and their aspiration to pull on life reflects a grotesque of the sufferings borne by the workers during the lockdown period. The role played by the Apex Court becomes

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all the more significant and paves a way forward for interpretations in the future that touches upon the lives of the working class.

1. INTRODUCTION

1.1. Setting the Tone

As a response to resurrect economy during the pandemic, one of the measures resorted to by the state governments were exempting the industrial units and factories from the applicability of labour laws and regulations. This moves by the employers and consequent notifications issued by different states in India like Madhya Pradesh, Assam, Gujarat, Uttar Pradesh etc., supporting and promoting the employers' perspective assumes significance in an economy wherein divergent views exist regarding the efficacy levels of labour laws. An employer's perspective had always been oriented towards splitting of production units to areas in search of cheap labour , deregulation of labour markets, scrapping of protectionist measures like more lenient health, environment and safety requirements, less rigid labour procedural compliances, lower environmental protection standards, more favorable tax laws that leads to maximization of profits [1] . The divergent perspective of workers to secure their rights has led to trends like migration of human resources from rural areas to industrial areas in search of jobs providing for more wages, lack of solidarity among the human resources, feminization of labour, least social security measures, the presence of contractors and sub-contractors, more of casual workers, more of exploitations and less of the protections afforded. The idea of flexibility/deregulation/exemptions from applicability of regulations to reap profits for the employers turns disadvantageous to the workers as the same idea of flexibility/casualization is

[1] Marie McGregor, *Globalization and Decent Work (Part I) A Survey of General Principles (2006)*, 150 available at http://heiinon line.org, last seen on 19/06/2016.

synonymous with vulnerability and insecurity. It is at this juncture when lockdown and pandemic has hovered the society, the Apex Court has upheld the rights of workers breathing in life to rights of the workers in the Indian social context. This judgment assumes significance when the allegations has come up that Social Justice is not being promoted or has rather been forgotten by the Apex Court.

2. JUDICIAL ACTIVISM DURING THE PANDEMIC-A JUSTICE MODEL

Judicial activism in India reflected deep concerns over the issue of bonded labour and Apex Court had been pro-active in issuing directions to suit the context of social justice as envisaged under the Constitution of India. The understandings of human dignity and right to life and thereby extending the arms of judiciary to interpret the cause of the entrenched class are reflected through monumental cases in the Indian context. The liberalization of the concept of locus-standi to make accessibility to justice and court system easy[2], initiated the changing attitude of the courts in dealing with the depressed classes.

In *Gujarat Mazdoor Sabha & Anr v. State of Gujarat*[3] a petition was filed under Article 32 of the Constitution challenging the validity of notifications issued by State of Gujarat amidst lockdown**.** The point of contest aroused, when the State of Gujarat invoking the powers vested under Sec 5 of the Factories Act[4] had issued two consequent notifications issued by

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[2] See, *People Union for Democratic Rights v. Union of India*, 1982 AIR 1473, *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, *Neeraja Chaudhary v. State of M.P*, AIR 1984 SC 1099 prominent cases in which the apex court liberalized the rule of Locus Standi.

[3] *Gujarat Mazdoor Sabha & Anr v. State of Gujarat*, Writ Petition (Civil) No. 708 of 2020.

[4] S. 5, The Factories Act, 1948. Power to exempt during public emergency. —In any case of public emergency, the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act [except section 67] for such period and subject to such conditions as it may think fit: Provided that no such notification shall be made for a period exceeding three months at a time. 2[Explanation. — For the purposes of this section "public emergency" means a grave emergency whereby the

the Labour and Employment Department of the State of Gujarat during the lockdown starting from April 20th 2020 extending up to October 2020 exempting all the factories registered under the Act, across the state, from certain welfare provisions extended to the workers in factories, thus enabling a blanket ban. The aim of the notifications touted by the Government was to provide certain relaxations for industrial and commercial activities. The provisions relaxed by the state Government of Gujarat were Sections 51, 54, 55 and 56 of the Factories Act 1948. Through the notifications issued, there was a prohibition made applicable to female workers not allowing them to work between 7:00 PM to 6:00 AM. As well. The consequences of the above notification are summarily reflected through a table given below.

Pre-Notification Effect	Post Notification Effect
Sec 51- Prohibition relating to adult worker- restricted to 48 hours in any week.	72 hours in any week
Sec 54-Limit on Daily hours of work for an adult worker, subject to what is provided u/Sec 51)— 9 hours in any day: Proviso enables that, subject to the previous approval of the Chief Inspector, the daily maximum specified in this section may be exceeded in order to facilitate the change of shifts.	No adult worker shall be allowed or required to work in a factory for more than 12 hours in any day

security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.]

Sec 55- Limit of the periods of work of adult workers – 5 hours followed by interval for rest of at least half an hour. Exemptions are possible subject to the State Government or, subject to the control of the State Government, the Chief Inspector, may, by written order and for the reasons specified therein, but still a cap of total number of hours worked by a worker without an interval does not exceed 6.	The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour
Sec 56- Spread over shall not be more than ten and a half hours in any day. Proviso enables Chief Inspector for reasons to be specified in writing increase the spread over up to maximum of 12 hours	
Payment of overtime wages as envisaged under Sec 59-twice the ordinary rate of wages	Substituted by a rate proportionate to ordinary existing wages

The notifications according to the contention of the Government served the purpose of Public Emergency taking justification under Sec 5 of Factories Act to ensure the maintenance of minimum production levels in factories. The State Government of Gujarat contended that since the pandemic has disturbed the social order of the country and has led to extreme financial exigencies leading to an ‘internal disturbance’ in the State a temporary exemption of factories and

establishments from the operation of labour laws such as the Factories Act to overcome the financial crisis and to protect factories and establishments was the need of the hour. Payment of wages for overtime work to be computed on existing wages, according to the respondents was not to be considered as an offensive measure.

These notifications were contested by a registered Trade Union under Trade Unions Act 1926 and by a federation of trade unions spread across the country as well contending that there was no situation warranting public emergency that necessitated the passing of the ordinances that had in effect resulted in whittling down the rights of the workers concerned. Public emergency as explained under Section 5 of Factories Act 1948 is envisaged as a "grave emergency" which threatens the security of India or of any part of the territory by war, external aggression, or internal disturbance. As opposed to this idea, the power under Section 5 provided to State Government when it was used and put into practice as a prerogative by the State, was opposed by the petitioners. According to the petitioner, pandemic induced lock down measures and subsequent economic rescission ought not to be categorized under the situation called as public emergency and hence the move of the State was unnecessary, unwarranted, and unconstitutional in nature. Listing all the factories in the State and bringing a blanket ban as envisaged by the notifications was an unnecessary exercise and that was oriented towards an inclination to the employer's perspective was, yet another contention put forward by the petitioners. Wages payable for overtime work being computed at the rate of existing ordinary rate of wages violated the normal rule of overtime wages payable also violated the spirit of the Minimum Wages Act, 1948 and amounted to forced labour violating the workers' fundamental rights under Article 23, 21 and 14 of the Constitution of India. An alternative position was taken by the petitioners that the notifications ought to have been passed under Sec 65(2) Factories Act under the

context of exception pressure to work situation, that enables State government to exempt the application of Sec 51,52,54, and 55 simultaneously acknowledging the welfare conditions stipulated under Sec 65 (3)[5] of the Act which could have taken care of the workers' rights to an extent, which never happened in this case since the powers invoked was under Sec 5, of the Act. The State Government contended that they never had the intention to take up the justification nor acknowledged the ground of 'exceptional pressure to work' situation as envisaged under Sec 65(3) of the Factories Act 1948.

The Apex Court had to consider the interpretation that was to be made possible to the terminology public emergency under Sec 5 of Factories Act, whether violations as contested by the petitioners has happened and whether the situation of pandemic warranted such a stringent measure on the part of the Government as against the workers. Apex Court was vociferous in upholding the legacy created by the Factories Act 1948 and acknowledged the history of labour legislations and the concomitant factors of colonialism and poverty and mass migration of workers that happened to the urban pockets leading up to the need of enacting of Factories Act 1948, which came up as an epitome of bulwark against exploitative employers during the period of industrialization keeping in tune with the vision of the drafting committee of the Constitution of India and that enactment reflected the gist of Welfare State Policy discussed under the Directive Principle of State Policy of the Constitution. The Factories Act had been projected as a poster boy for socialist and welfare labour legislation

[5] See S. 65(3), The Factories Act, 1948. Any exemption granted under sub-section (2) shall be subject to the following conditions, namely: —(i) the total number of hours of work in any day shall not exceed twelve;(ii) the spreadover, inclusive of intervals for rest, shall not exceed thirteen hours in any one day (iii) the total number of hours of work in any week, including overtime, shall not exceed sixty;(iv) no worker shall be allowed to work overtime, for more than seven days at a stretch and the total number of hours of overtime work in any quarter shall not exceed seventy-five.

positioning the rights of workers intact, taking cognizance of their health, safety and welfare measures. The Act clearly, mandates the obligations of the employers in the context of manufacturing processes and envisioned conducive working conditions, adequate and sufficient rests and leave facilities, overtime wages as well as timely payment of wages to its workers. Having reflected upon the intent of the Act and its history, the Supreme Court clarified that the Factories Act specifically provided for*: "(i) when an exemption can be granted; (ii) who can exercise the power to grant an exemption; (iii) who can be exempted; (iv) the conditions subject to which an exemption can be granted; (iv) the provisions from which an exemption can be allowed; (v) the period of time over which the exemption may operate; and (vi) the manner in which the exemption has to be notified."* The existence of a '*public emergency*' , it was categorically pointed by the Court that it was not to be left to the subjective satisfaction of the state governments but can only be construed in situations where a '*war*', '*external aggression*' or '*internal disturbance*' causes a grave emergency that threatens the security of the State and therefore, the powers provided under Section 5 of the Factories Act can only be exercised (i) on the existence of such '*public emergency*' and (ii) the existence of a rational nexus between the notifications and the exemption so provided existed.

Supreme Court referred to the proportionality test propounded under *J.K.S. Puttaswamy Judgment*[6] to determine the validity of impingement of fundamental rights by State action to understand what constitutes an '*internal disturbance*', the Apex Court discussed various precedents in which its meaning and ambit had been discussed. The term '*internal disturbance'* provided under Article 355[7]

[6] *K S Puttaswamy v. Union of India* 3 (2017) 10 SCC 1, para 325.

[7] Art. 355, The Constitution of India. Duty of the Union to protect States against external aggression and internal disturbance: It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution

of the Constitution, was interpreted by the Court as that can be exercised only when there is a failure in the functioning of the constitutional order of the State as provided under Article 356[8] of the Constitution. The Supreme Court held that even though the pandemic had caused great economic hardships, such hardships were not in any way threatening the security of India or any parts of its territories and thus, the COVID-19 pandemic does not qualify as a '*public emergency*' within the meaning of Section 5 of the Factories Act as no '*internal disturbance'* which threatens the security of the State could be made out. Apex Court after going through many precedents and referring to essence of Sarkaria Commission categorically opined that unless the threshold of an economic hardship is so extreme that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law. Recourse can be taken to them only when the conditions requisite for a valid exercise of statutory power exists under Section 5 of Factories Act 1948 and Court out rightly rejected the contention of respondents that such emergency ever existed.

The highlight part of the judgment was the elaborate discussion that has gone behind interpreting the essence of Conscience of the Constitution i.e., Fundamental rights, Part III and Directive Principles of State Policy Part IV. The enlightened idea that political democracy and rights cannot be achieved unless economic democracy and rights are taken care of was emphasized

[8] Ibid, Art.356. Provisions in case of failure of constitutional machinery in States: (1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State.

during the discussion. The ideal argument of transformative constitutional vision to achieve Justice- Social Economic and Political as provided in the Preamble of the Constitution. to the workers of the land was projected by the J.D.Y Chandrachud while elaborating on the philosophical terrain of the Constitution of India. Labour welfare was reiterated by the Court as an essential part and parcel of that vision. Court positioned its justification on the legacy of sea change paradigm shift that had happened from the concept of employer employee relationship/contract as a one of private contract to the contract of status. It referred to the reflections of Supreme Court in *Bhikusa Yamasa Kshatriya (P) Ltd. v. Union of India*[9] and emphasized on the paternalistic approach that the Welfare State ought to enact in situations of exploitation of workers at the hands of exploitative and unscrupulous employers.

Apex Court condemned the practice of paying ordinary rate of wages proportionate to existing wages for a worker who has toiled and rendered labour in the form of overtime to the employer. Reliance was placed on *Y A Mamarde v. Authority*[10] under the Minimum Wages Act and interpreted the concept of overtime pay at double the rate of the ordinary wage, as a minimum endeavour of just compensation for the significant additional labour that is utilized by a worker, after having toiled in the ordinary course of the day. An interesting and timely interpretation of idea behind paying double the rate for overtime work was enunciated by referring to the judgment in *I.T.C. Ltd. v. Regional Provident Fund Commissioner*[11]. The need for due payment to worker doing overtime work was emphasized as below,

[9] *Bhikasu Yamasa Kshatriya & Anr v. Union of India & Anr.,* AIR 1963 SC 1591.
[10] Y.A. Mamarde v Authority under the minimum wages act, (1972) 2 SCC 108.
[11] *I.T.C. Ltd. v. Regional Provident Fund Commissioner,* 6 ILR (1988) 1 P&H 73.

Two types of remuneration are fixed for work being done during the additional hours and overtime hours. While remuneration for additional hours, i.e., beyond the normal hours, is fixed at one and a half times, the remuneration for overtime, i.e., beyond the statutory hours is fixed at double the normal hour rate. It clearly shows that remuneration for additional hours is not considered as an overtime allowance and two rates of payment are fixed, one for the additional hours which come within the normal statutory working hours and the other for the overtime hours which are beyond the normal statutory working hours.

The court categorically upheld the rights of the workers while acknowledging the efficacy level of Factories Act 1948 and held that

Clothed with exceptional powers under Section 5, the state cannot permit workers to be exploited in a manner that renders the hard-won protections of the Factories Act, 1948 illusory and the constitutional promise of social and economic democracy into paper-tigers. It is ironical that this result should ensue at a time when the state must ensure their welfare.

J. Chandrachud, referred to the seminal work of Granville Austin and literature brought in by Prof. Upendra Baxi while he was reviewing the work of Granville Austin, to emphasize upon the essence of what the Governments should be working upon to make directive principles of state policy a reality. Fundamental Rights are often considered as operational in nature and while Directive Principles of State Policy is aspirational in nature. The Court took cognizance of the understandings of supplementary and complementarity connection brought out between Part III and Part IV through various precedents between Part III and Part IV ending up with the Minerva Mills Case. The clarification on justifiability and non-justifiability difference between Rights and Principles under Part IV was

acknowledged and alongside the need to operationalize the principles into reality was solidified by the Court.

Interestingly Court reflected upon a vivid explanation to the terminology strive under Article 38 of the Constitution. This explanation rendered by the Apex Court takes the judgment to a classic level as to how to construe the terminology strive that is made use of under Article 38 of the Constitution of India. A student of Constitutional Law and any stakeholder within the system ought to know and profess this idea incorporated into the Constitution of India. Dr Ambedkar, in defending the retention of the word 'strive' in the Constituent Assembly debates emphatically noted:

The word 'strive' which occurs in the Draft Constitution, in judgment, is very important. We have used it because our intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these Directives. That is why we have used the word 'strive'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go." (Emphasis added)

The Court ventured to lay down the idea of constitutional vision and the need to understand the ushering in of a new world order by interpreting the actual essence of Directive Principles of State Policy in the Constitution of India. The Court was sympathetic towards the plight of the migrant workers during the pandemic and reiterated the sentiments of the vulnerable and marginalized reflecting a humanitarian approach during the times of crisis.

The wholehearted and humanitarian face of the Court got projected when the notification of the Labour Department was quashed and the Apex Court invoking the inherent power of the Court under Article 142[12] of the Constitution, directed payment of overtime wages, in accordance with the provisions of the Factories Act to all the workers who have continued working in the conditions provided since the issuance of the impugned notifications.

3. CONCLUDING REMARKS

This judgment and the ethos expressed therein comes as a sigh of relief to the working population of the country. It is heavily ordained upon a society wherein lesser the economic power lesser the visibility, ideology exists. Sir Henry Maine had opined that all progressive societies are moving from status to contract. But the contradictory has happened with developments in industrial Relations scenario wherein the change is from contract (inequitable) to status (equitable). This change from contract to status is because of the manifest inequality in the position of parties to the contract of employment. In order to create a proper balance in the employer-employee relationship and to maintain peaceful and cordial industrial atmosphere so that the process of production continues unhampered, the State has intervened actively in the sphere of industrial and labour relations. When State loses track of this noble ideology and the legacy of industrial jurisprudence in the country, judgments of this kind make a clarion

[12] Art. 142, The Constitution of India, Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

call to relook and reconsider the way forward in balancing the rights of the marginalized with the elite class.

It is interesting to recollect here in this context the explanation given to forced labour as per the judgment in *PUDR v Union of India*[13]. Explaining the scope of the expression 'traffic in human beings and beggar and other similar forms of forced labour under Article 23, the court categorically observed:

What article 23 prohibits is 'forced labour', that is, Labour or service which a person is forced to provide ... and 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger, and poverty, want and destitution ... The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice or alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. (Emphasis added)

Applying this principle into a situation of COVID 19 could very well be taken up as a good justification that could have been invoked by the petitioners, but which was not taken expressly neither by the petitioners nor in the judgment. Leaving no choice to the downtrodden masses and compelling them to take up occupations harmful and destructive in nature to meet both ends of life is the socio-economic cultural reality that exists in India. The Court's opinion that *Berefts of social security, they have no fallback options* resonate as highly reassuring, instilling confidence in Rule of Law and reaffirming the values of equality, dignity and worth inherent in a human being generally and the

[13] *Peoples Union for Democratic Rights v. Union of India* (1982) 2 LLJ 454 (SC).

working class specifically. The change in the philosophy of the State from laissez-faire to a Welfare State brought State intervention into the field of industrial relations and the development of industrial jurisprudence have eroded most of the principles relating to the sanctity of the employment contract. Now the employer employee relations are governed more by status than by the contract of employment.

A transformative vision of the Indian Constitution is a welcoming aspect of this judgment as the bench emphasized the need for protecting labour welfare on one hand and combating a public health crisis occasioned by the pandemic on the other with careful balancing, with due regard for the rule of law. Article 51(c) of the Constitution of India requires the governments to foster respect for international law and treaty obligations. India has ratified various conventions relating to forced labour of 1930 and 1957 as well. It is thus made evident that labour laws are an essential substratum of constitutional values that ensures that workers are no more to be treated as slaves and are to be duly recognized as rights holders. *A need of the hour cited by the Court from the works of Prof. Upendra Baxi to move on from the planet of platitudes to analytic paradise reveals the dearth of constitutional scholarship on the understanding of how Part III and Part IV works in tandem and synergy, which leads to the realization of Directive Principles of State Policy could be considered as one of the majors take away from this judgment. The ideal of transformation from the so-called regulatory Police State to that of Welfare State gets highlighted through this.*

The judgment goes in tune with the ethos expressed by the Court while accepting Public Interest Litigations on the grievance of the oppressed

classes[14] generally, and the ethos reflected by Olga Tellis Case[15]. A great philosophy ingrained in the Industrial Relations is reiterated through this benchmark judgment i.*e., a worker's right to life cannot be deemed contingent on the mercy of their employer or State*.

A fresh life gets infused into the Factories Act,1948 which had always been known for all the wrong reasons like, that the Act is too much imposing regulations on safety, health and welfare measures making the industrial relations scenario congested and non- flexible for employers is being re written through this epoch-making judgment. That is where the ideal of Gandhi that partnership in production between the workers and employers gets exemplified. This case represents a model judgment upholding the synergy of social and economic democracy indigenous to the Indian socio cultural and economic context which needs to be emulated and serves as a beacon, amidst the pandemic.

Labour is prior to, and independent of, capital. Capital is only the fruit of labour, and could never have existed if labour had not first existed. Labour is the superior of capital, and deserves much the higher consideration.

Abraham Lincoln's First annual message to Congress, December 3, 1861

[14] *People's Union for Democratic Rights v Union of India*, (1982) 2 LLJ 454 (SC); *M.C. Mehta v Union of India*, AIR 1987 SC 965; *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802*; Neeraja Choudhary v State of MP*, AIR 1984 SC 1099.

[15] *Olga Tellis v. Bombay Municipal Corporation & Anr*., 1986 AIR 180.

A CRITIQUE OF THE INDUSTRIAL RELATIONS CODE 2020

Dr Balwinder Kaur*

Abstract

The Industrial Relation Code integrates and substitutes three different central labour legislations specifically The Industrial Disputes Act, 1947; the Trade Unions Act, 1926; and the Industrial Employment (Standing Orders) Act, 1946. The main reason for reforms of labour laws in the area of industrial relations to afford them labour flexibility and regulate trade unions, collective bargaining and strikes. The four labour codes are as follows, (i) Code on Wages (ii) Social Security Code (iii) Industrial Relations Code and(iv) OSH Code (Occupational Safety and Health). The purpose of these Codes is not only to reduce the complexity of labour laws but also to introduce reforms for facilitating employers and workers. This paper attempts to articulate and puts a highlight on the Industrial relations code 2020. After analysis of the IR Code, it is evident that the IR code is more favorable to employers and it would be unable to create a harmonious relationship between employers and workers.

1. INTRODUCTION

On March 25, the unexpected lockdown was introduced firstly for few days thereafter stretched with changing moderations. Lockdowns intended to stop all the economic activity in India. As the lockdown extended the position of workers came into the picture. The state governments tried to amend the specific laws during lockdown especially law regarding maximum work hours from 8 to 10–12.[1] It was these two states Uttar Pradesh and Madhya Pradesh where the

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[1] S. Chatterji, *Govt plans changes in law to allow 12-hour shifts in factories*, Hindustan Times (11/04/20), available at https://www.hindustantimes.com/india-news/govt-plans-changes-in-law-to-allow-12-hr-shifts-in-factories/story-eODI0qrWT6p757VMRPSqTP.html, last seen on 14/01/21.

government have brought the ordinances for suspending vital labour legislations. During lockdown, few states have enlarged the borders of labour laws.[2] There is no second thought that the labour laws in India have been outdated and overlapped not only this approximately 90% of the labour force which are in the informal sector are not protected by these formal labour legislations. The justification of prevailing labour laws is unthinkable, for both labour flexibility as well as for the safety of the worker's rights. It is the time to have clear, appropriate and specific laws. To make labour laws clear and simplified the system to bring in line with the present business environment the government has carried a series of reforms in the labour law. The Labour reforms are based on the Second Labour Commission's (1999),[3] recommendations, according to the government labour legislation which is in existence have been combined into four different codes. These four labour codes are as follows, (i) Code on Wages (ii) Social Security Code (iii) Industrial Relations Code and(iv) OSH Code (Occupational Safety and Health).[4] The purpose of these codes is not only to reduce the complexity of labour laws but also to introduce reforms for facilitating employers and workers. This paper attempts to articulate and puts a highlight on the Industrial relations code 2020.

The most confrontational is the Industrial Relations Code which combines and modifies laws relating to trade disputes investigation and settlement of disputes and certification of standing orders. The Code on social security provides social security to all persons irrespective, of their sectors.[5] The Code on OSH unite and

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[2] KR S. Sundar, *Who needs national codes and laws?* The Hindu Business Line (22/07/2020), available at https://www.thehindubusinessline.com/opinion/who-needs-national-codes-and-laws/article32162616.ece, last seen on 14/1/21.

[3] A. Sarma and S. Sunder, *Labour reforms sans human face*, Indian Express (28/10/20), available at https://indianexpress.com/article/opinion/columns/labour-reforms-strikes-trade-unions-economy-manufacturing-factories-6907339/, last seen on 15/1/21.

[4] PRS Legislative Research, Government of India, *The Code on Social Security, 2020*, available at https://www.prsindia.org/billtrack/code-social-security-2020, last seen on 27/1/21.

[5] Government of India Ministry of Labour & Employment, Government of India, *The Code on Social Security, 2020*, available at

modify the laws which regulate the job-related safety, health and the working conditions of the employees employed in an establishment, and apart from it the matters which are incidental to it. Next is the Code connected to wages, which was enacted in the year 2019 it legalizes wage and bonus payments paid by an employer in all establishments where code is applicable.[6] As we know it is the Concurrent List of the Indian Constitution under which the subject related to labour falls. The Concurrent List gives power to the center and the state to legislate laws on labour. Before these Labour Codes, we were having approximately 40 central and approximately 100 state laws which used to regulate labour issues such as the investigation and settlement of industrial disputes, regulating working conditions of the workers, providing social security and regulating wages. According to the data "India consumes the largest working population in the world between 2022 and 2034, with 10 million youth incoming the workforce every year."[7] If we notice then during the last five years, the government has introduced many variations to increase employment, for example, the Shram Suvidha Portal,[8] Make in India,[9] Skill India,[10] MUDRA,[11] Startup India,[12] etc. It is expected that labour codes would give a new platform for the creation of jobs. If we look from the viewpoint of the business side, due

https://labour.gov.in/sites/default/files/SS_Code_Gazette.pdf, last on 15/01/21.

[6] Government of India Ministry of Labour & Employment, The Government of India, *The Code on Wages, 2019*, available at http://egazette.nic.in/WriteReadData/2019/210356.pdf, last seen on 15/01/21.

[7] Sergio Picarelli, *India's workforce is growing - how can job creation keep pace?* World Economic Forum (06/10/17), available at https://www.weforum.org/agenda/2017/10/india-workforce-skills-training/, last seen on 18/01/21.

[8] Government of India Ministry of Labour & Employment, Government of India, *Shram Suvidha Portal*, available at https://labour.gov.in/shram-suvidha-portal, last seen on 09/01/21.

[9] *About Us*, Make in India, available at https://www.makeinindia.com/about, last seen on 09/01/21.

[10] *Skill India Portal*, Skill India, available at https://www.skillindia.gov.in/, last seen on 09/01/21.

[11] *Pradhan Mantri MUDRA Yojana*, Mudra, available at https://www.mudra.org.in/, last seen on 09/01/21.

[12] *Startup India*, Invest India, available at https://www.investindia.gov.in/startup-india-hub, last seen on 09/01/21.

to practical hurdles, industries are incompetent to respond to market competition, not only that many definitions available under the existing Acts are not clear such as workers, wages establishment and industry, it generates confusion misperception and creates an interruption in the litigations. Therefore, when it comes to justifying existing labour laws it seems overbearing, for both labour elasticity for employers and statutory guard for employees/workers. Now, is the pressing time to have clear terms and definitions under codes which reject generalization.

It is a known fact that the right of association and social security provided to workers institutes international human rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[13] Abolition of the present labour laws would certainly result in an abandonment of the right provided by the Constitution and UDHRC. Changing of absolute labour laws would leave workers forcefully defenceless, and it leads to organized patchiness of bargaining power between the two.

2. INDUSTRIAL RELATION CODE

The Industrial Relation Code integrates and substitutes three different central labour legislations specifically The Industrial Disputes Act, 1947; the Trade Unions Act, 1926; and the Industrial Employment (Standing Orders) Act, 1946[14]. The main reason for reforms of labour laws in the area of industrial relations is to afford them labour flexibility and regulate trade unions, collective bargaining and strikes.[15] Industrial Relations is one that would give strength to

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[13] *International Covenant on Economic, Social and Cultural Rights*, United Nations Human Rights Office of the High Commissioner, available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx last seen on 09/01/21.

[14] PRS Legislative Research, Government of India, *The Industrial Relations Code, 2020*, available at https://www.prsindia.org/billtrack/industrial-relations-code-2020, last seen on 15/01/21.

[15] KR Shyam Sundar, *The Current State of Industrial Relations in Tamil Nadu*, ILO Asia-Pacific Working Paper Series, 39, 978-92-2-124531-5[ILO_THUMB], Subregional Office for South Asia, New Delhi (2010).

the industrial establishment and grow the business, as it tries to free employees from the stringent provisions of previous labour laws. The Commission on Labour recommended that different labour laws should be amalgamated into different Codes.[16]

The Industrial Code was passed by both Houses of the Parliament and received the assent of the President on September 28, 2020. As far as Industrial relation code is concerned it applies to all establishments. The IR code does not apply to that establishment which is engaged in philanthropic and charitable work, sovereign functions of the state and domestic work, and any activity which is notified by the government. If we analyze the Industrial Disputes Act there are certain terms which are not clear.[17]

2.1. Certain terms not defined in the Code

2.1.1. Employee

Employee means any person (other than an apprentice engaged under the Apprentices Act, 1961) employed by an industrial establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.[18]"

The Industrial Relations Code outlines "workers include, all persons employed in a skilled or unskilled, manual, technical, operational and clerical capacity,

[16] T.K. Rajalakshmi, *The new labour codes: Labour's loss*, Frontline (23/10/2020), available at https://frontline.thehindu.com/the-nation/labours-loss/article32749705.ece, last seen on 18/01/21.
[17] Government of India Ministry of Labour & Employment, Government of India, *The Code on Social Security, 2020*, available at https://labour.gov.in/sites/default/files/SS_Code_Gazette.pdf, last seen on 18/01/21.
[18] S. 2(l), The Industrial Relations Code, 2020.

supervisory staff who are drawing up to ₹18,000 a month would be excluded from the definition of workers." [19] It is well-intentioned mention here that the two terms 'manager' or 'supervisor' are mentioned in the definition of the worker. Both the terms are also used in the different labour code. The OSH Code,[20]the Industrial Relations Code, 2020 and the Code on Wages, 2019. It is observed that nowhere these two terms are defined. The Standing Committee[21] observed the Occupational Safety Health Code suggested "that both the terms 'supervisor' and 'manager' should be clearly defined in the Code as it regulates the categories of persons who would be excluded from the definition of worker.[22]" Chapter III of the IR Code, defines worker under the trade union the "worker means all persons employed in trade or industry; and also covers the worker defined under the Unorganised Workers' Social Security Act, 2008." The stretched definition under the IR Code would certainly cover a greater part of the workforce (including those engaged in the unorganised sector) within the horizon of the IR Code.

Whenever there is a conflict or a difference between administration or management and workers regarding their employment it is considered as an industrial dispute. Whenever there is an industrial dispute, in the industry both the parties try to press each other to agree to their terms and conditions. The industrial unrest results in strikes, picketing, gheraos lock-outs, and insubordination on the part of workers. The Industrial Code has stretched the definition of 'Industrial Dispute' under the ID Code include disputes or differences between an individual worker and an employer, connected with, or

[19] Ibid, S. 2(zr).
[20] Standing Committee on Labour, Lok Sabha, *The Occupational Safety, Health and Working Conditions Code*, 2020.
[21] Standing Committee on Labour, Lok Sabha, *The Occupational Safety, Health and Working Conditions Code*, 2019.
[22] S. 2(zr), The Industrial Relations Code, 2020.

arising out of discharge, dismissal, retrenchment, or termination of such individual worker (Individual Dispute).[23]

A wage is a reward paid to employees for work for a company during a time. Under the Industrial Relations Code, the term ‘wages’ is connected with the other Labour Codes, thereby bringing uniformity across legislations. The definition of wages has been broadened to embrace all remuneration by way of salaries, expressed in monetary terms, which includes basic wages, dearness allowance and retaining allowance. It is the complete definition, which also provides a list of eliminations, such as:

a. Statutory Bonus,
b. Provident Fund,
c. Pension,
d. House rent allowance,
e. Value of house accommodation and utilities,
f. Conveyance allowance,
g. Sum paid to defray special expenses due to the nature of work,
h. Any overtime allowance,
i. Any commission,
j. Any retrenchment compensation, and
k. Gratuity.”[24]

[23] Ibid, S. 2(q).
[24] S. 2(zq), The Industrial Relations Code, 2020.

2.1.2. Definition of "Industry"[25]

The first case in which the term industry was explained was *Bombay Province v. W. I. Automobile Association*,[26] in this case, the Bombay High Court was confronted with a problem to decide whether an association of automobile owners which simply rendered services to its members and had no motive to make a profit could be held an industry for the Industrial Disputes Act, 1947. The court observed that the association was an industry though it has no motive to make a profit. Interpreting the statutory language of section 2 (j) of the Act, the court pointed out that profit motive may be essential for a business, trade or manufacture but, observed Chagla, C.J: " *There is no indication in the section itself that the Undertaking referred to in this definition clause must be undertaking carried on to make a profit . . . the exp' calling ' is also sufficiently wide to include in its activities not*".

In *V. S. Marwari Hospital v. Its Workmen*,[27] interpreting section 2(j) of the Industrial Disputes Act, the Labour Appellate Tribunal held that "section 2(j) of the Industrial Disputes Act, 1947, is of wide amplitude and is not ejusdem generis with the word " business or trade " used in the section. It was held that if judged by the object and scope of the Act and the other provisions of the Act, the plain meaning of the word could not be cut down to limit it to profit-making enterprises only. Hence charitable institutions like hospitals, universities, free schools or colleges or public bodies like municipalities would come within the concept of "undertaking" as used in section 2(j) of the Act necessarily concerned

[25] Ibid, S. 2(p).
[26] *Bombay Province v. W.I. Automobile Association*, A.I.R. 1949 Bom. 141.
[27] *V.S. Marwari Hospital v. Its Workmen*, 4 F.J.R. 295 (L.A.T. Calcutta) (1952); II L.L.J. 327 (L.A.T. Calcutta) (1952).

with a profit motive."[28] Under the Industrial Relations Code the definition of " industry" specifically excludes the following:

- “Institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service; or
- any activity of the appropriate Government relatable to the sovereign functions of the appropriate Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or
- any domestic service; or
- any other activity as may be notified by the Central Government.”[29]

2.1.3. Definition of Employer [30]

The term employer has been defined under the industrial dispute act of 1947 under section 2(g) the employer according to the definition was the person authorized to do the work in the capacity as an employer under the leadership of either the Central Government or the state government or the local authority.[31] The definition of "employer" under the Code has been lengthened to include:

(m) "**employer** means a person who employs, whether directly or through any person, or on his behalf or behalf of any person, one or more employee or worker in his establishment and where the establishment is carried on by any department of the Central Government or the State Government, the authority specified by the head of the department in this behalf or where no authority is so specified,

[28] Ibid
[29] S. 2(p), The Industrial Relations, 2020.
[30] S. 2(m), The Industrial Relations Code, 2020.
[31] S. 2(g), the Industrial Disputes Act, 1947.

the head of the department, and about an establishment carried on by a local authority, the chief executive of that authority, and includes,—

- about an establishment which is a factory, the occupier of the factory as defined in clause (n) of section 2 of the Factories Act, 1948 and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the said Act, the person so named;

- about any other establishment, the person who, or the authority which has ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager or managing director, such manager or managing director;

- Contractor; and

- the legal representative of a deceased employer;[32]".

The rights and duties coexist. Most of the country supports a right to strike to the workers. But this right shall not use arbitrarily the right to strike must be used as the weapon of the last choice because if this right is misrepresented, it will generate a problem in the industry. In India, right to protest is a fundamental right under Article 19 of the Constitution of India gives but the right to strike is not a fundamental right but a legal right and with this right statutory restriction was attached in the industrial dispute act, 1947. The term 'strike' has been stretched under the Industrial Relations Code to include within it meaning any concerted casual leave on a given day, taken by 50% or more workers employed in a particular industry. The purpose of this extension aimed at discouraging workers from taking unexpected concerted casual leave to disrupt or stop the work at the establishment of an employer.[33] According to the Industrial Disputes

[32] S. 2(m), The Industrial Relations Code, 2020.
[33] S. 63, The Industrial Relations Code, 2020.

Act, it was prescribed that only in public utility services,[34] a notice of strike needs to be given. However, under the IR Code, there is a change that workers who are employed in an industrial establishment irrespective of it being a public utility service industry or not allowed to go on a strike without giving notice within 60 days before striking or (ii) within 14 days of giving such notice; or (iii) before the expiry of the date of the strike as the case may be, specified in such notice.[35]

Both the IDA and the IR Code provide that no strikes or lockouts are permitted when the industrial dispute is pending for conciliation and the seven days after the conclusion of such proceedings. Further, unlike the IDA, under the IR Code, no strike or lock-out, is permitted during the pendency of a proceeding before a tribunal or a national tribunal and 60 days, after the conclusion of such proceedings; or if the pendency of arbitration proceedings before an arbitrator and 60 days after the conclusion of such proceedings; or any period in which a settlement or award is in operation, in respect of the matters covered by the settlement or award.[36]

3. JURISDICTION OF CIVIL COURTS

Section 9 of the Civil Procedure Code provides that courts to try all civil suits unless their cognizance is either expressly or impliedly barred.[37] Next question

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[34] S. 22, The Industrial Disputes Act, 1947.

[35] K Venkataramanan, *The Hindu Explains | What does the new Industrial Relations Code say, and how does it affect the right to strike?* The Hindu (27/09/20), available at https://www.thehindu.com/news/national/the-hindu-explains-what-does-the-new-industrial-relations-code-say-and-how-does-it-affect-the-right-to-strike/article32705599.ece, last seen on 18/01/20.

[36] *The Industrial Relations Code, 2020*, The Gazette of India, available at http://egazette.nic.in/WriteReadData/2020/222118.pdf, last seen on 18/01/21.

[37] S.9, Code of Civil Procedure, Courts to try all civil suits unless barred**.** -The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
Explanation [I]. -A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

is whether the Civil Court can adjudicate matters related to Industrial matters. In the case of *Premier Automobiles Limited v. Kamalakar Shantharam Wadke,*[38] the Hon'ble Apex Court has set out the guidelines applicable to the jurisdiction of the Civil Court about an industrial dispute. If we explain an industrial dispute as defined under the Industrial Disputes Act, 1947 is a dispute or difference of opinion between an employer and worker in respect of their employment, non-employment and conditions of working. Therefore, when a dispute arises, how far a Civil Court can intervene in such matters is the question. The Hon'ble Supreme Court has set out; four broad principles in this regard:

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in the Civil Court;

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy;

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act;

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter. V.A then the remedy for its enforcement is either S.33C or the raising of an industrial dispute, as the case may be."

The recent Industrial Relations Code precisely eliminates the jurisdiction of civil courts in respect of any matter to which the Industrial relation Code applies, and

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Explanation II.-For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in *Explanation I* or whether or not such office is attached to a particular place.

[38] *Premier Automobiles Limited v. Kamalakar Shantharam Wadke*, 1976 (I) LLN page 1; AIR 1975 S.C. 2238.

not only that Code provides anything done or intended to be done under the IR Code against that no injunction is to be granted by a civil court. This is a change brought by the IR Code, leaving employers and workers with option only to approach establishments prescribed under the IR Code.[39]

4. TRADE UNION DISPUTE

The Industrial Relations Code has defined the concept of 'Trade Union Disputes', which mean any dispute which is related to trade unions arising either between two or more trade unions or between the members of a trade union.[40] This empowers the industrial tribunals to adjudicate disputes arising between trade unions as well.[41]Chapter VB was incorporated in the Industrial Disputes Act, 1947 through amendment under Article 32 of the Constitution.[42] The new chapter deals with the special provisions relating to lay-off, retrenchment and closure in certain establishments. Under the Industrial Disputes Act, retrenchment, lay-off and closure in industrial establishments (i.e., factories, mines and plantations thereunder) in which less than 100 workmen are employed or were employed on an average per working day for the preceding 12 months, cannot be done, without the prior permission of the appropriate Government.[43]The requisite criterion to acquire prior permission remains the same under the Industrial Relation Code, the threshold for looking prior permission from the appropriate Government has been increased from 100 to 300 workers (with an option given to the appropriate Government to notify a

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[39] *Labour Laws in India*, National Crime Investigation Bureau, available at https://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf, last seen on 18/01/21.
[40] S. 2(zm), The Industrial Relations Code, 2020.
[41] PRS Legislative Research, Government of India, *The Industrial Relations Code, 2020*, available at https://www.prsindia.org/billtrack/industrial-relations-code-2020, last seen on 18/01/21.
[42] Chapter VB, The Industrial Disputes (Amendment) Act, 1976.
[43] Ibid.

threshold higher than 300 workers).[44] The above-mentioned change does not touch industrial establishments other than factories, mines and plantations. Further, under the Industrial Relations Code, the appropriate Government has been authorized to recommend retrenchment compensation other than the average pay of 15 days prescribed under the IDA.[45]

5. FIXED TERM EMPLOYMENT

The employers frequently enter into fixed-term contracts with the employees for a short duration, the same was mainly unregulated under earlier Indian labour legislations. In an attempt to acknowledge fixed-term employment and contracts, the Central Government by way of notification dated March 16, 2018, incorporated fixed-term employment as a classification of workers under the central rules framed under the IESO Act across all sectors, where the Central Government is the appropriate Government. Similarly, various states, such as Haryana, Karnataka, Bihar, and Punjab, have amended their respective state rules framed under the IESO Act to recognize the concept of fixed-term employment.[46] With a purpose to offer flexibility to employers across sectors, to engage workers for shorter and fixed durations (irrespective of whether the appropriate Government for the sector is the Central Government or the State Government) the IR Code has also clearly defined fixed-term employment. The IR Code aims at protecting the rights and ensuring the welfare of the fixed-term employees and this is reflected in the definition of fixed-term employment. Under the IR Code, a fixed-term worker shall be entitled to inter alia the following: i. Parity in wages, working hours, allowances and other benefits of

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[44] PRS Legislative Research, Government of India, *The Industrial Relations Code*, available at https://www.prsindia.org/billtrack/industrial-relations-code-2020, last seen on 18/01/21.
[45] Ibid.
[46] Ministry of Labour & Employment, Government of India, *Notification No. G.S.R. 235(E) dated 16.3.2018 to incorporate Fixed Term Employment Workman category under the Industrial Employment (Standing Orders) Act, 1946 and Rules made thereunder*, available at https://labour.gov.in/whatsnew/notification-no-gsr-235e-dated-1632018-incorporate-fixed-term-employment-workman-category, last seen on 18/01/21.

fixed-term workers and permanent workers for doing same work or work of similar nature. ii. Statutory benefits extended to all permanent workers proportionate to his period of employment, notwithstanding the qualifying period to receive such benefits provided under the respective legislation; iii. Gratuity benefits, if such fixed-term worker renders service for 1 year under the contract.[47]

6. WORKER RE-SKILLING FUND

The Industrial Relation Code first time incorporated provisions for re-skilling of workers. The meaning of re-skilling is connected with those workers who have been laid-off from the services. The purpose of this fund means that the workers who have been laid off secure employment again. The IR Code provides for the setting up of a fund, namely 'Worker Re Skilling Fund', by the appropriate Government through a notification. The foundation for establishing such a fund is to offer monetary backing to retrenched workmen, for training and re-skilling purposes. The said fund will consist of:

- "The contribution of the employer of an industrial establishment equivalent to 15 days' wages last drawn by the worker immediately before retrenchment, or such other number of days as may be notified by the Central Government, for every retrenched worker in case of retrenchment only;

- The contribution from such other sources as may be prescribed by the appropriate Government. This fund will be utilized by crediting an amount equivalent to 15 days wages last drawn by the retrenched worker

[47] *Industrial Relations Code 2020 Recognition of Negotiating Union Prohibition on Strikes, Lock-outs without Prior Notice*, The SCC Online Blog, available at https://www.scconline.com/blog/post/2020/09/30/industrial-relations-code-2020-recognition-of-negotiating-union-prohibition-on-strikes-lock-outs-without-prior-notice-of-14, last seen on 18/01/21.

to such worker's account within 45 days of such retrenchment in the prescribed manner. This amount would be paid in addition to the compensation paid to a worker at the time of retrenchment."[48]

7. GRIEVANCE REDRESSAL COMMITTEE

Why there is need of Grievance redressal committee? The term grievance can be demarcated as a "bitterness or antipathy typically arising out of a feeling of being wronged and as an expression of discontent made to an organization about the services rendered by it and related to its products, where a certain standard is explicitly or implicitly expected." In 1998, India ratified Article 1 of Convention 122[49] of the International Labour Organization. Article 1 of the Convention it can thus be concluded confers upon workers the right to have redressal mechanisms to their grievances and thus the Indian Government is now by way of ratifying the Article 1 of the Convention 122 indebted to look into such interests.[50] The commission recommended that Grievances Committee shall include all establishments with twenty or more workers, a Grievance Redressal Committee consisting of an equal number of workers and employers not exceeding ten members or lesser than two members must be constituted depending on the employment size of the establishment.[51] The Commission suggested that the Grievance Redressal Committee shall be the body to which all grievances of a worker in respect of his employment, including his non-

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[48] S. Jha, *Companies will soon be required to pay for re-skilling retrenched workers*, Business Standard (29/11/19), available at https://www.business-standard.com/article/economy-policy/companies-will-soon-be-required-to-pay-for-re-skilling-retrenched-workers-119112801586_1.html, last seen on 18/1/2021.

[49] *Employment Policy*, International Labour Organization Convention 122, available at http://ble.dole.gov.ph/downloads/issuances/ILO_122.pdf, last seen on 18/01/2021.

[50] *Reports requested and replies to CEACR comments: C122 - Employment Policy Convention, 1964 (No. 122)*, International Labour Organization, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:14001:0::NO::P14001_INSTRUMENT_ID:312267, last seen on 18/01/2020.

[51] Ministry of Labour & Employment, Government of India, *Thirty-Ninth Session of the Indian Labour Conference*, available at https://labour.gov.in/sites/default/files/39ilcagenda_1.pdf, last seen on 17/01/2021.

employment will be referred to be resolved within a limited period. "The IR Code provides that every establishment employing twenty or more workers is to have one or more grievance redressal committees for resolution of disputes and such committee is to consist of an equal number of members representing the employer and the workers chosen in a manner as may be prescribed. Further, the total number of members in such committee shall not exceed ten and there shall be equal representation of women workers in the committee and such representation shall not be less than the proportion of women workers to the total workers in an establishment. The erstwhile law provided for grievance settlement authorities to bet set up in establishments employing a minimum of fifty workers. Further, it did not provide for equal representation of women as specified under the IR Code.[52]"

8. CONSTITUTION OF INDUSTRIAL TRIBUNALS

Under the IR Code by notification in the Official Gazette, the appropriate Government have the power to establish one or if it thinks more than one Industrial Tribunals and National Tribunal for the adjudication of industrial disputes relating to the matter, specified in the Second Schedule or the Third Schedule and for performing such other functions as may be assigned to them under ID Act.[53] Every industrial tribunal shall have two members who are to be appointed by the appropriate Government. The one member shall be a judicial member and the other, an administrative member. The National Industrial Tribunal shall also consist of two members to be appointed by the Central Government.[54]

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[52] Ministry of Labour & Employment, Government of India, *The Industrial Relations Code, 2020*, available at https://labour.gov.in/ebook/IR/files/basic-html/page13.html, last seen on 18/01/21.
[53] S. 7A, The Industrial Disputes Act, 1947.
[54] Supra 52.

9. APPOINTMENT OF A NEGOTIATING UNION/COUNCIL

Under the new IR Code, there is a provision for sole negotiating union/council in an industrial establishment having a registered trade union for negotiating on such matters as may be prescribed. If in an industrial establishment only one trade union of workers which is registered is functioning, then, the employer of such establishment shall, subject to such standards as may be prescribed, recognize such trade union as the sole negotiating union of the workers. If more than one trade union is functioning, then, the union having fifty-one per cent or more workers shall be recognized as the sole negotiating union of the workers. There is another provision suppose if in an industry there are more than one trade union of workers which are operative and no such trade union has fifty-one per cent or more of workers, then, a negotiating council having not less than twenty per cent of the total workers of that industrial establishment shall be constituted by the employer.[55]

Before the Industrial Employment Standing Orders Act, 1946 there was no law to govern employment contracts were often not reduced to writing and were they uniform in nature, though applicable to a set of similar employees. This position was incompatible to the notions of social justice the contract of service was so unilateral that it could be described as a mere manifestation of the subdued will of the workmen to sustain their living at any cost. It was in the case of *Rohtak Hissar District. v. State of Uttar Pradesh & Others,*[56] the Apex court stated the importance of the standing orders in the industry the court held "that before the Act, in many industrial establishments, the conditions of employment were not always uniform, and sometimes, we are not even reduced to writing, and that led to considerable confusion which ultimately resulted in industrial disputes."

[55] http://egazette.nic.in/WriteReadData/2020/222118.pdf, last seen on 18/01/21.
[56] *Rohtak Hissar District. v. State of Uttar Pradesh & Ors.,* 1966 AIR 1471.

The absence of standing orders in the industrial establishment is the main reason for the dispute between management and workers in industrial undertakings. It was noticed by the Supreme Court in Management Shahdara (Delhi) Saharanpur Light Railway Co. Ltd v. S.S. Railway Workers Union[57] "*the object of the Act is to require employers to define with certainty conditions of service in their establishments and to reduce them to writing and to get them compulsorily certified, to avoid unnecessary industrial disputes*." Most of the provisions concerning standing orders under the Industrial Relations Code have not undergone any vital change from the current law under the IESO Act. The important amendment brought by the government in the Industrial Relations Code, to the Standing Order Regulations (SOR)is that applies only to industrial establishments engaging 300 or more workers. After this amendment, most of the workers would not be covered under employment standing orders. Before this code there was a schedule "matters" listed in the schedule gave a common framework for industries to make regulations–which was the objective of the law.[58] Now the elasticity of the schedule in the Industrial relations code will present inconsistency in the Standing Orders across firms and hence will encourage inequality. The Code now permits employers to draft Standing Orders relating to not only matters provided in the first schedule but also any other matter unusual to their establishments.[59] Further to reduce the transaction costs, of the employers the Code under Section 30(3) allows employers to adopt the "Model Standing Orders" which would be framed by the Central government concerning "matters relevant to his establishment" and this shall be considered to have been certified as by the usual process drawn in this section. Then, all that the employer needs to do is to "inform" the certifying officer concerned of what

[57] *Management Shahdra (Delhi) Saharanpur Light Railway Co. Ltd v. S.S. Railway Workers Union*, AIR 1969 SC 513.
[58] *Salem Erode Electricity v. Salem Erode Electricity*, (1966) II LLJ 242 Mad.
[59] Ibid

has been adopted or left out from the Model Standing Orders.[60] It was mandatory Under the IESO Act, an employer is required to submit five copies of the draft standing orders to the certifying officer for certification. However, under the IR Code, the same can be done electronically.[61] An appeal against the order of the certifying officer Under the IESO Act, any employer, workman, trade union or other prescribed representatives of the workmen aggrieved by the order of the certifying officer passed concerning certain objections raised against the draft standing orders, could appeal to the appellate authority within 30 days from the date on which copies of the order of the certifying officer are sent to the parties. The timeline for appealing against the order of the certifying officer has been increased from 30 days to 60 days under the Code.[62] The IR Code also raises the penalties for offences committed thereunder, adding to their deterrence value and placing uniform penalties for noncompliance with provisions under the IR Code relating to inter alia conditions of employment in an industrial establishment, settlement of disputes and trade unions.

Despite the labour reforms the General Secretary, of All India Trade Union Congress Amarjeet Kaur, says, "*This code is to tame and cripple unions by weakening instruments of collective bargaining including the right to strike, right to represent interests of workers, especially unorganised sector which is more than 90 per cent of the workforce. The code justifies fixing term employment as against job security won over with several decades of struggle*."[63]

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[60] *Government issues draft standing orders on WFH under new Industrial Relations Code*, Sights in Plus (02/01/21), available at https://sightsinplus.com/news/labour-law/government-issues-draft-standing-orders-on-wfh-under-new-industrial-relations-code/, last seen on 26/01/21.
[61] S. 5, The Industrial Employment (Standing Orders) Act, 1946.
[62] *The Industrial Employment (Standing Orders) Act, 1946*, Indian Kanoon, available at https://indiankanoon.org/doc/1376794/, last seen on 18/01/21.
[63] Sonal Khetarpal, *Good, bad and ugly of industrial relations code*, Business Today (29/11/19), available at https://www.businesstoday.in/current/economy-politics/good-bad-and-ugly-of-industrial-relations-code/story/391272.html, last seen on 18/01/21.

The 2020 code on Industrial Relations not only come with the major changes it also recommends the government to if it is in the public interest the government could exempt any new industrial establishment or class of establishment from any or all of IR Code's provision. [64] Apart from this Code Occupational Safety Code also gives the appropriate government the power to exempt any establishment for a period to be specified in the notification. it permits the state government to excused any new factory from its provision in the interest of generating more business and employment. It is under the Factories Act, 1948 that exemptions would be given from its provisions in cases of public emergency, and limited such exemption to three months.[65] The exemptions could cover a wide variety of provisions including those related to hours of work, safety standards, retrenchment process, collective bargaining rights, contract labour.

10. THE GOVERNMENT'S POWER TO CHANGE OR THROWAWAY TRIBUNAL AWARDS

The Industrial Relation code offers for the composition of Industrial Tribunals and a National Industrial Tribunal to adjudicate disputes. The IR Codes prescribed the time for enforceability of the award and settlement. The prescribed time for the awards must be enforceable on the completion/expiry of the 30 days. If the government thinks reasonable it may defer the enforcement of the awards in conditions on the public grounds where it is touching the national economy or social justice. These circumstances are mentions as follows when: (a) the central or state government is a party to the dispute in appeal; (b)

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[64] K Venkataramanan, *The Hindu Explains | What does the new Industrial Relations Code say, and how does it affect the right to strike?* The Hindu (27/09/20), available at https://www.thehindu.com/news/national/the-hindu-explains-what-does-the-new-industrial-relations-code-say-and-how-does-it-affect-the-right-to-strike/article32705599.ece, last seen on 18/01/21.

[65] *The Industrial Relations Code, 2020*, PRS Legislative Research, available at https://www.prsindia.org/billtrack/industrial-relations-code-2020, last seen on 15/01/2021.

the award has been given by a National Tribunal. The appropriate government has the power to reject or modify the award.[66] The central government introduced fixed-term employment in March 2018 but the state governments did not notify the same. The Industrial Relations Code 2020 has reintroduced Fixed Term Employment (Section [2] [l]) along the lines recommended by the employers (CII 2014).[67] Under the Fixed Term Employment, workers will be officially engaged for a fixed tenure and their compensation and benefits will not be less than those for regular workers performing the same work, and they will be qualified for statutory benefits equal to their tenure. This makes the Fixed Term Employments high-priced than contract labour. However, most worryingly, the IRC has omitted significant protection, which was included in the notification, that the employers shall not change the existing regular/permanent posts into a Fixed Term Employments. [68] There is a good prospect that employers might change the future permanent posts into Fixed Term Employments. the central government seemed committed to creating a flexible labour market, it did not have the political courage to implement the corresponding reforms. Instead, it has shifted this reform mandate on to the state governments using the constitutional provision of placing "labour" in the Concurrent List.

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[66] Ibid.

[67] Sharmila Kantha, *Confederation of Indian Industry Labour Law Reforms Policy Watch* (27/10/17), available at https://cii.in/policy_watchDetail.aspx?enc=ZOYj09YfRs9yT+nkTsigi9ksp5uimFFuQqxL6SRISSo=, last seen on 27/07/2020.

[68] *Permanent jobs can now be converted into fixed-term contracts under new labour laws: Report*, Deccan Herald (05/10/20), available at https://www.deccanherald.com/business/business-news/permanent-jobs-can-now-be-converted-into-fixed-term-contracts-under-new-labour-laws-report-897526.html, last seen on 18/01/21.

11. CONCLUSION

After going through the major changes in the Industrial Relations in conclusion it could be said that the Code is messy and badly drafted. India is the founding member of the International Labour Organization. India has ratified Tripartite Consultation Convention 1976, which enforces the tripartite consultation processes between employer, workers and government. This Code is a violation of tripartite convention because during the draft of the Code the workers were not consulted. It is evident that the IR code is more favorable to employers and it would be unable to create a harmonious relationship between employers and workers.

REGULATION OF FIXED TERM EMPLOYMENT CONTRACTS IN INDIA

Dr. Parveen*

Abstract

After 1990's, the labour law has witnessed major transformation in employment relations. There has been tremendous increase in 'atypical form of employment'. One such form which found greater liking of employers is fixed term employment contracts. Initially, fixed term employment contract was used only to meet temporary and sudden demand for work. But, now, to compete in a globalized world, this form of employment contract is seen the most common and appropriate thing by the employers. This form, in the opinion of many scholars, has led to increase in vulnerability of employees as it has now become a tool to avoid employer's lawful obligations towards their employees. This paper critically analyses the legal and judicial regulation of fixed term employment contracts in India. It points out the loopholes in the existing law. The main focus of this paper is to find out how far legal and judicial regulation of this form of contract takes care of the legitimate demands of the workers. It offers some suggestions to make fixed term employment contracts more effective and meaningful. This paper argues for better regulation of Fixed Term Employment Contracts and is premised on the assumption that fixed term employment contracts should be resorted only on 'justified reasons' and not as an exploitative tool.

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1. INTRODUCTION

In the last three decades, globalization has led to "enormous increase in precarious employment."[1] It has led to the greater disengagement between labour law and worker as the precarious employment takes the employment beyond the pale of law. There has been deployment of new techniques by the employers, which has led to, in the words of Judy Fudge, "contraction of standard employment relationship"[2]. This has happened and is happening because many employers have fundamentally restructured the employment relationship through various means.[3] It has proved Alegandro Portes right when he noted in 1980s that now the 'process of informalization' has become a common feature of global capitalism as there are far greater efforts made by the employers to 'shift work outside the scope of labour protection' to meet the pressure of global market.[4] It has led to highly unregulated process of income generation as informalization has now been "considered to be the solution rather than the problem."[5] Earlier, this process of informalization of employment was more prevalent in developed countries, but now it has permeated to a greater level in developing countries.[6] It happened due to multiple reasons. One prominent reason is "heightened consciousness" among employers to use

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[1] Judy Fudge, *Blurring Legal Boundaries: Regulating for Decent Work*, 2 in *Challenging the Legal Boundaries of Work Regulation* (Judy Fudge, Shae McCrystal, and Kamala Sankaran, Oxford: Hart Publishing, 2012).
See Judy Fudge and Rosemary Owens, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006).
[2] Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* 5 (Judy Fudge, Shae McCrystal, and Kamala Sankaran, Oxford, U.K.; Portland, Or: Hart Publishing, 2012).
[3] David Weil, *The Fissured Workplace – Why Work Became So Bad for So Many and What Can Be Done to Improve It* 3 (Harvard: Harvard University Press, 2014); Manfred Weiss, *Re-Inventing Labour Law* 45 in *The Idea of Labour Law* (Guy Davidov and Brian Langille, Oxford; New York: OUP Oxford, 2011).
[4] Supra 2 at 2-4.
[5] Jan Breman, *A Mirage of Welfare: How the Social Question in India Got Aborted* 98, 104 in *The Social Question in the Twenty-First Century: A Global View* (Breman, J., Harris, K., Lee, C.K & Van der Linden, Oakland: University of California Press, 2019).
[6] *Ibid* at 99; Supra 2 at 30.

various relatively precarious or atypical form of employment contracts.[7] One such form which found greater liking among employers is fixed term employment contracts (hereinafter called "FTEC").

The main reason for this liking is that FTEC gives more freedom to employers to hire and fire. Services of a workman[8] employed on fixed term contract can be terminated at any point of time with or without reasons. Use of FTEC further makes employer's task easier as now the employer need not be bothered about the "recruitment, training, safety and wages" of workmen employed on fixed term in comparison with their regular workmen.[9] This freedom has often been misused by employers and made many countries, particularly European ones, to introduce effective regulations to safeguard the interest of workers employed on fixed term contracts.[10]

This paper seeks to analyze regulation of FTEC in India. It first deals with the definition of FTEC and then points out the reasons for using FTEC by the employers. After this it deals with legal provisions governing FTEC under the Industrial Disputes Act, 1947, and the Industrial Employment (Standing Orders) Act, 1946. How higher judiciary has interpreted the law and contracts governing FTEC is an important part of this paper and is covered in the fourth part of this paper. Subsequent to this an attempt is made to identify the main gaps in the legal regulation of FTEC in India. In the next part a conclusion is drawn in light of the foregoing analysis. Lastly this paper makes certain suggestions for the

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[7] Mark Freedland, *General Introduction – Aims, Rationale, and Methodology I*16 in *The Contract of Employment* (Mark Freedland, Oxford, United Kingdom: OUP Oxford, 2016).

[8] The expression 'workman', 'worker' and 'employee' have been used interchangeably in this paper.

[9] C.S. Venkata Ratnam, *Globalization and Labour-Management Relations: Dynamics of Change*, 332 (New Delhi: Response Books, 2001).

[10] Agata Ludera-Ruszel, *Typical or Atypical: Reflections on the Atypical Forms of Employment Illustrated with the Example of a Fixed-Term Employment Contract-A Comparative Study of Selected European Countries*, 37 Comp. Lab. L. & Pol'y J, 407 (2015); Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 Berkeley J. Emp. & Lab. L., 251, 286 (2006).

effective regulation of FTEC in India. This paper does not cover the social security for the workers employed on FTEC.

2. MEANING OF FIXED TERM EMPLOYMENT CONTRACT

Till recently, there was no statutory definition of fixed term employment contract in India.[11] Fixed term employment workmen as a category of workman was inserted in the Industrial Employment (Standing Orders) Central Rules, 1946, by central government through a notification dated 10 December 2003.[12] But the said category was omitted, owing to protests from the trade unions, by another notification dated 10 October 2007.[13]

In a recent note of Ministry of Labour & Employment, Government of India,[14] fixed term employment is defined as a contract between employer and a workman under which workman is employed on a contract basis for a fixed period. This period of fixed term can be for a pre-specified period, like six months or one year, or it can be a for a duration till the occurrence of a limiting event, for example time taken to finish a scheme or project. In such contracts the service of workman terminates automatically as a result of non-renewal of the contract between the employer and the workman concerned and workman is not

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[11] S. Sethuram, *Fixed Term Employment in India: An Analysis of Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018*, 7(8) International Journal of Business and Management Invention 10
(2018). See David Cabrelli, *Duration, Lawful Termination, and Frustration of the Employment Contract* 515, 532 in *The Contract of Employment* (Mark Freedland, Oxford, United Kingdom: OUP Oxford, 2016).

[12] Ministry of Labour. See Suresh C Srivastava, *Labour Law-I (Labour and Management Relations)* XXXIX Annual Survey of Indian Law 511 (2003).

[13] Ministry of Labour and Employment. See K.R Shyam Sundar, *Non-Regular Workers in India: Social Dialogue and Organizational and Bargaining Strategies and Practices*, 4, Working Paper Number 30, International Labour Organization, (2011).

[14] Ministry of Labour & Employment, Government of India, *Fixed Term Employment introduced for Apparel Manufacturing Sector- win-win situation for both Employers and Employees* available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=151537.

entitled to any notice or pay in lieu thereof unless the contract provides for otherwise.[15]

Recently passed the Industrial Relations Code, 2020 and the Code on Social Security, 2020 contains identical definition of "fixed term employment". The definition states that ""fixed term employment" means the engagement of a worker on the basis of a written contract of employment for a fixed period."[16]

2.1. Why Employers Use FTEC?

Labour legislations are size dependent rules and impose some compliance cost on employers and, therefore, all employers are not covered by them[17] The reasons to employ workers on FTEC are many. FTEC is economical as it circumvents costs of regulations. Furthermore, it provides far more freedom to an employer to adjust his labour force. An employer is virtually free to employ workers on FTEC at any time. Today, flexibility is a necessary condition to remain completive in this world of cut throat competition.[18] Employers believe that this flexibility can be achieved only by using "atypical form of employment".[19] One such form of 'atypical form of employment' is FTEC under which services of workers can be dispensed at any time.[20] Hence, in case of

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[15] Stella Vettori, *Fixed Term Employment Contracts: The Permanence of the Temporary*, 19 Stellenbosch Law Review 189, 190 (2008).

[16] S. 2(o) Industrial Relations Code, 2020; S. 2 (34) Code on Social Security, 2020 (under this legislation the term "employee" has been used in place of "worker").

[17] K. V. Ramaswamy, *Employment Protection Legislation and Threshold Effects: How the Firms are Staying below the Legal-Size Threshold in Indian Manufacturing*, 239, 240 & 257 in *Labour, Employment and Economic Growth in India* (K. V. Ramaswamy, New Delhi: Cambridge University Press, 2015).

[18] Agata Ludera-Ruszel, *Typical or Atypical: Reflections on the Atypical Forms of Employment Illustrated with the Example of a Fixed-Term Employment Contract-A Comparative Study of Selected European Countries*, 37 Comp. Lab. L. & Pol'y J. 407, 408 (2015).

[19] Rina Agarwala, *The Politics of India's Reformed Labor Model*, 95, 105-106 in *Business and Politics in India* (Christophe Jaffrelot, Atul Kohli, Kanta Murali, Oxford: Oxford University Press). As per Rina Agarwala "every debate on labor reform since the 1990s has focused on the issue of labor flexibility." (emphasis mine).

[20] A. C. L. Davies, *Perspectives on Labour Law* 76-77 (Cambridge: Cambridge University Press, 2004).

FTEC employer is free to hire and fire than in case of other form of employment. An employer has to bear lesser cost in terminating services of a worker employer on FTEC as compared to cost an employer has to bear in terminating services of a worker employed in a full-time employment contract for an indefinite period.[21] Owing to these benefits employers don't hesitate to use FTEC even for long duration.

3. LEGAL PROVISIONS GOVERNING FIXED TERM EMPLOYMENT CONTRACT

A contract of employment is a special type of contract and being that it is also subject to the general principles contained in the Indian Contract Act, 1872. This contractual relationship gives birth to a relationship that exist "between a bearer of power and one who is not a bearer of power."[22] That is why contractual relations were exploited by the employers in the 18th and 19th century.

Prior to the enactment of various labour legislations, the employers use to take full advantage of their social and economic power as neither there was any obligation on employer to reduce the terms and conditions of service in writing nor were these terms and conditions of service were uniform in nature. It was the era of *laissez faire* as there was no statutory protection available to the workmen, the contract of employment was often so unilateral in character that it could be described as mere manifestation of subdued wish of the workmen to sustain their living at any cost.[23] It was the common law that regulated the master servant relationship. Under common law a contract of employment could not be suspended "in absence of an express term empowering the employer to do so"

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[21] S. 2 (oo) Industrial Disputes Act, 1947. A workman who has competed one year of continuous service is entitled severance pay under section 25F. But a workman employed on fixed term contract is not entitled to get the same at the time of termination of services as such termination would not amount to retrenchment.

[22] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* 18 (Stevens, 1983).

[23] *Uptron India Ltd. v. Shammi Bhan*, (1998) 6 SCC 538 at 543.

or could not have been ended without reasonable notice with or without reasons.[24]

In *Western India Match Company Ltd.* v. *Workmen*[25] the Supreme Court has correctly encapsulated the conditions of that era. The Court observed

"In the sunny days of the market economy theory people sincerely believed that the economic law of demand and supply in the labour market would settle a mutually beneficial bargain between the employer and the workman. Such a bargain, they took it for granted, would secure fair terms and conditions of employment to the workman. This law they venerated as natural law. They had an abiding faith in the verity of this law. But the experience of the working of this law over a long period has belied their faith."

In order to overcome this difficulty and achieve industrial harmony and peace, the Industrial Employment (Standing Orders) Act, 1946, was enacted requiring the management to define, with sufficient precision and clarity, the conditions of employment under which a workmen would work in their establishments. This enactment was a legislative response to the laissez faire rule of hire and fire.[26]

The underlying object of the Industrial Employment (Standing Orders) Act, 1946, was to bring uniformity in conditions of employment of workmen discharging similar functions in the same industrial establishment under the same management and to make those terms and conditions widely known to all the workmen before they could be asked to express their willingness to accept the employment. This enactment was aimed at achieving a transition from mere

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[24] David Cabrelli, *Duration, Lawful Termination, and Frustration of the Employment Contract*, 515, 520-521 in *The Contract of Employment* (Mark Freedland, Oxford, United Kingdom: OUP Oxford, 2016). See Ridge v Baldwin [1964] AC 40, 65 (House of Lords).
[25] *Western India Match Company Ltd. v. Workmen* (1974) 3 SCC 330 para 10 at page 334.
[26] *Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd*., (1984) 3 SCC 369 at 377.

contract between unequals to the conferment of "status" on workmen through conditions statutorily imposed upon the employers by requiring every industrial establishment to frame "Standing Orders" in respect of matters enumerated in the Schedule appended to the Act.[27]

With the Constitution of India coming into force, India became a welfare state in which State was mandated to build a welfare society in which justice social, economic and political will be available for all.[28] The Constitution of India provided a plan for orderly progress towards the social order contemplated by the preamble to the Constitution. It does not permit any kind of slavery, social, economic or political. That is why in India, after adoption the Constitution, freedom of trade never meant freedom to exploit.[29]

It is to prevent misuse of social and economic power of the employer that labour law came and acted as a balancer of rights between employer and workers.[30] As far as India is concerned, the courts have treated contract of employment partly contractual, in the sense that the agreement of service may give rise to mutual obligations, and partly non-contractual, as the States have already, by legislation, prescribed positive obligations for the employer towards his workmen.[31] That is why the Supreme Court has time and again reaffirmed that "industrial adjudication does not mean adjudication according to the strict law of master and servant."[32]

Employers in India had always the freedom to hire workmen on fixed term employment. There was no legislative provision prohibiting employer to employ

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[27] *Uptron India Ltd. v. Shammi Bhan* (1998) 6 SCC 538 at 544.
[28] *Bhavan Boarding & Lodging, Bangalore v. State of Mysore*, (1969) 3 SCC 84 at 93.
[29] Ibid
[30] Paul Davies, and Mark Freedland, *Kahn-Freund's Labour and the Law*14 (Stevens, 1983).
[31] Supra 27 at 543.
[32] *Patna Electric Supply Co. Ltd. v. Patna Electric Supply Workers' Union*, AIR 1959 SC 1035 para 14.

workmen as 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. It was only in 1984 that two important changes were made in the Industrial Disputes Act, 1947. First change was the insertion of provisions pertaining to unfair labour practices in the Industrial Disputes Act, 1947.[33] Furthermore, another change was insertion of sub clause (bb) in clause (oo) of section 2 which defines "retrenchment".[34] Prior to this change, a workman employed under a fixed term employment contract had more rights in employment as the judiciary treated *discharge simpliciter*, i.e., termination of service on the completion of fixed term, to fall within the purview of the definition of "retrenchment".[35] This judicial feat was reversed though legislative amendment. This legislative action now excluded from the purview of "retrenchment" (i) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry; (ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment, no such stipulation is provided or prescribed, then such contract shall not be covered by clause (bb) of Section 2(oo).

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[33] The Industrial Disputes (Amendment) Act, 1982 (46 of 1982) (w.e.f. 21-8-1984) added Chapter V-C along with the Fifth Schedule to the Industrial Disputes Act, 1947.

[34] S. 2(oo) Industrial Disputes Act, 1947, reads as follows: -

"retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(d) termination of the service of a workman on the ground of continued ill-health;"

[35] *State Bank of India v. N. Sundara Money* (1976) 1 SCC 822, *Santosh Gupta v. State Bank of Patiala* (1980) 3 SCC 340.

The Industrial Employment (Standing Orders) Act, 1946, is the legislation that requires employers in industrial establishments to define with sufficient precision the conditions of employment under which workmen are to work by way of getting certified Standing Orders. However, this legislation does not apply to all establishments as like many labour legislations it is also size dependent.[36] It primarily applies to every industrial establishment wherein one hundred or more workmen are employed, or were employed on any day of the preceding twelve months.[37] However, the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any industrial establishment employing such number of number of persons less than one hundred as may be specified in the notification.[38]

The Industrial Employment (Standing Orders) Act, 1946, has "significantly undermined" the freedom of contract as far as employers are concerned.[39] But, due to limited applicability to industrial establishment employing 100 or more employees, lot of contracts of employment are "still a matter of free will of the parties with regard to terms and conditions of employment"[40].

On 16th March, 2018, the Central Government in exercise of the powers conferred by section 15 of the Industrial Employment (Standing Orders) Act, 1946, amended the Industrial Employment (Standing Orders) Central Rules,

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[36] K. V. Ramaswamy, *Employment Protection Legislation and Threshold Effects: How the Firms are Staying below the Legal Size Threshold in Indian Manufacturing*, 239, 240 in *Labour, Employment and Economic Growth in India* (K. V. Ramaswamy, New Delhi: Cambridge University Press, 2015).

[37] S. 1(3) Industrial Employment (Standing Orders) Act, 1946. In exercise this power many States in India has reduced the number of workmen to less than 100.

[38] Proviso *Id.*, Some State Governments have reduced this threshold limit to 50 workmen. See C K Johri, *Labour Law in India* 75 (Netherlands: Kluwer Law International, 2014).

[39] V Janardhan, *Industrial Relations in India* 64 (New Delhi: Orient Blackswan, 2016).

[40] Harish Chander, *Contract of Employment and Management Prerogatives* 63 (Noida: Vijaya Publications, 1993).

1946 and Schedule 1.[41] This amendment replaced the words "fixed term employment workmen in apparel manufacturing sector;"[42] with the words "fixed term employment" in item 1of Schedule 1(Model Standing Orders). In the substituted sub-paragraph (h) of Item 2 of Schedule defines a "fixed term employment workman" as "a workman who has been engaged on the basis of a *written contract of employment* for a fixed period". Hence making "fixed term employment" applicable to all the Industrial Establishment governed by the Industrial Employment (Standing Orders) Act, 1946. This substituted sub-paragraph also provides that (a) hours of work, wages, allowances and other benefits of fixed term employment workman shall not be less than that of a permanent workman; and (b) he shall be eligible for all statutory benefits available to a permanent workman proportionately according to the period of service rendered by him even if his period of employment does not extend to the qualifying period of employment required in the statute.

In addition to the above changes the said amendment of 2018 inserted rule 3A in the Industrial Employment (Standing Orders) Central Rules, 1946, providing that "No employer of an industrial establishment shall convert the posts of the permanent workmen existing in his industrial establishment on the date of commencement of the Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 as fixed term employment thereafter." It further added item 6A in the rule 5 regarding number of fixed term employment workmen. Though this amendment nowhere mentions any limitation regarding how many workmen can be employed on fixed term. It nowhere states that FTEC cannot be used in work which are perennial in nature.

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[41] Notification No. G.S.R. 235(E) dated 16.3.2018 available at https://labour.gov.in/sites/default/files/FTE%20Final%20Notification.pdf .
[42] Ibid.

So now the fixed term employment contracts are regulated only for those establishments to whom the Industrial Employment (Standing Orders) Act, 1946, applies. But as far as those establishments which are not covered by the Industrial Employment (Standing Orders) Act, 1946, employer has more freedom to employ workmen under fixed term employment.

4. JUDICIAL INTERPRETATION OF FIXED TERM EMPLOYMENT CONTRACT IN INDIA

Mark Freedland has, rightly, said that it is the judges who have shaped and developed the law of the contact of employment.[43] In 1953, a Constitution Bench of the Supreme Court in *D.N. Banerjee v. P.R. Mukherjee*[44] held that "the conflicts between capital and labour have now to be determined more from the standpoint of *status than of contract*." The Apex Court was aware that without such an approach, industrial disputes "cannot be tackled *satisfactorily."*

In *R.B. Diwan Badri Dass v. Industrial Tribunal*[45] the Supreme Court, again, recognized that "doctrine of the absolute freedom of contract" cannot trump "the higher claims for social justice." The Court was aware that 'industrial adjudication does not recognize the employer's right to employ labour on whatever terms the employer wants as social justice requires that the rights should be controlled.'[46] Further, the court observed that employer's right to dismiss an employee is also a controlled one and is subject to "well-recognized limits in order to guarantee security of tenure to industrial employees."[47] In *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha*[48], the Apex

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[43] Supra 7 at 20. See Supurna Banerjee and Zaad Mahmood, *Judicial Intervention and Industrial Relations: Exploring Industrial Disputes Cases in West Bengal,* 46 (3) Industrial Law Journal 366, 370-378 (2017) on role of judicial intervention in industrial relations in India,",

[44] *D.N. Banerjee v. P.R. Mukherjee* AIR 1953 SC 58. The Industrial Employment (Standing Orders) Act, 1946

[45] *R.B. Diwan Badri Dass v. Industrial Tribunal* AIR 1963 SC 630.

[46] Ibid.

[47] Ibid.

[48] *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCC 593 at 615.

Court accepted that courts will have jurisdiction to determine the real nature of termination even in case of '*termination simpliciter*' as "sometimes words are designed to conceal deeds by linguistic engineering."[49]

In *Jar nail Singh v. State of Punjab*[50], the Supreme Court made the position of law very clear when it held that

"The position is now well settled that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a *termination simpliciter* in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e., the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the court in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency, or not."

It was this progressive trend which the Apex Court generally followed in interpreting labour statutes as it used to pay greater "heed to the spirit than the letter of the law."[51] It was the Supreme Court which interpreted definition of 'retrenchment' under clause (oo) of section 2 of the Industrial Disputes Act, 1947, so expansively that it even covered the case of *discharge simpliciter*.[52] To

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[49] B T Kaul, *Retrenchment*, 139, 148 in *Labour Adjudication in India* (Z. M. Shahid Siddiqi and Mohammad Afzal Wani, Indian Law Institute, 2001).
[50] *Jarnail Singh v. State of Punjab* (1986) 3 SCC 277 at 291.
[51] O. Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* 185-190 (Oxford University Press, USA, 2008).
[52] *State Bank of India v. N. Sundara Money* (1976) 1 SCC 822, *Santosh Gupta v. State Bank of Patiala* (1980) 3 SCC 340. See Bushan Tilak Kaul, *Law of Retrenchment in India* 12 Delhi Law Review 141-157; Supra 49 at 139-163; Supra 2.

remedy the situation the Parliament amended the definition of the "retrenchment" in 1984. In *S.M. Nilaja v. Telecom District Manager*[53] the Apex Court explained the reasons behind the said amendment. The Court observed that

"The Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase projects or schemes were to become a liability on the employer State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting in onerous obligations entailed upon it by extended application of the labour laws."

It was this requirement which was fulfilled through insertion of sub-clause (*bb*) in the definition of retrenchment. So, it was to reduce the financial burden on state welfare activities that this amendment was brought by the Parliament as these different state welfare activities used to be carried out only for short durations.

In *M. Venugopal* v. *Divisional Manager, LIC*[54] , the appellant was appointed on probation for a period of one year from 23.5.1984 to 22.5.1985 and the said period of probation was extended for further period of one year from 23.5.1985

[53] *S.M. Nilajkar v. Telecom District Manager* (2003) 4 SCC 27 at 36.
[54] *M. Venugopal v. Divisional Manager, LIC* (1994) 2 SCC 323.

to 22.5.1986. Before the expiry of the said period of probation, his services were terminated on 9.5.1986. The Apex Court held that since the termination was in accordance with the terms of the contract though before the expiry of the period of probation it fell within the ambit of Section 2(oo)(bb) of the Act and did not constitute retrenchment.

In *Escorts Ltd.* v. *Presiding Officer*[55] the Apex Court was dealing with a case where services of the workman were terminated on 13.2.1987, as per the terms of the contract of employment contained in the appointment letter dated 9.1.1987 which enabled the appellant to terminate the services of the workman at any stage without assigning any reason. In Apex Court held that "since the services of the workman were terminated *as per the terms of the contract of employment*, it did not amount to retrenchment under Section 2(oo) of the Act and the Labour Court was in error in holding that it constituted retrenchment and was protected by Sections 25-F and 25-G of the Act."[56]

In both the above cases the Apex Court followed liberal interpretation over strict. The beneficial statutes should be given a liberal and not strict interpretation. If there is exception to the rule then it has to be interpreted strictly. But the Apex Court interpreted an exception liberally which resulted into denial of benefits under the law.

In *S.M. Nilajkar v. Telecom District Manager*[57] the Court was dealing with a case in which a number of workers were engaged as casual labourers for the purpose of expansion of telecom facilities in the district of Belgaum, Karnataka, during the years 1985-86 and 1986-87. The services of these workers were utilized for digging, laying cables, erecting poles, drawing lines and other connected works. It appears that the services of these workmen were terminated

[55] *Escorts Ltd. v. Presiding Officer* (1997) 11 SCC 521.
[56] Ibid, at 523.
[57] *S.M. Nilajkar v. Telecom District Manager* (2003) 4 SCC 27 at 36

sometime during the year 1987 and they were not engaged on work thereafter. Their disputes were referred for adjudication to the Labour Court in the years 1994 to 1997. The Labour Court directed the employer to reinstate all the workmen into service, with the benefit of continuity of service and with 50% of back wages. When the employer challenged the award passed by the Labour Court in the High Court, the Single Judge of the Karnataka High Court while upholding the award passed by the Labour Court held that the workers were not project employees as contended by the employer. In the opinion of the Single Judge appointment in this case were not for any particular project and hence would not be governed by sub-clause (*bb*) of clause (*oo*) of Section 2 of the Industrial Disputes Act, 1947.

After this, the employer filed intra-court writ appeals which were heard and disposed of by a Division Bench of the Karnataka High Court. The Division Bench held that the workmen were employed under a project of the Telecom Department and were, therefore, covered by sub-clause (*bb*) of clause (*oo*) of Section 2 of the ID Act. In the opinion of the Division Bench, it was a clear case of termination of services of the workmen as a result of non-renewal of contract of employment on the expiry of the contract.

Now the workmen approached the Supreme Court. The Supreme Court set aside the judgment of the Division Bench of the High Court and laid down the essential conditions for applicability sub-clause (*bb*). In Court's opinion

"The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (*bb*) subject to the following conditions being satisfied:

- that the workman was employed in a project or scheme of temporary duration;

- the employment was on a contract, and not as a daily-wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;

- the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and

- the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment."[58]

In *S.M. Nilajkar v. Telecom District Manager*[59] the Apex Court also held that "it is well settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision."[60] The Apex Court in this case adopted a strict approach in interpreting the exception carved out in the sub-clause (*bb*) of clause (*oo*) of Section 2 of the ID Act.

In *Municipal Council, Samrala* v. *Raj Kumar*[61] the Supreme Court took a U-turn from its earlier approach. In this case the stipulation in the appointment letter was to the following effect: - "his services will be availed till it is considered as fit, proper and necessary, after that the services will be dispensed with."

The Supreme Court held that the termination pursuant to the clause as above would be covered by Section 2(oo)(bb) of the I.D. Act. It held that

"The decision of this Court [in *S.M. Nilajkar*] is not an authority for the proposition that apart from a project or a scheme of temporary duration, Section

[58] Ibid, at 37.
[59] Ibid, at 36.
[60] Ibid.
[61] *Municipal Council, Samrala v. Raj Kumar* (2006) 3 SCC 81.

2(oo)(bb) of the Industrial Disputes Act will have no application. Furthermore, in the instant case, as has been noticed by this Court in *S.M. Nilajkar* [(2003) 4 SCC 27: 2003 SCC (L&S) 380] itself, the respondent was categorically informed that as per the terms of the contract, the same was a short-lived one and would be liable to termination as and when the appellant thought it fit or proper or necessary to do so. Yet again, this Court in view of the facts and circumstances prevailing therein had no occasion to consider the second part of Section (oo)(bb) of the said Act."

This decision was a clear-cut U-turn from the initial approach of the Supreme Court.[62] In earlier part of this paper a reference was made to *R.B. Diwan Badri Dass v. Industrial Tribunal*[63] in which the Supreme Court held that 'doctrine of the absolute freedom of contract' cannot triumph "the higher claims for social justice." In *Management, Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. S.S. Railway Workers Union*[64] the Supreme Court held that

"The right to contract in industrial matters is no longer an absolute right and statutes dealing with industrial matters abound with restrictions on the absolute right to contract. The doctrine of hire and fire, for instance, is now completely abrogated both by statutes and by industrial adjudication, and even *where the services of an employee are terminated by an order of discharge simpliciter the legality and propriety of such an order can be challenged in Industrial Tribunals.* These restrictions on the absolute right to contract are imposed evidently because security of employment is more and more regarded as one of

[62] See Municipal Council, *Samrala v. Raj Kumar* case; Jaivir Singh, *Who is a Worker; Searching the Theory of the Firm for Answers* 265, 274 in *Labour, Employment and Economic Growth in India* (K. V. Ramaswamy, New Delhi: Cambridge University Press, 2015).
[63] Supra 45.
[64] *Management, Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. S.S. Railway Workers Union* AIR 1969 SC 513 para 17.

the necessities for industrial peace and harmony and the contentment it brings about a prerequisite of social justice."

In 1986, the Supreme Court in *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*[65] has held that Indian "courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power." In the same case it, further held that the courts should not hesitate to strike down a contract as unfair and unreasonable contract when "the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them."[66]

There are many judgments from several High Courts which have refused to give benefit to the workman on the ground that their case is covered by the *Municipal Council, Samrala* v. *Raj Kumar*[67]. The Supreme Court itself has relied on *Municipal Council, Samrala* v. *Raj Kumar*[68] in several decisions[69] indicating that now its contract is more important than status in adjudicating labour claims. This approach of the Apex Court is clearly different from the earlier one.

5. GAPS IN LAW

After going through the legal and judicial regulation of FTEC in India, following lacunas has been identified in the existing regulation.

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[65] *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly* (1986) 3 SCC 156 at 216.
[66] Ibid. See Jaivir Singh, *Incentives and Judicially Determined Terms of Employment in India: Endemic Trade-Off between Justice and Efficiency* XXXVIII (2) Economic and Political Weekly 123-133 (2003).
[67] Supra 61.
[68] Ibid.
[69] *Bhogpur Coop. Sugar Mills Ltd. v. Harmesh Kumar*, (2006) 13 SCC 28; *State of Rajasthan v. Sarjeet Singh*, (2006) 8 SCC 508.

5.1. Lack of any objective justification

It is generally believed that FTEC provide no protection to workers. It is only in case of skilled workers that FTEC may be advantageous as they can bargain more effectively regarding their conditions of service. But, in case of unskilled workers, it is the employer who fixes the conditions of labour and, hence, will be more concerned about the benefit of the establishment rather than the benefit of workers.[70] In India, the law does not require employer to specify the reasons or justify the use of FTEC. FTECs are generally used when there is sudden temporary, increased demand for work exist. But, in India an employer is free to employ workers on FTEC even in those cases when there is need for permanent worker and in turn it leads to misuse of FTECs. The freedom in the hand of employer may lead to more exploitation of the unskilled and semi-skilled workers.[71]

5.2. No Limitation on time

We know that FTEC is different from permanent employment contract and should be used for a limited period. An employer should be free to take services of an individual for a fixed period for a short duration. And once the period it over it should either terminate the contract or refuse to renew the contract. In India, there is no maximum duration fixed by law for using FTEC. FTEC can be of any duration provided the duration must not be long duration. If the duration of a FTEC is long then it generally indicates that employer has used FTEC just to shrink his responsibilities. In various countries an outer limit is prescribed.[72]

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[70] Jenny Julén Votinius, *On the Gendered Norm of Standard Employment in a Changing Labour Market* in *Precarious Work, Women and the New Economy* (Fudge and Owens).

[71] S. Sethuram, *Fixed Term Employment in India: An Analysis of Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018*, 7(8) International Journal of Business and Management Invention 10, 12 (2018).

[72] See Supra 18 at 416-433 for time limitation in various countries; Anwarul Hoda and Durgesh K. Rai, *Labour Regulations and Growth of Manufacturing and Employment in India: Balancing*

5.3. No need to have contract in writing

In India law provides that a contract can be an oral contract. An oral contract has its own problems. If there is an oral employment contract then it becomes very difficult for a workman to claim any benefit due to lack of adequate evidence. If law makes it mandatory that all employment contracts, including FTEC, must be in writing than it may become very difficult for an employer to take advantage which they would have been able to take under an oral contract. In France, if FTEC is not reduced to writing than there is an irrebuttable presumption that the contract is a full-time one.[73] Because of this France has been able to contain the misuse of FTEC. As far as India is concerned there is no such thing in India giving employers an unnecessary benefit.

On 16th, March, 2018, the Central Government amended the Industrial Employment (Standing Orders) Central Rules, 1946. As per this amendment a "fixed term employment workman" is "a workman who has been engaged on the basis of a *written contract of employment* for a fixed period." If a contract of employment is not in writing, then will it be treated differently? It depends upon judicial interpretation. In France when a fixed term contract is not in written form then it is "presumed to be an open-ended contract."[74]

5.4. Successive Fixed Term Employment Contract

The primary aim of labour law is to prevent exploitation of workers. This aim gets defeated if employer is allowed to use successive FTEC making

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Protection and Flexibility, ICRIER Working Paper, 21, Working Paper Number 298 (2015) available at http://icrier.org/pdf/Working_Paper_298.pdf.

[73] Sylvaine Laulom, *France: Part-Time Work – No Longer an Employment Policy Tool*, 85, 97 in *Employment Policy and the Regulation of Part-Time Work in the European Union: A Comparative Analysis* (Silvana Sciarra, Paul Davies, and Mark Freedland, Cambridge, U.K. ; New York: Cambridge University Press, 2004).

[74] Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* 155, (2nd ed., Oxford: Oxford University Press, 2011).

employment always “on probation”. As far as renewal of FTEC is concerned, the law does not prescribe the maximum limit of such renewals. How much gap should be there between two FTECs is another area where law provides no guidance. Thus, FTEC can be used successively for indefinite duration.

5.5. Unfair Labour Practice

The policy behind the Industrial Disputes Act, 1947, was to protect workmen as a class against unfair labour practices and not to enact special provisions for enforcing the claims of individual workmen.[75] But, in 1984, a new chapter was added to the Industrial Disputes Act, 1947. It was chapter V-C and its object was to prohibit unfair labour practices listed out in fifth schedule.[76] Its Fifth Schedule list out the practices which are unfair labour practices. The very essence and concept of unfair labour practice is that in the industrial sector there is complete bar to appoint the casual appointees for a continuous period with the object to deprive them the status and privileges of permanent workmen.[77] Under section 25U of the ID Act any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both. In today’s time the current provisions are grossly inadequate to prohibit the unfair labour practices.

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[75] *Management of Indian Cable Co. Ltd. v. Workmen*, 1962 Supp (3) SCR 589.

[76] Kamala Sankaran, *Unfair Labour Practices-An Overview*, 187-195 in *Labour Adjudication in India* (Z. M. Shahid Siddiqi and Mohammad Afzal Wani, Indian Law Institute, 2001). The expression 'unfair labour practice' has been defined in S.2(ra) of the Industrial Disputes Act, 1947, to mean any of the practices specified in the Fifth Schedule to the Act. The Fifth Schedule enumerates the various unfair labour practices statutorily recognised.

[77] Item no 10 of fifth schedule prohibits employment of 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.

The Industrial Relations Code, 2020, under section 2(*zh*) defines "retrenchment". It excludes termination as not amounting retrenchment. It states "retrenchment" does not include

"(iii) termination of the service of the worker as a result of the non-renewal of the contract of employment between the employer and the worker concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(iv) termination of service of the worker as a result of completion of tenure of fixed term employment;"

If we take the literal meaning of the above mentioned two exceptions then every termination before the expiry of completion of tenure of fixed term employment would amount to "retrenchment". But we do not know whether the courts will take this interpretation or other interpretation.

5.6. Lack of Effective Remedies

Standing Orders as soon as they are certified under the Industrial Employments (Standing Orders) Act, 1946, become binding on the employer and the workmen and determine the relations between employer and workmen. But the important question is "does the Industrial Employments (Standing Orders) Act, 1946, provide a remedy for the enforcement of the rights and liabilities created by the Standing Orders certified under the Act?". The Gujrat High Court in *Tata Chemicals Ltd*. vs *Kailash C. Adhvaryu*[78] observed that

"The Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946, create rights and obligations but *the Act does not provide any special or particular remedy for enforcing such rights and obligations* and the

[78] Tata Chemicals Ltd. vs Kailash C. Adhvaryu AIR 1964 Guj 265 (para. 18).

workman whose rights are infringed by violation of Standing Order can, therefore, proceed by an ordinary action in a Civil Court in order to enforce such rights against the employer."

So, due to lack of effective remedy, a workman will not get the benefit of law.[79] The penalties prescribed under the Industrial Employment (Standing Orders) Act, 1946, are grossly inadequate.[80] Moreover, the no prosecution for an offence punishable under the Industrial Employment (Standing Orders) Act, 1946, can be instituted except with the previous sanction of the appropriate Government.[81]

6. CONCLUSION

In light of the above analysis, we can say that "private strategies and public policies"[82] have failed to provide enough safeguards to the workers employed on FTEC as in India there is absence of effective regulation of FTEC.[83] There is urgent need to rectify the existing position if we have to provide decent working conditions to our workers. The Supreme Court of India has also changed its approach in recent years.[84] Now the court is more concerned about the contract rather than the status. This "shift from labour law to contract law"[85] has

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[79] V Janardhan, *Industrial Relations in India* 67 (New Delhi: Orient Blackswan, 2016).

[80] For example, sub-section (2) of Section 13 provides "An employer who does any act in contravention of the standing orders finally certified under this Act for his industrial establishment shall be punishable with fine which *may extend to one hundred rupees*, and in the case of a continuing offence with a further fine which *may extend to twenty-five rupees for every day after the first during which the offence continues.*"

[81] S. 13(3) Industrial Employment (Standing Orders) Act, 1946.

[82] David Weil, *The Fissured Workplace – Why Work Became So Bad for So Many and What Can Be Done to Improve It* 4 (Harvard: Harvard University Press, 2014).

[83] Anwarul Hoda and Durgesh K. Rai, *Labour Regulations and Growth of Manufacturing and Employment in India: Balancing Protection and Flexibility*, ICRIER Working Paper, 20, Working Paper Number 298 (2015) available at http://icrier.org/pdf/Working_Paper_298.pdf.

[84] See Ramapriya Gopalakrishnan, *Enforcing Labour Rights through Human Rights Norms: The Approach of the Supreme Court of India* 195 in *Human Rights at Work: Perspectives on Law and Regulation* (Christian Brunelle, Hart Publishing, 2010).

[85] Richard Michael Fischl, *Teaching Law as a Vocation: Local 1330, Promissory Estoppel, and the Critical Tradition in Labour Scholarship*, 33(1) International Journal of Comparative Labour Law and Industrial Relations 145 (2017).

contributed in weakening of labour rights in India. Recently, Professor Upendra Baxi lamented that

"We all now remain destined to witness the demise of the rights of the working classes, which the Supreme Court so painstakingly crafted earlier. The selfsame Supreme Court now remains the chief architect of the restoration of some horrendous managerial prerogatives."[86]

So, there is very strong case for urgent legislative reforms in order to make regulation of FTECs in India much more effective and meaningful.

7. SUGGESTIONS

In 2001, Lord Steyn said that "the need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in past."[87] Therefore, a case is made out in this paper for better regulation of FTEC in India. Following suggestions are made for this purpose.

In order to curb the misuse of FTEC in India, it is suggested that law must provide that every employer who want to use FTEC should record the objective reasons. FTEC should not be allowed to be used in those works where the nature of work is perennial. The law should provide how many renewals are allowed and the maximum duration of FTEC. There is a need to prescribe the maximum number/ proportion of persons who can be employed on FTECs. There should be provision in law providing gap between two successive FTEC. Law should provide for stricter penalties for misuse of FTEC by the employers.

Till such legislative reform comes, it is the courts who can prevent misuse of FTECs. The courts must understand that it is only a *bona fide* exercise of right by an employer to terminate the service in terms of the contract of employment

[86] Prof. Upendra Baxi, *Convocation Address* 5 NUJS Law Review 163, 168 (2012).
[87] [2001] 2 WLR 1076 at 1084 (para 19).

or for non-renewal will be covered by the Clause (bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed term employment as a conduit or mechanism to frustrate the rights of the workman, the termination of the service will not be covered by the exception contained in Clause (bb). Instead, the action of the employer will have to be treated as an act of unfair labour practice as specified in the Fifth Schedule of the Act. After all, the courts should nor allow FTEC to be used "to frustrate the rights of the workmen."[88]

Better regulation of FTEC is in the best interest of industrial relations in India. If, FTEC in India is not regulated in proper manner, then, it is more likely to disturb industrial peace and harmony which is sine quo non for industrial and economic prosperity

[88] *Bhikhu Ram v. Presiding Officer, Industrial cum Labour Court, Rohtak* (1996 Supp (3) LLJ1126 at 1147 (Punjab and Haryana High Court).

FUTURE OF WORK, LABOUR POLICY & THE EMPLOYER-EMPLOYEE RELATIONSHIP

Adv Mayank Francis Dia [*]

Abstract

This paper explores the various possible outcomes in the future, in terms of Work, Labour Policy and the evolution of the relationship between an Employer and an Employee. Part One deals with the concept of evolution of Work in the past, the impact of next generation technology on India and the future workplace. Part Two analyses the state of the labour force in India, the present practices and policies, and address policy concerns for the future. Part Three focuses on the technology enabled disruptive business models and the rise of gig economy.

1. INTRODUCTION

The idea of the Future in itself evokes multifarious reactions. This, coupled with the breakneck speed of technological advancements further provoke predictions of either an imminent apocalypse or a utopian paradise. The four conventional factors of production namely, Land, Labour, Capital, and Entrepreneurship are undergoing significant changes, and the component of Labour which is the backbone of present-day society is facing a challenge unlike any before, in the form of Technology. Legislative bodies across the world have been late or entirely unresponsive to this Tech-tonic shift, which the International Labour Organization has hailed as the Fourth Industrial Revolution (referred to as 4IR). Technology is set to alter humans as a species. *Labour* in the conventional sense of the term may cease to exist, as is already evident from the large scale robotization being adopted across the globe especially in the manufacturing and automotive industries. Technology has also enabled newer methods of providing services which in turn has given birth to novel business models creating interesting relationships, that are difficult to confine in the existing legal framework of an Employer-Employee relationship. This model of *Uberisation*

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is challenging the set legal norms and has left Legislative bodies across the world grappling with issues, which need to be delicately managed while striking a fine balance between labour welfare and industry interests. This is especially complex in the Indian scenario, where on one hand India is the fastest growing economy and to sustain its momentum and ensure ease of doing business, it would be expected to be at the forefront of adoption of new technology; however, on the other hand India is also fast approaching the unique distinction of being the most populated country in the world with the largest labour force on the face of the planet. Hence, India's jobless growth story places it in an unenviable position when it comes to facing the prospect of adoption of the new wave of next generation technology.

This paper explores the various possible outcomes in the future, in terms of Work, Labour Policy and the evolution of the relationship between an Employer and an Employee. Part One deals with the concept of evolution of Work in the past, the impact of next generation technology on India and the future workplace. Part Two analyses the state of the labour force in India, the present practices and policies, and address policy concerns for the future. Part Three focuses on the technology enabled disruptive business models and the rise of gig economy.

2. THE EVOLUTION OF THE CONCEPT OF WORK

The modern idea of Work as we know it today, has undergone centuries of transformation and evolution. In pre-economic societies, there was no distinction or even acknowledgment of the different types of works. The eighteenth century is when the term "work" crystallized: from the moment a certain number of activities were considered sufficiently homogeneous to be encompassed by a single word it became possible to speak of "work" in a general sense. But in exchange, the actual content of the activities it covered disappeared and work became an intangible notion; what was understood was work in the

abstract, and commodities were detached from the people who produced them. Describing the category of objects that can be rented out, for instance, Pothier (1764), a jurist, mentions houses, pieces of land, furniture, movable goods, and the services of a free man.[1] However, though considered – by Locke (1690) in particular – a source of individual autonomy, work as an activity did not confer any value in itself. According to Smith (1776) and his contemporaries, work remained synonymous with torture, effort, and sacrifice, a view for which Marx (1979) would later reproach the author of An Inquiry into the Nature and the Causes of the Wealth of Nations, claiming that Smith did not understand the true nature of work.[2]

Over a period, time, the idea of work for the purpose of earning a wage started to develop. Work for self or work for self-sufficiency and self-reliance slowly and steadily made way for providing services and doing work for others in lieu of a wage. This trend of work for a wage received a fillip with the advent of the Industrial Revolution. Before the Industrial Revolution agriculture was the primary occupation of the time with the farmer's main objective being to feed and sustain his own family. However, the Industrial Revolution introduced machines and methods of doing work which did not rely upon human or animal effort. The Industrial Revolution led to a demand for a new labour force. The incentive of wages which could provide for more than just sustenance of the worker and his family, lured the unskilled agricultural workers from the farm to the factory floor. This transition was coupled with a skill upgradation, whereby the unskilled farm worker was transformed into a semi-skilled machine worker. Thereafter, the invention of the steam engine and the adoption of the assembly

[1] D. Méda, *The Future of Work: The meaning and value of work in Europe*, ILO Research Paper No. 18, 2 (2016)

[2] "[…] to consider work simply as a sacrifice, thus as a source of value, as the price of things that give things a price according to the amount of work they cost, means keeping to a purely negative definition […] Work is a positive, a creative activity" ("Work as sacrifice and as free labor" in Marx, 1979, pp. 289–293. Translated from French).

line method of production further escalated the demand for more labour, and in turn also created a demand for another class of labour- the supervisor. The rapidly increasing labour force needed its efforts to be organised and supervised to ensure maximum output and optimum efficiency.

The next landmark in the evolution of the concept of Work came towards the end of the twentieth century with the introduction of the Computer and the Internet, which ushered in the Digital Age with the Information Technology Revolution. It is the computer which fastened the pace of development and has had a huge impact not only on the labour force, but on humans as a species. Hence, any conception of a future would inevitably essentially revolve around the computer, and the Technology that followed as a consequence. The Information Technology Revolution again created a demand for a new class of labour force viz. the skilled labour force. The Computer Age had initially placed a premium on the possession of skills, and thereafter, has laid emphasis on the continual upgradation of skills. This has in turn impacted the education system, which shifted its focus from obtaining degrees to developing skills, in order to satisfy the new demands of the industry.

The Information Technology Revolution impacted the semi or medium-skilled workforce the most, which declined since the introduction of the computer. The rationale behind this, if simply put is, that a computer can follow and execute set commands more efficiently than a human. Hence, all jobs which are carried out by following a set standard form of instructions without requiring any degree of human discernment or exercise of discretion could be successfully carried out by a computer. An intuitive explanation for this, is that Computers substitute for office clerks because what they do can be codified and ultimately expressed in software language.[3] The corollary to this is the increase in the unskilled labour

[3] M. Goos, *How the world of work is changing: a review of the evidence*, Bureau for Employers' Activities, International Labour Office, 23 (2013).

force especially the unskilled service worker, which seems to have been unaffected by the introduction of Computers, unlike the semi-skilled worker. The relative growth in unskilled service employment is also intuitive as, for example, the job of a waiter in a restaurant is not easily done even by the most powerful computer. In short, labour markets in advanced economies are no longer unambiguously characterized by skill-upgrading. Although there is continued growth in the employment share of skilled white-collar jobs at the expense of medium-skilled employment, the fraction of unskilled service workers is also growing. This process, rising shares of skilled and unskilled and falling share of medium skilled employment, is known as "job polarization".[4]

2.1. The Impact of Technology on Work in India

Unlike the developed countries of the world, which to a certain extent have reached a level of saturation with respect to the impact of Computers and is set to brace the next generation of technological reforms in the form of Artificial Intelligence and machine learning, India is still very much going through the Computer Age. The recent giant leaps taken by the Telecom industry in expanding the coverage of high-speed internet across the country has certainly given a boost to the Digital Age in India; however, digital and technological literacy is still at low levels. This coupled with lack of infrastructure and inadequate resources has kept India bereft of the opportunity of maximizing on the benefit from the fruits of the Information Technology Revolution. Thus, India would certainly be a latecomer in the adoption of the next generation of Technology. Further, due to the aforementioned reasons India is considered severely ill-equipped to meet the challenges of the next generation of technology leading to a disconnect between the future of work in India, in comparison to the rest of the world. India's skill development initiatives are attempting to mitigate

[4] Ibid.

the problem of lack of skills; however, the future of work requires the labour force to constantly upgrade and adapt to new skills, which becomes a major challenge for the Indian work force which lacks the basic education thereby, considerably hampering its ability to adapt to new skills and re-skill constantly.

In the developed countries, the next generation of technology is expected to substantially usurp jobs which are carried out in a set routine procedure or are clerical and repetitive in nature. Whereas, in India a majority of the labour force is unskilled and employed in the unorganised sector, and the proportion of medium skilled workers in the organised sector is very small. Thus, the impact on the different segments of the Indian labour force will vary considerably in comparison to the labour force in the developed countries.

However, these low-medium skill level jobs within the organised sector are what millions within the unorganised sector, particularly youth, aspire toward. As businesses within the organised sector realign to new technological possibilities, a critical pathway for upward labour mobility and income mobility is likely to shrink. This can pose a significant challenge in the Indian context as middle skill jobs have served as a pathway out of poverty. Adoption of 4IR technologies will be in niches within the organised manufacturing and service sectors, primarily because of the relative cost of labour and infrastructural constraints.[5]

2.2. Future of the Workplace

Will the future even have a workplace or will the offices of today, be tomorrow's relics? In a time when brick and mortar is increasingly making way for online facilities, it is widely presumed that the brick-and-mortar office too, will make way for remote work or work from home.

[5] Tandem Research, *Emerging Technologies & The Future of Work in India*, ILO Asia Pacific-Working Series, 11, International Labour Organization, (2018).

The concept of work from home is not a new one, as the earliest form of retail shops or family businesses were run out of the family home, which would double up as the family workplace during business hours. As discussed in the aforementioned section, the idea of working for a wage emanated during the Industrial Revolution.

The Industrial Revolution brought profound changes for men and women alike. Factory work, particularly in the textile industry for women, meant leaving home and toiling in outside work environments. The industrial age birthed a new movement of skilled workers and set up a working-outside-the-home model that many employers still follow today, even though it has become increasingly outdated. That model (the precursor of the 9-to-5, in-office work schedule) meant working an inflexible schedule from an employer-provided environment, with employer-provided tools or equipment. The means of production were transferred from the work-home to the work-site. Despite the advent of work opportunities outside the home, some people continued to work for pay from their homes into the 19th and early 20th centuries. For women, that work may have included doing laundry for outside customers, providing food and baked goods to sell to factory workers, or doing "finish work" for shoe and garment manufacturers.[6]

In a manner of speaking, we shall revert to the pre-industrial revolution phase of work from home, albeit, in the new 'knowledge economy' ecosystem. The internet has made the world a lot more inter-connected, and in turn, has also helped in diminishing geographical and physical constraints. For instance, in the pre-internet era, a communication used to be delivered via a messenger- a postman, who would be physically required to take the message from the sender

[6] B.W. Reynolds, *The Complete History of Working from Home*, Flex jobs, available on https://www.flexjobs.com/blog/post/complete-history-of-working-from-home/, last seen on 06/10/2018.

to the receiver. With the introduction of the internet, messages from across the globe were transmitted instantaneously. On an analysis of the reasons why an employee's physical presence is required at the workplace, an integral reason is the ease in communication with someone in person; this ease has been provided through the medium of the internet, hence, making the requirement of an employee's physical presence at the workplace immaterial and redundant. Similarly, another reason for ensuring an employee's physical presence at the workplace was to supervise the employee's work and measure his performance. This too, has been addressed to a large extent via the online media, whereby once an employee logs onto the employer's network the employee's work can be tracked, thereby enabling the employer to both supervise and measure the employee's performance in real time. The workplace was also considered as a repository for all official documents and was a location where all the information was concentrated in the form of physical files and documents. However, that feature of the physical workplace also has lost its significance in the wake of technologies such as cloud computing, whereby a network of remote servers hosted on the internet store, manage and process data, instead of a local server or a personal computer.

The concept of work from home is already prevalent and recent trends suggest that it is here to stay, with newer technologies facilitating faster means of communication. The work from home model is also considered to be more efficient and economical as was determined by a recent study. The study conducted by a Stanford Graduate School of Business expert shows how companies and employees benefit from workplace flexibility.

Stanford Graduate School of Business professor Nicholas Bloom says requiring employees to be in the office is an outdated work tradition, set up during the Industrial Revolution. Such inflexibility ignores today's sophisticated communications methods and long commutes, and actually hurts firms and

employees. “Working from home is a future-looking technology,” Bloom told an audience during TEDx Stanford, which took place in April. “I think it has enormous potential.” To test his claim, Bloom, with co-researchers James Liang, John Roberts, and Zhichun Jenny Ying, studied China’s largest travel agency, Ctrip. Headquartered in Shanghai, the company has 20,000 employees and a market capitalization of about $20 billion. The company’s leaders — conscious of how expensive real estate is in Shanghai — were interested in the impact of working from home. Could they continue to grow while avoiding exorbitant office space costs? They solicited worker volunteers for a study in which half worked from home for nine months, coming into the office one day a week, and half worked only from the office. Bloom tracked these two groups for about two years. The results? “We found massive, massive improvement in performance — a 13% improvement in performance from people working at home,” Bloom says.[7]

The increasing adoption of the concept of work from home is expected to lead to several fundamental changes in business structures. Vertical hierarchies in business would be replaced by more horizontal chains of command, which would encourage free flow of interaction by breaking earlier barriers of communication within the organization.

Rewiring the cultural mindset in both organizations and professionals will be an imperative for tomorrow’s workplace. Holacracy (decentralized management) could well be the new operating system to redefine and redistribute control of work practices. Employees need to be given the leeway to act more like entrepreneurs in self-directing their work. Work-life balance and “work-from-anywhere” are two realities to reckon with. Security teams need to create secure

[7] S. Lynch, *Why Working from Home Is a “Future-looking Technology”,* Stanford Graduate School of Business (2017), available at https://www.gsb.stanford.edu/insights/why-working-home-future-looking-technology, last seen on 06/10/2018.

tech environs with advanced security analytics and machine learning—and without privacy conflicts.[8]

3. PRESENT STATE OF THE LABOUR FORCE IN INDIA

India has the second largest labour force in the world, second only to China. Historically India has been an agrarian economy, as a result, the majority of India's labour force has been engaged in the agricultural sector. However, subsequent to the adoption of the economic reforms of 1991 coupled with improved literacy rates, employment in the non-agricultural sector has been rising.

Changes in employment status are linked to the process of structural transformation, as resources (capital and workers) are moved from low to high-productivity sectors. Although this has been a characteristic feature of the development processes of other parts of East and Southeast Asia, in India (and South Asia in general) the shift from agriculture to manufacturing has not yet taken place to the same extent. In India, a large proportion of the workforce is still dependent on the agricultural sector (48.9 per cent employment share in 2011-12, which reduced further to 47.3 per cent in 2015-16). The agricultural sector still accounts for 62.7 per cent of India's rural employment, although this share has fallen significantly, from 77.6 per cent in 1993-94. At the same time, agriculture's share in gross value added (GVA) has fallen rapidly, from 18.5 per cent in 2011-12 to 15.2 per cent in 2016-17.

The Indian economy is dominated by the services sector, which accounted for 53.7 per cent of GVA in 2016-17. In terms of employment, the share of the services sector in urban areas was 58.7 per cent (2011-12), compared to just 16.1

[8] K.R. Murugesh, *The Workplace of the Future*, Live Mint (23/02/2018), available at https://www.livemint.com/Opinion/i8tj8C3IpDkj166E4IMnSJ/The-workplace-of-the-future.html, last seen on 05/10/2018.

per cent in rural regions. The share of industry (which consists of both manufacturing and construction), stood at 31.2 per cent of GDP in 2016- 17, as compared to 31.5 per cent in the previous year. At the sectoral level, the construction and manufacturing sectors saw sharpest decline among others, and stood at 7.9 per cent and 1.7 per cent of GVA in 2016-17. In terms of employment, the manufacturing sector provides employment to 12.6 per cent in 2011-12. [9]

Thus, India the fastest growing economy in the world is faced with a situation where the sector which is employing the largest proportion of the labour force is contributing lesser to the national economy, in comparison to the sector which is employing a smaller proportion of the labour force. This is reflected in the overwhelming contribution of the services sector to GDP growth (63 per cent) over the last decade, but a significantly smaller share in employment (about 25 per cent) during the same period. Growth has been capital rather than labour intensive.[10]

Over 80 per cent of the workforce is engaged in the unorganised sector and more than 90 per cent is in informal employment. There are significant disparities in employment conditions between urban and rural workers. National Sample Survey (NSS) data from 2011-2012 reveals that of all non- agricultural labour, 75 per cent of rural workers are engaged in the unorganised sector and 85 per cent have no job contract, while 69 per cent urban workers are occupied in the unorganised sector and 73 per cent are without a job contract.[11] The majority of workers in India have to work to survive – even if it generates below subsistence

[9] Indian Labour Market Update, ILO Country Office for India, July 2017.
[10] A.K. Ghose, *India Employment Report; 2016: Challenges and the Imperative of Manufacturing-Led Growth*, (New Delhi: Oxford University Press, 2016).
[11] CP Chandrasekhar, *India's informal economy*, The Hindu (23/08/2017), available at https://www.thehindu.com/opinion/columns/Chandrasekhar/indias-informal-economy/article11119085.ece, last seen on 10/10/2018.

incomes. The unorganised sector contributes almost 50 per cent of the national income. Small and medium enterprises contribute an estimated eight to nine per cent of the GDP, providing employment to a vast majority of the workforce in the informal economy and representing more than 60 million jobs. [12]

3.1. India's Labour Policy and its challenges

India's large labour force and widespread poverty has meant that laws needed to strike a fine balance between welfare of the workforce, while adopting measures that incentivized industry and facilitated business. However, unfortunately India has been in a state of constant policy paralysis with regard to labour reforms. Further, interpretations and definitions propounded by the Supreme Court in the mid-1900's are still the guiding principle for resolving industrial disputes of the twenty first century. The Supreme Court on numerous occasions while refraining itself from encroaching into the territory of the Legislature, has repeatedly urged Governments over the years to bring about long-overdue reforms in labour legislations.

However, labour is as much an electoral subject, as it is emotive. As discussed in the earlier sections, India has a sizeable labour force which translates into a sizeable vote bank. Further, all the major labour unions are factions of national political parties and an entry in the union is widely regarded as a stepping stone to mainstream politics. In fact, Section 16 of the Trade Union Act, 1926 permits a registered trade union to constitute a separate political fund that may be utilized for elections, holding meetings, distribution of any literature or support such candidate including a prospective candidate, holding of political meetings and the like. In such an ecosystem, there are several hurdles in the path of reforms, which has led to our present condition where the Indian economy is set to take

[12] *Report IV: Small and Medium Sized Enterprises and Decent and Productive Employment Creation,* International Labour Organization, 104th Session, International Labour Conference, (2015).

flight, but the Indian industry is plagued with archaic labour laws riddled with provisions and compliances which had lost their significance decades ago. A major contributor to India's poor rating on the scale of Ease of Doing Business, is the nature of its labour laws.

Recently, the Government did make efforts to streamline all the existing labour laws under four codes namely Code on Wages, Code on Industrial Relations, Code on Social Security, Code on Occupational Safety, Health & Working Conditions. However, on a close analysis of the proposed codes, it is observed that it is an instance of, old wine in new bottle. The four codes are little more than an assimilation of the existing labour laws into four categories. In fact, even the assimilation has left a lot desired. Several proposed provisions as a result of the assimilation, have become convoluted and more complex. For instance, the definition of the term 'wage' at present varies from one labour law statute to another and hence, has a different meaning depending on the context. In the proposed Code on Wages, the term 'wage' has been propounded by amalgamating the various existing definitions of wages, thereby further complicating the issue, rather than simplifying it.

The Government has recently introduced the provision of Fixed Term Contract, whereby a worker can be employed for a fixed term or period of time, and at the expiry of which the relationship between the employee and the employer would automatically cease to exist, irrespective of the length of the tenure of continuous service provided by the worker to the employer. Such initiatives do lend much needed flexibility to Indian Industry with regard to its labour force. However, more such initiatives are needed to instill confidence in the Indian Industry.

Thus, India's present labour policies are struggling to mitigate today's issues, hence, in order to prepare for the next wave of technological advancements policy makers in India will need substantial political will to address issues such

as wage inequities, skill development, reducing bureaucratic hurdles and most critically bringing the unorganised sector which through covered by the provisions of a plethora of labour laws at present, under the ambit of labour legislations but are incapable of effective implementation entirely due to its magnitude and impact that would immediately culminate in large scale unemployment. It may be clarified that the present set of labour and employment laws do not facilitate employment growth but rather impede and retard the growth of employment in the economy. Another key issue which needs to be addressed is data collection about the labour force. Lack of information and inadequate data regarding the labour force have led to inaccurate determination of rates of unemployment, which results in policies that are based on incorrect data.

4. UBERISATION: TECHNOLOGY ENABLED DISRUPTIVE BUSINESS MODELS

Uber, the taxi giant in less than a decade has transformed not only the taxi business but has introduced a disruptive new business model with the use of technology. The Uber business model essentially revolves around its ride sharing service, wherein drivers owning a car, in their spare time can transport people who want to reach from one place to another. Hence, Uber simply connected drivers with passengers via smartphones. The traditional taxi required a passenger to reach a dedicated taxi stand or wave out their hands hoping that a vacant taxi would oblige, whereas, with Uber, a passenger could instantly share his location through the Uber Application on his smartphone and accordingly, directly connect with drivers present in the vicinity. Further, with Global Positioning System (GPS) capabilities of tracking on maps, the whole Uber experience became revolutionary. However, the real game changer for Uber was its relationship with the drivers and how Uber positioned itself.

Uber avoided medallions, special license plates, and other Government created systems aimed at regulating taxi and limousine companies by claiming that it was a technology company rather than a transportation company.[13]

Uber had called its Drivers "independent contractors". This relieved the company from Government mandated employer responsibility in most countries, and in the United States, where Uber started, it relieved the company of almost all of them. Workers who are classified as "employees" must be paid while they take coffee breaks and must be treated accordingly to anti – discrimination laws. They come with commitments to contribute to Government safety net programmes for retirement and unemployment benefits and they can be difficult to fire when business circumstances change. independent contractors come with none of these responsibilities. They also do not have the right to unionize under US Federal Collective Bargaining laws, and there is no requirement to provide them with training, equipment to do the job or benefits[14]. The situation is similar, albeit to a lesser extent elsewhere. UK employers, for instance, do not need to offer sick days, holiday pay, a guaranteed minimum wage, or other benefits to self-employed contractors. When a Driver signed up to work for Uber as an independent contractor, he/she (but most likely he, as 81% of US drivers, as of December 2015, were men[15]) supplied his own car, gas, and overly pungent air – fresheners. He paid for his own coffee breaks and his own health insurance. All of the responsibility of being in business, including taxes rested on his shoulders. An Uber Driver, in other words, was as close to a

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[13] S. Kessler, *Gigged: The Gig Economy, the End of the Job and the Future of Work*, 6 (1st ed., 2018).

[14] K. Hallock, *Pay: Why People Earn What They Earn and What You Can Do Now to Earn More.* (Cambridge University Press, 2012)

[15] *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, Uber Newsroom, available at https://www.uber.com/newsroom/driver-partner-survey, last seen on 18/10/2018.

piece of code as Uber could find without having the cars drive themselves (an initiative that quickly became the company's priority).[16]

This led to the creation of what is today called the gig economy, and the credit for it is appropriately given to Uber, by christening the method whereby employers enter into a relationship with independent contractors for services which were traditionally provided by permanent employees, as *uberisation*.

The gig economy is transforming the conventional employer-employee relationship. An individual is not hired as an employee, but instead is looked upon as a separate enterprise, whose skills are hired not to conduct tasks of perennial nature, but instead for a particular project which is not indefinite but has a determined expiry date. The rise of gig economy is incidental to the rise of technology. As the routine and standardized tasks are usurped by technology from the humans, due to greater efficiency and economics; the demand for the labour force will increase to execute specialized tasks which require the exercise of human creativity and discretion. This in turn is expected to shift the focus of skill development and because technology will be the competition in this new ecosystem, which has the ability to advance and adapt rapidly, the labour force will be under immense pressure to constantly re-skill in order to adopt and adapt to the changing demands of the industry.

4.1. The Gig economy in the India context

The gig economy has arisen in the west recently because of the employer's growing desire to engage contract workers rather than permanent employees. This, however, is not a new trend in India. In the developed nations, gig economy arose alongside the growing use of technology, whereas, in India hiring labour on contract has been in vogue for some time. The primary reason behind it is

[16] Supra 13 at 7 (1st ed., 2018).

Section 25B of the Industrial Disputes Act, 1947 which provides that a worker is deemed to become a permanent employee if he provides his services for 240 days continuously in a year. To circumvent the said provision, the Contract Labour Act, 1971 was effectively employed; to the extent that both the Central and State governments across the country developed cold feet to invoke Section 10 of the Act to prohibit the engagement of contract labour even in purely government enterprises such as the various ministries of government. Hence, the current mantra of doing business and/or engaging in economic activities is to engage contract labour not permanent or regular workmen. As per the provisions of the 1971 legislation, an employer can engage a contractor, on a principal-to-principal basis, for providing certain services. These services would be provided to the principal employer, by the labour force which would be the employees of the contractor. Thereby, restricting the liabilities of the principal employer qua the labour, by means of an intermediary in the form of a contractor/service provider.

5. CONCLUSION

The moot question is whether India's future of work scenario will be a contest of Labour vs. Technology. Considering our demographic features along with low levels of skill and inadequate education, it is understandable that a doomsday prediction is popularly predicted. However, one must refer to the Schumpeter theory of the "gale of creative destruction" which is described as the "process of industrial mutation that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one"[17]. The notion of 'creative destruction' articulated in the Schumpeter Formula is often used in the dominant discourse on the impact of technological change on employment. The argument is that markets evolve through

[17] J.A. Schumpeter, *Capitalism, Socialism and Democracy*, 82–83, (1942).

technological disruptions: the destruction of some jobs is compensated by the creation of new employment opportunities. Suggesting a 'churn', economists argue that emerging technologies will erode certain jobs but create new ones in their place. Public anxiety about robots taking over human operations, they argue, is based on a faulty assumption that the amount of work is fixed in any given economy[18].

In India, the wave of next generation of technology will take some time before making its full impact. This is largely because the basic infrastructure required to adopt the next generation of technology is lacking in terms of regular water, electricity and telecommunication connectivity. The manufacturing sector is expected to be the first to adopt maximum next generation technology for automation, as the nature of work involved is the most amenable to automation. The medium and small enterprises of the manufacturing sector which employs a major proportion of the labour force in the sector are also expected to adopt more and more technology, however the same shall be predicated on several factors such as availability of skilled labour and relative cost of labour. Thus, job displacement will take place across sectors, however, there will be an increased demand for a higher skill set.

India is a country of great diversity and even greater inequalities. The next generation of technology is expected to impact nations having the capital to adopt such technologies. India will see its adoption in a phased manner. Industries which could afford to adopt such technology in an economically viable manner will adopt it, however, such industries do not employ the largest proportion of the labour force. The biggest employer in India is in the informal sector, where too gradually the next generation of technology is expected to make inroads in the form of micro-technologies first, which will not result in

[18]Supra 5 at 20.

drastic job displacement, as in the case of other developed economies which are already equipped with the basic infrastructure to usher in the next technological revolution.

Irrespective of when technology has its full impact on the labour force, one fact is certain that technology is all set to transform work as we know it today radically. The gig economy will fuel the demand for a higher skill set, but also a constantly evolving skill set, thereby placing greater stress on the labour force to continuously improve their skills in consonance with the demands of the industry, while competing to stay relevant despite technological advancements. The traditional notion of a job will make way for the new gig-based services ecosystem. This technology enabled gig system of providing services will blur the definitions of terms such as working hours and make the present concept of workplace archaic. However, the cost of the flexibility extended by the gig economy is the stability that was provided by the traditional concept of a job. Similarly, the erosion of the present employer-employee relationship would further accentuate the problem of instability, as the gig worker will no longer have the safety net of an employer funded employee welfare program.

COLLECTIVE NEGOTIATION IN THE POST-REFORM SCENARIO: AN ANALYSIS OF THE HIERARCHY OF THE LABOUR STANDARDS

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Abstract

This article intends to analyze the amendment to the Consolidation of Labour Laws enacted by law n. 13.467/2017, called "Labour Reform" regarding innovations in the scope of collective negotiations. Therefore, it was established that such modifications are not secluded; on the contrary, Brazil followed the trend of developing countries, according to study published by ILO on labour reforms and their impacts around the world. The expansion of the matters in which trade unions and employers shall have greater negotiation power was only one of the innovative points, but if the modification stopped in this aspect, it would not be effective. Before the old hierarchy scenario of the labour standards, the dialog of the labour law sources established that the most protective standards for the employee were the ones adopted on a case-by-case basis. Law n. 13467/2017 replaced such scenario with the predominance of the negotiated on the legislated and the collective agreement before the collective convention. The expansion of the collective negotiation power would only make sense if the collective instruments were primarily enforced. Otherwise, the amendment would never be implemented, as it would be negotiated collectively, but the old hierarchy logic would only enable clauses agreed upon positively for the employee to be enforced. Such modification favors the principle of reality, as the provision in collective agreement ends to be closer to the effectively

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experimented by the employees. Finally, this article sought to historically scrutinize the issue of proactivity of collective negotiations, i.e., the incorporation of the rights provided in collective agreements and collective conventions, before and after the legislative modification. Therefore, for a complete analysis of the subject, studies on labour reforms in the world and their main innovations were used, going through the comparison between the "old" and the "new" labour law, on the subject under discussion.

Key words: hierarchy of labour standards – collective negotiation– collective convention – collective agreement – proactivity – dialog of the sources

1. INTRODUCTION

1.1. Labour Reforms – World Trend

Law n. 13.467, published on 07/13/2017, promoted amendments to several provisions of the Consolidation of Labour Laws (CLT), in order to attempt to adjust it to the socioeconomic and technological advance which the Brazilian society reached, through the modernization of the modes of production and working relations.

The reforms scenario is not exclusivity of our country. A study published by ILO (International Labour Organization) - *Drivers and effect of labour market reforms: Evidence from a novel policy compendium*[1]*, suggests* that labour legislative reforms were carried out in 110 countries between 2008 to 2014.

The common foundation observed in the several reforms initiatives was to increase the competitiveness of the economies and create work positions,

[1] Dragos Adascalitei, Clemente Pignatti Morano, *Drivers and effects of labour market reforms: Evidence from a novel policy compendium*, 5:15, IZA Journal of Labour Policy (2016) available at https://izajolp.springeropen.com/articles/10.1186/s40173-016-0071-z, last seen on 12/20/2017.

especially in the context of severe crisis and economic stagnation with unemployment.

In 55% of the cases, the reforms reached the whole population and had permanent character, producing a long-term change in the labour market regulation in the world. This results from a general trend for the deregulation recorded in developed economies - particularly in Member States of the European Union - and a strengthening of the labour legislation in developing countries.

Developed economies, among such the European Union, countries of Central and Southeast Europe and the Commonwealth of Independent States worry specially about the legislation reforms in terms of permanent contracts, such as in Portugal and Spain. In comparison, the majority of the developing economies worry about the reforms in the scope of collective negotiations which, in many cases, formed a trade unions institutional strengthening process.

Following the world trend of developing countries, law n. 13.467/17 innovated regarding collective negotiation, giving relevant emphasis to this conflict's resolution method.

2. THE HIERARCHIES OF THE STANDARDS IN THE "OLD" LABOUR LAW

The "old" labour law presented an adamant legislation, in which rights could not be negotiated, as the presumption of lack of sufficiency of the worker was a key element of the system.

Before the logic of an employee who should be protected from his/her employer, any standard or contract condition should be construed in order to favor the worker as much as possible, to the point of, often, infantilize him/her.

The logic of the labour law changed dramatically from the reform that broke historical paradigms by removing the state control part of the regulation of the working relations, valuing the autonomy between employees and employers to adjust what is more convenient for both.

Once, article 8 of the CLT announced that the principles of the labour law would be filters for the enforcement of rules that would not be expressed in the Consolidation of Labour Laws. Not anymore. The text now clarifies that (i) the common right shall be a subsidiary source of the labour law and also that, (ii) in the examination of collective convention or collective agreement of labour, the Labour Justice shall exclusively analyze the compliance of the essential legal business elements, pursuant the provision of article 104 of Law n. 10.406, of January 10th, 2002 (Civil Code), and shall beacon its performance by the principle of minimum intervention in the autonomy of the collective will.

The central labour guideline was the protection of the worker once the employee would not have the same legal equality of its employer. Consequently, the purpose of the labour law would be to reach a true substantial equality between the parties and, for such, necessary to protect the most fragile party of the relation, the employee. This was the coherence. This was the thread. The lens through which it was all read and the logic through which everything was understood. Today, not anymore.

Before this supposed imbalance in the relation between the employee and the employer, the principle of the protection of the worker was enshrined, in order to balance the labour relations. The principle of the protection of the worker was always featured by the intense Brazilian state intervention in the relations between employee and employer, greatly limiting the autonomy of will of the parties.

The principle of protection of the worker, foundation and base for the old labour law was performed in sub-principles, such as: (i) Principle of interpretation: *in dubio, pro operário*; (ii) Principle of the predominance of the most favorable standard for the worker; (iii) Principle of the predominance of the most beneficial condition for the worker.

The sub-principle *in dubio pro operário* consisted in the idea that, in doubt between more than one interpretation attributed to a same legal Law standard, the hermeneutics should adopt the most beneficial one for the worker – disadvantaged – whichever it was.

While this sub-principle focused on the interpretation of the standard, the Most Favorable Standard one suggested which would be the standard applicable to the worker. Before several rules, from several origins: Legislative, Judicial Power, trade unions, private etc., it is natural that certain conflicts arose between several sources, which would make the most effective standard for the worker to prevail, even though hierarchically in lower grade.[2]

Therefore, due to the principle of protection, in the labour law the hierarchic pyramid was built in a variable manner, making the standard closer to the purpose of protecting the worker located in its vortex, that is, the most favorable standard for the worker, therefore not being necessarily the Federal Constitution, depending in the subject under discussion. In short, as said by Fernando Hoffmann:

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[2] "The rule according which 'in case of doubt the most favorable interpretation for the worker' shall not be deemed a protecting standard against to stronger, as its essence is more. It informs us that, in the opposition between human values and the material economy interests, justice imposes the supremacy of the former. A final consideration: the idea of protection of the class by the bourgeois State offends the dignity of the worker because he/she is not a child under its tutor."· DE LA CUEVA, Mario. EI nuevo derecho mexicano del trabajo. 19 -1. P 274 e segs. apud ROMITA, Arion Sayão. Os Princípios do Direito do Trabalho ante a realidade. *Revista LTr.* 74-09/1038. Vol. 74, No. 09, September, 2010.

"(...) the teleological matrix of the Labour Law points to the direction of giving solution to the employment relations according to a social meaning of hypothetically restoring a non-verifiable balance in the concrete material relation, also aiming the improvement in the social conditions of the worker, the most likely standard that shall prevail, in the hierarchic view if the one that better expresses and responds to this organic, constructive teleological purpose."[3]

As for the Most Beneficial Condition, it explained that the most positive working conditions, if compared to the ones generically established by the labour law, would integrate the employment contract, but the possible harmful modification would be simply null.

Therefore, the hierarchy of the standards was dynamic, depending on the case analysis of what would be better for the worker.

3. COLLECTIVE NEGOTIATION AND ITS TYPES

Ideologically, to negotiate in a collective manner, in group, shows more strength to bargain better conditions than if the negotiation were only between the employer and the employee. In fact, exactly in this line of reasoning, the new law only enabled greater individual negotiation power, that is, without the presence of the trade union, for said "hyper-employees", those who earn more than the double of the limit of the Social Security General Regime, as per article 444, sole paragraph.[4]

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[3] Hoffmann, Fernando, *O Princípio da Proteção ao Trabalhador e a Atualidade Brasileira*. São Paulo: LTr, 96 (2003).

[4] Art. 444, CLT. The employment contract relations may be object of free arrangement of the interested parties in all without contravening the provisions of protection to the work, to collective contracts applicable and the decisions of the competent authorities.

Sole paragraph. The free arrangement to which the caption of this article refers applied to the hypothesis provided in art. 611-A of this Consolidation, with the same legal effectiveness on the collective instruments, in case of employee holding a college degree diploma and who

The collective negotiation is the main form of adjustment of the interests between trade unions and employers' unions or between the latter and the employers, directly. It intends to establish working conditions that meet the mutual interests of companies and workers, being an essential tool for the modernization of the working relations and an increase of competitiveness.

The collective standard is a gender, which types are: (i) Collective Working Convention; and (ii) Collective Working Agreement. The concepts of the two negotiation types aforementioned are inserted in article 611 of CLT, *caption* and paragraph 1.[5]

Before the analysis made on the principle of the most favorable standard, the collective negotiation before the enactment of law no. 13.467/17 had importance as long as it could establish more favorable standards for the employees than the ones resulting from legal provision. The arrangements that could provide on the opposite of the law, occasionally reducing some right so that another would be provided as compensation, were not deemed valid by the Labour Justice.

The purpose of a negotiation is to make the parties reach an agreement, eventually restricting some rights to get other benefits. What happens is, if the

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perceives monthly salary equal or above two times the maximum limit of the benefits of the Social Security General Regime.

[5] Art. 611 CLT, - Collective Labor Convention if the agreement of normative character, through which two or more Trade Unions representing economic and professional categories establish applicable working conditions, in the scope of the relevant representations, to the individual working relations.

1 The Trade Unions representing professional categories are granted with the execution of Collective Agreements with one or more companies of the corresponding economic category, which established working conditions, applicable in the scope of the company or of the agreeing parties regarding working relations.

2 The Federations and in the lack thereof, the Confederations representing economic or professional categories could execute collective working conventions in order to govern the relations of the categories bound to it, not organized in Trade Unions, in the scope of their representations.

principle that reigned was the most favorable standard to the employee, the negotiation logic, per se, lost its essence: it would not be valid for an employer union or for the employers, within the convention and collective agreement, respectively, to promote a dialog with the trade union, as only what was positively provided for the employee would be guaranteed to be deemed valid.

This logic discouraged the conflict settlement through collective negotiation. Therefore, the employee him/herself ended up having his/her rights limited to the ones regulated by the law that, for being general, would not be close regarding the reality of that working relation, per se.

4. THE HIERARCHY OF THE LABOUR STANDARDS IN THE BRAZILIAN POST-REFORM SCENARIO

The interpretation and the *modus operandi* of the "protecting principle" before the plurality of existing scenarios had been showing to be inefficient, obsolete and unconstitutional.

Law n. 13.467/2017 reinstated the actual reach of art. 7º, item XXVI, of the Federal Constitution[6], regarding the acknowledgment of the collective working conventions and agreements, as well as the right to full negotiating autonomy of the social actors, as it acclaimed the collective/individual will rather than the legal standard.

Therefore, the reform legislator annihilated the "principle of protection for the worker", admitted as unrealistic, once: (i) it is not linked with the Constitution, which places on the same level, as State foundation, the valuation of work and free initiative and (ii) the society does not correspond to the *locus* of a binary,

[6] Art. 7, Federal Constitution. The rights of the urban and rural workers, besides those which aim their social condition, are the following:

XXVI - acknowledgment of the collective working conventions and agreements;

dichotomous or stalled system of rich companies and poor employees deserving full protection.

On the contrary, striking feature of the contemporaneity is the complexity of the interaction of the State with the individuals and the principles with each other. A hard system, which has as proposition of lack of sufficiency not always real, could not handle the settlement of social conflicts in an efficient manner, not promote, in a disciplinary manner, the clearing of the choke lines between capital and work.

For company and worker to escape the true neurosis which the model State intervention model was described to be in the working relations, increasing the whole circuit, the way out was the collective negotiation as creating source of standards more adhering to the reality. In this regard, Ludovico Barassi sustains:

"The preeminence of the imperative law (intended to compensate the worker socioeconomic weakness) is easily justifiable, when applied to the individual arrangement. But, when the trade union comes into place, the individual ceases to be weak. The weakness of the employee ends when, in his/her place, the trade union negotiates, which main characteristic is to exert counterpower before the employer (which, by nature, has economic power). By balancing the scales by the collective negotiation, the mandatory nature of the law is not justifiable. Thus, the arrangement in pejus is justified, since the trade union assures more relevant collective advantages in certain cases, sacrificing certain property rights for the acquisition, for instance, of guarantee of the existing positions."[7] *(emphasis added)*

[7] *BARASSI, Ludovico. II diritto del lavoro, v. I, Milan: Dott. A. Giuffrè*, 119 (1957).

Law n. 13.467/2017 inverted the underlying principle and protectionist logic of the Labour Law when, for example, it set forth in art. 620 of CLT[8] the predominance of the collective agreement on the convention. Logically, it shall only result in exception to the principle when the collective agreement contains less favorable rights for the worker than the collective convention.

With Law n. 13.467/17 article 611- A was included in the CLT which establishes that the labour collective convention and collective agreement prevail on the law when, among others, provide for certain subject listed in the provision. The text, amended by the provisional measure n. 808, also states that the enumeration of the rights listed in the items of the article would be merely illustrative.

In this context, the *heading* of article 611- A of CLT [9] authorizes flexibilization, increasing the range of possibilities of rights provided by the law that may be

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[8] Art. 620, CLT. The conditions established in collective working agreement shall always prevail on the ones established in collective working convention.

[9] Art. 611-A, CLT. The labor collective convention and collective agreement, in compliance with items III and VI of the captions of art. 8 of the Constitution prevail over the law when, among others, provide for:

I - pact regarding the work hours, compliant with the constitutional limits; II - annual overtime bank;

III- break schedule, compliant with the minimum thirty minutes limit for over six hours workload;

IV- accession to the Job Insurance Program (PSE), to which Law no. 13.189, of November 19th, 2015 regards;

V - positions, salaries and roles plan compatible with the personal condition of the employee, as well as identification of the positions that meet trust roles;

VI - corporate regulation;

VII - representative of the workers at the workplace;

VIII- teleworking, warning regime, and intermittent work;

IX - remuneration by productivity, including the tips received by the employee, and remuneration for individual performance;

X- modality of work hours registry;

XI - change of official holiday;

XII- framework of the unhealthy level and extension of work hours in unhealthy places, including the possibility of technical hiring, without the prior license of the relevant authorities of the Ministry of Labor, as long as compliant, in full, with the health, hygiene and labor safety standards provided by the law or regulatory standards of the Ministry of Labor;

reduced or suppressed. The following provision bans the negotiation on rights deemed unavailable.[10]

[10] Art. 611-B, CLT. Constituting illicit object of labor collective convention or collective agreement, exclusively, the suppression or reduction of the following rights:

I- professional identification standards, including the annotations in the Employment and Social Security Record Card;

II- unemployment insurance, in case of involuntary unemployment;

III- value of the monthly deposits and of the terminating indemnification of the Employment Security Fund (FGTS);

IV- minimum salary;

V- par value of the Christmas bonus;

VI- remuneration of night shift above the day shift;

VII- protection of the salary as required by the law, its wrongful retention constituting crime;

VIII - family salary;

IX- weekly paid rest;

X- remuneration of extraordinary service above, at least, in 50% (fifty percent) to the ordinary;

XI - number of vacation days due to the employee;

XII - enjoyment of annual paid vacations with, at least, a third over the regular salary;

XIII - maternity leave with minimum duration of one hundred and twenty days;

XIV- paternity leave as per the law;

XV- protection of the woman work market, upon specific incentives, as per the law;

XVI - prior notice proportional to the time of service, with at least thirty days, as per the law;

XVII - health, hygiene and labor safety standards provided by the law or in regulatory standards of the Ministry of Labor;

XVIII - additional remuneration for distressing, unhealthy or dangerous activities; XIX - retirement;

XX - insurance against work related accidents, afforded by the employer;

XXI - action, regarding the credits resulting from work relations, with limitations period of five years for urban and rural workers, to the limit of two years after the termination of the employment contract; XXII - prohibition of any discrimination regarding disabled worker salary and admission criteria;

XXIII - prohibition of night-shift, dangerous or unhealthy work to people under eighteen years of age, except as apprentice, from fourteen years of age;

XXIV - legal protection measures for children and adolescents;

XXV - equality of rights between the worker with permanent employment relationship and the temporary worker;

XXVI - freedom of professional or trade union association of the worker, including the right not to undergo, without their express, prior agreement, any salary charge or discount set forth in labor collective convention or collective agreement;

Two important practical consequences arise from the changes highlighted above: (i) the end of the principle of predominance of the most favorable standard and (ii) the weakening of the principle if unavailability of the legal labour rights.

The reform made the labour law more exclusive and made an inversion of the labour pyramid. If formerly the so-called dynamism of the labour standards was applied, that is, the hierarchically lower standard was applied is it granted a better benefit than the one provided in the higher standard.

With the reform, collective agreements are above the collective conventions in the pyramid and the dynamism of the labour law sources lost its place. In short, combining the new articles 8º, 611-A and 620 of CLT, the new hierarchy of the main Brazilian labour law sources is as follows: 1st - Constitution, 2nd - collective agreement, 3rd - collective convention and 4th - ordinary legislation.

Therefore, the new wording of article 620 of CLT privileges the collective private autonomy, giving the trade union entities more prestige. On other words, the conditions adjusted in labour collective agreement shall prevail on the ones set forth in labour collective convention, on the assumption that, as the agreement is a legal act executed between trade unions and companies, the clauses to be consigned by it shall be closer to the realities of the parties than those set out in convention, which are intended to a whole category.

In such reality, before the reform, when there is collective convention and agreement applicable to the same worker, regulating differently certain matter, or also, with beneficial parties and others less favorable than the other standard in comparison, the one most favorable for the employee should be complied

with, compliant with the criterion comparison according to atomistic, conglobation and intermediary theories.

Basically, the atomistic theory is the criterion of interpretation and integration of standards that takes into account the secluded benefit in each standard, converging them, accumulating them in one. As for the conglobation theory, it concerns with the standard as a whole, in compliance with its set. It exclusively applies, after confrontation, the one most favorable for the worker, in the block, ignoring the other.

The intermediary theory, or the mitigated conglobation, in turn, does not deliver interpretation adding the benefits of both standards, regarding the same matter set, nor ignoring a standard in favor of the other, in its set. It selects the existing institutes between both standards in order to collect them and, from then on, exclusively chooses the most beneficial of each standard in order to apply it to the worker.

Before the reform, the mitigated conglobation theory prevailed.

However, with the new article 620 of CLT, two possibilities are opened, which are, (i) enforcement of the agreements, with full separation of the conventions, as in overcoming the principle of the most favorable standard, there would be no foundation to justify the mitigated conglobation theory or (ii) enforcement of the conventions, only in omitted cases in agreements. Before the existence of foundations that sustain both possibilities, the case law shall end up defining the path that shall prevail.

Finally, regarding the need of counterpart in collective negotiations, § 3 of art. 611-A of CLT guaranteed it only in cases in which a clause reducing the salary or working hours is settled. In such cases, the collective standard shall provide

for the protection of the employees against dismissal without cause during the effectiveness of the collective instrument.

Then the obsolete thesis of TST that the removal of advantages by collective standard would only be valid if there were compensatory counterpart falls flat. In fact, § 2 of the same article was express in this regard: "The non-existence of express indication of mutual counterparts in labour collective convention or collective agreement shall not result in its nullity as it is does not feature an irregularity of the legal business."

5. THE BAN OF PROACTIVITY OF THE LABOUR COLLECTIVE NEGOTIATIONS

The Consolidation of Labour Laws always banned effectiveness above two years to collective standards. However, the scenario of termination of effectiveness of the collective convention or collective agreement, the uncertainty regarding the rights of the workers provided in such contract instruments reigned. Would they lose the efficiency? Would they still be applied until a new collective standard supervened?

Initially, the doctrine mostly sustained that proactivity would be limited to the will of the parties and to the legal term. Thus, in fact, it could not exceed two years, in case of collective conventions or agreements, or four, for cases of normative sentences. The case law also followed this logic. Initially, Abridgment n. 277 of the Labour Superior Court set forth[11] :

“Abridgment n. 277. Normative sentence; Effectiveness. Repercussion in employment contract. The employment conditions reached by operation of

[11] Original wording - Res. 10/1988, DJ 03.01, 02 and 03.1988 and Abridgment maintained – Res. 121/2003, DJ 11.19, 20 and 21.2003.

normative sentence are effective within the term signed, not definitively incorporating the contract."

In 2009, the wording was amended:

“Abridgment n. 277. Normative sentence. Collective convention or agreement. Effectiveness. Repercussion in employment contract (Wording amended in session of Full Court, on 11.16.2009 – Resolution no. 161/2009, DJe disclosed on 11.23, 24 and 25.2009)

- The employment conditions reached by operation of normative sentence, collective convention or agreement are effective within the term signed, not definitively incorporating individual employment contract."

II– The rule mentioned in item I acknowledges the period covered between 12.23.1992 and 07.28.1995, in which Law n. 8.542 prevailed, revoked by the Provisional Measure n. 1.709, converted to Law n. 10.192, of 02.14.2001.”

The amendment revealed that the Superior Labour Court would have acknowledged the legal possibility of incorporation of the normative clauses to the employment contract in the strict period of the troubled effectiveness of Law n. 8.542/92[12] , which provided, with emphasis:

Art. 1 The national salaries policy, compliant with the principle of intransigence, is based on the free collective negotiation and shall be governed by the standards set forth in this law.

S 1 The labour collective agreement, conventions or contracts clauses integrate the individual employment contract and may only be reduced or suppressed by

[12] The law was attacked by Provisional Measures, in turn attacked in action of unconstitutionality in which preliminary was granted and the opposite merit was adjudged.

later labour collective agreement, convention or contract. (Revoked by Law 10.192, of 2.14.2001)

S 2 The working conditions, as well as salary clauses, including actual increases, productivity gains and minimum salaries proportional to the extension and the complexity of the work, shall be fixed in labour collective contract, convention or agreement, arbitral award or normative sentence, compliant, among other factors, with the productivity and the profitability of the sector or company. (Revoked by Law 10.192, of 2.14.2001)" (emphasis added)

Actually, the evolution of the mentioned wording was gradual. Gradually, the Superior Labour Court lightened its intolerance to proactivity of the collective standards[13]. Some relevant adjudged, including sub-sections, had been opening space for the acknowledgment of proactive effects of settled standards. Despite the old wording of the abridgment n. 277, the Court acknowledged the validity of settlement that expressly previously the definitive incorporation to the employment contract indemnification for service time in case of dismissal without cause:

Appeal to embargoes ruled by law 11.496/2007. Indemnification for service time. Incorporation to employment contract of advantage provided in collective standard. Enersul. The existence of normative clause creating the indemnification for service time and incorporation of such advantage to the employment contract in force in the period of validity of the collective agreement, even though contractual termination had been performed after the effectiveness of the collective standard, imposes the compliance with the

[13] The Case Law Guideline No. 41 of SBDI-1 – Sub-section I Expert in Individual Disagreements depicts the history we tell, depositing that in filling all assumptions for the acquisition of stability resulting from work-related accident or illness, even during the effectiveness of the normative instrument, the employee would enjoy stability even after the end of its effectiveness.

collective settlement due to the provision of article 7, XXVI, since the parties decided to incorporate to the labour individual contract definitively the indemnification for service time in view of dismissal without cause. Appeal of known and provided embargoes. (E-RR - 4924900-11.2002.5.24.0900, Reporting Minister: Augusto César Leite de Carvalho, Judgment Date: 04/15/2010, Sub-section I Expert in Individual Dispute, Publication Date: DEJT 04/30/2010)[14]. (Emphasis added)

In May, 2011, the Section Expert in Collective Disputes expanded the effectiveness specifically normative sentences:

"Precedent n. 120 of TST. NORMATIVE SENTENCE; DURATION. POSSIBILITY AND LIMITS. The normative sentence is effective, from its initial term until the normative sentence, supervening labour collective convention or labour collective agreement produces its express or tacit revocation, compliant with the maximum legal term of four years of effectiveness".

[14] The Federal Superior Court denied general repercussion of the case: Appeal - Extraordinary Appeal - Advantages Conferred Upon Normative Clauses - Absence of General Repercussion - Ai N. 731.954 Rg/Ba - Claim of Nullity by Denial of Provision Jurisdictional - AI No. 791.292 RG/PE 1. The Federal Superior Court, in the case records of the Appeal of Instrument no. 731.954 RG/BA, decided that there is no general repercussion to the issue pertaining the incorporation of the individual employment contract of advantages conferred by labor collective agreements or conventions. As well, by deciding Point of Order in the Appeal of Instrument no. 791.292 RG/PE, fixed the interpretation that - art. 93, IX, of the Federal Constitution required that the judgment or decision are based, even though briefly, without determining, however, the detailed examination of each of the claims or proofs, without the decision foundations being correct-. 2. Decision that denies follow-up to Extraordinary Appeal for lack of general repercussion and/or convergence of the judgment appealed for the understanding fixed by the Federal Superior Court in matter with general repercussion acknowledged is pursuant the systematic set by the Constitutional Amendment no. 45/2004 and Law no. 11.418/2006. 3. Appeal to which provision is denied. (Ag-ED-E-RR-4924900-11.2002.5.24.0900, Reporting Minister: Maria Cristina Irigoyen Peduzzi, Judgment Date: 08/01/2011, Special Body, Publication Date: DEJT 09/09/2011).

In September, 2012, the wording of the abridgment no. 277 was amended[15] covering the chain of the limited proactivity by revocation for the normative clauses:

“Abridgment n. 277 of TST. LABOUR COLLECTIVE CONVENTION OR LABOUR COLLECTIVE AGREEMENT.

EFFICACY. PROACTIVITY (wording amended in the session of the Full Court carried out on 09.14.2012) - Res. 185/2012 – DEJT disclosed on 09.25, 26 and 27.2012. The normative clauses of the collective agreement or collective conventions integrate the individual employment contract and may only be modified or suppressed upon labour collective negotiation".

The change was questioned at the Federal Supreme Court, at ADPF 323. In preliminary injunction stage, minister Gilmar Mendes determined the suspension of all procedures and effects of decisions in the scope of the Labour Justice that discussed the application of proactivity of collective conventions and agreements standards.

With the new wording of article 614, S 3 of CLT[16] the discussion about constitutionality or not of such abridgment losses the object, as proactivity was adamantly banned in collective negotiations and the settlement of clause setting forth extra effectiveness period of the labour collective convention or agreement, over such two years.

Such amendment was of crucial importance, as negotiations too good for the employees ended up discouraging the workers trade unions to renegotiate, as the rights insured to the employees would lose their efficacy.

[15] The novel wording Abridgment 277 of the Superior Labor Court became effective from its publication, without retroactive enforcement. Ver RR-1308100-19.2006.5.09.016.

On the other side, the employers were not encouraged to negotiate, as the rights granted in a two years term scenario could drag for a longer period. Obviously, the business activity is intrinsically linked to economic "waves", reason why a right granted in a contractual instrument effectiveness period could no longer be economically sustainable in the next negotiation.

6. CONCLUSION

This article analyzed the modifications brought by law 13.467/17 regarding the collective negotiation and the hierarchy of the labour standards arising therefrom.

The change of the Brazilian labour law, in brief summary, made the principle of the most favorable standard for the worker, applied in working relations to be replaced by the following sources hierarchy:

1. Rights provided by the Federal Constitution;
2. Collective agreement;
3. Collective convention and;
4. Ordinary legislation.

With the arrival of the reform, the collective agreement overrides the collective conventions and the law itself, the justification for such being reasonable: for being a negotiation between the company and the workers trade union, the standards to be applied shall be more adherent to the reality of those employees. The expansion of the collective negotiation power would only make sense if the collective instruments were primarily enforced. Otherwise, the amendment would not be put into action, as it would be negotiated collectively, but the old hierarchic logic would only enable the clauses positively agreed for the employee to be applied.

Therefore, the new hierarchy of the sources makes the principle of reality, so dear to the labour law, could be effectively put into practice.

Therefore, the trade unions, before the new hierarchy of the labour standards, are immensely highlighted. In such scenario, the labour modification shall need strong trade unions, aware of their roles and linked with the interests of the workers to negotiate fair and, at the same time, protecting standards.

However, sadly, the trade union associations in Brazil are not prepared for such a change of paradigms, above all because they are inserted in an outdated context of trade union uniqueness, which may be the subject of a future article to approach, specifically this national drama.

THE FUTURE OF WORKERS' HEALTH AND SAFETY RIGHT IN THE INDIAN AND TANZANIAN LABOUR AND EMPLOYMENT REGIME

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Abstract

Discussions on improvement of working conditions and protection of WHS are as old as the human society and occupations themselves are. The worst was witnessed during the Industrial Revolution which necessitated the taking of welfare measures including the enactment of welfare legislation to protect workers from occupational fatalities, injuries and diseases. The kinds of legislation are in place in many countries including India and Tanzania. However, the working conditions have continued to be hazardous costing the lives, causing incapacity and sufferings among workers. Of latest, with Global estimates of about 2.74 million workers dying every year and about 374 million encountering non-fatal occupational injuries, workplace hazards raise serious human rights concerns. Health and safety of workers has for a long time been marginalized as a labour policy topic. It has been extracted from workers' rights. WHS is left out of discussions on fundamental workers' rights. The authors analyze the understanding that WHS is a fundamental human right and explain the reason for its marginalization and failure to realization. Besides, the authors analyze the place of WHS right in the Indian and Tanzanian labour and employment regimes. Key to the analysis is its recognition as a fundamental worker right and hopes for the future. The analysis incorporates an assessment on the efficiency of the labour regimes in addressing the present and future

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dangers with intent of paving way for human right discussions and approaches on working conditions and WHS. The article set forth some ways forward for the future of the right in India and Tanzania.

Keywords: Workers' Health and Safety, WHS Right, Future of Work, Labour and Employment Policies & Laws, India and Tanzania

1. INTRODUCTION

"The recent exclusion of health and safety from core labour rights is based on critical assumptions regarding the ability of the market, over time, to create adequate improvements in health and safety conditions (or provide wages that compensate for the persistence of wages). ... In fact, relegation of health and safety to market solutions leaves workers vulnerable to unacceptable abuses."[1]

Workers' Health and Safety right ('WHS right' or 'the right') is one of the fundamental human rights of the working class. It is linked to their survival at work, protecting them from fatalities, injuries, diseases and other workplace menaces. The right, just like all other fundamental human rights, is of universal application. It has to be realized by all countries. The same is the goal by most inter-governmental institutions including the United Nations (UN). This paper analyses the place of WHS right in the Indian and Tanzanian labour and employment regimes. The paper attempts to respond to two main issues. Foremost is the issue as to whether WHS right is recognized and protected as a fundamental workers' right. Does it form part of the fundamental labour constitutional, labour and employment guarantees and if so to what extent? The

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[1] E. A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, 89, 90 in *Workers' Rights as Human Rights* (J.A. Gross, 2003).

In almost a similar way J. Hilgert argues Health and safety has been marginalized as a labor policy topic and is often extracted entirely from the question of workers' rights. The two are often treated as separate and distinct legal topics when in reality there is interconnectedness and overlap in certain key areas, See: J. Hilgert, *The Future of Workplace Health and Safety as a Fundamental Human Right*, Comp. Labor Law & Pol'y Journal 719, 720 (2013).

second issue for discussion is whether the present labour and employment set ups on WHS are sufficient to contain for the present and future threats to WHS. Particularly, the second issue aims at measuring whether or not the human rights approach is inevitable in addressing working conditions and WHS in particular.

The authors carried out a survey of various literatures, primary and secondary. Literatures addressing human rights in labour and employment, including WHS right were reviewed. To understand trends and approaches in protection and promotion of WHS, various scholarly works have been reviewed. Similarly, regarding the place of WHS as a fundamental workers' right, constitutions, labour and employment policies and legislation of India and Tanzania have been reviewed. Particular interest has been on the recognition, protection and enforcement of WHS as a fundamental labour right and whether policy and legislative measures takes care of the contemporary and future threats on health and safety of workers in the two countries, the aim for the latter being that of assessing the efficiency and effectiveness of the labour regime prior an assessment of the need to approach the issues with a human right eye.

The discussion on WHS right, as a fundamental right and its place in India and Tanzania is preceded by the historical account on the genesis of the concerns for protection of workers against occupational hazards. The following section explains the historical accounts regarding humanitarian concerns, legislative measures over the welfare of the workers and human rights concerns, regarding the improvement of the working conditions and particularly the protection of workers' health and safety.

2. PROTECTION AND PROMOTION OF WORKERS' HEALTH AND SAFETY: HISTORICAL ACCOUNT

2.1. Early Concerns for Workers' Protection

Poor working conditions, affecting health and safety of workmen women and children have existed for centuries. Hilgert points out that working conditions has been an ongoing topic of scholarship and government for more than a century.[2] Discussion over working conditions and workers health and safety had featured even before industrial revolution, gained momentum during the revolution and years after till date. Social reformations in form of welfare legislation and various other socio-economic measures were adopted to protect workers from their health and safety misfortunes. History appreciates the works done by early physicians, people in medicine, humanitarians, and a few employers who sympathized with their workers.[3] Physicians and medicine men works on occupational diseases influenced some legislative processes.[4] As time went by humanitarians, social reformers and more physicians and medical practitioners showed concerns on working conditions and protection of workers' health and safety.[5]

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[2] J. Hilgert, *A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right,* 43 in *Human Rights in Labour and Employment Relations: International and Domestic Perspectives* (J.A. Gross & L. Compa, 1st Edition, 2009).

[3] H.K. Abrams, *A Short History of Occupational Health* (2001); See R.S.F. Schilling, *Development in Occupational Health* 1-22 in *Occupational Health Practice* (H. A. Waldron, 3rd Edn, 1989).

[4] Ibid.

[5] Rudolph Virchow, Bernadino Ramazzini, Percival Pott, Edwin Chadwick and Robert Owen are some to mention, Physicians and medical practitioners studied diseases of workers in various occupations, occupational in nature, and came up with suggestions to prevent and treat them. Bernadino Ramazzini is known for example for his important study *De Morbis Artificum Diatriba – The Diseases of the Workers* which described various diseases of workers in various occupations and called for measures to address them. On the other hand, social reformers like Robert Owen for humanitarian reasons took steps by calling for legislative measures to address the occupational sufferings of the workers, it terms of their working conditions, health and safety.

2.2. Ancient Occupations and Industrial Revolution

Early forms of protection took place in ancient occupations, i.e., those of mining and factories.[6] Mining and factory legislation were enacted to protect miners and factory workers. Few years after the industrial revolution in Europe various countries in the Industrial Europe made various attempts all seeking to protect workers' health and safety. The most common ones were in form of enactments and a series of amendments of factories and workmen's compensation legislation.[7] The measures were later adopted by many other countries. The British factory and workmen compensation legislation influenced the legal regulation of workers' health and safety in most common law countries. Various welfare legislation was introduced in India and Tanzania to cater for the protection of workers and their health and safety.[8] Factory, mining and plantations legislation presented new labour and welfare reforms in these countries.[9]

2.3. Concerns for Protection at the International Level

At the international level, efforts to protect a worker from occupational hazards were ongoing. It all started with formation of the International Association for Labour Legislation (IALL).[10] At the epicenter was the formation of the ILO in 1919. The ILO was formed for inter-alia to promote global social justice and

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[6] Agriculture is also an ancient occupation but was considered one simple and safe. See J. Jeyaratnam, *Occupational Health in Developing Countries*, 31 (1992).

[7] UK for instance, enacted the first Factories legislation in 1802, German on the other hand enacted the first ever workers compensation legislation in 1884, See Supra note 3.

[8] India first Factory legislation was introduced in 1881 and the Tanzanian one was introduced in 1950.

[9] It is unfortunate most of the legislation provided limited protection in terms of coverage and provisions (as some issues related to workers' health and safety were not encompassed, similarly legislation was not kept up to date)

[10] The IALL was formed in year 1900; it is a result of a series of international meetings/conferences held internationally with a view of adopting international labour legislation to address among others, working conditions. See: ILO, International Labour Standards; *A Workers Education Manual* (4th Revised Edn, 1998).

internationally recognized human rights.[11] Improvement of working conditions has always been one of its major objectives.[12] Together with the ILO, other international organizations have been working on the workplace health and safety agenda.

The World Health Organization (WHO), Human Rights Watch and other NGO's concerns have been with the protection and promotion of WHS. The ILO and the aforementioned organizations have worked to cater for universal principles and standards on workplace health and safety. Various international conventions on workplace health and safety have been adopted and in place. Recommendations are also in place regarding same issues.[13]

2.4. Pursuit of Labour Rights and WHS Right as a Human Right

At first, working conditions and workers' health and safety was not being protected and promoted as a fundamental human right. The formation of the UN after the Second World War brought significant impacts on protection of the rights of the members of the human family. Under such considerations various human rights instruments were declared and adopted. The UN took aboard the rights of the working class including those on the working conditions and health and safety.[14]

Sadly however, for about half a century, after the UN recognition of the rights, there were no or less concerns of pursuing workers' rights including WHS right

[11] Preamble, The Constitution of the ILO 1919; the ILO was formed following the Versailles Peace Treaty signing. The ILO Constitution Preamble encompasses the organisation objective in promoting social justice and human rights.

[12] Ibid.

[13] It is estimated that close to 80% of the ILO instruments and standards are either in wholly or partly concerned with workplace health and safety, see: B. Alli, Fundamental Principles of Occupational Health and Safety, viii (2008).

[14] The United Nations Charter 1945, The Universal Declaration of Human Rights 1948, The International Covenant on Economic, Social and Cultural Rights, 1966 and other core UN Human Right Treaties encompassed WHS right as one of the fundamental rights.

as human rights.[15] It was in the 1990's when movement towards converging labour and human rights emerged.[16] Before then, labour rights were viewed less than human rights. The movement gained momentum at the end of the 20th and beginning of the 21st centuries. Besides, there began an international movement on health and human rights which identified the need to promote and protect health as the need to promote and protect human rights.[17]

3. WHS RIGHT: A FUNDAMENTAL HUMAN RIGHT?

3.1. Industrial Relations Approach: Dominance of Labour Economics and Setbacks to Protection of WHS Right

As noted earlier, before 1990's the approach to WHS was not a human right one. One of the strong reasons for the neglecting or offering little attention to the right is the dominance of labour economics approach in addressing WHS. It is also argued that the Anglo-American domination of global politics over the last half century has allowed some form of managerialism to dominate the global worker health and safety debate.[18] WHS has been approached with a labour economics eye. It has been viewed as one of the workplace agenda left to be regulated by the market itself. 'Leave it to the market approach' has been dominant with a belief that if markets 'deliver', working conditions would improve and will eventually adjust health and safety risks.[19]

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[15] Supra 2; concerns and movements to protect and promote WHS as a fundamental worker right began in the 1990's.

[16] Ibid, prior to that focus was on the civil and political rights, massive violations of political and civil rights violations.

[17] Many scholarly writings emerged addressing health rights as human rights including workers' health rights, eg: S. Gruskin et al, *Perspectives on Health and Human Rights*, (2005) and J.M. Mann et al *Health and Human Rights: A Reader*, (1999).

[18] Supra 2 at 735.

[19] Supra 1 at 89; by creating adequate improvements in health and safety conditions or by providing wages that will compensate the persistence of hazards.

One of the thoughts points towards such adjustments is provision of compensating wage differentials to workers willing to assume risk.[20] Negotiations have been part and parcel of the labour market approach. Institutional labour economists of the 20th century believed that such negotiations provide best framework for workplace health and safety. The approach is defended in a sense that it creates environment for negotiations and provide freedom to accept terms and wages.[21]

Markets are yet to improve, and even where they improved, there has been no evidence of improvement of working conditions and WHS. Persistence and rise in workplace fatalities, injuries and diseases is evident. With statistics on fatalities, the situation is alarming and referred to as constituting a human right crisis.[22] All these have contributed to new thought over the approach to WHS. International workers organizations, NGO's, scholars and interest groups are calling for the right-based approach. The right based approach scholarship has not received a smooth welcome. It has received strong opposition from the existing labour market scholars.

3.2. International Human Rights Framework and Scholarship on WHS right

The question as to whether or not WHS right is a fundamental human right has been discussed lengthily by scholars of human rights at work. The discussion, in most cases, features in and forms part of the analysis as to whether or not labour

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[20] Ibid.

[21] By accepting risks employees cannot protest. Their ability to sue for damages, particularly in torts is undermined. Peter Dorman explains the implications posing a question as to what court would then make an additional award in response, say, an accident, thereby making riskier work more desirable when all the costs and benefits are factored in; See P. Dorman, *Markets and Mortality, Economics, Dangerous Work, and the Value of Human Life*, 110 (1996).

[22] Supra 2 *a*t 43.

rights are human rights.[23] It is not the authors' intention to reiterate, in detail, the positions advanced in the discussions. Generally, scholarship recognizes the right as one of the fundamental human rights, however, with an acknowledgement of the difficulty in defining its scope.[24] Besides the scholarly understanding, the UN human rights system recognizes WHS as one of the fundamental human rights.[25] The Universal Declaration of Human Rights (UDHR), 1948 and the International Covenant on the Economic, Social and Cultural Rights (ICESCR) encompasses WHS right as a fundamental socio-economic right.[26] The right has also found its place in the other core UN human rights treaties.[27] The right is also part of some human rights instruments under the regional human rights system of the European Union, Inter-America, Africa, ASEAN, and the League of Arab States.[28]

3.3. The Right under the ILO Framework

Since its establishment, the ILO has been striving to create universal labour standards with a view of improving working conditions. Health and safety of workers is given primacy in the ILO Constitution.[29] So, to say, it is one of the

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[23] See V. Mantouvalou, *Are Labour Rights Human Rights*, EU Labour Law Journal (2012).

[24] However, attempts have been made and scholars have suggested aspects which should form part of the right. On the recognition, basis has been the availability of international legal standards, moral discourse as well as political discourse. Yvonne Oldfield refers to Collins crucial features of human rights to examine whether WHS meets the human right standard. The author is convinced that WHS meets the moral weight and universality tests and stringency and timelessness is left with the definition of scope; Y. Oldfield, *Safe and Healthy Work: A Human Right*, NZJER 39 (2), 80 (2014).

[25] See Supra 2. The author looks at the International Human Rights law classification of WHS as economic and social right

[26] Art. 23 The Universal Declaration of Human Rights, (United Nations); Art. 7, The International Covenant on Economic Social and Cultural Rights, (United Nations); - right to just and favorable conditions to work, and workers' health and safety right.

[27] UN Convention on Elimination of Racial Discrimination, UN Convention on Elimination of Discrimination Against Women, the Convention on the Rights of a Child and International Convention on Protection of the Rights of the People's with Disabilities

[28] Treaty of the Functioning of the European Union, Protocol to the American Convention of Human Rights on Economic, Social and Cultural Rights, 1988, African Charter of Human Rights, 1981

[29] The ILO Constitution, 1919.

reasons as to why the ILO was established.[30] The ILO has also adopted multiple conventions and issued recommendations on workplace health and safety.[31] The International Labour Standards by the ILO, are however undermining the status of WHS right.[32] Key WHS conventions subjects WHS right into standards which makes it less than a fundamental right.

The Declaration on Fundamental Principles and Rights at Work was adopted in 1998 with four core labour rights on it. WHS right was not part of the core rights. It encompassed fundamental rights with a civil and political nature in the name of right to work, freedom of association, collective bargaining, elimination of forced and compulsory labour, abolition of child labour and discrimination in respect of employment and occupation.[33] Ten years later, through the Seoul Declaration, WHS right was declared so by the ILO. WHS features in other key ILO instruments. However, the crafting of the provisions of the conventions downgrades WHS right to less than a fundamental right.[34]

3.4. The Human Right Approach to WHS

The right based approach is a strategy seeking to combat abuse, exploitation and danger on the job.[35] The argument is that workers' health and safety must not be excluded from core labour rights' discussion.[36] Health and safety involve human rights problems and crises.[37] Advocates of the human right approach to

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[30] Ibid; the object was to achieve universal social justice as well as safe working conditions.

[31] Key conventions are; Convention No. 155 (Occupational Safety and Health Convention of 1983); Convention No. 161 (Occupational Health Services Convention of 1985) and; and Convention No. 187 (Promotional Framework on Occupational Safety and Health Convention of 2006).

[32] Supra 1.

[33] Declaration of Fundamental Principles and Rights at Work 1998 (ILO).

[34] The standards of *in as far as practicable* or *as it may be practicable* etc.

[35] Supra 24 at 104.

[36] Supra 1 & 4; I.L. Feitshans, *Occupational Health as a Human Right*, ILO Encyclopedia (2011); Supra 24.

[37] Supra 2 at 43; it only requires a specific understanding of the issues and the issues aren't easily understood because of various reasons. In the US there is, for instance, little freedom, no

workplace health and safety are critical to the labour market efficiency on addressing health and safety problems associated with workers.

Spieler, refer to the labour market approach as a political approach and claims that it has failed to address the significant issues.[38] She offers various reasons in cementing her argument. According to her, economically speaking, markets cannot adequately address health and safety issues. There are imperfections within the market which are even acknowledged by labour economists including lack of information amongst workers, inability to refuse risk,[39] monopsony and the dumping of the injured and disabled workers. Those in high risks are not compensated with the so-called wage differentials.[40] Besides, markets have failed to identify non-economic reasons for workers assumption of risks.[41] It is argued that non-economic issues are left unattended by the market.[42] Besides the two, there is also noted the failure of the economic approach to address extreme health hazards. The incommensurability of human life as a critique to labour market theory of compensating wage difference also forms part of the reasons justifying the labour market failure to address WHS issues. Leaving WHS issues to market solutions is looked at as a relegation of such issues and with such relegation workers are left vulnerable to unacceptable conditions. Spieler notes;[43]

…In view of the egregious health and safety hazards in some workplaces, it can be argued that postponing the improvement of health and safety until market

liberty to challenge hazards, inaccuracy of statistics on fatalities from occupational diseases as there is not system of surveilling death causes by such diseases.

[38] Supra 1 at 91.

[39] Ibid.

[40] Long term-latent risks are, as well, not compensated.

[41] Including reasons attached to pressure from family and poverty. The argument that labour market offers a compensating wage difference to the risky workers remains redundant as it's not right when someone assumes risk without complete consent.

[42] Ibid, at 90; second markets do not provide justice or equality. Markets focus is on aggregate solutions which may in turn occasion injustices and inequalities in terms of wealth and risks.

[43] Supra 1 at 94.

forces can effect change is analogous to postponing the release of political prisoners who may die in prison until a despotic government is replaced through democratic elections. It is in fact the right to life that we are talking about when we talk about work safety.

Various other scholars have seen the danger of leaving WHS issues in the hands of the market itself. *Okun* observes the compelling nature of the right to survive and reiterates the principle that market should not legislate life and death.[44] Hilgert, quoting Mazzocchi is critical on approach to solving workers' health and safety problems. In Mazzocchi words; "*Ever since the Industrial Revolution, we vested the power to regulate with the producer. But I believe that you cannot solve occupational safety and health problems while those who produce are given the responsibility to regulate themselves. That system does not work …*"[45]

The human right approach to WHS is justified not only by the failure of the labour market approach but also the prospects over protection and promotion of workers. Protecting and promoting WHS as a human right will significantly address workplace menaces. The current approach is inhumane, placing value to human life. WHS and workers right generally comes next to production and profits. Developing a human rights analysis, Jeff reiterates the economic and social right character of WHS.[46] The need for human rights in industrial relations is justified for provision of the normative framework.[47]

Critical to the labour market approach and referring to workers in the US, Hilgert reveals such workers lack of meaningful collective bargaining. Mass of them cannot refuse unsafe work hazards.[48] It is the employer rights which are given

[44] Ibid at 95.
[45] Supra 2.
[46] Ibid at 53.
[47] Ibid at 54; unlike the labour market approach, the human right approach is free of theoretical biases and does not allow pre-existing theories in its application.
[48] Ibid at 49.

primacy. They are respected and protected. The health and safety rights of workers are secondary and with such positioning there is a room for human rights crises.[49] Hilgert concludes noting that the protection and realization of human rights of the workers, health and safety inclusive, is unlikely without recognizing a number of misconceptions posed by labour economists. Scholars are urged to catch up with the reality of suffering those millions of workers worldwide wish they had never come to know.[50]

4. WORKERS' HEALTH AND SAFETY RIGHT IN INDIA AND TANZANIA

4.1. Challenges and Necessity of the Workers' Health and Safety Right Discussion

Generally observed as a challenge to the Indian and Tanzanian legal and institutional frameworks for WHS protection is the insufficiency to addressing the present and future WHS issues. And this challenge is even acknowledged in the countries' occupational health and safety policies. Various threats, serious ones, contemporary and future ones, are reported.

WHS and other labour laws have not been able to address the challenges posed by globalization, shifts in paradigms in employment relationships, chemical and biological threats and other emerging technological threats towards WHS. It's these issues which brings in the discussion, a human right one, over the health and safety of workers and propose a human right approach to workplace health and safety.

[49] Ibid at 50.
[50] Ibid at 68.

Most of WHS laws were enacted without the impacts of Globalization in mind.[51] They have not been amended to address the evils of Globalization on OSH. Globalization has weakened the labour regimes of present day. Globalization has accelerated market systems with weakest capacities to create and enforce regulatory system to protect workers and consumers.[52] Multinational corporations interpret globalization as an opportunity for, *inter-alia,* low wage and removal of protective regulations for workers' health and environment rather than a contribution to improve health and wealth of the less developed parts of the globe.[53]

There has also been a shift of paradigms in employment relationship. The 20th C relationship of a worker for one employer is no longer in play. The 21st C has brought complexities in the relationship where an employee is of service to so many masters and some special categories of employees in the name of independent contractors, part time employees, day labourer's and those in the informal economy. These shifts are not covered by WHS laws of most countries. It is sometimes hard to know if they are protected, under which regulation or standard are they protected, and who has the responsibility to protect them.[54]

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[51] J.E. Myers, *Globalisation and Occupational Health*, OHSA 15, 16 (2004); Myers argues that to date, aspects of Globalisation, occupational health and agriculture sector have not been systematically drawn together in one text.

[52] See: M.S. Nkuhi & M.S. Benjamin, *Protecting Health of Rural Workers: An Assessment of the ILO and WHO Efforts, Encounters and Needs for the Future*, Indian Bar Review, 193 (2018).

Quoting R. G. Lucchini & L. London, an example of impact of market liberalization is offered with reference to Tanzania where pesticides distribution was carried out unregulated. Same challenge is noted in the WHO Declaration on Workers' Health 2006 and other recent reports.

[53] Ibid.

[54] J. Howard, *Seven Challenges for the Future of OSH*, Journal of Occupational and Environmental Hygiene 12 (2010); According to the commentary, the present standards (ILO Standards) were written without the paradigms in mind, See UN Special Rapporteur Report 2012 (UN Assembly).

The complexities have found places in the Indian and Tanzanian labour and employment relations. Difficulties in creating a nexus between occupational diseases and work environment are also observed.[55] Besides, there are chemical and biological threats which make the future of WHS volatile. Literature points out the export of agricultural hazards to the third world countries as one of the major threats to workers existence.[56] WHS laws of most of developing countries, India and Tanzania inclusive, are yet to address these threats.

The laws have not kept pace with the production and movement of such substances. The 2009 report on chemical and biological substances revealed the difficulty in finding reliable data on the substances. Data is often outdated and contradictory and there is missing information for about 95% of the substances.[57] More than thirty million organic and inorganic, natural and synthetic substances have been identified and registered worldwide. There are other emerging risks technological ones, other involving nano materials and intangible risks like stress. They are fast growing and exposing workers to the highest dangers of fatalities, diseases and injuries. The WHS Policies of India and Tanzania acknowledges the threats and the gaps in the WHS law and seeks to cure them.[58]

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[55] M.M.K. Sardana, *Health and Safety at Workplaces in India*, 6 (2010).

[56] Supra 2 at 51; the author sees the resurfacing of the problems, which the United States workers had faced before, in the developing world.

[57] Report of the International Labour Conference (ILC), *General Survey Concerning Occupational Safety and Health Convention, Recommendation and Protocol*, Report III, Part IB, (98th ILC Session) See Supra 1 at 717.

[58] India*:* Policy Item 1.6 provides *"The changing job patterns and working relationships, the rise in self-employment, greater sub-contracting, outsourcing of work, homework and the increasing number of employees working away from their establishment, pose problems to management of occupational safety and health risks at workplaces. New safety hazards and health risks will be appearing along with the transfer and adoption of new technologies. In addition, many of the well-known conventional hazards will continue to be present at the workplace till the risks arising from exposure to these hazards are brought under adequate control. While advancements in technology have minimized or eliminated some hazards at workplace, new risks can emerge in their place which needs to be addressed".*

4.2. Eyeing the Countries' Constitutions: WHS in the Bills of Rights

Labour and employment policies and legislation of most countries in the third world countries excludes/ do not guarantee WHS right. The exclusion is somewhat linked with the absence of political will rather than the availability of resources. The right does not form part of their Constitutions' Bills of Rights; Labour and Employment legislation, Regulations and Policies. Bills of Rights of many of these countries' constitutions omit or limit the enjoyment of economic, social and cultural rights. Fundamental human rights in the Bills of Rights are mostly civil and political in nature. The Indian and Tanzanian scenarios are not exceptional to the foregone.

WHS right is not embodied in Part III of the Constitution of India, 1950 which contains fundamental human rights. However, the Constitution provides for a limited protection in the name of the Directive Principles of State Policies (DPSP).[59] The limit is understood with the unenforceable character of such provisions.[60] On the other hand, the Constitution of the United Republic of Tanzania 1977 is silent on WHS right.[61] The Fundamental Objectives and DPSP are sketchy and too general to draw any reference on the constitution framer's intent to grant protection to the working class regarding their health and safety as it is the case with the Indian Constitution.[62]

Tanzania*:* Policy Item 1.3 *"Challenges, the promotion of occupational health and safety at enterprise and national level faces a number of challenges. The challenges to be addressed by the National Policy includevii) Fast technological development and globalization;"*

[59] Art. 39 (e), 42 and 43, The Constitution of India.

[60] DPSP are provisions which cannot be enforced in the court under the Indian and Tanzanian Constitutions.

[61] There is no judicial precedent to that effect.

[62] Art. 9, the Constitution of the United Republic of Tanzania; it addresses work, only right to work; nothing is on the conditions of work. However, an inference might be drawn from the Directive that requires use of national resources to eradicate diseases and that of preservation of human dignity in accordance with the UDHR. It is however subject to judicial tests.

4.3. Labour, Employment and Health and Safety Legislation

Employment and labour legislation provides for among others, the rights of workers. WHS right is sadly, not part of the bundle of rights forming part of the legislation in India and Tanzania. The rights to freedom of association, collective bargaining, elimination of all forms of forced labour, effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation are part and parcel of the labour and employment laws of most ILO member states including India and Tanzania.[63] WHS legislation are in place in India and Tanzania. The key legislation on WHS are the offspring of the British Factory legislation and they are partly influenced by the ILO standards on WHS. Occupational Health and Safety Acts/ Factories Acts, Mining/Mines Acts and Plantations Acts represents some of the many legislations in place and which seeks to protect WHS.

These legislations provide for protection of WHS through the imposition of duties and standards, prohibitions, sanctions as well as provisions of certain rights. The duties and standards imposed are to employers, occupiers, manufacturers and other persons whose acts and/or omission might affect the health and safety of workers. The obligations, standards, prohibitions regulate the use, handling, processing, transport, or production of substances, use of machinery and other tools, medical care and medical services, hazardous materials and processes and emissions to mention a few.[64]

WHS right is not part of the rights guaranteed by WHS legislation. There is a human right approach gap to addressing WHS issues looking at the provisions

[63] See The Indian Industrial Disputes Act, 1947 and the Tanzanian Employment and Labour Relations Act, 2004. With their civil and political character, it is easy to find back up in the Constitutions.

[64] See, The Indian Factory Act, 1948 and the Tanzanian Occupational Health and Safety Act, 2003.

of the WHS legislation. Like most ILO standards compliant legislation, highly influenced by the labour market approach, these legislations subject the health, safety, and welfare of the workers to standards less to human rights ones. They prescribe for preventive and protective measures, providing for duties, prohibitions and sanctions but with the standards of *as far as it is reasonably practicable, through the best practicable means, as soon as reasonably practicable* to mention a few.[65]

There is also too much discretion left to State and employers/occupiers regarding the taking of various health and safety measures.[66] Similarly, there is limited scope in terms of coverage which reveals that protection is only available for particular workers.[67] The latter is both under the preventive and curative laws. This denotes the absence and validates the need for human rights-based standards, under which, all workers coverage will be insured.

4.4. National Policies on Workers' Health and Safety

India adopted its National Policy on Safety, Health and Environment at Workplace in 2009 (the Indian WHS Policy). However, for a long time, the same has not been in use. On the other hand, Tanzania has a similar Policy namely, the National Occupational Health and Safety Policy of 2009 (The Tanzanian

[65] A few provisions substantiate the contention above. The Indian Factory Act, 1948 provides for health and safety measures including ventilation and temperature (s 13), dust and fumes (s 14) and lightning (s 17) such measures are required to be *adequate as practicable*, taken *as far as possible*, and *so far, as it is practicable*. Provisions of sections 54, 55, 61 and 66 of the Tanzanian Occupational Health and Safety Act 2003 have similar standards regarding provisions of measures to prevent water contamination, sanitary conveniences, measures to avoid inhalation of dust, fume or other impurity and safety on electrical installations and apparatus, respectively. The list of the standards is not exhaustive. The standards are in many more measures prescribed under this legislation.

[66] The Indian Factory Act, 1948 for e.g., provides for States obligations in making of rules to enforce specific health measures. These obligations are mostly discretional, i.e., the most use of 'State may' phrases.

[67] The Factory Act 1948 covering ten or more employees, Mining Act 1948 leaving out some mines, informal economies are also left out under both countries WHS laws, mostly curative laws.

WHS Policy). Both Policies were adopted with the aim of revealing government commitments in reduction of occupational fatalities, injuries and diseases.

Various policy issues have found their place in the policies as well as government commitments on setting up standards and enforce them.[68] Focus is on development of national standards on WHS. The question is whether or not there is reference to WHS right in the Policies. The Indian WHS Policy makes reference to the Constitution of India, particularly the Directive Principles of State Policy DPSP, deriving state responsibility regarding protection and promotion of health and safety at workplaces. There is no much on the Policy on WHS right except for a 'mention' of government firm belief WHS right is a fundamental right.[69]

The right is and its realization forms no part of the policy issues and mechanisms to realize the same. The Tanzanian WHS Policy on the other hand, recognizes the absence of clear and comprehensive legal framework on workers' health and safety. It does not, however, contain any provision regarding the protection of WHS as a fundamental worker right. The Policies intends to bring regular reviews on the current OSH legislation with a view of upgrading the same to regional and international standards.[70] Whether or not the upgrade will encompass the human rights perspectives, it is only a matter of time.

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[68] Mainly the lack of comprehensive legal framework on WHS, impacts of technological advancements and globalization, information and awareness, as well as low compliance issues.

[69] Policy Item 1.5.

[70] **India:** Program of action is set: "*4.1.4 by amending the existing laws relating to safety, health and environment and bring them in line with relevant international instruments 4.1.9. by making an enabling legislation on safety, health and environment at workplaces*";

Tanzania: Policy issue 3.2 Occupational health and safety legal framework provides; "*There is no clear and comprehensive legal and regulatory framework for occupational health and safety. Lack of specific occupational health and safety national standards consistent with the regional and international conventions and treaties and for the purposes of enforcement and compliance. Objective – enact a clear, comprehensive and harmonised legal and regulatory*

4.5. Judicial Decisions vis a viz the Present Standards

In India, various judicial pronouncements have recognized WHS as a fundamental workers' right. The Indian Supreme court's decisions have declared WHS right as a fundamental right under the ambit of the right to life, right to dignity of a person, right to social justice.[71] The Landmark decision was made by the Supreme Court in the case of *Consumer Education and Research Centre v Union of India*.[72] The Supreme Court held;

The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which a worker would lead life of misery. Lack of health denudes his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning to himself and his dependents should not be at the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore, it must be held that the right to health and medical care is the fundamental right under Articles 21 read with Article 39(c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with the dignity of a person…

The decision is crucial to workmen, women and children in India, and has been followed by many other courts providing for massive judicial protection on

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framework consistent with the Policy. Government in collaboration with stakeholders will develop national OSH standards in harmony with regional and international standards."

[71] Consumer Education and Research Centre v Union of India (1995) AIR 922 (1995) 1 SCR 626.

[72] Ibid.

various workers against multiple workplace menaces.[73] The Supreme Court directions to central and state governments have been key to improvement of working conditions.

In Tanzania, the Constitution guarantees the right to life under Article 14, however there has not been, so far, a test in terms of a petition for the protection of workers' health and safety as a fundamental right. Unlike India, the DPSP under the Tanzanian Constitution are sketchy and makes a too general reference to 'diseases', which makes it even harder to think of petitioning to establish a nexus between right to life and right to workmen health and safety.[74] That notwithstanding, the Tanzanian judiciary has been proactive in protecting workers against precarious working conditions. The high court, labour division, has recently acknowledged the workers' right to refuse work which poses imminent danger distinguishing it from the right to strike.[75] There have also been a series of compensation awarded by the labour courts to victims of workplace hazards but so far on the grounds of unlawful termination. [76]

Judicial role essential but the framework (legal and institutional) must be clear, comprehensive and must provide for the WHS right which shall apply to all workers and must encompass State positive obligations in the protection and promotion of WHS right as a socio-economic right. So far, a few elites are aware of the fundamental character of the right in and the judicial decisions in place. Majority, who are also victims of the occupational hazards, are in darkness.

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[73] See, M.C. Mehta v State of Tamil Nadu AIR 1997 SC 699; *Bandhua Mukti Morcha v. Union of India and Others* (1997) 10 SCC 599 *and Occupational Health and Safety Association v. Union of India and Others* (2014) 3 SCC 547.

[74] It requires a bold spirit judge to declare WHS right a fundamental right with the current legal set up especially the concerns over the positive duties on the State.

[75] Amboni Plantation Ltd v Athumani Mbaraka & 148 Others Revision No 1 of 2016, High Court of Tanzania, Labour Division - Tanga (Tanzania).

[76] Vodacom Tanzania v Zawadi Bahenge and 6 others [2013] LCCD 1 (Tanzania).

In the judicial records, WHS is a fundamental right but examining the current WHS legislation and their provisions, the standards adopted and in operation are way less to buy the idea of WHS as a fundamental workers' right. Same is the case with obligations set by the legislation. They are too discretional especially on part of the State and the employers regarding measures to be taken in protection of workers' health and safety which implies the protection of their livelihood. This is the reason the right should be part of the WHS policies, legislation, and constitution of the countries. They When will the right be recognized as a as a fundamental and enforceable socio-economic right capable of judicial enforcement? Will workers have an avenue to sue the government for damages on its failure to protect them against hazardous works as required under international human rights regime?

5. RECENT DEVELOPMENTS IN WHS PROTECTION: NEW HOPES FOR WORKERS?

India and Tanzania have recently opted for legislative and constitutional and statutory reforms, respectively, intending to address some gaps in protection of WHS. The question is whether or not such reforms will cater for the human right standards on WHS. India is seeking to simplify, amalgamate and rationalize its central labour laws. This is in accordance with the 2nd National Commission of Labour recommendation. The reforms, introduces four major labour codes in India, Code on Wages; Code on Industrial Relations; Code of Social Security and Code on Occupational Health, Safety and the Working Conditions. The latter i.e. The Occupational Safety, Health and Working Conditions Code, 2019 (herein the WHS Code 2019 or WHS Code), amalgamates 13 laws relating to OHS in India including the Factories Act, 1948, Mines Act, 1952, the Building

and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Plantation of Labour Act, 1951.[77]

Promulgated in 2018, after discussions by relevant stakeholder it was tabled before the Parliament in July 2019. The WHS Code is a Government of India response to longstanding calls on comprehensive legislation and umbrella institution for WHS protection. The Code ultimate effect will be the enhancement of coverage through its application to all establishments with 10 or more workers not only in industries but also IT establishments and service sector.[78] The Code has kept intact most of the preventative provisions from the legislation it amalgamates. Provisions are, however, defined to encompass protections not only to the workers in specific sectors but all other workers in establishments employing 10 or more.[79] Specific provisions for workers in mines, factories, construction are also part of the Code.[80]

Looking at the WHS Code 2019 generally, it has certain important features significant to take note of. Foremost, the Code offers a broad legislative framework. It is a broader enactment with a few provisions on its own and the rest being enabling provisions on sectoral subsidiary legislation and bye-laws. The Code is also bringing institutional reforms on WHS in India. The National

[77] Other legislation which will be subsumed by the Code are: The Working Journalist (The Fixation of Rates of Wages) Act, 1958; The Working Journalist and other Newspapers Employees (Conditions of Service and Miscellaneous Provisions) Act, 1955; Motor Transport Workers Act, 1961; The Beedi and Cigar Workers (Conditions of Employment) Act, 1966; The Contract Labour (Regulation and Abolition) Act, 1970; Sales Promotion Employees (Conditions of Service) Act, 1976; Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; The Cine Workers and Cinema Theatre Workers Act, 1981, Dock Workers (Safety, Health and Welfare) Act, 1986.

[78] Ones governed by local shops and establishment legislation.

[79] The Occupational Safety, Health and Working Conditions Code, 2019, Chapter III, IV, V and VI; Chapter III is on Duties regarding Occupational Safety and Health and Chapter IV is on Occupational Safety and Health Regulation. Chapter V caters for the provisions on health and working conditions and employers' responsibilities. Chapter VI comprises of welfare measures in the establishments.

[80] Ibid, Chapter XI, Parts III, V and VI respectively.

and State Occupational Safety and Health Advisory bodies will be brought into existence.

Moreover, the Code seeks to formalise employment and provide free annual health checkups including free annual checkups to retired workers.[81] Finally, (for this paper) the Code enhances criminal sanctions including payment of up to 20 lakhs as fine for a prolonged breach of the Code regarding hazardous processes and works.[82] It is significant to note that the Code bars civil suits.[83] After the enactment, all the aforementioned legislation will be subsumed. On WHS right, the Code, as it is, seems to have not encompassed critical components of WHS right and respective sanctions for non-compliance. Whether or not these will be taken aboard, it is only a matter of time.

For the United Republic of Tanzania, the 1977 Constitution contains no provision on WHS right. However, following the Constitution Review process, there is a Proposed Constitution for the United Republic of Tanzania in 2014. The Proposed Constitution encompasses WHS as a fundamental right in the Bill of Rights. The Constitution is yet to go through the referendum. It is not certain as to when the same will be held. Notably, there is also a move to amend the 2003 Occupational Health and Safety Act with a view of keeping pace with changes that have so far occurred. Whether or not the amendment will reflect the changes including the ones in the Proposed Constitution (recognizing WHS as a fundamental work and employment right), time is of essence in providing the answer.

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[81] Ibid, S. 18(2) (c).

[82] It also prescribes for fines for noncompliance leading to death or injury to the tunes of five lakhs and two lakhs respectively, S. 95, Where such noncompliance is on hazardous work, process, the fine is one up to 20 lakhs. S. 94 Imprisonment terms extend up to three years. Non maintenance of register, records, and non-filing of returns, fine fifty thousand rupees to one lakh rupees S. 89.

[83] Ibid, S. 113.

6. WAYS FORWARD

The present Indian and Tanzanian labour and employment policies and legislation are not sufficient enough to protect workers from workplace hazards. WHS right is somewhat downgraded. Moreover, to a greater extent, it is because of protecting the interests of producers as Hilgert rightly states; '*in our global society production comes first, and moral concerns addressed through social regulation of the economy, second*', calling for the reversing of the order.[84] The reversing is significant in an attempt to rescue mankind against workplace fatalities, diseases and injuries. The reversing is critical for both countries. The two shall, *inter alia*, take all the necessary measures, legislative and socio-economic ones inclusive.

Elsewhere, the first author has proposed for multiple measures in an attempt to ensure that WHS right is realized effectively.[85] Recognizing and protecting WHS as a fundamental socio-economic right of the workers is amongst the measures. They extend to doing away with arbitrary clauses (the *in as far as*

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[84] Supra 1 at 735

[85] See: M.S. Nkuhi, M.S. *Legal Regime for Workers' Health and Safety: Human Rights Dimension with Reference to India and Tanzania*, PhD Thesis, University of Mysore, 2019. The author proposes for the enactment of umbrella legislation recognizing the recent developments in India (the adoption of the WHS Code in 2019). There are specific reforms called for including reforms of the WHS bodies and frameworks. In order to do away with the problem of multiple regulators and multiple standards, the author calls for an umbrella national WHS body for India (acknowledging the developments under the WHS Code 2019). Besides, the author proposes the tackling of WHS problems with a Human Right Approach, Recognizing WHS as a fundamental socio-economic right (calling for necessary constitutional amendments), incorporation of critical WHS rights in WHS legislation and policies, removal of flexible and ambiguous clauses in WHS legislation, putting in place effective framework for business and human rights, Expanding the scope of right to life in Tanzania (to encompass elimination of WHS hazards in Tanzania), stringiest measures and regular follow ups for the most hazardous occupations, ensuring effective enforcement of the laws, ratification and considerations of automatic application of critical WHS treaties, enhancing the roles of courts and human rights institutions, ensuring provision of adequate occupational health services to workers, promoting voluntary preventative compliance culture, expansion of workers' compensation coverage and benefits and removal of bars to common law suits, development of national WHS management information systems as well as sustainable research and development for WHS protection.

practicable or *as might be reasonable* standards), which subject WHS into less than a fundamental worker right, in the Indian and Tanzanian labour legislation. There are proposals for removal of limits regarding coverage i.e., laws should provide protection to all workers. The starting point shall be the WHS right recognition in the Bills of Right of the Indian and Tanzanian Constitutions. Besides employers civil and criminal liabilities there should also be human rights one which will also encompass State obligations to protect, respect and fulfill the right.

One of the most acknowledged challenges in human right scholarship is the defining of WHS right. The scope of the right has attracted scholarly discussions. By defining the right and providing for its scope, there is room for effective protection and implementation. The existing literature confines WHS right to the *right to information, freedom to raise concerns, right to refuse or decline unsafe work, right to be free from retaliation for raising concerns or refusing unsafe work, right to work in the environment that is free from hazards, right to participate in health and safety issues* as well as the *right to occupational healthcare.* Therefore, taking the right-based approach implies guaranteeing of the above rights and thereby imposing duties to the other actors, government and private sectors altogether.

Human rights as international norms advance a particular approach to government policy which has to be examined through the lens of effectiveness and are to be the first responsibility of governments.[86]

6.1. Guaranteeing the Right to Information

Foremost, right to information shall be part and parcel of labour and employment policies. [87] Protecting health and safety with the right based approach implies

[86] The Vienna Plan of Action, 1993.
[87] Supra 13 at 20.

guaranteeing the right to information to the workers. *Yvonne Oldfield* reiterates Gary Fields' position that 'no one has the right to expose another to unsafe or unhealthy working conditions without the fullest possible information.' Alli adds further qualifying the right as one to 'adequate' information.[88] It should be information that is adequate so as to allow the worker to exercise his discretion of undertaking or not to undertake the particular work under conditions shared thereof.

6.2. Ensuring the Freedom to Raise Concerns and Freedom from Retaliation for Raising Concerns and/or Refusing Hazardous Work

Labour and employment policies and legislation should encompass freedom to raise concerns. Freedom to raise concerns is another important component of the WHS right. Workers should be guaranteed with the freedom to 'sound the alarm' whenever it is necessary to do so. By so guaranteeing workers will not be subject to employers' retaliation as it is the case in our labour markets today. Furthermore, as part of recognizing and enforcing WHS right, right to refuse or decline unsafe work must be part of labour and work policies and legislation.

Workers should be guaranteed with the option whether or not to undertake an unsafe work. In addition, thereof, workers should be protected from employers' retaliation upon such refusal or decline. Ensuring their protection against retaliation by employers for raising concerns or refusing hazardous work will partly guarantee their health and safety. The right addresses the question as to whether or not a worker should stay and fight or quit. It is the right that is protective of the worker in case of his refusal to do an unsafe work or where he

[88] Ibid.

raises concerns on occupational hazards. It guarantees workers' tenure and ability to stay and fight, instead of quitting.[89]

6.3. Right to Work in an Environment that is Free of Predictable, Preventable and Serious Hazards

Similarly, WHS right encompasses the right to work in an environment that is free of predictable, preventable and serious hazards.[90] Working in environment that is dangerous offends human rights standards. Thus, cases of human rights violations emerges when employers deliberately and intentionally expose workers to preventable, predictable, and serious hazards. A universal principle that no worker should work in the conditions that involve knowing exposure to preventable, predictable, serious risk is of essence under the present discussion.[91] It is also expected that future labour and work policies and legislation will ensure WHS right by guaranteeing *workers' participation* in in WHS issues and undertakings. Workers' participation in programs and other workplace activities regarding improvement of workplace health and safety must expressly be provided for. It is the workers are well informed about the nature of health and safety problems at workplace. Guaranteeing their participation will bring meaningful contribution and improve health and safety at workplaces.

6.4. Right to Access Quality Medical Care for Occupational Disorders

Another important aspect in approaching WHS as a human right is guaranteeing the right to access to medical care for occupational disorders to all workers. The right to health care for occupational disorders should be recognized and realized. Integrating it with universal health care may also serve a purpose. It is a critical

[89] Supra 1.
[90] Ibid, at 99.
[91] Ibid, at 104.

component of both the curative and preventive measures in workplace health. It is up to the future work and labour policies and legislation to address these.

6.5. Right to Remedies for Violation of WHS Rights

Violation should entitle workers of the human rights remedies. Including compensation claims for human rights violations against not only the employer or the State as an employer but also the state under its positive and negative obligations under international human rights treaties regarding WHS right.

Taking a human right-based approach to occupational health and safety would be of great significance in transforming health and safety at workplaces. Workers' dignity, freedoms and lives will be protected. Similarly, the primary obligations of states will be re-enforced. The obligations to respect, protect and fulfil will be binding upon states and thus measures, including progressive ones, will be taken. The right will equally apply in the private sectors.[92]

The right-based approach would also be useful in condemning and remedying massive and horrifying workplace hazards. Massive violations and hazardous disasters will be, as case may be, violations of human rights. The right based approach can provide an avenue for individual employee to confidently adjudicate where the right has been infringed, is infringed or likely to be infringed. This does not mean, however, that the right to collective bargaining will not be in force. The status of workers' health and safety would be one of not just a workplace right but a core and human right.

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[92] Supra 1 at 79; the start is with the UN Guiding Principles on Business and Human Rights which recognizes the responsibility of companies to respect human rights in their operations. See, E.R. George, et al, *Recognising Women Rights at Work: Health and Women Workers in Global Supply Chain,* Berkeley Journal of International Law, 4 (2017).

7. CONCLUSION

Protection and promotion of WHS right has been and still is dim. Globally, about 300 years since the first initiatives to protect workers were taken, the progress is too slow, painfully slow. Protection of WHS has been and is being discussed a great deal but in most instances little or nothing is done about it. There has to be a change in the approach. WHS right has to form part to our *Grundnorm* as well as work and labour policies and legislation. The human right approach is inevitable at this juncture. With a possibility of advent of new pathologies, stress, AIDS, robotics related injuries, geriatrics, space travel sickness, genetic aberrations[93] the best approach to protect workers from workplace fatalities, diseases and injuries will be protecting and promoting WHS as a human right.

The right-based approach will create norms which will apply to all workers and guarantee them with *inter-alia,* a bundle of rights including that to information, raise concerns, refuse hazardous works, freedom from employers' retaliation, participation and safe workplace rights as well as access to health care. A successful protection of WHS is also dependent on creation of sustainable national WHS system, surveillance, reporting and recording systems, WHS right standards and their enforcement, as well as sanctions, both civil and criminal. Future for WHS in developing nations is hard to predict. Writing on the Indian context, Parekh explains how the lack of epidemiological data and information has made it difficult to predict. The future depends with our law makers and enforcers as well as the employees' literacy.

It is important thus there should be considerations for labour policies with human rights foundations on WHS. As Hilgert correctly links the future with change of approach from national labour policy models on market voluntarism to human

[93] R. Parekh, *Future of Occupational Health: A Prospection*, Indian Journal of Occupational and Environmental Medicine, 8, 6 (2004).

rights at the working environment,[94] applying human rights norms to new realities is required in a world of precarious employment, increasingly disorganized work, and hazardous workplaces.[95]

[94] Supra 1 at 734.
[95] Ibid, at 735.

LABOUR LAW AND TECHNOLOGY: STUDY APPLICATION-BASED TRANSPORTATION IN SOUTH JAKARTA, INDONESIA

***Willy Farainto*[*], *Annisa Fathima Zahra*[**], & *Lorita Fadianty*[***]**

Abstract

The presence of technology in the business world is fundamental. In Indonesia, the presence of application-based transportation in the transportation business has disrupted the conventional transportation. The pattern of relations in application-based transportation based on a partnership agreement between the driver and a platform that is the affiliation of many companies. The driver is constructed as individual entrepreneurs who own the vehicle and not as non-employee. However, the driver's position as an individual is weak and does not have a bargaining position in the partnership agreement. The driver also loses all rights contained in the Indonesia Manpower Law No. 13/2003. This paper raises the issue of how the driver's relationship pattern with a fair platform for the parties should be and how is the legal protection that needs to be built on the individual driver. With the qualitative approach and constructivism paradigm, the paper suggests two conclusions: (1) The freedom of the platform to make the construction of partnership relationships with drivers need to pay attention to the position of drivers as vulnerable and need protection. So, it is necessary to reconstruct the partnership agreement between platform and driver. (2) Limitation of distributive justice is needed by the government in an effort to protect drivers by regulating platform partnership agreements. The government can still protect drivers without interfering in the consensus generated by the platform with drivers.

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Keywords: Driver, Legal protection, Manpower Law, Partnership Agreement, Platform

1. INTRODUCTION

Justice is one of the basic values of human life and is a classic problem that has never been completely resolved. The absence of appropriate interpretation for justice encourages people to try to formulate and define it according to their respective background of knowledge and experience[1]. Justice for employees can be found in Article 5 and 6 of the of the Indonesian Manpower Law No. 13 of 2003 (hereinafter "Manpower Law") explaining that employees have the same rights to obtain decent work and livelihoods and obtain equal treatment without discrimination from employers. Employees under the Article 1.3 of Manpower Law are those who work by receiving wages or other forms of rewards. Whereas the employers in Article 1.5 of Manpower Law are defined as individuals, partnerships and legal entities that run a company, either their or others' own. Conceptually the relationship between employees and employers based on Article 1.15 and 50 of Manpower Law is referred to as an employment relationship. Employment relationship occurs when employee and employer entered into an employment agreement, which contains elements of wages, orders and work. Wage is a reward or in other forms, while a work represents a performance made by the employee for the employer.[2] The element of the order may come about when there are dependency and subordination relationships[3].

This explanation shows that Manpower Law has a rigid definition of who the employee is, who the employer is and how a relationship is called as the employment relationship. An employer who has an employment relationship

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[1] K. Britton, *Philosophy, and the meaning of life Filsafat Sebagai Lentera Kehidupan*, 24 (1st ed., 2009).
[2]A. Uwiyono & S. H. Hoesin, *Asas-Asas Hukum Ketenagakerjaan*, Rajawali, 57 (Press, Jakarta, 1st ed., 2014)
[3] Ibid.

with the employee is obliged to carry out legal obligations regulated by Labour Law, such as paying a minimum wage, limiting work time, paying overtime pay, giving leave permission, including employees in labour and health social security programs and etc. Instead, if the pattern of relationship does not meet all the subjective requirements in the form of employers and employees as well as objective requirements in the form of employment agreement that contains elements of wages, orders, and work, the relationship cannot be called as an employment relationship. The consequence of the pattern of relationship beyond the employment relationship is that the rights and obligations regulated by Manpower Law are not mandatory to do for the parties.

Sometimes, the pattern of relationship in society seems beyond the Manpower Law by calling it a partnership agreement rather than an employment agreement, even though it could actually be an employment relationship. For example, a partnership relation between driver and transportation company that seems to have entered into a partnership agreement based on freedom of contract[4]. The driver is a person who works as a driver and Indonesian Manpower Law does not distinguish which type of driver is protected by labour law, so that the driver bound by employment agreement are referred to as an employee. However, the driver's work time is difficult to regulate due to its flexible nature which makes the employers personally organize how to get out of the concept of employees regulated by the labour law, i.e., by making the pattern of employment relationship to be a partnership relationship. The research results[5] on the conventional transportation partnership agreement found that the partnership agreement met the elements of employment agreement and subject of the

[4] S. Williston, *Freedom of Contract*, 6 The Cornell Law Quarterly, 365 (1921) available at https:// heinonline.org/HOL/LandingPage?handle=hein.journals/clqv6&div=28&id=&page=, last seen on 04/11/2018

[5] W. Farianto, *Menuju Perlindungan Hukum Bagi Pekerja dan Pengusaha yang Berkeadilan: Suatu Telaah Paradigmatik Tentang Hubungan Kerja di dalam Undang-Undang No. 13/2003 tentang Ketenagakerjaan*, 198-208 (1st ed., 2018)

employment relationship, so that it was actually an employment agreement. Nevertheless, the driver and transportation company have already felt comfortable with the results of their agreement where the work time is very flexible. The conventional transportation partnership agreement can be understood and is not a problem because the Manpower Law is not able to regulate work time.

Today there is an application-based transportation partnership agreement; each party has a division of roles so that an ecosystem[6] is formed for the sustainability of its business. The application-based transportation partnership agreement involves 5 parties, one of them is a driver as an individual who acts on himself. Driver is directly associated with 4 companies that are established in affiliates where it is very difficult to ensure that the driver has a balanced position. Even if the driver as an individual has means of production in the form of a vehicle, his bargaining position is very low under the standard agreement so that he is subject to unilateral suspension/account blocking which may cause him unable to use the application facility to meet the consumers.

In application-based transportation, a driver is designed in such a way with gamification of work [7]. Drivers are positioned as independent entrepreneurs even though they are actually defecting because they cannot move and are bound to the application. Lack of protection against basic tariffs and payment of promos in partnership agreements make drivers ultimately unable to rely solely on cheap tariffs as income to meet their needs. Another alternative for drivers to keep the amount of income is to try to achieve the daily bonus earned after reaching the target. Employees are trapped in false consciousness[8] which causes them to be

[6]R. Kasali *The Great Shifting, Series on Disruptions,* 21 (1st ed., 2018)
[7]*Drivers' stories reveal how exploitation occurs in Gojek, Grab and Uber,* The Conversation, available at https://theconversation.com/drivers-stories-reveal-how-exploitation-occurs-in-gojek-grab-and-uber-82689, last seen on 04/11/2018.
[8] See K. Marx, *Capital A Critique of Political Economy* (1887).

manipulated to continue playing their role as drivers without being able to innovate or change anything as partners in the partnership agreement.

As a constructivism, the researchers see the practice of gamification of work in partnership relations not as mistakes or wrong patterns. Nevertheless, in doing so, the position of the driver as a weak individual must be treated as his capacity. For example, the driver questioned the absence of a clarification when suspension sanction was given and the delay in payment of promo which took up to 3 days. Arbitrariness or tyranny by a platform having a strong position that will potentially lead to mass opposition must be avoided. Therefore, to avoid such problem then the driver's position in the partnership agreement that becomes the law for the parties must be improved, especially the problem of balancing the rights between the platform and the driver as individuals. An agreement that covers all the parties and becomes a reference for this further policy must not have a different treatment for the parties.

This research will also try to analyze whether the driver's relationship pattern in a partnership agreement represents a balanced partnership relation or there is a less balanced position, and how the driver's relationship pattern with a fair platform for the parties should be. Even though application-based transportation partnership agreement cannot be categorized as employment agreement that may generate employment relationship, but how the legal protection needs to be built on individual drivers who make and enter into partnership agreement with the platform?

2. RESEARCH METHODS

This research is advanced research from the Willy Farianto's research entitled "Towards Legal Protection for Fair Employees and Employers: A Paradigmatic Study of the Employment Relationship in Manpower Law." In contrast to the previous research that discussed various relationship patterns in society,

including application-based taxi partnership patterns, this research will discuss both modes of transportation, motorcycle as well as car. This research also analyzes how the Indonesian law may exist in the relationship pattern of application-based transportation, so that the partnership agreement can be made fairly to accommodate partnership relations of application-based transportation.

This research is a qualitative[9] legal research. The qualitative research was important and useful to involve us in important things in a more appropriate way. The objective of this research was to reach the depth of data (not the number of data). Because the objective was the depth of data, it needs the selected informants/key informants. This research uses the constructivist paradigm, in constructivist qualitative research, the research motives are (1) to explore; (2) to criticize; and (3) to understand[10]. Four topics that cover paradigmatic differences in this research are as follows: (1) ontology, is the nature of the employee/driver; (2) epistemology, is the application company and driver relations; (3) methodology, is how to build partnerships; and (4) method, is the practice of fairly legal protection.

This research wants to find out how application-based transportation partnership agreements are understood by key informants and informants where this is in line with the method of constructivism which rejects generalizations and attempts to produce unique descriptions of social reality.[11] Key informants are the decisive research subject in this research because they are actors in implementing partnership relations, while informants are those, who based on their experiences and knowledge have interacted socially with the actors in the implementation of partnership relations. Based on these qualifications, the selected key-informants in this research were: application-based car drivers,

[9]J Grondin, *History of Hermeneutics from Plato to Gadamer*, 72 (2010)
[10] Ibid.
[11] S. Rohman, *Hermeneutik Panduan ke Arah Desain Penelitian dan Analisis, 24 (1st ed., 2013)*

application-based motor riders and the transportation company. The informants in this research were people as application-based motorcycle or car users and insurance company. This research held in South Jakarta at 23-24 November 2018. This research also used the Supreme Court and Constitutional court judges' decisions as well as government regulations in this case the Ministry of Transportation.

3. RESULT & DISCUSSION

3.1. Understanding The Indonesian Manpower Laws

Article 1.15 of Manpower Law defines an employment relationship as a relationship between an employee and an employer based on an employment agreement. There are 3 elements of an employment agreement: job, wage and order. Wage is compensation by the recipient for the job done. Wage may be in monetary or non-monetary form. A job should be done by the employee himself/herself and may not be transferred to another person. Order means a dependence on instructions / directions from the owner, so this is pretty much of a subordination relationship.[12]

The subjects in an employment relationship are the employee and the employer. Article 1.3 of Manpower Law defines an employee as any person working for a fee or other form of compensation. Moreover, pursuant to Article 1.5 of Manpower Law, an employer is an individual, a partnership or a legal entity running a company owned, either by it/him/her or by another person. Any obligations arising from an employment relationship under Manpower Law must be performed and fulfilled by any incorporated or unincorporated employer employing an employee.

Fig. 1

[12] Supra 2.

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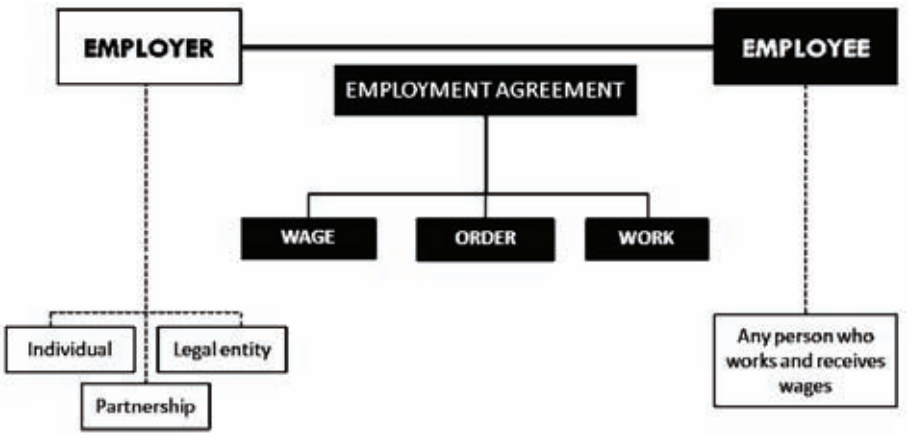


Manpower Law also does not define the differences of small, medium and large-scale employers in performing the obligations they have under Manpower Law when employing an employee. The Indonesian Law No. 20/2008 regarding Micro, Small and Medium Businesses (hereinafter "UMKM Law") defines micro business as a business which has a net worth of no more than IDR 50,000,000. Small business is defined as a business which a has net worth of more than IDR 50,000,000 up to no more than IDR 500,000,000. Medium business is defined as a business which has a net worth of more than IDR 500,000,000 up to no more than IDR 10,000,000,000.

3.2. Understanding The Relationship Between Transportation Drivers and Platforms

A partnership agreement in transportation businesses originally involved only the drivers and the transportation company. The relationship between the drivers and the transportation company, although it is so called a partnership agreement, is actually an employment relationship because it meets the subject of an employment relationship and the elements of an employment agreement.[13] A partnership agreement between a driver and a transportation company is

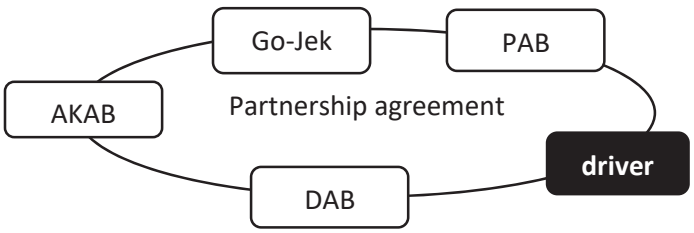
[13] W. Farianto, *Loc. Cit.* (1st ed., 2018)

different from a partnership agreement between a driver and the current platforms due to disruptive technology.

Disruption actually is a change that we experience every day.[14] The difference is that in disruption, changes take place radically and revolutionarily, known by the term '3S', sudden, speed and surprise, which could trigger tension and chaos.[15] One of the technologies disrupted in Indonesia is transportation, which also occurs in many countries. Today, the public can access transportation quickly, practically and at a more affordable price. Disruptive technology in transportation uses a platform approach with the involvement of many parties in a partnership agreement in which each plays their respective roles and is dependent on one another.

Fig. 2

The pattern of partnership agreement in Go-Jek Platform



A platform is made up of affiliated legal entities for the purpose of conducting an integrated business. In transportation business, this pattern can be found in Go-Jek and Grab, which are large transport platforms in Indonesia. Companies that affiliate with Go-Jek platform include PT Applikasi Karya Anak Bangsa (AKAB), Go-Jek, PT Paket Anak Bangsa (PAB), and PT Dompet Anak Bangsa

[14] R. Kasali, *Tomorrow is today: this is the disruptive innovation of Indonesian companies in facing invisible competitors*, 36 (5th ed., 2018).
[15] Ibid.

(DAB). PT Aplikasi Karya Anak Bangsa is the owner of the Go-Jek application which is used by registered customers to obtain pick and drop services for goods and/or persons, order and delivery services for other goods or services using two or four-wheeled motor vehicles or other services. Go-Jek is a company which manages third-party services providers working with AKAB. PT Paket Anak Bangsa is a company which is affiliated and works with AKAB in the provision of postal services. PT Dompet Anak Bangsa is a company which is affiliated and works with AKAB in the provision of electronic money services. These four companies maintain a partnership agreement with individual drivers. A driver, under the partnership agreement, is defined as a partner who picks up and drops goods and/or persons, orders and delivers goods pre-ordered by a customer, or performs other services via Go-Jek application. The same also occurs to the Grab platform, where Grab identifies its drivers as a partner, rather than as an employee or a contractor.

To figure out whether a partnership agreement between the driver and the platform is actually a partnership relationship or an employment relationship, there should be an analysis on the existence of employment relationship subject and employment agreement elements.

Parameters of the employment relationship in a partnership agreement between the driver

Subject of Employment	**Employer**	✓
	Employee	✗
Elements of Employment Agrement	Wage	✗
	Order	✗
	Work	✓

the wage and job elements of the employment agreement. The description below

helps identify whether or not the 3 elements of an employment agreement exist in a partnership agreement between a platform and a driver:

- Wage element: Drivers are of course given a bonus as their additional income when they have reached certain points. However, their earnings are not derived from one of the companies in the platform, but rather from passengers after dividing the percentage to which the platform is entitled as agreed upon in the partnership agreement. The wage element of a partnership agreement between the platform and the driver is therefore not met.

- Order element: In a partnership agreement there is a distribution of duties of each of the parties based on their respective capacities. Order element in a partnership agreement between the platform and driver is therefore not met, because it is coordination, rather than subordination in nature.

- Job element: By understanding the pattern of the recruitment by the application company which uses online forms to drivers, it would be difficult for drivers to transfer their job to another person. Application company limits the registration of 1 driver to 1 account, to the exclusion of other accounts. This is so due to the fact that the driver's pattern of relationship with the application company is individual in nature. On the basis of that, activities of drivers may be categorized as a job element.

The explanation above leads to a conclusion that only job element of the elements in an employment agreement is med, as the order and wage elements are not met. Since the wage element is not met, application-based drivers are not a subject of an employment relationship and cannot be identified as employees, but rather they are more precisely identified as an individual employer because they employ their own production equipment in the performance of their jobs.

Thus, the partnership relationship of the driver and the application company and their affiliates is actually not an employment relationship.

3.3. The Public Understanding of The Relationship Between the Transportation Drivers and The Platforms

In constructivism research, it is important to understand the perspective of each party in maintaining a relationship from both the driver's and the platform's sides. The platform's point of view can be seen from the standard partnership agreement it prepares, while the drivers can be seen from the questioners in the interview performed by the researchers. This research will show how motorcycle and car drivers actually view their relationship with the application companies under a partnership agreement. Of all the key informants researched, they use only Grab or Go-Jek application for both car and motorcycle. There are 7 points to be discussed one by one based on the data obtained.

3.3.1. Relationship Between Driver and Go-Jek/Grab

The researchers tried to elicit the public understanding of the transportation business pattern using a platform. Many of the key informants and informants knew that the pattern of the relationship between the driver and the platform is a partnership relationship. 90.9% of the key informants knew that the relationship between drivers and Go-Jek/Grab is a partnership relationship (partner-partner), while the other 9.1% stated that the relationship is an employment relationship (employer – employee). It is true that a partnership agreement explicitly mentions that partnership agreement is not an employment agreement. Applicators, as the party preparing the standard agreement, construe that their relationship with their drivers is as a partner. The signing by a driver of the agreement would, under the principle of pacta sunt servanda[16], constitute

[16] M. P. Sharp, *Pacta Sunt Servanda*, 41 *Columbia Law Review*, 783, 783 (1941), available at www.jstor.org/stable/1117839, last seen on 04/11/2018

the driver's acknowledgement and agreement that he/she plays the role of a partner in the partnership agreement. The data above shows that the key informants and informants mainly knew that an agreement between a driver and an application company is a partnership agreement.

3.3.2. Relationship Between Driver and A Transportation Company

The researchers felt it necessary to find out how far the key informants knew what relationship is established between a transportation company and driver. The result of the research shows 45.5% of them responded that the relationship is a partnership relationship (partner-partner), 21.5% did not establish a relationship with a partner because their vehicles are their own motorcycles, 15.2% considered it an employment relationship (employer-employee), and the other chose to abstain or had no idea. Many of the key informants and informants knew that maintaining a relationship with the platform, a car driver directly interacts with the platform or may, if the driver does not have his/her own car, maintain the partnership with a transportation company for car rental. As for a motorcycle driver, since Indonesia does not recognize motorcycle as a public transportation for safety reason, there is no public transportation company for motorcycles. The research shows that all motorcycle drivers establish a direct relationship with a platform as a partner.

The data shows that many of the key informants and informants choose partnership relationship, in which a partnership agreement between a transportation company and a driver is based upon ownership, lease and nominee agreements, all of which are construed as a partnership, rather than an employment relationship.[17] That is then the consequence a driver may get if he/she is a party to a partnership agreement. If we analyze from Manpower Law viewpoint, not considering a partnership agreement as an employment

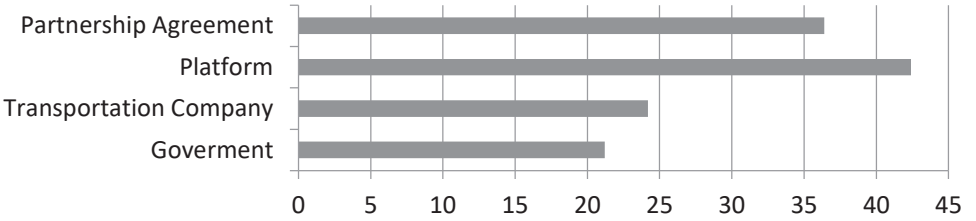
[17]Supra 13.

agreement would cause the legal protection provided by Manpower Law to be not mandatory as to its application to drivers by both application companies and transportation companies.

3.3.3. Where To Find Legal Protection for Drivers

As to where legal protection for drivers is obtained from, 42.4% of the drivers considered that application companies should provide it. 36.4% considered that legal protection for drivers should be provided by a partnership agreement, 24.2% stated to be provided by transportation company and the other (21.2%) assumed that the government should provide the legal protection.

Fig. 3
Where to find legal protection for drivers



The researcher has the understanding that naturally when a driver has agreed to a partnership agreement, he/she at the same time releases himself/herself from the legal protection provided by the government to an employee. The data in this research also shows the key informants' understanding that legal protection should appear in a partnership agreement as the law that shades the parties. Even so, the government actually is still able to provide legal protection outside the partnership agreement.

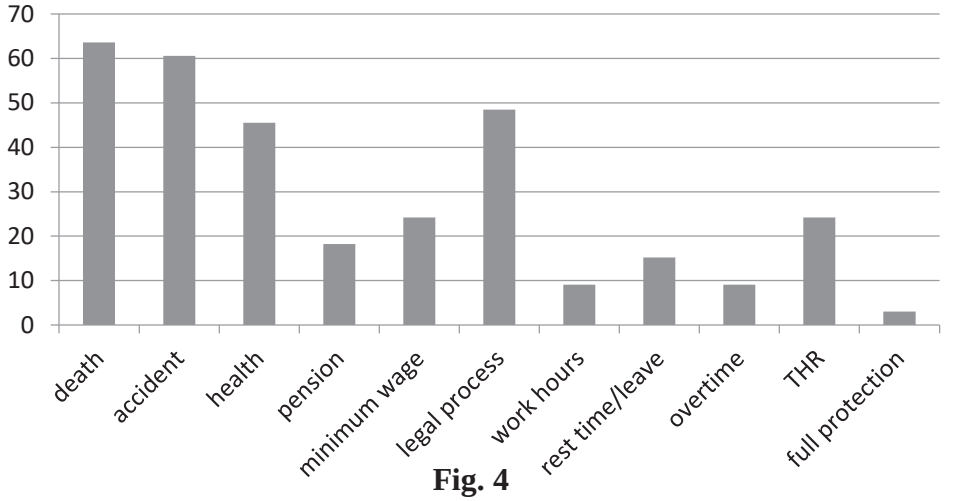


Fig. 4
The legal protection from the government required by drivers

3.3.4. The Government's Legal Protection to Drivers

The researchers tried to elicit the informants' and key informants' perception of whether a driver actually needs all legal protection from the government or not. Although application-based drivers are not protected by Manpower Law, the researchers opined that it is possible that drivers still need that protection. The legal protection which should be provided by the government to employees under Manpower Law should cover death, accident, health, pension, work hours, minimum wage, legal process, rest time / leave, overtime, and religious holiday allowance (hereinafter "THR")

The key informants and informants viewed it necessary for drivers to get legal protection from the government, although the forms of the legal protection required by drivers from the government might not be uniform. It appears that the most important protections are death (63.6%) and accident (60.6%) securities, followed by legal process (48.5%) and health security (45.5%). One of the key informants stated, "*give us accident insurance, because we are human too*." Death and accidents are thought as the main protection to drivers by the

government because driving is highly exposed to those risks. In the event that a driver enters into a partnership agreement with a transportation company, the transportation company is likely to accommodate third-party insurances. An interview with PT Bhineka Bangun, a transportation company, and PT Jasa Raharja, a state-owned insurance company, reveals that some transportation companies include their drivers in Jasa Raharja's life and accident insurances. The interview shows that transportation companies are already aware of the importance of death and accident securities and they even have paid the premium. A different situation occurs in the platforms, which are also aware of death and accident risks to their partners[18], but the platform requires the drivers to pay their own premium. Although platform and application companies maintain a partnership relationship with drivers, the actions taken by each of them are quite different in terms of death and accident protection.

As to protection from the legal process, this is closely related to the assistance to be provided upon the occurrence of an accident on the street, resulting in a claim for the loss of life or victim. In this case, it should be understood that any claim made will personally attach to the perpetrator, and the position of the transportation company partner is simply to jointly assist rather than be liable for the loss of life or victim. The transportation company's role, as in the answers to the interview, to give such assistance as it could give in the legal process, is satisfactory to the drivers. The role which an insurance company possibly could play is to compensate for damages if the accident occurred because there were two cars involved in a crash, so there would be a reciprocal liability.

The next protection is the 24.2% THR. The interview results show that drivers do not question so much about THR. Being aware of their role as a partner makes

[18] Go-Jek, *Life Insurance with Policy Market*, available at https://driver.go-jek.com/s/article/Asuransi-Jiwa-bersama-PasarPolis-1536819711947, last seen on 04/11/2018

them not question about THR because it is a right of employees. With respect to the protection from minimum wage (24.2%), it is necessary to consider the average income of the drivers. Drivers can make a high income and make many trips at the high price plus bonus. What should be highlighted is such a very low base rate that it influences the income of the drivers and can result in their income being below the minimum wage. The base rate will be discussed in the next point. With respect to pension security protection, which is 18.2%, it is still difficult to understand since Go-Jek/Grab platforms were released just in the past few years, and the drivers have worked only for no more than 3 to 4 years. So, the researchers viewed that it is reasonable if pension security is not part of the discussion regarding main protections from the government.

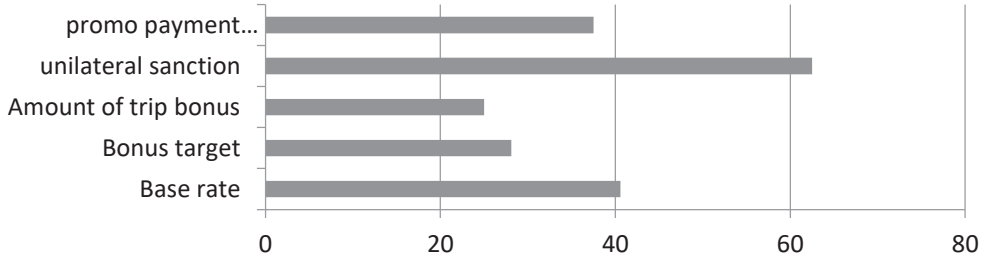
A small percentage during working time (9.1%, rest/leave time (15.2%) and overtime 9.1%) may indicate the key informants' and informants' understanding of the partnership relationship is deemed as something which should not be questioned so much. Although some passengers stated: "*Drivers are given maximum time to work, so there has been no case of a driver being exhausted due to overwork*." The researchers viewed that it is particularly in this form of relationship that Manpower Law is unable to provide for flexible working times, resulting in the exclusion of the partnership pattern from the scope of Manpower Law. As we can see in conventional taxi partnership agreement, which in fact is an employment relationship, Manpower Law is still unable to accommodate working time flexibility. Despite this, conventional taxi drivers also have felt comfortable with the resulting flexibility of working times they have produced with transportation companies.

3.3.5. Legal Protection Under a Partnership Agreement to Drivers

The partnership agreement, according to many of the key informants (75.8%), has not provided protection to drivers. In fact, the basic principle of an

agreement places the parties in a just and balanced position. Since this partnership agreement is a standard contract, the researchers felt it necessary to identify further whether partnership agreement has provided protection to drivers in terms of base rate, bonus target by rate/trip, amount of trip bonus, unilateral sanction and period for payment of promos.

Fig. 5
The legal protection from the partnership agreement required by drivers



The research results show that many of the key respondents (69.7%) felt it necessary to have protection from unilateral sanctions by application companies. Statements of the key informants about unilateral suspension are seen in the following results of the interview: "*No unilateral suspension for the same order, please*"; "*Please review the unilateral* suspension *by Go-Jek/Grab, to allow for defense against passenger's complaint*" and "*It is said that unilateral termination of a partner can be appealed for settlement, but drivers are still to be blamed. This is true despite the fact that drivers perform their job based on the SOP. So, the threat that SOP is useless when drivers appeal as it was not their fault, it is only system and the only system is explained.*"

Many car driver respondents complained about the opportunity not given to them to clarify any report by passengers which could lead to permanent unilateral sanction. In addition, there is no *clearance* granted to those who are found guilty of committing a breach. This prevents them from again doing a

driving job unless they use a fake account not showing their personal identity. There was also advice from a transportation company which assumed that imposition of sanctions on drivers who are through a transportation company should be clarified first with the transportation company. "*Application companies determine account suspension unilaterally. The authority to suspend should be conferred upon the transportation company that has been managing and developing the drivers*".

After the unilateral sanction, the next position is base rate protection (40.6%). Base rate issue surfaced following the transportation company's unilateral determination of the nominal rate, as the rate has decreased further since 2015s, which was 4,000s, to 1,600 – 2,000 per kilometer today. One of driver even stated, "*Do not oppress us the partners, we have a family to feed*." Another motor driver stated: "*Please show appropriate respect to the drivers*"; "*Set a humane base rate, not arbitrarily"* and *"Set the appropriate rate, not unilaterally"*. Even the result of the interview with customers shows that this low base rate issue was also highlighted, *"Customer oriented is not always everything."* Various responses to the low base rate were shown, such as by waging demonstration by the drivers.19

In many interviews with the key informants, the determination of such too low base rate is not equivalent to the driver's expenses for gasoline, motorcycle's installment, maintenance, and meal of the driver, not to mention if he/she is married and needs more income. It is also discovered from the interview that the go-sent rate for the third-party partner, i.e., Tokopedia, is quite inappropriate because it is too low, which is IDR 1,500 per kilometer. In fact, Tokopedia's go-sent orders are large in number, so the motor driver's failure to pick them up

[19] *Grab Increases Tariff, Online Ojek Continues Scheduling Protest during Asian Games*, Kompas, available at https://megapolitan.kompas.com/read/2018/08/09/11571831/grab-naikkan-tarif-ojek-online-tetap-jadwalkan-demo-saat-asian-games, last seen on 04/11/2018

will result in a reduced performance because it is considered unwilling to work. In addition to the protection from low base rate and unilateral determination, 37.5% of the key informants also wanted promo payment protection. This was seen in the result of the interview, as follows: "*Promo payment should not take too much time, because we need it for daily needs & gasoline*"; "*Promo should be claimable directly, not waiting until days*" and "*Grab promo should be removed, because it is to the driver's detriment and late payment is allowed only up to 3 days*."

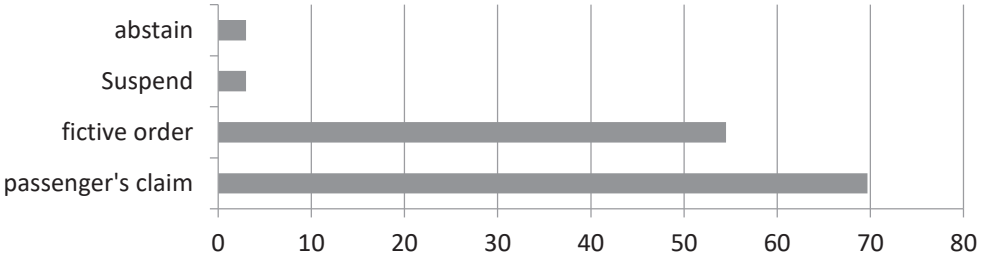
The key informants realized that promo is the business right of a company, but it is obvious that payment for promo should not be held up to 3 days. There are circumstances where drivers need cash on the same day, particularly grab motor drivers. Payment in 3 days thereafter would cause them to have no cash even for their daily needs. Protection of target bonus according to trip rate gained 28.1% from the key informants and 25% for number of trips bonus. Target bonus according to trip rate refers to the bonus arrangement in which bonus can be claimed only after the driver has collected the target amount of money that day. This is different from number of trips bonus, in that, bonus can be claimed only after the driver has collected a number of trips that day. Despite the booming of target bonus pursuant to trip rate on the internet[20], the percentages of the target bonus pursuant to trip rate and number of trips bonus are not as many as the requests for protection against the unilateral sanction, the base rate, and promo period. This suggests that the main focuses of the drivers' demand for protection in a partnership agreement are on unilateral sanction, base rate and promo period.

3.3.6. Legal Protection for Drivers from The Job They Do

[20] *Did Grab cheat, watch the whole video to understand properly*, Youtube.com, https:// www.youtube.com/watch ?v=nLZeTy5r8LM, last seen on 28/10/2018

The job done by application-based motor/car drivers is closely related to third-party, namely passenger. In many cases, a unilateral suspension is originated from a passenger who raised a claim/demand, causing the driver to sustain loss, although it is undeniable that fault might be really on the driver's part.

Fig. 6
Legal protection for drivers from the job they do



Research data shows that 69.7% of the key informants wanted to be legally protected from passenger's claim. His high rate is in line with the high level of the desire to be legally protected from unilateral suspension. One car driver stated that he was unilaterally suspended just because the route he took was different from the route he should have taken as there was a road repair work, but the passenger did report him. Another car driver stated that he wanted the protection of his right of defense from passenger's complaint. Another protection which the drivers want in their job is about a fictive order (54.5%). In late 2017 there was a growing number of fictive food orders, which also happened to passenger orders[21], and these cases hurt the drivers.

3.3.7. Fairness In Partnership Agreement for Drivers, Go-Jek/Grab and Passengers

[21] Go Jek Drivers', *Misery, Screwed by Fictive Orders*, Detik News, available at https://news.detik.com/ berita/d-3581271/derita-para-driver-go-jek-dikerjai-pelaku-dengan-order-fiktif, last seen on 28/10/2018.

With respect to fairness that should be set out in a partnership agreement for the parties, the writer tried to see if the partnership agreement is already fair enough for the driver, the platform and the passenger based on the informants' and key informants understanding. The research data shows that none of the key informants and informants stated that the partnership agreement was already fair enough for the drivers. But 15.2% stated it was already fair enough for the application companies. The large percentage was gained from how fair the partnership agreement was to passengers as a person not a party to the agreement. 56.3% of the informants and key informants stated that the partnership agreement was already fair enough for passengers. In the next sub-chapter, the researchers tried to analyze the fairness using the parameter that what would be the rights expected and actually accepted by the drivers in a partnership agreement and whether such rights already provide adequate protection. How fair is the partnership agreement to the driver?

The seven points of the research result as elaborated above lead to a conclusion that drivers, as an individual, still need protection when maintaining the partnership relationship with the platform. The main protections from the government to drivers include accident, death and health securities. The main focus of protection to drivers in a partnership agreement is protection from unilateral sanctions as the platform does not provide any opportunity for clarification. The other focus is protection from a very low base rate and late payment of promo, which takes 3 days.

3.4. Driver's Position in A Partnership Agreement with A Transportation Platform

As a large transportation platform in Indonesia, Go-Jek raised a total of $ 3.3 billion in funding on Oct 30, 2018,[22] and Grab raised a total of $ 6.3 billion in funding on Oct 20, 2018.[23] As they are still new companies, both have expanded to several countries in Southeast Asia. Grab has opened the market in almost all countries in the Southeast Asia. Furthermore, Go-Jek has started to expand to Vietnam with the name Go-viet and to Thailand with the name Get.[24] At the beginning of its establishment by Nadiem Makarim in 2011, Go-Jek only had go-ride. It then grew quickly and now has 20 features: go ride, go car, go bluebird, go food, go tix, go pay, go send, go box, go shop, go med, go pulse, go bills, go life, go massage, go clean, go auto, go glam, go daily, go fix, and go laundry.[25]

Go-Jek has been downloaded by over 10 million users and has more than 1 million motor and car drivers.[26] Grab was established in 2012 by Anthony Tan. Grab's features include car services (GrabCar), motorcycle taxis (GrabBike), last mile delivery (GrabExpress), ride sharing (GrabShare), and food delivery (GrabFood). Today Grab is already the largest in 8 countries in the Southeast Asia: Indonesia Cambodia, Malaysia, Myanmar, Philippines, Singapore,

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[22] *Go-Jek*, crunch base, available at https://www.crunchbase.com/organization/go-jek#section-funding-rounds , last seen on 28/10/2018.

[23] *Grab*, crunch base, available at https://www.crunchbase.com/organization/grabtaxi#section-funding-rounds, last seen on 28/10/2018.

[24] *Go-Jek officially expands to Vietnam*, IDN Times, available at https://www.idntimes.com/business/ economy/santi-dewi/go-jek-resmi-beroperasi-vietnam-menggunakan-nama-go-viet/full, last seen on 30/10/2018.

[25] *Download the latest GO-JEK Online & APK Application 2018*, Go-Jek, available at https://www.go-jek.com/blog/download/, last seen on 30/10/2018.

[26] Ibid.

Thailand, and Vietnam.[27] Downloads for Grab application have reached 60 million users in total and it has almost 1 million drivers.[28]

On the other side, a driver who maintains a partnership relationship with a platform is an individual who performs his/her duty as a driver. The research shows that many drivers do not possess their own vehicle, as their production tool. They do their job using a rental car or using pension or severance pays to buy one. There are also many who own motorcycle or car on credit with installments that are required to be paid regularly within a specified period. The standard requirements of vehicles for Grab-Car and Go-Car are also not high, namely: max age of vehicle 5 – 6 years, minimum capacity 1000 cc and maximum capacity 2000 cc, and of MPV or Family Car type. The researchers observed that the cars mainly used for application-based driving job pursuant to the criteria are Toyota Avanza[29] or Suzuki Ertiga[30].

The data shows the reality that there is a difference in capability, especially in terms of capital between the driver and the platform. A driver, as an individual, is in a more vulnerable and in a weaker position when maintaining a direct relationship with a platform. Such is also the case for the drivers who maintain a relationship with platform through transportation company. To the best of the researchers' knowledge, transportation company only acts as license administrator because 1 driver must also have a direct account with the platform's application.

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[27] *Grab, where are we*, https://www.grab.com/id/where-we-are/, last seen on 30/10/2018.

[28] *Grab Celebrates its 5th Anniversary and Users' Significant Achievement,* Grab, available at https://www.grab.com/id/press/business/grab-rayakan-ulang-tahun-ke-5-dan-pencapaian-signifikan-pengguna/, last seen on 30/10/2018.

[29] *Toyota Avanza's prize is around 13,145 $ based on Toyota pricelist*, Toyota, available at https://www.toyota.astra.co.id/shopping-tools/pricelist, last seen on 30/10/2018.

[30] *Suzuki Ertiga's prize is around 13,145 $ based on Suzuki pricelist*, Suzuki, available at https://www.suzuki.co.id/pricelist, last seen 30/10/2018.

As elaborated in the previous discussion, drivers cannot be identified as an employee, it is more appropriate if they are identified as an individual employer as they perform their job using their own production tool. If we analyze based on employer criteria according to the ownership of capital, having only a car attaching to one account of a driver as his/her business tool, it can be assured that driver is a small employer who only has capital above IDR 550 million and below IDR 500 million. This, of course, is a far cry from the platform's capital, reaching IDR 50 trillion (Go-Jek) and IDR 95 trillion (Grab). With such huge capital, the platform cannot be identified as a medium, small, let alone micro-business under the UMKM Law. So, although the driver's position in implementing the partnership relationship with a platform under a partnership agreement is on the basis of business – business relationship, it is very difficult to set the parties under a partnership agreement to equal bargaining powers, due to such huge gap in the capital. Drivers are positioned as an individual employer, although this is defective,[31] because they cannot move and are bound by the platform.

Such a vulnerable position of the drivers is also seen in the result of the interview discussed above, where a platform applies a "take it or leave it" agreement model. A platform can unilaterally suspend a driver and also unilaterally determine the base rate. Under a partnership agreement, both parties are surely permitted to terminate the agreement, but seeing the fact above that platform has millions of driver partners' while driver is only able to use one account for one application, unilateral termination of a partnership agreement by a platform would adversely affect the drivers who will lose access to get passenger/order. This leads to a conclusion that the bargaining position of a driver in his/her individual capacity in a partnership agreement with a platform is invisible at all.

[31] Alex, a transportation businessman, interviewed on 23 October 2018 in Jakarta

The researchers agreed with Aulia Nastiti who identified the driver's pattern of a partnership relationship with a platform as a gamification of work[32]. The driver's job is not as simple as providing a ride, there is also a mathematical game in it: driver must continuously calculate points, bonuses, performance percentage, and rating in order to obtain adequate wage.[33] Lack of base rate and promo payment protections in a partnership agreement causes the drivers to eventually not only rely on low rate to make income to meet their needs. The alternative available to them in order to survive is to make every effort to reach the daily bonus after meeting the target. As a constructivism, the researchers saw the gamification of work in a partnership relationship not as a mistake or a wrong pattern. Except that, in doing so, the driver's position as a weak individual should be treated within his/her capacity.

3.5. Legal Protection for Drivers in A Partnership Agreement with A Transportation Platform

Generally, a driver is an employee of a transportation company, but, as previously analyzed regarding elements of an employment agreement and the subjects of an employment relationship, a driver who performs a partnership relationship with a platform cannot be identified as an employee. Thus, once a driver has agreed upon a partnership agreement, he/she is not an employee who is legally protected as to his/her minimum wage, health security, overtime pay, THR, leave and others. His/her position in the partnership agreement has shifted to the position of a partner who releases himself or herself from the legal protection provided to an employee. At the same time, a drive as a partner in a partnership agreement also has the position of an employer who has production tools. Under Manpower Law, an employer has legal protection, including the

[32] *Drivers' stories reveal how exploitation occurs in Gojek, Grab and Uber,* The Conversation (26/09/2017), available at https://theconversation.com/drivers-stories-reveal-how-exploitation-occurs-in-gojek-grab-and-uber-82689, last seen on 04/11/2018.
[33] Ibid.

rights to impose sanctions, to lock out, to issue company regulations/collective labour agreement, to outsource works and others. Once a driver has agreed upon a partnership agreement, he/she also cannot have his legal protection as an employer. So, what is the legal protection that can extend to a driver?

Basically, each person is free to conclude an agreement, including a partnership agreement concluded by a platform with a driver with all of the rights and consequences in it. In the previous discussion, it was revealed that the driver's position in a partnership agreement is weaker and more vulnerable. Therefore, it is important that the driver's position is given legal protection when performing a partnership relationship with a platform. Partnership relationship is based upon a partnership agreement agreed upon by the parties. The construction built in the agreement produces a resultant that is performed by each party.

Constructivism point of view of a legal protection is a freedom given by the state to the people to make a construction with relative consensus/resultant.[34] Except that, the research shows that the resultant produced by a partnership agreement is felt to have not provided a legal protection that is fair to the parties, particularly to the drivers. The driver's position in a partnership agreement, which serves as a law for the parties, should be improved, particularly with respect to the balance between the rights of a platform and those of a driver as an individual. Despite many such provisions that a partnership agreement contains with its derivative policies, there are actually only three protections that are required by the driver as a vulnerable party. The main focus of the drivers is on protection from unilateral sanctions because platforms do not give drivers the opportunity to give clarification. The other focus is on protection from very low base rate and payment of promo that takes three days. Addressing the three

[34] W. Farianto, *Op.Cit.,* xxvii

protections that are required by drivers in a partnership relationship, the partnership agreement should be reconstructed to ensure a fairer partnership relationship between the driver and the platform.

3.6. The Government's Role in Providing Legal Protection to Drivers

Justice has become one of the basic values in a human's life and is a classic issue that has never been resolved completely. According to Erlyn Indarti[35], justice will be understood differently based on the paradigm adopted. According to Sionaidh Douglas-Scott[36] demands for and understandings of justice are framed in many ways and may appear subjective, relative and emotive. As a constructivist, the researcher opined that justice in the society can be guaranteed when the freedom of each member of the society actively constructs the law to achieve further a resulting legal construction or a consensus or an agreement through a democratic process.

Such constructivist's understanding of justice is confronted with Notonagoro's triangle justice that there are three types of justice: distributive justice, legal justice, and commutative justice.[37] *The first angle* of Notonagoro's triangle justice is distributive justice, which states that the government should play its role as the executive to provide justice to employees and employers. *The second angle* is legal justice, which determines that the main character is the members of the society, where they are required to comply with and implement the rules issued by the government. And *the third angle* is commutative justice, which provides the members of the society all things to which each of them is entitled.[38]

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[35] E. Indarti, *Discretion and Paradigm: A Philosophy of Law Review,* 48 (2010), available at http://eprints.undip.ac.id/28180/1/Erlyn_Indarti.pdf, last seen on 04/11/2018.
[36] S.D. Scott, *Law after Modernity*, 178 (1st ed., 2013).
[37] Sunarto, *Pancasila Distributive Justice in the Philosophy of Values Review*, 202 (1st ed., 2007).
[38] Ibid, at 203-204.

Such a definition of justice by Notonagoro can mean that all parties, the government, the drivers and the platforms, must play their roles in a balanced manner, so as to create a harmonious partnership relationship. As to who should provide legal protection to drivers, the possibilities available are the government and the platforms themselves. Platforms, as part of the society, are required to comply with and implement the rules issued by the government. The government is, under a distributive justice perspective, required to play its role to provide justice to the society.

Although the government has, through the minister of transportation, tried to provide rules regarding application-based transportation, but there have been resistances from communities, particularly the individual drivers who always challenged the minister's regulations and the challenges were accepted by the Supreme Court judges as well as through judicial review of the Traffic Act at the Constitutional Court. There should be a line clearly defining conventional transportation from application-based transportation because both have different patterns of relationship and not just digitalization of payments. Variety of legal responses in Indonesia regarding application-based transportation indicate that the law is still unable to accommodate the consensus of the communities. The consensus in the communities which comes in the form of a partnership agreement should be accommodated by the government in the form of new rules which are different from those for conventional transportation. Rhenald Kasali even saw them clearly as different *animals.* Such a difference is apparent from the legal subjects of the agreement, the mechanism and the platform's business system. Conventional transportation only involves two parties in its partnership agreement, while application-based transportation involves platforms and individuals or transportation companies as a partner.

The response from the government, i.e., the ministry of transportation, to the presence of the disruptive technology seems to be very imitative by only revising

the existing regulations of the minister of transportation and offering no regulatory solutions that are suitable for the relationship pattern between application companies and their affiliates and the drivers. By the time this paper was prepared, there was no rule that could accommodate a consensus that would produce a resultant in the communities. The government is challenged to maintain an open mind so that it is friendlier to technological developments with regulatory solutions that do not treat it as a conventional pattern.

Although in distributive justice the government looks like having to do something, the researchers are of the view that the government should understand at which point it should stop doing. This is true in view of the fact that the rules that have been tried to be interpreted by the government always gain resistances from the parties to the partnership agreement. The government's interference that has gone so far in the consensus between the platforms and the drivers should be limited. In this case, the researchers agreed with the Supreme Court's decision 'letting' the resultant produced from the consensus between the platform and the drivers. The researchers viewed that the Supreme Court has decided properly in its opinion that justice under constructivism guarantees the freedom of each member of the society who actively constructs the law further to achieve the resulting legal construction or consensus itself. The partnership relationship maintained by the drivers and the platforms in the eyes of a constructivist can now be called a just relationship because it is a legal construction that was prepared by the parties. Even so, there are some points in the partnership agreement that require reconstruction as discussed earlier.

Limitation of the government's intervention in the construction of the partnership relationship does not necessarily mean that the government automatically ignores the legal protection for the drivers who are weak. The government should continue performing its distributive justice obligation by protecting the drivers without entering into the partnership agreement. For

example, by actively providing death, safety and health securities through Jasa Raharja as the state-owned corporation providing social security services especially to road users. The other way is by recognizing the resultant / consensus produced from the construction of the partnership between the platforms and the drivers into the Traffic Act. Furthermore, the law will be able to accommodate consensus that exist in the community.

4. CONCLUSION

The platform's freedom to construct its partnership relationship with the drivers should consider the drivers who are vulnerable and require protections from unilateral sanctions without clarification, from low base rates and from promo payment period. This requires reconstruction of the partnership agreement between the platforms and the drivers.

There should be a reconstruction of the distributive justice by the government to ensure limitation of the government's efforts to regulate the partnership agreement between the platforms and the drivers. The actions which the government should take to protect the drivers should not require its involvement in the arrangement of the partnership agreement. This can be achieved through social security programs specifically provided to drivers and recognition of the resultant produced by the platforms and the drivers in the arrangement of the Traffic Act.

A STUDY ON WORKING ENVIRONMENT OF SEWAGE WORKERS IN INDIA: A SOCIO - LEGAL APPROACH

R. Dhivya*

Abstract

The Massive population growth has led to a huge impact on the working environment of workers worldwide. Every human being has the right to health and lead their lives in a dignified manner without any discrimination. It is mandated that the working environment of workers should be hazardous free but the working environment of sewage workers drops their lives in peril. So, the appropriate authority has to provide necessary measures in securing the life and livelihood of sewage workers. The appropriate authority has initiated several measures but due to certain barriers, they were not been implemented stringently. The duties of appropriate authorities are significant. The Constitution of India guarantees the right to live in a healthy environment which also includes a healthy working environment. The quality of life and living of the sewage workers should not be endangered or impaired. The working conditions of sewage workers should be regularized with the support of appropriate machines which shall be operated manually. Rehabilitation measures can be undertaken for the sewage workers by including their family members too. While a close understanding of the working environment of sewage workers leads us to analyze several factors which influence a person to work as a sewage worker. This study reveals out that there is a significant relationship between the sewage system and the working environment of sewage workers. Thus, this study concludes that there exist several risks like

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Occupational Hazardous, Occupational diseases to which the sewage workers are exposed in their day-to-day activities during their course of work.

Keywords: Sewage workers, Occupational Disease, Hazardous, Working environment, Life

1. INTRODUCTION

The caste system in India remains[1] to be the key factor for the person to work as sewage workers. Every worker has the right to have a healthy working environment without any discrimination. These sewage workers are carrying out their work without any proper measures most of them are not aware of the risks they expose to. During their work, they are inhaling massive polluted air which is obnoxious to their health. They risk their lives to clean sewerage, septic tanks, etc. They are just using the rope and vessel to dry out sewerage and septic tanks with their bare hands. They not only expose to occupational diseases, hazardous but also social atrocities. Most of the people who involve as sewerage workers belong to scheduled caste and scheduled tribes which also considered being caste-based occupations. Two acts were passed in the year 1993[2] which prevented the construction of dry latrines and another act was passed in the year 2013[3] preventing a person to become a manual scavenger. The death toll of Sewage workers is increasing day today because of their working environment. They lose their lives not because of governance but it's because they are rooted in caste. Most of them are losing their life during their course of work because of untreated sewerage and septic tanks. Their Working environment shall be

[1] R. Mitra, *Sanitation workers belonging to lower caste face social stigma,* The New Indian express (14/11/2019), available at https://www.newindianexpress.com/nation/2019/nov/14/sanitation-workers-belonging-to-lower-caste-face-social-stigma-report-2061590.html, last seen on 21/02/2021.

[2] The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

[3] The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013.

maintained with proper measures. These can be resolved by the incorporation of technologies and the modernization of sanitation methods. Even though we have Act relating to sewage workers regularizing the working conditions of works has not been strictly followed. The objective of the paper is to find out the issues the sewage workers are facing at their working environment and to identify the significance relation between sewage system The hypothesis for the paper is:

- There is a significant relation between Sewage system and working environment of sewage workers
- There is significant relation between working environment of sewage workers and occupational Diseases

2. REVIEW OF LITERATURE

It is found out that there are so many journals, articles, books, research articles that were published related to Sewage workers. In recent years, there were several articles were posted online as well as offline regarding a Health condition, occupational hazardous of sewage workers and also several articles have come forward to state the risk the sewage workers are facing and also state about the Acts passed in the year 1993 and 2013 was enacted in view to restricting a person to employ a person as manual scavengers/sanitation workers/sewage worker. In the Article "Occupational health hazardous in sewage and sanitary worker" by Rajnarayanan R. Tiwaaaar has stated that sewage and sanitation workers are exposing to harmful gases. In an Article from Hindustan times dated 05, 2019 it was stated that the sewage /sanitation workers have died as they had no safety equipment and inhaled methane trapped in the drain. So, from reading this article it is known that the working environment of sewage workers leads to their death in an article from The New Indian Express dated 20th September 2020 has stated that a total of 631 people has died while

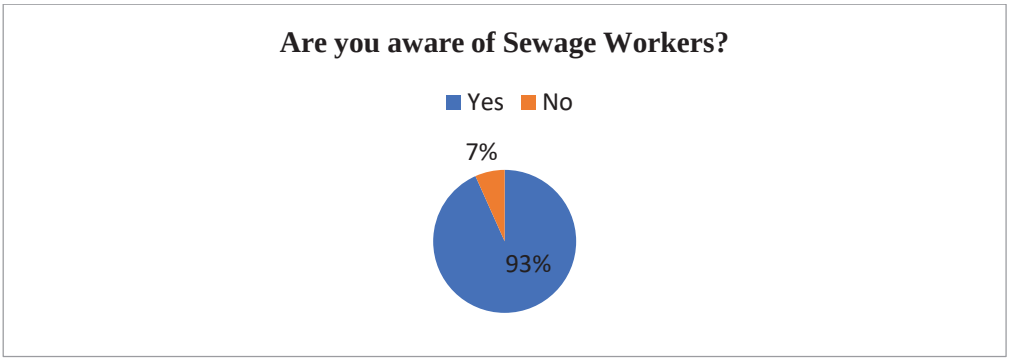
cleaning sewers and septic tanks in the last ten years and this figure was provided by National Commission for Safai Karamcharis.

3. MATERIALS AND METHODS

This socio–legal empirical study was carried out for finding out the working environment of sewage workers in India. This study is based on Primary sources as well as secondary sources. Primary sources were collected by using a convenient sampling method from the Public through the interview method; Secondary sources were collected from books, materials, Articles, etc. The researcher is limited in collecting the samples by collecting them only from the public It is not possible to collect samples Large in number so the researcher carried out a convenient sampling method in collecting the samples. The Sample size is 350.

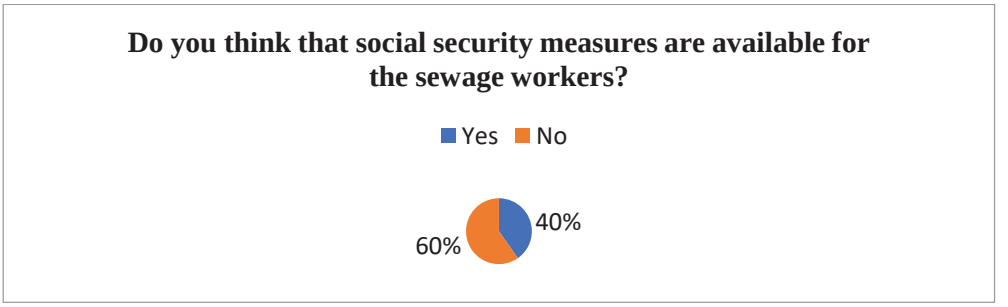
4. RESULTS AND DISCUSSION

There is a significant relationship between the sewage system and the working environment of sewage workers in India. The working environment of Sewage workers is highly influenced by the existing sewage system and septic tank system which is untreated from this study it came to know that the existing sewage system and septic tanks are basically constructed with cement which prevents soil to observe water which leaves the sewage workers to clean those sewage and septic tanks. There is a significant relationship between the working environment of sewage workers and occupational Disease. High exposure to obnoxious gases makes the sewage workers carry out their work at risk. Through this research, the researcher finds out untreated sewage and septic tanks plays important role in the conditions of the working environment of sewage workers.



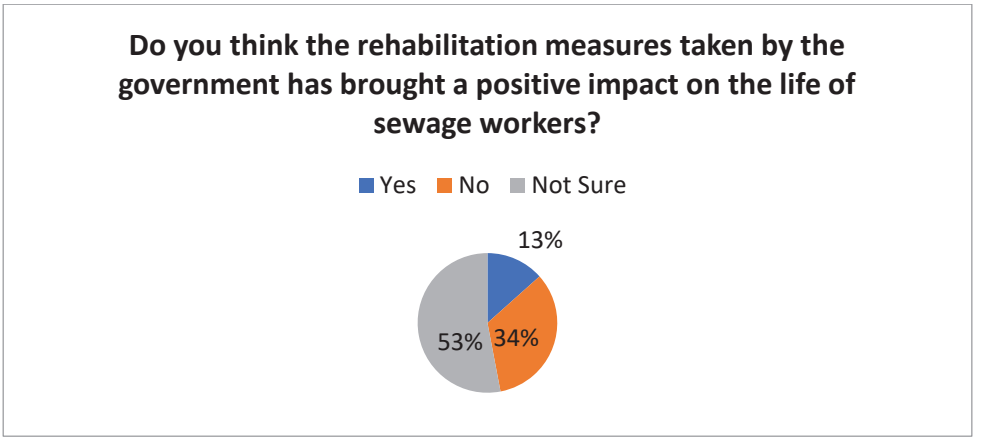
Pie chart 1

The first pie chart shows that 93.3% of the people are aware of sewage workers while 6.7% are not aware of Sewage workers. From this study, it comes to know that still, some people are not aware of the existence of sewage workers



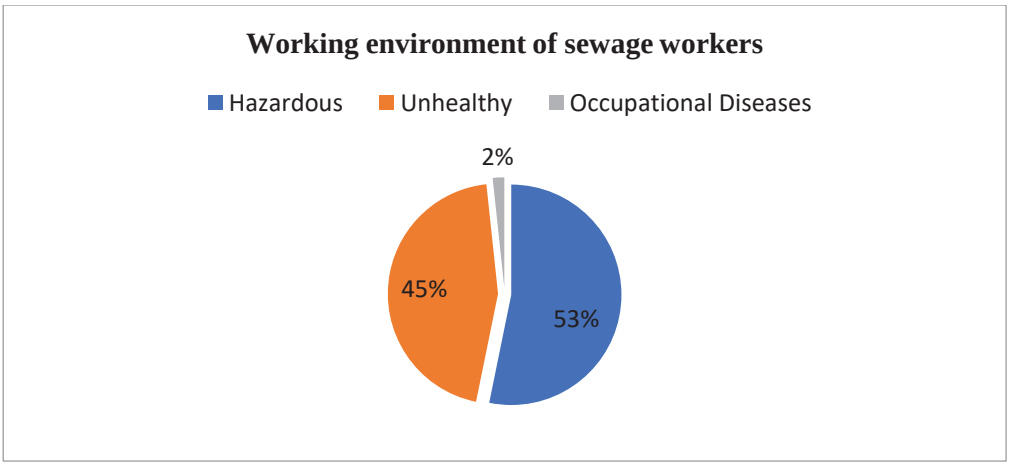
Pie chart 2

This second pie chart shows the 40.3 % of people think social security is available for sewage workers while 59.7% of the people think the social security measures are not available for sewage workers. From this study, it comes to know that the schemes are available for sewage workers but most of them are not aware of those measures



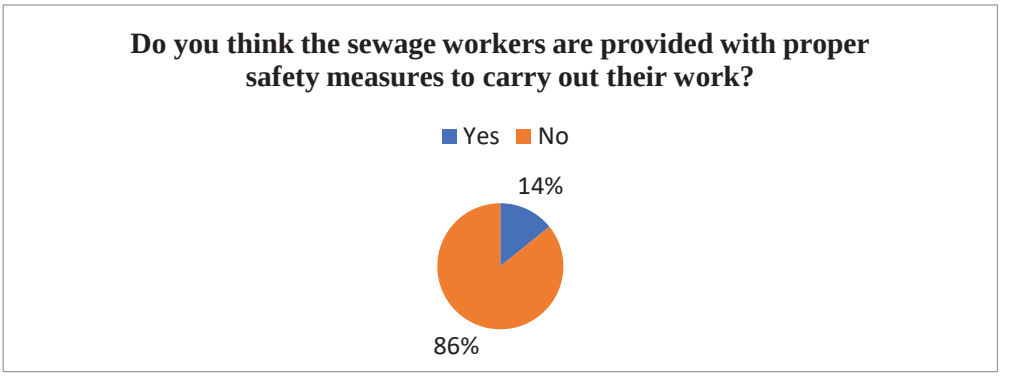
Pie chart 3

From the third pie chart, it shows that 13.4% of the people think the rehabilitation measures taken by the government has brought a positive impact on the life of sewage workers while 34 % are not supporting it and 53% people are not sure about the rehabilitation scheme from this study it comes to know that rehabilitation measures are available for the sewage workers but most of them are not aware of that so the government can take appropriate measures to bring awareness among them about the rehabilitation schemes



Pie chart 4

From the fourth chart pie chart, it shows that 53 % of the people think that the working environment of sewage workers is hazardous while 45 % of the people think that the working environment of sewage workers are unhealthy and 2% of the people think that the sewage workers are exposed to occupational disease from this study it comes to know that the working environment of sewage workers are hazardous, Unhealthy and expose to occupational diseases



Pie chart 5

The fifth pie chart shows that 14% of the people think that the sewage workers are provided with property measures to carry out their work while 86% of the people think sewage workers are not provided with safety measures

5. CONCLUSION

Through this research study, it finds out that the working conditions of the sewage workers are not safe because of the untreated sewage and septic tanks. Apart from the sewage system the improper implementation of safety measures also the factor which makes the working environment of the sewage workers are not safe. This study concludes that by creating awareness among sewage workers, People and, strict implementation of the legislative measures and using powers suckers /Machines, change in the construction of Sewerage, septic tanks, etc. will lead to the safe working environment for sewage workers.

SHIP-OWNERS LIEN IN MARITIME EMPLOYMENT

Chhote Lal Yadav[*]

Abstract

For any business and its success depends on one of the important aspects, the sustainable business environment needs to balance the future of the work. The future of work in maritime employment denotes the shipowner and his contribution towards the maritime community. Where the maritime lien become the protection and sustainable business environment. All stockholders play a significant role in the performance of the contract. Maritime employment being the private subject matter in the relationship among the all-maritime entities, establishes an inevitable support in the maritime adventure. The shipowner lien in maritime employment is one of the business practices, which gives them the freedom to shipowner or carrier for contract performance and protection of interest in maritime events. This paper aims to discuss the shipowner liens and its relationship between the stockholders for the sustainable shipping business. In the periphery of the shipping business, the rights or claims on primary subject and liability and obligation are instruments for resolving the conflict between the parties.

This paper is divided into five parts, where the first part deals with the introduction of the maritime lien in maritime employment. Part second deals with kinds of Maritime Lien and the nature of future work in maritime employment. The third part comprises of maritime employment laws. Part fourth

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deals with the Statutory Lien and its impact on employment, and the fifth part is the conclusion.

Keywords: Shipowner, Lien, Maritime Employment, Sustainability of Shipping Business. Future of Work

1. INTRODUCTION

The future of work denoted the concept, which leads to facilitating and promoting the maritime business. The right of ship owner lien makes sustainable position to shipper or carrier in the business in any circumstance because the risk at ship in the sea is always the part of maritime employment. Characteristically, the ship is bound to the merchandise and the merchandise to the ship for the performance on the shipper and shipowner's respective contracts. The maxim which expresses this is; “Le batelest oblige a la marchandise et la marchandise au batel”. But before we undertake a discussion about the shipowner’s lien, it is pertinent that we have a cursory view on the type of liens that are usually exercised. There are four types of liens namely: Common law lien, which is a possessory lien, the statutory lien (unpaid seller’s lien), the equitable lien (lien in favour of the unpaid vendor of the land) and Maritime liens.

Common law lien and possessory lien, the common law lien which is essentially a possessory lien is of interest to us in the forthcoming discussion. According to Grose J in the case of *Hammonds v Barclay*, a possessory lien is a right of one man to retain that which is in his possession belonging to another, on demands of him the person in possession is satisfied.'[1]. The shipowner’s lien can be as:

[1] Stephen Girvin, (1802) 2 East 227, 235; 102 ER, 356,359.

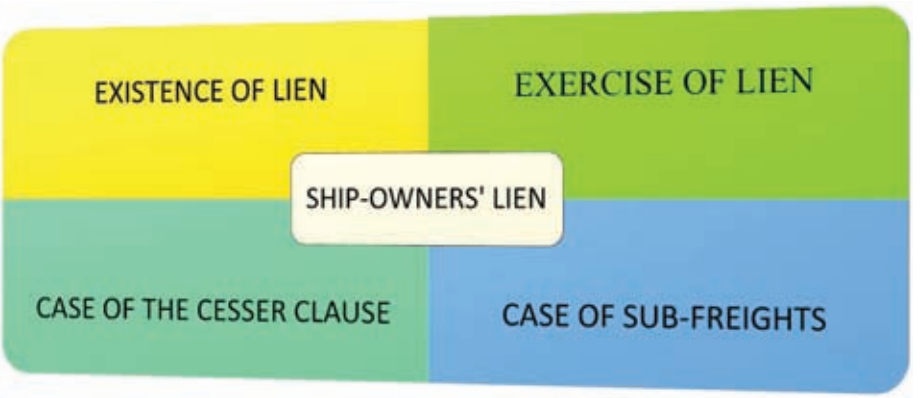

Figure 1

A shipowner has a lien on goods carried for charges incurred in carrying them at common law or by express contractual agreement.

- Common-law lien
- Statutory lien

The shipowners' existing lien gives the statue of how the contracts can be executed in the law and justice in maritime employment, which leads to the future of the work or business promoted by the shipowner in the maritime employment.

2. SHIP OWNER LIEN IN MARITIME EMPLOYMENT AND ITS NATURE

The shipowner lien is the exclusive rights, which is provided on the claims for the sustainable performance of the parties' rights and duties as per the practice at maritime business. The rights of shipowner as lien can be understood on the common law and statutory laws.

2.1. Common Law Lien:

On the subject of maritime employment and claim arises during the maritime adventure of the common laws' maritime lien of the shipowner can be raised only in three cases:

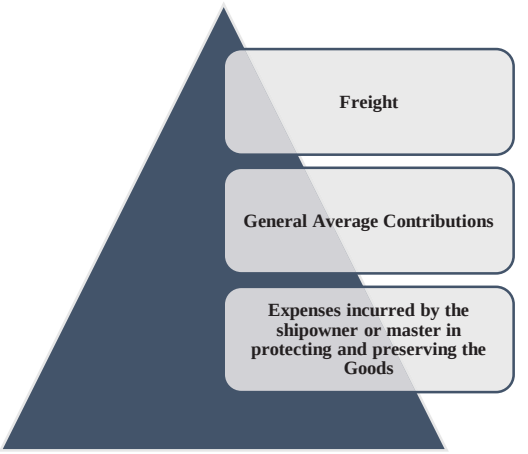

Figure no. 2

In the carriage context, a shipowner's possessory lien is one, which is dependent on his possession of the cargo.

2.1.1. The Lien for Freight

The lien for freight is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver the goods to the party until the fare is paid, and if he delivers them, the encumbrance of the lien does not follow them in the hands of the owner or the consignee. It is nothing more than the right to withhold the goods and is inseparably associated with his possession, and dependent upon it. Three features characterize the lien for freight:

1) Retention of the cargo: It is enforceable as long as the shipowner retains the cargo. The right of lien is lost once the cargo is delivered to the consignee.

How to exercise lien over the cargo? The exercise of lien for freight has two broad approaches:

a) In *Perez v Alsop*[2] the right to exercise the possessory lien on cargo is restricted to the consignment of cargo. The freight is due and may be exercised over the entire consignment, even where only part of the consignment is still outstanding.

b) The lien may not however be exercised over goods on different voyages covered by different contracts of carriage.

2) Freight paid in advance: Difficulties sometimes arise where freight is expressed to be paid in advance. However, the normal rule is that freight paid in advance is not subject to the common law possessory lien (*Kirchner v. Venus*[3]*).* In *Foster v. Colby*[4]it was held that lien cannot be exercised where the freight is payable after the delivery of the cargo or where it is not due when the cargo is claimed. In *Canadian Pacific (Bermuda) Ltd v. Lagon Maritime Overseas (The Fort Kipp)*[5] a stipulation that freight was payable after completion of discharge had the effect of precluding the exercise of a contractual lien for freight for cargo still on board a vessel.

[2] *Perez v. Alsop*, (1862) 3 F&F 188; 176 ER 85.
[3] *Kirchner v. Venus*, (1859) 12 Moore PC 361.
[4] *Foster v. Colby*, (1853) 3 H&N 705.
[5] *Canadian Pacific (Bermuda) Ltd v. Lagon Maritime Overseas (The Fort Kipp)*, 1985 2 Lloyd's Rep 168.

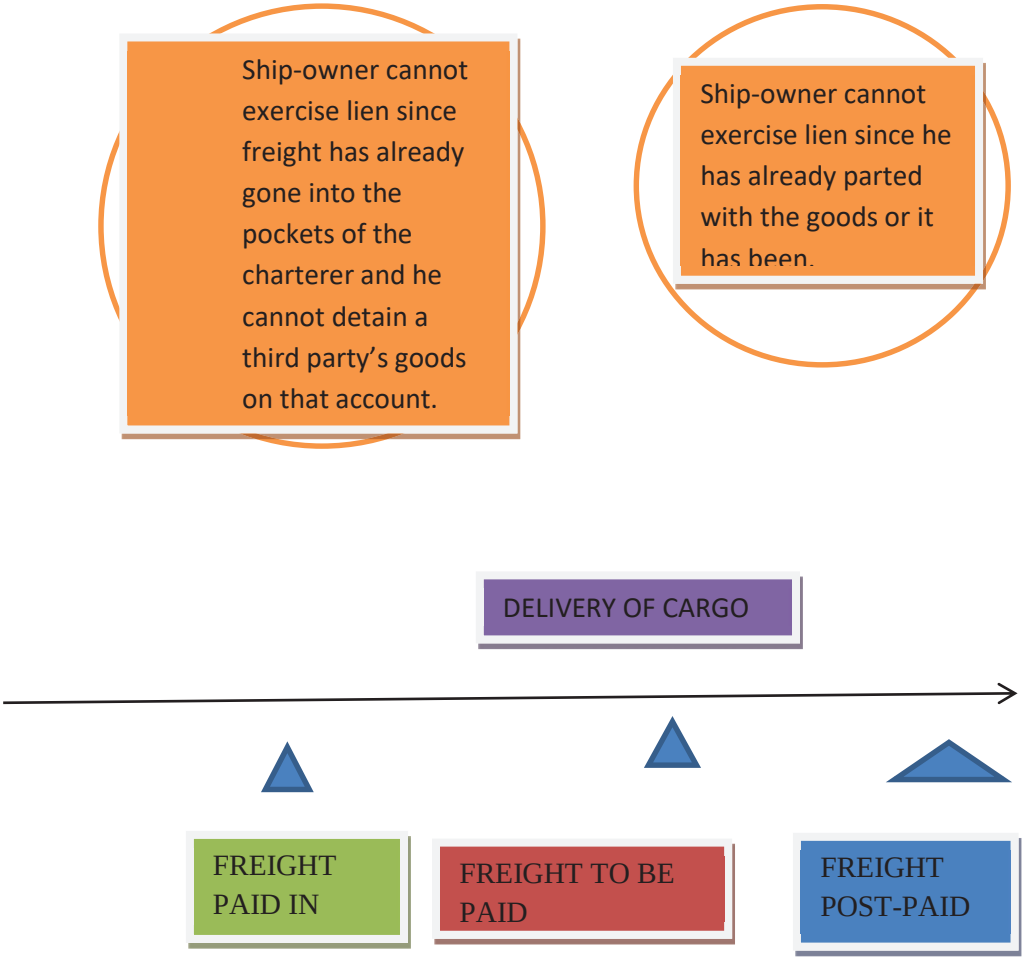

Figure No.03

3) Right to possession: Unlike a maritime lien, the shipowner's lien for freight merely gives a right of possession of the goods. There is no right of sale of the goods, even where expense has been incurred in retaining the cargo in lieu of payment, unless the goods have been abandoned. (*Enimont Overseas AG v. RO Jugotanker Zadar (The Olib)*[6].

[6] *Enimont Overseas AG v. RO Jugotanker Zadar (The Olib),* (1991) 2 Lloyd's Rep 108, 115.

2.1.2. The Lien for General Average:

The cost of a general average act on the part of the master I apportioned among all those participating in the voyage, including the shipowner and the cargo owners, and the claim for a general average contribution is secured by a lien over the property, usually the cargo. Release of the cargo is usually obtained by the cargo owner executing an Average Bond, under which his cargo will be released in return for agreeing to pay the amount adjudged to him by an average adjuster.

2.1.3. Expenses Incurred by the Ship-owner:

The master of a ship has authority to take whatever steps, necessary to protect the cargo owner's interest during the course of the voyage.

3. MARITIME EMPLOYMENT LAWS

1) The sea work law based oceanic agreement, sea exchange and trade are just as the connection between various partners. Rights, obligations, commitments and liabilities of people engaged with the business is exercised. The diverse show Hauge Rules, Hauge Visby Rules, Hamburg Rules and Rotterdam Rules bargains parts of rights, obligations, commitments and liabilities. The shipowner and load proprietor, charterer, group individuals and sailors and specialists contribute for maintainable improvement in oceanic and transportation business. Worldwide Convention on Maritime Liens and Mortgages, 1993; The Article 4, of International Convention on Maritime Lien and Mortgages, discusses all of the ongoing arguments against the owner, demise charterer, boss or manager of the vessel will be ensured about by a maritime lien on the vessel:

    a) claims for pay and various totals on account of the master, authorities and various people from the vessel's enhancement in respect of their

work on the vessel, including costs of getting back and social security responsibilities payable for the wellbeing of they:

b) claims in respect of loss of life or individual injury occurring, whether or not shoreward or on water, in direct relationship with the action of the vessel;

c) claims for compensation for the salvage of the vessel;

d) claims for port, channel, and other stream obligation and pilotage demand;

e) claims reliant on offense arising out of real mishap or damage achieved by the movement of the vessel other than loss of or mischief to cargo, holders and explorers' possessions carried on the vessel.

2) No maritime lien will interface with a vessel to ensure about cases as set out in subparagraphs (b) and (e) of section 1 which arise out of or result from:

a) hurt in regards to the carriage of oil or other unsafe or harmful substances through sea for which pay is payable to the inquirers as per overall shows or public law obliging demanding commitment and important insurance or various strategies for ensuring about the cases; or

b) the radioactive properties or a mix of radioactive properties with hurtful, unsteady or other hazardous properties of nuclear fuel or of radioactive things or waste.

Capture of the Ship Convention 1952, 1999; The capture of the boat show which bargains the arrangement of the capture of the maritime boats. Office of the chief naval officer Laws and Maritime Claims: 2017 arrangements the arrangement identified with the oceanic court where there is any question between the gatherings are the pieces of the National and International Maritime exchange

and trade. The Salvage Convention, 1989: The Salvage show gives the rights and commitments of the salvor in rescue show the commitment of the rescue in the sea exercises in any conditions. Maritime Mortgages and Lien Convention, 1993; Marine Insurance Laws: - Protect the rights and assurance of the work on board ship proprietor's obligation and impediment of the risk. The Maritime Lability 1976; Discusses the liability of shipowner and the extensive and when the shipowners can restrict the obligation. How much obligation can be restricted under the limit of risk show on different situations.

Maritime Labour Convention, 2006 is one of the essential laws of sea work which is relevant to the manager and representatives regarding the business arrangement of connection between various specialists. The Maritime work show additionally bargains the commitments of the ports state, coastal state and flag state for implementation of sea work show according to their purview region.

4. STATUTORY LIENS AND ITS IMPORTANCE IN SHIPPING BUSINESS

On the subject of maritime claims as per the practices in international maritime contract. In maritime employment, the parties follow particular standard form of the charter party clauses, which become the term of the contact. In case of no payment of unpaid wages as per the contract, the parties have the right to maritime lien on the things involved in maritime adventure. It has given freedom of contract to shipowner in any incidents to continue the maritime employment in shipping business. Various employment laws are Maritime Labour Conventions, 2006 deals the employment agreement and the liability and also fixed liability of the ports state, coastal state and flag state in the maritime employment.

4.1. Express Contractual Liens over Cargo:

Implies express provisions under a bill of lading or a charter party in form of Specific Clauses. The Gencon clause provides which although 'owners shall have a lien on the cargo for freight, dead freight, demurrage and damages for detention'. The NYPE 1946 charter provides in Clause 18 which says that the owner shall have a lien upon all cargoes and all sub-freights for any accounts due under this charter including general average contributions. In addition, the charterers to have a lien on the ship for all the money paid in advance and not earned, and any overpaid hire or excess deposit to return at once. The charterers will not suffer nor permit to be continued any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners of the vessel. This may be in contrast with the clause in NYPE 93 charter party: Clause23 on Liens consists of Clause 18 of NYPE 1946 and encompass the provision that the charterers undertake that during the period of the charter party.

***Characteristics**:*

- Contractual liens, and common law liens as well as possessory in character which create rights of lien between the parties to the contract in contractual relations.

- No rights of lien related as against third party bill of lading holders. In *Turner v Haiji Goolam Mahomed Azam*[7], The ship was chartered for a period of six months with an option to sublet and chartered for a round voyage. The head charter of the bills of lading were to sign at any rate of freight the charterers or their agents might direct without prejudice to the charter. The charter also provided that the owners were to have a lien

[7] *Turner v. Haiji Goolam Mahomed Azam*, (1904) AC 826 (PC).

> ‘upon all cargoes for freight or charter money due under this charter’. Bills of lading duly issued to the sub-charterers and the owners then purported to exercise a lien on the sub-charterer’s cargo for time charter hire. The Privy Council held that the owner had no right of lien on the sub-charter’s cargo. Lord Lindley said: …[A]s regards… giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance…. A right to seize one person’s goods for another person’s debt must be clearly and distinctly conferred before a court of justice can be expected to recognize it.

4.2. Exercise of Lien:

The maritime lien can be exercised on a person directly or indirectly associated with particular transaction in shipping business the claims arise as maritime lien.

4.2.1. Exercise against Consignee

A contractual lien may exercise against a third party where the bill of lading contains a clause, which incorporates the charter party clause. This point was made by Mocatta J in *Santiren Shipping Ltd v Unimarine SA (The ChrysovalandouDyo)*[8]. If the lien was on the facts properly exercised, it applied to the cargo here by reason of the incorporating clause in the bill of lading….

The NYPE 93 Clause: Clause 23 of the NYPE 93 charter party provides that the ship owner has a ‘lien upon all cargoes and all sub-freights for any amounts due under this charter’. This raises the issue whether the ship owner can detain cargo not owned by the time charterers. There are conflicting decisions on this point.

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[8] *Santiren Shipping Ltd v. Unimarine SA (The ChrysovalandouDyo*), (1981) 1 Lloyd’s Rep 159.

The conflicting views: The Agios Giorgis: The charter party for the carriage of cargo aboard the Agios Giorgis from Korea to Charleston (South Carolina) and Norfolk (Virginia). One of the main issues for consideration by Mocatta J was the charterers' ability to deduct from a hire instalment an amount of $19860 for an alleged speed deficiency. The owners had taken the view that there was no entitlement to deduct this amount and they duly instructed the master not to allow discharge of the cargo at Norfolk. The cargo was, detained for two days until the charterers agreed to pay the hire's balance. It held that there was no automatic right to deduct hire. So far, the exercise of lien was concern. He said that, the difficulty for the owners is that they are relying upon a contractual lien, not one given at common law, as against the cargo owners. Who were not parties to the time charter? I am unable to see how clause 18 can give the owners the right to detain cargo not belonging to the charterers and on which no freight was owing to the owners?

Aegnoussiotis Shipping Corporation of Monrovia v Kristian Jebsens Rederi of Bergen (The Aegnoussiotis)[9]

The case concerned with a charter party that entered NYPE 1946 form, for a round voyage in St. Lawrence sea-way. The dispute over the exercise of the contractual lien under the charter party again arose in connection with the payment of hire. While the vessel was in the course of discharging the cargo, a dispute arose as to whether any and, if so, how much hire was due by the charterers during the period when the discharge of the cargo was suspended. After threatening to halt the discharge of the consignee's cargo unless hire was paid by a particular time, the owners instructed the master of the Aegnoussiotis after the time had passed and no hire was forthcoming. So far as the lien was concerned, Donaldson J took the view that Clause 18 was to be construed as

[9] *Aegnoussiotis Shipping Corporation of Monrovia v. Kristian Jebsens Rederi of Bergen*, [1977] 1 Lloyd's Rep 268.

meaning what it said, namely, that the time charterer agrees that the owners shall have a lien upon all cargoes. As far as the third parties own such cargoes, the time charterers accept an obligation to procure the creation of a contractual lien in favour of the owners. If they do not do so and the owners assert a lien over such a cargo, the third parties have a cause of action against the owners. However, the time charterers themselves are in a different position.

If this view is correct, it seems that the time charterer will be obliged to secure a lien in favour of the shipowner from the cargo owner. Usually this will be done by means of a charter party clause incorporated into the bill of lading.

4.2.2. Time of Exercise

If the shipowner has the right to exercise a lien over cargo, this cannot be exercised by halting the laden ship enroute to the port of discharge. In *International Bulk Carriers (Beirut) SARL v. Evlogia Shipping Co SA (The Milhalios Xilas*[10]*),* the owners had let their vessel on the Baltime formand, provided that hire was payable monthly in advance, with a right of withdrawal on default of payment. It also provided that the charterers were to deposit a further 30 days hire, so-called 'escrow hire payment'. The vessel been delivered at Marseilles but the charterers paid neither the advance hire nor the escrow hire. The vessel been ordered to Casablanca and the master, on the instructions of the owners, refused to load until the advance hire had been paid. The vessel then called at Agusta to load bunkers but as the hire payment was still outstanding, the owners instructed the master not to sail. The vessel eventually sailed and completed discharge of cargo at Constanza, Sulina and Brila.

At Brila, the vessel was withdrawn for non-payment of hire. One of the issues for Donaldson J was whether the owners could exercise a lien on the cargo at

[10] *International Bulk Carriers (Beirut) SARL v. Evlogia Shipping Co SA (The Milhalios Xilas)*, [1978] 2 Lloyd's Rep 186.

Augusta by refusing to carry it further. He said that, I do not think that shipowner can usually said to be exercising a lien on cargo by refusing to carry it further. The essence of the exercise of a lien is the denial of possession of the cargo who wants it. No one wanted the cargo in Augusta and the owners were not denying the possession of it to anyone. It may be possible to exercise a lien by refusing to complete the carrying voyage, but I think that this can only be done when, owing to special circumstances, it is impossible to exercise a lien at the port of destination and any further carriage will lead to a loss of possession of the cargo following the arrival at that port. In such circumstances, a refusal to carry further can said to be a denial of the receiver's right to possession. There was no finding that this was the case in the present instance.

4.2.3. Place of Exercise

It is usually sufficient for the ship to have anchored off the declared port of discharge for the lien to exercised, as to require otherwise. 'Might involve unnecessary expense as in certain cases cause congestion in the ports which would seriously limit the commercial value of a lien on cargo granted by a clause in the charter' (*Sanitern Shipping Ltd v Unimarine (The Chrysovalandou).*[11]

4.2.4. Construing Waiver

Ship-owner may retain the goods until the amount of lien is paid. However, an unyielding adherence to such practice would create serious impedance to the normal shipping operations. Shipowner is then likely first to discharge the cargo (not deliver it) to give the cargo owner or the consignee an opportunity to inspect the freight, provided that the shipowner can reasonably land, lighter and warehouse without the risk of losing his lien. When the question of waiver of shipowner's lien comes before the court.

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[11] *Sanitern Shipping Ltd v. Unimarine (The Chrysovalandou)* (1981) 1 Lloyd's Rep 159,165.

- What was the understanding between the parties in relation to of the lien before or at the time the consignee took the possession?

- Has “due and reasonable notice,” been given to the consignee “so as to afford him a fair opportunity to remove the goods or put them under proper care and custody”?

- Were the demands for freight made as soon as delivery was complete or did the shipowner permit the cargo "to be at once carted the wharf as fast as discharged” ---without inquiring who was taking [it] away, or where [it] was going and without any notice at the time of the intention to hold the cargo for payment of and demurrage?

- Was there a stipulation in the contract of Affreightment inconsistent with the exercise of lien?

- Where, other security taken when the cargo discharged? Case laws referred *Egan v A Cargo of Spruce Lath*[12]*Mordecai v Lindsay*[13]*Pioneer Fuel Co. v Mc Brier*[14].

[12] *Pioneer Fuel Co. v. Mc Brier*, 41 F. 830(S.D.N.Y).
[13] *Mordecai v. Lindsay*, 72 U.S (5 Wall) 481.18L Ed 486(1867).
[14] *Pioneer Fuel Co. v. Mc Brier*, 84 F. 495(8th Cir.1897).

4.3. Lien over Sub-Freights

Contractual lien under the charter party extends to sub-freights in charter party forms. This reference to sub-freights includes any remuneration earned by the charterers from the employment of the ship, whether payable by the shipper under a bill of lading or by a sub-charterer under a voyage sub-charter. Remuneration also encompasses the case of hire and sub-hire under a time charter party.

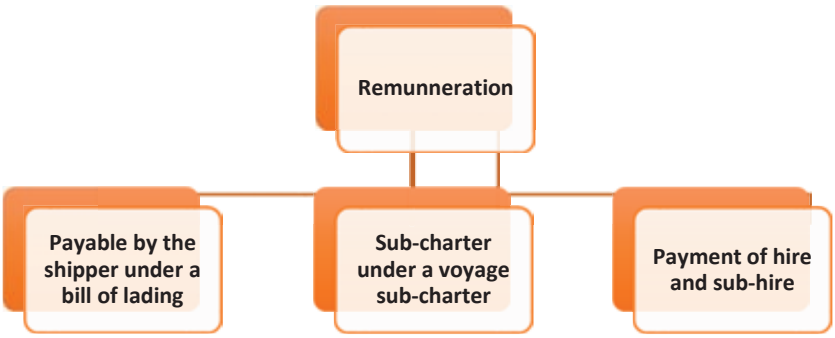

Figure no. 04

4.3.1. Remuneration-Payable by the shipper under a Bill of Lading

Owners' Bill of Lading; if the owners are parties to the bill of lading contract, the shipowners will not have to rely on any right of lien over sub-freights because they, rather than the charterers, will be entitled to receive the freight. Greer J made this point in *Molthes Rederi A/S v Ellerman's Wilson Line Ltd*[15], the bill of lading contract is a contract between the shipowners and the shipper and not a contract between the charterers and the shipper. If this is so, the legal right to the freight is with the owner and not with the charterer, and the former can intervene at any time before the agent has received the freight and say to him: 'I am no longer content that the charterer should collect the freight. If you

[15] *Molthes Rederi A/S v. Ellerman's Wilson Line Ltd*, [1927] 1 KB 710

collect it all, you must collect it for me'. If the agent then collects the freight, it follows that the shipowner can sue for it as money had and received'.

In *Molthes Rederi A/S v Ellerman's Wilson Line Ltd*[16]the Sproit was time chartered on the Baltic and White Sea Time Charter form, 1912, and then sub-chartered for a voyage between the Riga and Hull. Agents were appointed, at the port of discharge by the time charterers to attend to discharge and to collect freight due under the bill of lading. However, before any freight was paid the representatives of the shipowners required the agents to collect the freight as the agents for owners because a considerable amount of hire was still outstanding on the time charter. Greer J held that, although the agents were agents of the time charterers, the ship owners were perfectly entitled to call upon them to collect the freight on their behalf when they were parties to the bill of lading contracts.

Remuneration-Sub-Charter under a Voyage Sub-Charter: Under the NYPE clause, the shipowner merely has the right to intercept such payments made to the charterer by demanding payment to it rather than to the time charter. There is no right to follow the sub-freights once these have been paid.

In *Tagart, Beaton & Co. v James Fisher & Sons, Lord Alverstone*, it was stated that 'A lien such as this on a sub-freight means a right to receive it as freight. In addition, to stop that freight at any time before it has paid to the time charterer or his agent. But such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight'.

[16] Supra 14.

4.3.2. Remuneration-Payment of Hire and Sub Hire

Where, however, the ship owner purports to use the lien to collect any outstanding charter hire. This can only exercise in respect of the hire, although has already accrued before the sub-freight came into the hands of an agent and not for hire.

In *Wehner v Dene Shipping Co.*[17] the Ferndene was on time charter and was also sub-time chartered for a trip. The sub-time charterers were appointed as agents to collect the bill of lading freight. They received the freight from the consignee on 15th December and one day later, the shipowners notified the agents of their claim for the freight collected. At this time, part of the due under the head charter was still owed. A future hire payment was due some days later. Channell J held that, since the bill of lading contract was with the owners, they were entitled to the bill of lading freight. He further held that the owners were entitled to the freight received by the agents on 15th December but were bound to account for it to the sub-time charterers, deducting only the amount due to the owners at the time of receipt. Finally, the owners were not entitled to deduct the amount of hire, which only became due on 23rd December.

In *Itex Itagrani Export, v Care Shipping Corp (The Cebu) (No.2)*[18] let her on a time charter trip on the NYPE 1946 form. She was in turn sub-chartered to Lamsco, who themselves sub-chartered her to Itex, a sub-sub charter. During September 1981, at least a month's hire was due and notice was sent that under the terms of clause 18 of the charter, there was a 'lien upon all cargoes and all sub-freights'. The hire instalment paid to Lamsco. Had the shipowners exercised their rights under their contractual lien on sub freights under clause 18 in respect of hire due under a sub-sub-time charter?

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[17] *Wehner v. Dene Shipping Co*, (1905) 2 KB 92
[18] *Itex Itagrani Export, v. Care Shipping Corp (The Cebu) (No.2*), (1993) QB 1.

In effect Itex was asking the court whether the lien on 'all sub-freights' covered time charter hire and covered sub-sub hire? Steyn J referred to *Care Shipping v Latin American Shipping Co. (The Cebu) (No.1)* where Lloyd J held that, but it would be an odd consequence of the charterers opting to enter into a sub-time charter trip that the owners should in advertently be deprived of their security on sub-freights. I would hold that the lien on sub-freights conferred by clause 18 includes a lien on any remuneration earned by the charterers from the employment of the vessel whether by voyage freight or time-chartered hire.

4.3.3. The problem of freight prepaid

There can be further problems where bills of lading are issued which provide that freight is to be 'prepaid'. On such an instance, the lien on sub-freights will be lost, much as that for advance freight would be lost. The master cannot refuse to sign freight-prepaid bills of lading if the charterers require these.

In *The Shillito*[19], the owners of the Shillito time chartered her to Ercole Conti, the charterers sub-chartered the Shillito for a voyage between Barletta and the River Plate. At the loading port the bills of lading were presented to the master for signature, showing that all the freight had been paid in advance. The bill of lading contained no reference to the charter party. In due course the charterer defaulted on payment of hire. The owners sought to prevent the cargo for unloaded at the port of discharge but were unable to and they now brought a claim in negligence against the master for signing the bills of lading in such a way that they could not enforce their lien. Barnes J held that the charterer has right to present any bills he chooses and although there is a lien clause it is inoperative because the bills of lading contain no reference to the charter party and there is no freight on which a lien can be exercised.

[19] The Shillito (1897), 3 ComCas 44.

4.4. Cesser Clause:

In the case of goods, which were delivered under a bill of lading, issued pursuant to a charter party, the consignee is the party generally responsible for the freight. But where bills of lading are issued under a charter party, it is usual for the charterer to remain liable for demurrage, damages for detention and dead freight. In those instances, where the charterer does not wish to remain responsible for performance of the contract after the goods are loaded, he may insert in the charter party a so called 'cesser clause' whereby his liability for transport charges is to cease once the cargo has been shipped.

The effect of such clauses considered under in *Kish v Cory*[20]. In this case the charter party if cargo was to be loaded in thirteen working days, discharged at not less than 30 tons per working day. An additional period of ten days demurrage has been allowed. The court was required to consider the effect of the clause which stated that 'charterer's liability to cease when the ship is loaded, the captain or the owner having a lien on cargo for freight'. The Court of Exchequer Chamber held that the charterer upon loading the cargo which discharged from liability for demurrage, incurred at the port of loading. The important thing about this particular clause was that it expressly stated that liability was to cease on loading. From the point of view of the shipowner, ultimately cesser clauses are far from ideal because instead of the charterer whom he knows, he referred to a person unknown to him, often in an unfamiliar port, where collection of claims may not be easy. The receiver may of course, not pay the freight, as he should. These difficulties are avoided by the Gencon 1994 clause; lien clause; The owners shall have a lien on the cargo and all sub-freights payable in respect of the cargo, for freight, dead freight, demurrage,

[20] *Kish v. Cory*, (1875) 10 QB 553.

claims for damages and for all other amounts due under this charter party including costs of recovering the same.

4.4.1. General approach of the Courts

The general approach to, cesser clauses which considered by *Donaldson J in Overseas Transportation Co. V Mineral import export (The Sinoe)*[21], Here the plaintiffs (the shipowners) had chartered the Sinoe to the charterers for the carriage of a cargo of cement between Constanza and Chittagong. The charter party was on Genco form and contained the cesser clause. At Chittagong (Bangladesh), the lay days exceeded owing to the slowness and the incompetence of the stevedores. However, the charterers maintained that the cargo had been loaded and the owners had a lien for demurrage and therefore, under the cesser clause they had no further liability. During the course of his judgement, Donaldson J said, Cesser clause are curious animals because it is now well established that they do not mean what they appear to say, namely the charterers' liability shall cease as soon as the cargo is on board. Instead, in the absence of special wording which is not present in this charter, they mean that the charterers' liability shall cease if and to the extent that the owners have an alternative remedy by way of lien on the cargo.

On the facts, he held that cesser clause, could not be relied on by the charterers, for it only came into force if the owners had an effective right to a lien on the cargo. On the evidence, the right was not effective. The combined effect of the local law and practice in Chittagong was such that no lien for demurrage could be exercise by or on behalf of the owner either on shore or on board the ship. Thus, the cesser clause was of no avail.

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[21] *Overseas Transportation Co. v. Mineral import export (The Sinoe),* [1971] 1 Lloyd's Rep 514

The shipowners' lien, the charterer will only be released from liability under the charter to the extent that the shipowner is given a lien on the cargo. In *Fidelitas Shipping Co. Ltd v V/O Exportchleb (The Sophia)*[22], the owners of the Sophia chartered her to respondents on a voyage for the carriage, a grain between, Zdanov on the Black Sea, to Basrah on the Persian Gulf. When the vessel arrived at Zhdanov, she gave notice of readiness to load but nothing actually happened for another five days when it was agreed that the charter party should be cancelled. A new charter party was entered into (dated 6 October) with contract destinations of Avonmouth and Manchester. The question before the Court of Appeal was, whether the cesser clause absolves the charterers from liability for delay in holding? The matter was complicated by bill of lading which provided that 'all terms and conditions were as per charter party' and further stated a clause that the carrier was to have a lien upon the goods for and until payment of freight and all other charges and expenses due under the contract of carriage. The Court of Appeal held that:

On shipment of the goods, the lien comes into existence and the charterer is relieved of his personal liability, even if he is and remains the owner of the goods…the lien arises in the first instance under the charter party. Usually, however, there is a bill of lading with the receiver of the goods. A lien for demurrage exists only under contract. Consequently, the shipowner will not have a lien for demurrage as against the receiver of goods under the bill of lading unless the bill of lading provides for it either by alien clause of its own or by incorporation in the charterparty. Thus, it is essential for charter party liens to effectively incorporated, into the relevant bill of lading.

[22] *Fidelitas Shipping Co. Ltd v. V/O Exportchleb (The Sophia),* [1963] 2 Lloyd's Rep 113 (CA).

4.4.2. Wording of the clause

The wording of the clause must be adequate to cover the relevant charge. Thus, a clause, which provides for a lien for a demurrage will not extend to a claim for damages for detention. In *Clink v Radford,*[23] a cesser Clause, provided for the charterer's liability to cease on the cargo loaded, the owners having a lien on the cargo for freight and demurrage. The charterer provided for lay time and demurrage at the discharge port, but at the loading port the charterer envisaged customary lay time with detention thereafter. The charterers denied liability for detention on basis of the cesser clause. Lord Esher M.R held that the cesser clause will be construed as inapplicable to a particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that related breach, unless the cesser clause is expressed in terms that prohibit.

4.4.3. Effective exercise

The granting of lien must be capable of being effectively exercised. If, therefore, the contract of carriage itself provides that demurrage is not payable until a week after the date is fixed for discharge of the cargo, the lien could not be effectively exercised by ship owner.

4.4.4. Lien incapable of exercise

The lien may not be capable of enforcement where a foreign government does not allow the lien to exercise at the port of discharge. In *Action SA v Britannic Shipping Corp Ltd. (The Aegis Britannic)*[24], the Aegis Britannic chartered to carry a cargo of rice from US Gulf port to Basrah in Iraq. Charter party contained cesser clause. During discharge by stevedores at Basrah the cargo was partially damaged. The receivers claimed against the owners and obtained judgement

[23] *Clink v. Radford* [1891], 1 QB 625 (CA).
[24]*Action SA v. Britannic Shipping Corp Ltd. (The Aegis Britannic),* [1987] 1 Lloyd's Rep 119 (CA).

against them. In arbitration proceedings, the owners claimed against the charterers the amount, which they had to pay and a declaration of indemnity as to balance. Charterers claimed that their liability had ceased since this was not a claim for freight, dead freight or demurrage. Staughton J held that there was a long line of authority, which showed that cesser clauses had a special and limited meaning to relieve the charterers from liability where no effective lien provided there would have to be special wording, which made the point, clear beyond any doubt. Accordingly, the cesser clause has usually been construe as applying where the charter party provides the owners with an alternative remedy, a remedy that is not only effective in theory but also effective in practice.

5. CONCLUSION

The ship owner roles as business facilitator and promoter, which is recognized in maritime employment as the contributor in the environment of maritime business, ship owners give the job opportunities and promote employment as well as create business for future work. The right on maritime claim, in maritime business, with significant provision for protection of the interest of the ship owner. Due to this ship owners cannot suffer in any case apart from his own fault. It is covered and protected in insurance or the protection and indemnity clauses. The protection and indemnity club which is an association of the ship owners. To protect and provide a remedy out of claim is important means of the future of work in maritime employment.

Ship-owner’s lien is exercised both under the implied rights in common law principles as well as under explicit conditions laid out in an express contractual agreement. The lien is essentially possessory in nature. It can be exercised only when the goods are retained with the shipowner. The intricacies arising from sub-chartering and the mode of exercise of lien is resolved by the courts through its various judgements. The ambit and the scope of shipowners' lien in the light of these judicial pronouncements seem to be clearer and well chartered.

MIGRANT WORKERS IN UNORGANISED SECTOR: SOCIO-LEGAL AND POLICY ANALYSIS

Somanshu Shukla & Aryan Bhat [1]

Abstract

The paper attempts to analyze and explain the sociological significance of migration and highlights the challenges faced by migrant workers in the country to analyze the existing legal provisions governing the welfare of migrant workers from a socio-legal perspective. It broadly engages with two questions- First, why were migrant workers disproportionally affected by the pandemic and subsequent restrictions as opposed to ordinary workers? Secondly, whether the existing legal framework is adequate to address the unique economic and social challenges faced by migrant workers in India? The authors look at how economic crises affect migrant workers by using the COVID-19 pandemic as a paradigmatic example. The paper argues that the reverse migration, arising due to the pandemic, is likely to have a detrimental effect on the growth of urban regions, and may lead to great food insecurity and widening inequality. Thereafter, in light of the distinctive needs and requirements of migrant workers, the paper critiques the existing legal framework in terms of dealing with the hardships faced by migrant workers. In this context, the paper looks at the recently passed labour legislations, namely the Code on Occupational Safety, Health and Working Conditions, 2020, the Code on Wages, 2019, Code on Social Security, 2020 and the Industrial Relations Code and argues that, while these legislations do offer some beneficial measures, they are not sufficient to mitigate the concerns of migrant workers due to their specific circumstances. Lastly, the paper offers a policy framework to address the unique predicaments faced by migrant workers. The paper concludes that such a framework should

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be a combination of migrant-specific legislation and government schemes, and should be focused upon three planks: Institutional Capacity, Migrant Rights, Safe and orderly migration.

1. INTRODUCTION

Migrant workers contribute substantially to economies around the world and are essential for the growth of urban regions and the economy as a whole. The number of migrant workers has grown significantly due to continuous urbanization, which could be attributed to the growing pace of economic globalization[2]. The Census Data of 2011 calculated the migrants in the country to be numbered at around 450 million (of whom around 5.43 million migrated across states).[3] Migrant workers play a vital role in the economy as they provide a cheap source of labour in their places of destination but are subject to various adversarial conditions, distinct from those faced by ordinary workers, which have often been disregarded by policymakers in the country. For instance, the Census defined a "migrant" as one who is at a different place than his/her place of birth. However, this definition could be misleading, as the country also witnesses frequent cycles of seasonal migration among states[4], where it is very likely that the worker would be in her/his place of birth after having migrated to a distant place for a limited period of time. These short-term migrants are excluded from the ambit of this definition, which consequently excludes them from the necessary social security net. Hence, the actual number of migrant

[2] M. R. Bhattacharya, *Development and Internal Outmigration in India in Post-economic Reform Era*, 4 Asia-Pacific Journal of Regional Science, 713-735 (2020).
[3] S. Yadav, *India on the Move: What Data From Census 2011 Show on Migration*, The Indian Express (26/6/19), available at India on the move: What data from Census 2011 show on migrations | Explained News,The Indian Express.
[4] R. Venkatramakrishan, *India's Seasonal Migrants Have Been Invisible for Long. This Crisis Should Be A Wake-up Call*, Scroll.in, available at India's seasonal migrants have been invisible for too long – this should be a wake-up call (scroll.in)

workers can be considered to be much higher in figure than what is revealed in the Census.

For reasons, including but not limited to this flawed definition of migration, migrant workers tend to be neglected when it comes to policy formulation, as their unique needs and requirements are often disregarded by legislations meant to provide protection and security to the labour force. This is mainly due to the failure of the Indian State to appreciate the unique hurdles faced by inter-state migrants working in the unorganised sector. The repercussion of the COVID-19 lockdown and the subsequent reverse migration further highlight the underprepared mechanisms meant to safeguard migrant workers, causing a great deal of suffering for them.

This paper attempts to draw attention to the significance of migration and analyze it from a sociological perspective so as to understand the needs and requirements of migrant workers. Thereafter, the paper looks at how economic crises, arising out of natural and manmade factors, affect migrant workers disproportionately by using the COVID-19 pandemic as a paradigmatic example.

Subsequently, the paper looks at the consequences of the response of migrant workers to these crises and highlights their importance in the context of the modern economy. Thereafter, in light of the distinctive needs and requirements of migrant workers, the paper attempts to critique the existing legal framework in terms of dealing with the hardships faced by migrant workers. Lastly, the paper offers a policy framework to address the unique predicaments faced by them.

The paper adopts this interdisciplinary approach in order to come up with solutions relevant to their predicaments, which may not be possible if the situation were to be analyzed from a purely legal perspective. This is because

migration is a highly complex sociological phenomenon, which cannot be dealt with a conventional legal outlook, in isolation of its significance and its characteristics. Therefore, in adopting an interdisciplinary approach and offering a multi-faceted solution, the paper hopes to bring to the fore the distressing situation of the migrant workers and the lack of suitable legal mechanisms and accordingly provide policy recommendations.

2. MIGRATION IN RECENT TIMES

Migration, especially in modern times, is a major indication of basic social change. In most countries, industrialization is accompanied by vast movements of the population from farms to towns within the same country, and also between countries.[5] These movements of the population attained great numerical importance at the turn of the last century in Europe and North America, while in the newly developing countries of Africa, Asia, and South America this process continues to operate on a large scale.

Whereas in the historical experience of Western nations, migration has been associated with industrialization and economic development, concern has been expressed that internal migration to the cities of the emerging economies results from the "pushes" of rapid population growth and economic stagnation in rural areas instead of any opportunities for economic mobility in the urban regions.[6] In India, for instance, the primary reasons for high internal migration include regional disparity, lack of job opportunities, chronic poverty, weak education system, underemployment at places of origin, especially rural regions.[7]

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[5] C. J. Jansen, '*Readings in the Sociology of Migration*'3 (Pergamon Press, 1970).

[6] C. Goldschieder, *Migration and Social Structure: Analytic Issues and Comparative Perspectives in Developing Nations*' 2(4), Sociological Forum 674, 676 (1987).

[7] S. Sikdar & P. Mishra, *Reverse Migration during Lockdown: A Snapshot of Public Policies*, National Institute of Public Finance and Policy, Working Paper No. 318 available at https://nipfp.org.in/media/medialibrary/2020/09/WP_318_2020.pdf, last seen on 25/10/2020.

Migration has a significant impact on the social and economic structure of any place but the phenomenon of migration itself is impacted by social, political, and economic exigencies. As mentioned before migration in developing countries such as India is undertaken due to factors such as regional disparity, lack of job opportunities, chronic poverty, weak education system, underemployment at source centers.[8] A substantial portion of these migrant workers in India are employed in the informal sector, which encompasses all those who work under conditions outside labour laws and regulations and those who are self-employed in a business that is not registered with the state.[9] So, employees of informal enterprises, casual or day labourer, temporary or part-time workers, paid domestic workers, contract workers, unregistered or undeclared workers, and industrial outworkers can be classified as falling under the informal sector.[10] The absence of any form of safeguards and protections leaves them vulnerable to numerous predicaments arising out of a crisis. It is this vulnerability that triggered massive reverse migration in India and added salt to the collective misery of the migrants.

3. COVID-19 PANDEMIC AND ITS RAMIFICATIONS FOR MIGRANT WORKERS

Mobility- spatial and occupational- has been the hallmark of Indian labour dynamics over the last three decades, with a remarkable increase of rural-to-urban streams of labourer, suggested by a significant shift of the rural working population from agriculture to the secondary and the tertiary sectors of the economy.[11] However, the structure of urban and rural population in India and the dynamic component of migration, coupled with State apathy led to the

[8] Ibid.
[9] M. Dhal, *Labor Stand: Face of Precarious Migrant Construction Workers in India* 146(6) J. Constr. Eng. Manage 1, 2 (2020).
[10] Ibid.
[11] Ibid.

exacerbation of predicaments faced by migrants in India due to the COVID-19 pandemic and the restrictions imposed to control its spread.[12]

Social distancing had been adopted by the government as the primary prevention and control strategy after the severity of the disease and its spread became evident.[13] As part of this strategy, large-scale national movements were restricted after 24 March 2020 and a complete restriction on passenger travel was implemented as part of a nationwide lockdown.[14] However, this had immediate and severe effects on migrant workers because of being deprived of their mobility, which they rely upon to find employment opportunities.[15] Although the lockdown in India was arguably an effective strategy to control the pandemic, its execution was abrupt, with the State ill-equipped to deal with adverse effects on migrant workers.[16] A prior strategy for dealing with urban migrants, employees in the informal sector, and livelihood options for daily wage earners, migrant workers, and students, was visibly absent.[17]

A large body of economic literature in recent times, has in fact, even drawn parallels between migrant workers and bonded labour, underscoring the non-payment of the minimum wages and overtime compensation, exploitatively long working hours and the virtual monopoly vested by the contractors in buying their labour services in absence of credible employment sources. This resembles the contractor-labour relation in such a scenario similar to that of bonded labour.[18]

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[12] R. Mukhra, K. Krishan, & T. Kanchan, *COVID-19 Sets off Mass Migration in India* (2020), Archives of Medical Research available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7275149/, last seen on 25/10/2020.

[13] A. Maji, T. Choudhari, M.B. Sushma, *Implication of Repatriating Migrant Workers on COVID-19 Spread and Transportation Requirements*, available on https://arxiv.org/ftp/arxiv/papers/2005/2005.04424.pdf, last seen on 25/10/2020.

[14] Ibid.

[15] Ibid.

[16] R. Suresh, J. James & Balraju R. S.j, *Migrant Workers at Crossroads-The Covid-19 Pandemic, and the Migrant Experience in India* 35(7) Social Work in Public Health 633, 635.

[17] Ibid.

[18] Breman, J., *Footloose Labour: Working in the Indian Informal Economy*. (Cambridge: Cambridge University Press, 1996).

So, while destination centers do provide migrants assured employment opportunities, a disproportionate share of them are forced to reside and work in dismal conditions as informal workers, which is worsened by the fact that they have negligible amounts of savings.[19]Naturally, they do not have a 'buffer' in the form of savings to deal with uncertainties that may arise due to such a crisis as the meagre daily wages are exhausted to meet the essential needs of a household. So, when a complete lockdown was implemented, many migrants who survived on the basis of daily wages were deprived of their livelihood with no safety net in the form of savings or government protection in the form of social security. This left many with no option other than heading home.

The pandemic and the restrictions introduced to tackle it gave rise to an economic crisis, which triggered a mass migration of people to their place of origin.[20] In India's case, the mass exodus of migrant workers from destination centers (primarily urban) to the source centers, also known as reverse migration, was brought on by the sudden collapse of employment and effective social protection mechanisms.[21] The economic plight becomes evident by the fact that India's gross domestic product contracted 23.9 per-cent in the April-June period, far exceeding the estimates of economists.[22]

As per a World Bank study, roughly 40 million internal migrants were affected by the restrictions imposed during the lockdown.[23] A substantial number of them might have migrated to their places of origin but the same cannot be ascertained due to the lack of data on the subject, as was highlighted at the outset of this

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[19] Supra 6.
[20]A. Khanna, *Impact of Migration of Labour Force due to Global Covid-19 Pandemic with Reference to India* 22(2), Journal of Health Management 181, 182 (2020).
[21] Supra 6.
[22] S. Singh, *At -23.9%, GDP contracts at its Steepest Pace on Record*, NDTV (31/08/2020), available at https://www.ndtv.com/business/gdp-contracts-by-23-9-in-june-quarter-compared-to-3-1-growth-in-previous-2288121, last seen on 21/2/2021.
[23] Supra 6.

paper. The woes of migrant workers were compounded by a series of chaotic travel orders and gross mismanagement of the repatriation process.[24] The Ministry of Home Affairs (MHA) issued eight travel orders, which were opaque, ill-defined and did not fully appreciate the dynamics of the country's labour market. For instance, circular dated March 29, 2020[25] urged the State Governments to ensure that the migrant labourer is duly paid by their employers- which totally ignores the crucial point that the majority of such workers are employed in the unorganised sector and therefore, are not formally registered with any establishment for the same to be materialized. Assuming *ad arguendo* that such a step could have been enforced; the circular again was ignorant of the fact that Medium and Small Enterprises, which employ the bulk of India's unorganised workforce, were pushed to the brink of penury due to the impact of the pandemic, making it impractical for them to pay wages to their workers.[26]

In facilitating national economic growth and personal wellbeing, migration also affects the basic anatomy of local growth and decline.[27] Additions of the population through migration may stimulate further growth; subtractions may attenuate it.[28] So, by extension, it can be said that reverse migration on the magnitude that we are witnessing today, is likely to have severe repercussions for the functioning of urban regions besides the obvious demographic and social changes that would arise out of such a mass exodus.

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[24] A. Adhikari, N. Goregaonkar, R. Narayanan, N. Panicker & N. Ramamoorthy, *Manufactured Maladies: Lives and Livelihoods of Migrant Workers During COVID-19 Lockdown in India*, Ind. J. Labour. Econ., (2020), available at https://doi.org/10.1007/s41027-020-00282-x, last seen on 21/2/2021.

[25] Ministry of Home Affairs, Government of India, Order No. 40-3/2020-DM-I(A), (29/03/2020), available at MHA Order restricting movement of migrants and strict enforement of lockdown measures - 29.03.2020_0.pdf, last seen on 21/02/2021.

[26] J. Unni, *Impact of COVID-19 on Informal Economy: The Revival*, 63 The Indian Journal of Labour Economics,113-118 (2020).

[27] A. A. Brown & E. Neuberger, *Internal Migration: A Comparative Perspective* 69 (Academic Press 1977).

[28] Ibid.

3.1. Repercussions of migration and actions of workers on the market

En-masse reverse-migration of large portions of the migrant population would not only deprive many of the migrants of meaningful employment but also lower the growth of urban regions, where such populations provided a sizable market for various primary and secondary activities. Internal migrants constitute about one-third of India's urban population, and this proportion has been increased from 31.6 per cent in 1983 to 35 per-cent in 2007-08, with the percentage of internal migrants being as high as 58% in Surat, and 43% in Mumbai and Delhi.[29] Part of the reason why outmigration and economic stagnation reinforce each other is that migration is adversely selective.[30] Outmigration acts as an economic adjustment mechanism by reducing local labour surpluses and lessening competition for scarce employment. However, what begins as an equilibrating force may lead to disequilibrium, and at some point, outmigration accelerates local economic distress by reducing the productivity of the area's labour force and hence, its attractiveness to a new industry.[31]

It has been suggested by contemporary theories that decisions to migrate or stay at places of origin and destination along with the overarching patterns of movement are intrinsically related to economic conditions at the aforementioned places.[32] Economic crises make it evident that the propensity of migrants, to return to places of origin after economic upheavals, is possibly influenced by migrants' cumulative experiences and shared migrant associations.[33] A substantial portion of migrant workers who undertook reverse migration from the big industrial centers and metropolitan cities during the crisis might never

[29] M. Faetanini and R. Tankha, *Social Inclusion of Internal Migrants in India* 6 (UNESCO, 2013).
[30] Ibid.
[31] Ibid.
[32] Supra 19.
[33] Ibid.

return, preferring to sustain themselves on whatever marginal work they might find in the farms in their village or nearby towns.[34] This may lead to a temporary shortage of human resources in industries as industrial centers such as Mumbai, Surat, Delhi, etc. would be deprived of labour for a significant period of time. The absence of migrant labourers is likely to have severe deleterious consequences for industries, such as agriculture, textile, and construction, which are dependent on manpower. [35]

Since outmigration usually draws away from the labour force the more highly qualified members - the young, the educated, and the skilled- the labour force left behind tends to be over-aged, undereducated, and under-skilled.[36] As a labour force declines in quality, distressed areas become less attractive to new industries that require a supply of skilled workers, which might encourage industries to develop in other places, thereby exacerbating the problem of unemployment.[37] Furthermore, since the people who stay are generally less migration prone, the remaining population shows a reduced potential for mobility which implies that stronger and stronger economic incentives would be necessary to induce additional people to migrate to other regions in order to maintain any balance between population size and shrinking employment opportunities.[38]

Another major challenge raised by the reverse migration due to the lockdown restriction is insecurity related to food and nutrition. Lockdowns and economic depression dried up the work and incomes of migrants and other people which increased food insecurity and limited the livelihood options of migrant populations while simultaneously causing disruptions in the production of goods

[34] Ibid.
[35] Supra 11.
[36] Supra 25.
[37] Ibid.
[38] Ibid.

and consumables due to the breakdown of transportation systems and supply chains.[39] Such disruptions have not only caused a severe hindrance to the production of various goods but have also decreased the availability and distribution of such goods. Recent studies have highlighted the precarious situation of migrant workers, many of whom are unable to access simple amenities such as food and water, which has been exacerbated by the lack of proper documentation, amongst large sections of migrants, necessary to access governmental assistance.[40] Moreover, Reverse migration by workers to their homes in rural areas is likely to deprive them of access to necessary goods, especially in the absence of viable employment opportunities in rural areas. This is also bound to affect the standard of living for the migrant workforce and their families.

Migrant workers suffer due to the absence of civic identity and citizenship, poor access to housing and basic amenities, poorer entitlements, and poor working conditions at centers of destination.[41] They are often incorporated into the labour market in less favorable ways than non-migrants, which could be because of debt-interlocking, involvement in sub-contracting chain, greater isolation, fragmentation, and segmentation.[42]

Widening equality, which was already a concern, may acquire exceptional proportions due to the imposition of lockdown restrictions and subsequent reverse migration. Migration is often considered to be a response to regional imbalances, as people often migrate from rural areas that offer few opportunities

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[39] Supra 19.
[40] R. B Bhagat, R. R.S., Sahoo, Harihar, A. K. Roy, Dipti Govil, *The COVID-19, Migration and Livelihood in India: Challenges and Policy Issues*, 17(5), Migration Letters 705, 709 (2020).
[41] R. Srivastava, *Vulnerable Internal Migrants in India and Portability of Social Security and Entitlements* 2 Institute for Human Development (2020), available at http://www.ihdindia.org/Working%20Ppaers/2020/IHD-CES_WP_02_2020.pdf, last seen on 2/11/2020.
[42] Ibid.

for employment to urban areas. Interstate migration, therefore, is largely concentrated in urban areas.[43] However, urban inequality has been the main driver of overall inequality due to the occupational continuities of the poor.[44] Due to the lockdown restrictions, many migrant workers lost their employment which forced a substantial portion of them to migrate back to their places of origin and live-in deprivation of their previous level of income, thereby exacerbating the existing inequality of wealth and income. Another aspect of this is gender inequality which exists amongst migrating workers.

4. LABOUR REFORMS AND THEIR INADEQUACY

The only legal protection available for grievances specific to migrant workers was the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, which came into force in 1980.[45] It mandated, among other things, that a contractor must pay at least minimum wage as well as accommodation and journey allowances to the migrant workers.[46] This is applicable to all establishments employing five or more interstate migrants.[47] However, it was considered somewhat insufficient to meet the specific vulnerabilities of migrant workers, which had led to demands of separate legislation that addresses the complexities of issues faced by migrant workers.[48]

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[43] A. Adhikari, N. Goregaonkar, R. Narayanan, N. Panicker & N. Ramamoorthy, *Manufactured Maladies: Lives and Livelihoods of Migrant Workers During COVID-19 Lockdown in India*, Ind. J. Labour. Econ., (2020) available at https://doi.org/10.1007/s41027-020-00282-x, last seen on 15/11/2020.

[44] Ibid.

[45] S. Majumder, *Why a comprehensive legal framework to protect migrants' rights is urgently needed*, The Caravan, (03/05/2020), available at https://caravanmagazine.in/law/why-a-comprehensive-legal-framework-to-protect-migrants-rights-is-urgently-needed, last seen on 30/11/2020.

[46] Ss. 13, 15, 16, and 17, The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.

[47] Ibid at S.1(4).

[48] D. Varma, Bharadkar & R. Mehrotra, *India's new labour codes fail migrant workers whose vulnerability was highlighted by lockdown crisis*, Scroll, (27/09/2020), available at https://scroll.in/article/974137/indias-new-labour-codes-fail-migrant-workers-whose-vulnerability-was-highlighted-by-lockdown-crisis. Last seen on 30/11/2020.

The government instead has chosen to subsume the provisions of the Inter-State Workmen (Regulation of Employment and Conditions of Service) Act, 1979 into the Occupational, Safety, Health and Working Conditions Act.

4.1. The Occupational Safety, Health and Working Conditions Code, 2020

The Code on Occupational Safety, Health and Working Conditions, instead of strengthening the safeguards and protections provided to migrant workers, raises the threshold limit for bare minimum provisions. For instance, the protections under the Code on Occupational Safety, Health and Working Conditions (hereinafter referred to as the Code) would apply only to establishments employing more than 10 workers,[49] and the specific provisions available to migrant workers would only be applicable to establishments employing twenty or more inter-state migrants,[50] which is substantially higher in comparison to the threshold of five mentioned in the prior Inter-state Migrant Workmen Act, 1979. This becomes deeply problematic due to the fact that only around 30% of India's employment is in establishments with six employees and above.[51] What is also concerning is that the preamble of the Code explicitly restricts the ambit of its applicability only to workers employed in establishments. This excludes a little more than half of the informal workforce which is self-employed but as economically insecure as those engaged in casual work[52].

Therefore, a vast majority of migrants employed in workplaces that employ less than 10 workers would be outside the ambit of the protection of this Code. While

[49] S. 2(1)(u), The Occupational Safety, Health and Working Conditions Code, 2019.
[50] Ibid at S 45(1).
[51] Ministry of Statistics and Programme Implementation, Government of India, *Sixth Economic Census* available at http://mospi.nic.in/all-india-report-sixth-economic-census.
[52] Srija and Shirke, *An Analysis of Informal Labour Market in India, Confederation of Indian Industry* (Special Feature), available at CII EM-october-2014.pdf (ies.gov.in). last seen on 21/2/21.

the new Code does widen the definition of inter-state migrant beyond solely those who are recruited by contractors, Chapter XI under Part II of the Code, which pertains to migrant workers, completely ignores intra-state migrants who migrate within state borders despite the fact that they are subject to almost all the predicaments faced by inter-state migrants. In 2011, inter-state movement accounted for almost 88% of all internal migration.[53]

Under Section 13 of the Inter-State Migrant Workmen Act, 1979, every inter-state workman was entitled to a displacement allowance at the time of recruitment equivalent to half of the monthly wages payable to him.[54] However, this Code also does away with displacement allowance and other similar protections like equality of working conditions, accommodation, medical facilities, and evaluation irrespective of the number of workers on site, which were present in its 2019 version. Lastly, the Code omits provisions that required employers to furnish details to the Labour Department of both the home and destination state, upon recruitment as well as the cessation of employment of migrant workers which was present in the Inter-State Migrant Workmen Act.[55] This is particularly concerning given the fact that lack of data on migrants on part of the government, restricted its ability to formulate relevant policies to alleviate the grievances of migrant workers.[56] Therefore, the Occupational Safety, Health, and Working Conditions Code decreases the degree of protection

[53] Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India, Census 2011.
[54] S. Mandal, *Emerging Trends of Inter-State Migrant Workers in India: A Study of Legal Framework* 7 Indian JL & Just 106, 113 (2016).
[55] A. Chakradhar & N. Mallick, *Labor codes: Are protections for migrant workers migrating too?* Scroll.in, (18/09/2020) available at https://scroll.in/article/973402/labour-codes-are-protections-for-migrant-workers-migrating-too, last seen on 30/11/2020.
[56] A. Reddy, *Lack of Updated Data led to Massive Migrant Crisis during COVID-19*, Vidhi Centre for Legal Policy, available at https://vidhilegalpolicy.in/blog/lack-of-updated-data-led-to-massive-migrant-crisis-during-covid-19/, last seen on 28/10/2020.

available to a majority of internal migrants while raising the threshold for migrant workers who can potentially benefit from the legislation.

4.2. Code On Wages, 2019

Code on Wages, 2019, which was notified on August 8, 2019, seeks to amend and consolidate the laws related to wages and matters. The legislation has introduced various reforms. For instance, the Code, unlike the Payment of Wages Act and Minimum Wages Act, expands the definition of 'employee' and 'employer' to include both formal and informal sectors.[57] Moreover, the Code expands the application of the Minimum Wages Act, 1936, from being limited to works whose income had to be under a predetermined ceiling, to cover all establishments and employees unless specifically exempted.[58] It also adopts a uniform definition of wages, which includes basic pay, dearness allowance, and retaining allowance.[59] Another positive reform is the inclusion of web inspection and inspector-cum-facilitator to advise the employer and employees for better compliance with the law.[60] However, the definition of wages excludes bonus, value of house accommodation, HRA, contribution by employer in provident or pension fund, gratuity, overtime payment.[61] This is likely to prove detrimental to migrant workers as merely the guarantee of a basic salary is not sufficient to sustain something as unanticipated and uncertain as a pandemic and a guarantee of pension fund or gratuity provides much needed buffer to sustain in crisis like the COVID pandemic. The omission of overtime allowances in the calculation

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[57] M. Bordoloi, M.H. Farooqui, & S. Pandey, *Social Security for Informal Workers in India: Exploring India's Labour Market Policies on Provisioning of Social Security to Informal Workers in the Unorganised Sector, Centre* for Policy Research. Available at https://accountabilityindia.in/wp-content/uploads/2020/11/Brief_SocialSecurity_InformalWorkers_21Nov 2020.pdf ., Last seen on 21/2/21.

[58] Ibid.

[59] Shamim Ara, *Labour Market Reforms in India* 1(3) International Journal of Economics and Financial Issues 177, 181 (2020).

[60] Ibid.

[61] Ibid.

of minimum wages legitimizes the practice of non-payment of overtime allowances to employees working past the normal hours, which contributes to making an exploitative workplace.

The Wage Code also provides discretionary power to determine wage rates and lacks clarity for setting the implementation of the minimum wages.[62] The Code simply states that the subsistence wages may be set by either the central government or the state government, the latter of which cannot be lower than the national wage floor that is set by the central government.[63] This may still create confusion as to the applicable minimum wage. Furthermore, ensuring a high rate of compliance is dependent as much on a simplified wage system as on a coherent enforcement strategy involving the awareness and provision of information, effective labour inspections, and punitive sanctions in case of violation.[64] Lastly, the definitions of workers and employees provided in the legislation seem to suggest that the definition of workers is a subset of employees, but many provisions of the code use both the terms interchangeable which may create confusion and hinder its implementation. Hence, the implementation of the provisions remains an area of concern.

4.3. The Code on Social Security, 2020

The Code on Social Security, 2020, which aims at protecting the workers from the economic risk inherent in economic activity, endeavors to ensure adequate financial and other protection for the workers in the event of health and other

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[62] S. Mohan, *Economic Analysis of Code on Labor Wages 2019* 18 Jharkhand Journal of Development and Management Studies 8447, 8452 (2020).
[63] Supra 56.
[64] A. Satpathy, X. Estupinan, & B. K. Malick, *Wage Code and rules- Will they improve the effectiveness of minimum wage policy in India?* (23/08/2020). Available at https://www.researchgate.net/profile/Xavier_Estupinan/publication/345922351_Wage_Code_and_Rules_-_Will_They_Improve_the_Effectiveness_of_Minimum_Wage_Policy_in_India/links/5fe9f672299bf14088561d87/Wage-Code-and-Rules-Will-They-Improve-the-Effectiveness-of-Minimum-Wage-Policy-in-India.pdf, Last seen on 21/2/2021.

contingencies.[65] The Code rationalizes and consolidates relevant provision of around 15 labour legislations, relevant for both organized and unorganized sectors.[66] The Code defines social security as measures of protection afforded to employees, unorganised workers, gig workers, and platform workers to ensure access to health care and to provide income security.[67]

However, it is pertinent to highlight Chapter IX of the impugned Code wherein sections 109 and 110 mandate the Central and State Governments to formulate and implement schemes on various aspects of social security, *inter alia,* housing, funeral assistance, education and old age protection. It would however be made available to "registered" workers as prescribed by section 113 of the Code. This becomes a very restricted condition given that the collective experiences of internal migrants in developing countries like India has seen a tension between the constitutional guarantee of equal citizenship and rights and their actual deliverance to them on ground- a gap attributed to the acute lack of identity documentation of the internal migrants which is a result of administrative incompetence, corruption etc.[68]. The mandatory requirement of formal registration therefore, worsens the already unequal distribution of substantive legal rights among India's impoverished citizens.

Additionally, the Code, much like the erstwhile Unorganized Workers Social Security Act (UWSSA), stipulates the formation of national and state-level Social Security Boards to recommend schemes for unorganized workers. [69] However, like UWSSA, the National Social Security Board and State Security Board are mainly relegated to advisory and monitory roles in formulation

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[65] Supra 58 at 185.
[66] Ibid.
[67] S. 2(78), The Code on Social Security, 2020.
[68] A. Rameez, *Internal Migration and Citizenship in India*, 42(1), Journal of Ethnic and Migration Studies, 150, 168 (2016).
[69] Supra 56.

implementation of schemes and they, therefore, lack any substantive power to bring about a positive change.[70] Moreover, the Code retains many of the less desirable provisions of UNWSSA while relaxing some of the accountability and monitoring mechanisms in the provisioning of social security benefits by employers.[71] Another important concern with regards to the effectiveness of this Code is that, unlike the erstwhile UWSSA, no longer requires the district administration to ensure and facilitate registration of workers.[72] This, in effect, would mean that no one can be held accountable for delayed registration and since there is no other mechanism.

Lastly, and most crucially, the effectiveness of the protections offered by this code is bound to be affected by the presence of fragmented administrative and delivery systems, which is evident by the lack of a unified database of migrant workers and by the fact that social security schemes are run by different Union government ministries and state-level schemes by different state governments. This is because this distribution of responsibilities means that separate beneficiary databases are maintained under each scheme and that a worker has to apply for each scheme separately, thereby making the process extremely cumbersome and the portability of benefits from one state to another almost impossible.[73]

It should be noted that it is also very difficult to provide legislation-based social security to informal workers, daily wage earners, domestic workers, freelance workers, etc. where the employer-employee relationship cannot be defined properly.[74] A large population of migrant workers continues to work in such

[70] U. Agrawal and S. Agarwal, *Social Security for Domestic Workers in India* 14 Socio-Legal Rev 30, 42 (2018).
[71] Supra 56.
[72] Ibid.
[73] Ibid.
[74] Supra 58 at 186.

occupations, especially in rural areas. For instance, seasonal migrant workers, who often migrate to different regions in search of work during breaks in the farming cycle, are difficult to categorize as being employed under a particular establishment for a variety of reasons. Firstly, seasonal migration could take place could take place for a few days or a few months each time and could take place in several short migration cycles or just one in a year.[75] Secondly, seasonal migrants are likely to accept any kind of informal work, which is almost always temporary in nature, even if it offers meagre wage because seasonal migration is often a coping mechanism employed by people to tackle the uncertainties of agricultural livelihood in rural India, especially during the periods between the harvesting of crops and sowing of the next batch of crops.[76] Therefore, not only are migrant workers more vulnerable to exploitation but are also difficult to protect under such social protection legislation due to their unique circumstances, which might sometimes severely constrain their ability to access social protection.[77] Hence, the government will have to go beyond just legislative reforms in order to make protection mechanisms truly accessible.

4.4. The Industrial Relations Code, 2020

The Industrial Relations Code, 2020, which was passed by the parliament on 23 September 2020 and was notified on 29 September 2020, consolidates the provisions of three major central laws in the country, i.e., the Trade Unions Act, 1926; the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Order) Act 1946.[78] The Code is aimed at promoting ease of doing

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[75] Supra 40

[76] P. Deshingkar & D. Start, *Seasonal Migration for Livelihoods in India: Coping, Accumulation and Exclusion*, (Overseas Development Institute, 2003).

[77] Supra 40.

[78] R. Gopalkrishnan, *The Industrial Relations Code, 2020: Implications for Workers' Rights*, Live Law, available at https://www.livelaw.in/columns/the-industrial-relations-code-2020-implications-for-workers-rights-164921, last seen on 20/02/2021.

business by eliminating redundancies in law and safeguard the interests of workers by specifying condition of work at workplace, extending social security benefits to fixed term workers, setting up re-skilling fund, and ensuring jurisdiction free inspection and grievance redressal in a time-bound manner.[79] The Code defines a worker as any person employed in any person employed in any industry to do any manual, unskilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied.[80] Industry, under the Code, refers to any systematic activity carried on by co-operation between an employer and worker (whether such worker is employed by such employer directly or by through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes.[81] It is evident that the Code is applicable only to organised manufacturing, which accounts for a mere 2.5 per-cent of the total workforce in India.[82] Although the legislation might not be applicable to a majority of migrant workers, employed in the unorganized sector, it would be worthwhile to consider its provisions and assess whether the ambit of the Code can be expanded to bring the unorganized sector within its purview.

The Code, besides defining the term 'worker', also defines 'employees' as any person employed by an industrial establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward.[83] On a perusal of this definition, it seems that the term has been defined in a wider manner than the term 'worker' and a clear line of demarcation has not been drawn. However, there is no clarity

[79] Supra 58 at 183.
[80] S. 2(zr), Industrial Relations Code, 2020.
[81] S. 2(p), Industrial Relations Code, 2020.
[82] Supra 65.
[83] S. 2(l), Industrial Relations Code, 2020.

about the rights conferred by the Code on persons who fall within the scope of the definition of the term 'employee' but are outside the scope of the definition of the term 'worker'. For instance, the definition of 'industrial dispute' under Section 2(q) refers only to 'workers' and not 'employees', which could be interpreted to mean that only workers would have the right to access mechanisms for resolution of industrial disputes under the Code but Section 91 of the Code enables an 'employee' to make a complaint to concerned authority for alteration in their condition during the pendency of an industrial dispute.

The Code, on a positive note, has widened the scope of the term 'employer' to include almost all employers including contractors and legal representatives a deceased employer, which were up to now not a part of the said term under the Industrial Disputes Act.[84] Another laudable initiative in the new Code is the provision for the constitution of a Grievance Redressal Committee in all establishments employing 20 or more workers as an in-house redressal mechanism to ensure fast-track redressal (within 30 days) of the grievances of individual workers.[85] Moreover, fixed term workers of commercial establishments that need to have CSO are required to provide their fixed-term workers certain benefits, including gratuity, available to permanent employees doing similar work, if the former render service for a period of 1 year.[86]

It should be noted, however, that the legislation has increased the threshold for closure, lay-off, and retrenchment in certain establishments. Under the Code, industrial establishments operating as factories, mines, and plantations etc. need appropriate government permission for closure of their establishments or lay-

[84] A. Gaggar, *Decoding the Industrial Relations Code, 2020*, SCC Online Blog OpEd, available at https://www.scconline.com/blog/post/2020/10/25/decoding-the-industrial-relations-code-2020/.
[85] Ibid.
[86] Dwivedi & S Chowdhary, *Implications of the Industrial Relations Code, 2020*, available at https://www.mondaq.com/india/employee-rights-labour-relations/996474/implications-of-the-industrial-relations-code-2020. Last seen on 21/2/2021.

off/retrenchment of their workers only if they, in the previous year, employed 300 or more workers on an average per working day, which was earlier 100 workers.[87] This may provide greater independence to employers, but may be detrimental for workers. On the whole, the legislation may provide greater protection to migrant workers who are employed in industries and establishments covered under this Code. However, its coverage needs to be expanded substantially for it to have any substantial effect in terms of alleviating the grievances of migrant workers.

5. POLICY RECOMMENDATIONS

Given the magnitude in terms of numbers and the changing profile of migration trajectories at the regional, sub-regional, and national levels, including intrastate and interstate movements, there is a growing need for appropriate policy responses to manage both internal and international migration.[88] Policy instruments and national schemes developed thus far have been inadequate,[89] and given the detrimental consequences of the economic turmoil and reverse migration, the government, now, faces several challenges that need to be addressed by any policy that the government comes up with.

First of these challenges include immediate arrangement for basic needs, health facilities, and social protection for the low-end workers and marginalized communities.[90] Second, generation of employment for the return migrants at source centers.[91] Third, incentivizing the working population to stay in their regions of employment or encouraging reverse migrants to return to the destination center.[92] The latter would not be as problematic as the other two

[87] Ibid.
[88] S. Irudya Rajan & Sumeetha M., *Migrant Odysseys* in '*Handbook of Internal Migration in India* 692 (S. Irudaya Rajan & Sumeetha M., Sage Publications 2020).
[89] Ibid.
[90] Supra 6.
[91] Ibid
[92] Ibid.

challenges because when large-scale population migration occurs as a direct result of a health crisis, the movement tends to be internal, temporary, and early on in the health crisis.[93] This is because many migrants come from the most depressed and backward regions of the country, where there is currently little potential for employment and education.[94] Therefore, eventually, they would be inclined to migrate to other regions in search of employment as their marginal savings run out.

These challenges are exacerbated by the fact that the lackluster infrastructure present in urban cities is overwhelmed by the sheer number of migrants present in cities. Researchers and policymakers have regretted the fact that India has one of the most top-heavy structures globally, with 23.7% of its urban population in cities with a population over five million, against the global average of 16% and the European figure being 7%.[95] There are, on the other hand, a large number of small and medium towns that are languishing for want of an economic base and experiencing low or negative growth.[96] The quality of life deteriorates if the rise in urban population is not accompanied by a corresponding improvement in living conditions.[97] Among the world's 100 fastest-growing large cities, 11 are found in India.[98] However, incidences of migration happen to be the cause of the nearly 22.2 % growth in the urban population during the year 2001-2011. This is notable because migrants constitute a large section of urban poor whose living conditions and environment are characterized by a high density of population, unhygienic shelter, poor-quality drinking water, inadequate sanitation facilities,

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[93] A. Khanna, *Impact of Migration of Labour Force due to Global Covid-19 Pandemic with Reference to India* 22(2) Journal of Health Management 181, 182 (2020).
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] N. Mukherjee & B. Chatterjee, *Poverty, and Inequality in Urban India with Special Reference to West Bengal: An Empirical City* 164 in *Internal Migration, Urbanization and Poverty in Asia: Dynamics and Interrelationships* (K. Jayanthakumaran, R. Verma, G. Wan, & E. Wilson, 2019).
[98] Ibid.

and poor drainage and solid waste disposal.[99] The development of satellite urban towns and cities should be undertaken so as to tackle the problem of overpopulation and poor standard of living for migrants in major cities and ensure a more equitable distribution of growth and development. This would also be relevant in today's context as this would help in alleviating concerns of unemployment among the migrants in urban regions by providing them with better living conditions while incentivizing the rural migrant to migrate to these alternate urban centers due to employment opportunities.

It has also been proposed that India should strive towards developing a comprehensive integrated rights-based approach that brings internal and international population movements within a single mobility framework.[100] It is evident that there is a need for broad reforms in the migration policy of the government to assure migrants and to ensure that such crises do not lead to massive-reverse migration. Besides, large gains to human development can only be achieved by 'lowering the barriers to movement within and across borders and improving the treatment of movers so as to expand human choices and freedoms.[101] In this context, the development of a robust and unified framework, that forges and executes coherent policies while coordinating and collaborating across relevant government ministries and departments, is essential as opposed to fragmented policy instruments, which would be more inaccessible for migrant workers. The aforementioned framework should be focused upon three planks: Institutional Capacity, Migrant Rights, Safe and Orderly Migration.

5.1. Institutional Capacity

Institutional capacity needs to be expanded, perhaps, by the creation of a central organization within the government to collect relevant data and formulate

[99] Ibid.
[100] Supra 87 at 697.
[101] Ibid.

policies. This would be crucial in identifying gaps in the government databases of the information pertaining to migrants, which would prevent a situation where the government is unable to formulate necessary policies due to a severe lack of data, something which was evident recently.[102] A massive data gap exists in India when it comes to an enumeration of all migrant workers.[103] Due to this lack of accurate data, the government could not accurately estimate and provide migrant workers with necessary social security in terms of food, shelter, and transportation when the first lockdown in India, leading to the biggest migration crisis in India in recent times.[104] So, a 'lead institution' responsible for forging coherence, coordination, and collaboration with other organs of the government might be able to rectify the situation to a certain extent. Only once there is clarity as to the extent and the kind of migration that occurs in India, can the government start to implement the appropriate policies to alleviate the grievances of migrants in India. To this end, the development of a unified database of migrants by the lead institution would be a necessity. Furthermore, a lead organization can help in formulating cohesive policies that help in tackling issues, such as the gender ratio and the quality of life for migrants, which are neglected otherwise.

5.2. Migrant Rights and their realization

The second policy domain measures pertain to access to basic social services for migrants, health-care services, education (primary, secondary, and tertiary), family reunification, and right to work, residency, and citizenship, as these aspects determine a migrant's quality of life and future prosperity.[105] While

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[102] A. Kumar, *How the lack of reliable data hurts the most vulnerable Indians*, Scroll (16/09/2020) available at https://scroll.in/article/973179/how-the-lack-of-reliable-data-hurts-the-most-vulnerable-indians, last seen on 28/10/2020.
[103] Supra 55.
[104] Ibid.
[105] Supra 92.

certain rights have been provided to Indian citizens, because of which they, and specifically migrant workers, can access some services, such as the right to elementary education. However, this is far from sufficient for ensuring adequate protection to migrant workers. Certain schemes have been proposed in this regard, such as the universalization of the Public Distribution System and the elimination of domicile-based eligibility criteria, providing safe and hygienic shelter facilities among others.[106] It has also been suggested that the government should undertake national development strategies of migrant labour in India to promote a productive workforce with decent working conditions.[107] While these measures may prove to be beneficial, accessibility may remain an issue. Therefore, the best course of action may be to integrate the institutional capacity of the government with various scattered government schemes and make them accessible under a single accessible package. In the alternative, the government can attempt to offer a guaranteed minimum social security benefit which is currently not available under the Social Security Code, 2020 but its presence would be resonant with international norms where the importance of a minimum social protection floor is recognized.[108] This may even allow the government to come up with initiatives to decrease the gender gap in the labour force but any change in this regard is likely to materialize gradually due to widespread societal biases.

5.3. Migration Management for a safe and orderly migration

The last policy plank pertains to effective and comprehensive migration management. Any initiative in this regard would require 'efficient border control for external migration, return and reintegration support for migrants, and

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[106] S. Varma, *Why India's Legal and Labour System Needs to be Reconfigured to Really Help Migrant Workers*, The Wire (19/05/2020), available at https://thewire.in/labour/india-labour-legal-system-migrant-workers, last seen on 21/2/2021.
[107] Supra 92.
[108] Supra 56.

measures to combat human trafficking and smuggling'.[109] In terms of managing its migratory flows, India has made great strides with the introduction of the first comprehensive draft of the Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill by the Ministry for Women and Child Development which was approved on 28 February 2018 by the Union Cabinet to be presented in the upcoming session of the Parliament.[110] The government, in order to further its progress in this regard, may leverage expanded institutional capacity and legislative empowerment, to build a robust monitoring and enforcement mechanism which is capable of not only enforcing the safeguards for migrant workers but also capable of managing the migration flow within the country so as to optimize the benefits that may accrue out of migration. This would allow the government to not only protect the migrant workers from undue exploitation but also facilitate economic growth, which would further mitigate the grievances of migrant workers.

It should be noted that this proposal only provides the broad contours of an intricate mechanism that would be required to mitigate the hardships faced by migrant workers. However, a comprehensive framework devised on these three planks is likely to address many grievances faced by migrants today and efficiently tackle any problem related to migration as it arises, particularly in times of crisis.

6. CONCLUSION

Migration, especially in modern times, is a major symptom of basic social change. In most countries, industrialization has been accompanied by vast movements of the population from farms to towns within the same country, and also between countries. Migration has a direct impact on the population size of

[109] Supra 87 at 698.
[110] Ibid.

areas of origin and destination. Economic production, consumption patterns, labour markets, household and family networks, political power and authority structures, and other social, economic, and political aspects of society that are linked to population size will all be affected by migration.

In developing countries, for several decades, massive rural-urban migration has been observed resulting from the "pushes" of rapid population growth and economic stagnation in rural areas. The growth of urban centers, due in part to migration, has proceeded at a faster pace in LDCs than in MDCs, and in many cities has outpaced the growth in modern sector and infrastructure development producing squatter settlements, highly concentrated poverty, serious problems of congestion and widespread deficiencies in vital services.

In India, mobility - spatial and occupational - has become the hallmark of labour dynamics over the last three decades, with a remarkable increase of rural-to-urban streams of labourers, and a significant shift of the rural working population from agriculture to the secondary and tertiary sectors of the economy. However, the precarious situation of a large section of the migrant population, especially those belonging to the marginalized sections of society and those who depend on daily wages for a living, was brought to the fore when large-scale movements were restricted with a national lockdown enforcing a complete restriction on passenger travel by all transportation modes. The consequent unprecedented reverse migration, as inter-state and inter-district travel restrictions were lifted, is bound to have substantial consequences for urban regions.

A number of migrant workers who left the big industrial centers and metropolitan cities during the crisis might never return, or not return for a considerable period of time, which would result in a shortage of human resources for the industries in these industrial centers. Furthermore, the

economic crisis arising due to the restrictions in the wake of the pandemic may lead to great food insecurity and widening inequality

The pandemic and the ensuing crisis have highlighted the growing need for appropriate policy responses to manage both internal and international migration. The existing legal framework for the protection of migrant workers, consisting of but not limited to the Code on Occupational Safety, Health, and Working Conditions, the Code on Wages, 2019, and Code on Social Security, 2020, is inadequate. It is argued that, while these legislations do offer beneficial measures, they are not sufficient to mitigate the concerns of migrant workers due to their specific circumstances. While there are a lot of policy proposals to deal with the reverse-migration crisis occurring nowadays, it is evident that there is a need for broad reforms in the migration policy of the government to assure migrants and to ensure that such crises do not lead to massive-reverse migration. In this context, the development of a robust framework, that forges and executes coherent policies while coordinating and collaborating across relevant ministries and departments, is essential. This framework should be focused upon three planks: Institutional capacity, Migrant Rights, Safe and orderly migration. A comprehensive framework devised on these three planks is not only likely to address many grievances faced by migrants today but it would also be in a position to tackle any problem related to migration as it arises efficiently.

ASSESSING GENDER BASED CHALLENGES IN THE MGNREGA: THE GROUND REALITY

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Abstract

The existence of gender gaps in the labour market is a persistent problem, witnessed on a global scale. The position of a woman in the market for labour is challenged by societal norms and imposition of responsibilities upon them, stemming from patriarchy and conservative traditions. In India, women face a plethora of difficulties in gaining access to paid employment. The probability of women engaging in the market for labour is lesser as compared to men, and when they seek to do so, the chance of such women's employment in most sectors are not equal to that of their male counterparts. This is a violation of the right to work, to be guaranteed to all, in consonance with the Universal Declaration of Human Rights. One of the important initiatives taken by the Government of India in furtherance of warranting this right, is the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA), which became one of the crucial factors in women having the ability to access paid employment. It happens to be one of the largest public works programmes in the world.

However, in spite of the opportunities that the scheme professes to provide to women, it has not attained self-sufficiency in addressing the critical need for transformative upliftment of rural women. In lieu of this problem, this paper attempts to analyze and bring out the shortcomings in the nexus that exists between the law in force, i.e., MGNREGA, problems faced by women is seeking and undertaking paid employment, empowerment of women and the scope for an enhanced status of women in India. It provides recommendations for a fairer implementation of the scheme, in order to bridge the gaps that happen to exist between the potential scope of the said Act and reality of its sketchy application, through the lens of gender and in the context of the right to work provided in the Constitution of India.

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Key Words: MGNREGA, paid employment, women, labour

1. INTRODUCTION

The MGNREGA happens to be the first initiative of its kind, not only in India, but on a global level, with regard to its aim to act as a safety mechanism that stipulates the provision of employment to at least two third of the population. The significance of this Act can be viewed through the fact that it currently engages about one tenth of the world's total population. The execution of this legislation happened in different stages or phases, wherein 200 districts were initially identified and covered in the first phase, which lasted for about a year after the Act came into force. The second phase took place with 130 more distractions along with the previous ones. Roughly, more than 645 districts in rural areas have been brought under the purview of the Act. Its objective of guaranteeing work to the economically backward sections of the populations and empowering humans as resources, encouraging inclusivity in labour, and strengthening their financial and livelihood status. However, it has come under critique for reasons relating to the overall effects of the programme on the country's economy, and the rationale behind the intervention of the government in the market and regulation of labour in the course of liberalization.[1]

The Act serves as a manifestation of the right to work as it provides a form of security to the economically weaker sections in the rural households. Along with the objectives of the Act that focus on the provision of guaranteed wage employment for at least one hundred days, in each financial year, the other aims of the Act, as highlighted by the MoRD, also includes the creation of assets that induce productivity, of a viable quality as well as durability, while strengthening the resources possessed by the rural population in terms of livelihood

[1] R. Ranjan, *Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA): A Critical appraisal of its performance since its inception*, 8(2) IMJ 55 (2016).

enhancement. This also comprises the proactive and social inclusion of women, minorities and the reinforcement of the Panchayati Raj Institutions (PRIs).[2]

The legacy of the public works schemes in the history of India do form a major part of the aims of MGNREGA but its composition and constituent elements do vary from the previous programs that were of similar nature in many aspects. The novel ingredients in the Act have now adopted a transformative approach for making efforts towards reduction of poverty, by creating a rights-based avenue as well. This is embodied through the Constitutional provision entitling the rural impoverished people to 100 days of work. Hence the Act is not merely a safety net. MGNREGA happens to be the first program of its kind to be implemented across the entire nation as a whole, sponsored through the budget at the central level, and executed at the state through smaller agencies such as the Gram Panchayat.[3] About 45 million households have been able to access and benefit from MGNREGA as of 2009. Around 0.5% of the GDP was dedicated to the development of MGNREGA in 2009-2010. Moreover, the program doesn't merely follow the format of just providing allocated work, it has made a shift towards the provision of demand-based work. The procedure starts from an application process for registration, receipt of a job card and then pursuing an opportunity by giving another application in writing, for a specific time period as determined by the applicant.[4]

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[2] A. McCord and M. Hannah Paul, *An Introduction to MGNREGA Innovations and their Potential for India-Africa Linkages on Public Employment Programming*, German Federal Ministry for Economic Cooperation and Development (2019).

[3] *Progress in providing employment for the poor: The national public works program in India*, Overseas Development Institute, available at https://www.odi.org/sites/odi.org.uk/files/resource-documents/11575.pdf, last seen on 19/09/2020.

[4] E. Ehmke, *India's Mahatma Gandhi National Rural Employment Act: Assessing the quality of access and adequacy of benefits in MGNREGS public works*, 69 International Social Security Review (2016).

2. GENDER DISCRIMINATION AND STATUS OF WOMEN IN LABOUR MARKET

One of the negative impacts of globalization is its effect on the labour market, especially the casualization of women's labour force. This is on account of the fact that the female gender has been marked by lesser means, skills and formal education, while being subjected to poverty more than their male counterparts. This has led to concentration of the female workforce being primarily occupied in the informal sectors such as agriculture, farming, forestry, etc. They also face the difficulty of balancing their household chores and employment, especially due to the lack of support from their families in this respect.[5] Factors such as the personal preferences of women (because of societal pressures), socio-economic constraints, and the need to conform to their gender role happened to be increasing the gender gaps in the labour market. Lack of affordable childcare, inadequate safety in transportation, and risks of sexual harassment at the workplace are few other issues that act as disincentives for women in being a part of the labour force. Private domestic responsibilities as well as salary/wage rate discrepancies amongst men and women, push women to take up part time jobs. The prevalence of high magnitude of indirect discrimination against women with respect valuation of their skills, provision of growth opportunities for career development and other deprivations disincentivize female members to utilize their full potential and invest time and efforts in a professional environment.[6]

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[5] *Resource guide on Gender issues in employment and labour market policies*, International Labour Organisation, available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/instructionalmaterial/wcms_243015.pdf, last seen on 19/09/2020.

[6] *Women in labour markets: Measuring progress and identifying challenges*, International Labour Organization, available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_123835.pdf, last seen on 17/09/2020.

3. VIEWING POVERTY AND VULNERABILITY THROUGH THE LENS OF GENDER

The differential engagement of the male and female individuals within the market for labour, results in disparate effects upon both the genders during the course of macroeconomic shocks. In developing countries where creation of job opportunities in the formal sector is comparatively rare, there happens to be a high inclination for men as well as women to take up self-employment. So, the rate and chances of vulnerability increase in such circumstances. Moreover, within the realm of such employment subject to many vulnerabilities, there are unfavorable factors for women, such as unpaid work in the family.[7] Firstly, poverty is directly connected to landlessness and the decline of agriculture, though more than half the population of India is directly or indirectly dependent on this sector for their income. Inequality in development is a challenge as well as reason while trying to understand poverty. These inequalities in the Indian context are marked by factors such as societal differences in the form of religion, ethnicity, caste, age, and gender. The gendered risks faced by women in this respect highlights their vulnerability on account of the economic inequalities faced by them during the course of employment as well as within the household.[8]

Women employed in the informal sector in India happen to earn 30% lesser than men, especially in casual labour. The wage being paid to them is 20% lesser for the same task. Though women happen to form two thirds of the workforce in the segment of agriculture, they do not own more than one tenth of the total land

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[7] V. M. Moghadam, *The "feminization Of Poverty" And Women's Human Rights,* UNESCO (2005) available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Feminization_of_Poverty.pdf, last seen on 17/09/2020.

[8] *Capacity-building Programme On Gender, Poverty And Employment: GPE Guide Series - Poverty And Employment In Crisis Situations: The Gender Dimensions,* In Focus Programme on Crisis Response and Reconstruction, International Labour Organization (2003), available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_crisis/documents/publication/wcms_116437.pdf., last seen on 20/09/2020.

utilized for cultivation in India. Moreover, their work time is characterized by disproportion, because of the fact that they are primarily burdened with domestic chores as well. Men perform some form of labour for about 391 minutes per day, while women do so for 457 minutes. Moreover, gender discrimination and patriarchy have manifested themselves in the form of lack of adequate food security and health benefits for women in the household, on account of the preferential treatment accorded to men and the other members. One must also note the subjection of women to domestic violence as well, amongst the other problems. All these issues reinforce the marginalization of women, increasing their economic vulnerability, exposing them to social risks.[9]

4. FEATURES OF THE GENDER SENSITIVE APPROACH ADOPTED BY MGNREGA

In an attempt to incorporate a gender inclusive approach, MGNREGA consists of ingredients that serve as a solution to the challenges faced by rural women in their livelihood and employment. The promotion of increased participation of women has been encouraged through reservation of one third of the labour force in favor of positions for women, provision of facilities such as that of creches, preferences for female participants by providing employment opportunities close to their place of residence, equal treatment in terms of wages, as well as full-fledged application of the Equal Remuneration Act, 1976; representation of women in committees at the local, state and central level, social audit schemes; MGNREGA also provides stipulation of joint accounts in local banks for the members of a household so that the total money earned by them doesn't end up solely in the hands of the male member which results in women's deprivation of their own money; further, it suggests measures towards more representation of women by way of ensuring the presence of worksite facilitators as well.

[9] R. Holmes, N. Sadana and S. Rath, *Gendered risks, poverty and vulnerability in India Case study of the Indian Mahatma Gandhi National Rural Employment Guarantee Act (Madhya Pradesh)*, 4, Overseas Development Institute and Indian Institute of Dalit Studies, (2010).

However, while perusing the effects of MGNREGA, it can be seen that there is much scope for improvement with respect to the need for investment in capacity building and awareness, especially at the community level.[10]

5. MGNREGA AND GENDER-BASED INCLUSIVENESS

It has been demonstrated that MGNREGA has played a major role in increasing the possibilities of earning opportunities for women. The opportunities given by MGNREGA in the designated areas has facilitated settlement of families and minimized the migration of household members in search of work. Within the household it has enhanced their economic status, while providing them with more power while making decisions. But it is noteworthy that in spite of the Act's stipulation that households subject to entitlement of 100 days employment and wages at par, when one takes a more proximate glance at the number of days of actual employment and the issues in wages, there are questions that arise in relation to inequality.[11] Ingrained thoughts regarding the gender differences and division in labour have an effect on the vision of the so-called work that is acceptable for performance by women. The duration and number of days for which they happen to work happens to be lesser under the MGNREGA scheme as compared to informal labour obtained through other means, due to the fact that women are not involved in all the categories of jobs available. Women are made to labour in "soft" jobs or work that are not very labour intensive, however these require fewer days. It is seen that the married women who are employed are more prone to domestic violence in their homes. Moreover, there is no established relation between the empowerment of women and the inclusion of the women in the bank account maintained for MGNREGA employment. The

[10] Ibid, at 20, 30.
[11] A. A. Naikoo, S. S. Thakur, T. A. Guroo, *Women Empowerment and Gender Equality under MGNREGA: A Great Revolution in Rural Life,* 3(1) International Journal of Advance Research and Development 303 (2018).

responsibility to implement gender-based inclusion in this respect is devolved upon the Gram Panchayat, but there is no proper reverence towards this duty.[12]

On a general note, MGNREGA creates jobs such as construction of roads, well digging, plantation and agriculture related work, etc. In this respect, MGNREGA does create community-based assets. However, the welfare and beneficial impact of these has been subject to debate. This is on account of the fact that the rural poor who contribute towards the creation of the assets do not derive the fruits of their labour, and women are affected by this issue in an aggrandized manner, as compared to men. This is another challenge to the goal of poverty reduction envisioned by MGNREGA. There has also been a notion that MGNREGA is possible placing more emphasis on employment at the cost of dispensing with additional scope for overall development.[13]

6. ELEMENTS OF INADEQUACY IN ADDRESSING GENDER DISPARITIES

The lack of widespread participation of women in MGNREGA, in spite of enabling provisions is not just marked by barriers imposed by cultural and institutional factors, life cycle vulnerabilities also play a major role in respect of the same. Though the scheme does prescribe a provision for allocation of appropriate work for individuals who are physically challenged[14], there is no proper provision in relation to the kind of work that must be suitably assigned for pregnant women or the ones that might have given birth fairly recently. This

[12] Neha, *Understanding MGREGA through Gender lens: A case study of Bihar*, 6(10) International Journal of Research in Economics and Social Sciences 84 (2016).
[13] Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), available at https://rural.nic.in/sites/default/files/SyllabusOfCertificateCourseVolum-2.pdf, last seen on 15/09/2020.
[14] KP Kumaran, *Inclusion of Persons With Disabilities Under MGNREGS: A Study Across Three States*, National Institute of Rural Development (2013).

increases the prospects of exploitation of women.[15] Moreover, it is seen that, the programme does have a provision for equipping the workplace with creche facilities so that their domestic care responsibilities do not act as a hindrance towards their participation, but in reality, there is major lack of implementation of such provisions, posing a challenge to their engaging role in MGNREGA. The lack of childcare facilities in the workplace often acts as an impediment for breastfeeding mothers. The lack of sufficient time allocation towards household duties on account of their employment increases the tensions in the relations between the women and their family members. However, there is no provision regarding flexible working hours for women to handle such pressures on the side of the family.[16]

Patrons of women's empowerment have laid focus on the varieties of works that are proposed under the program and urge literacy and skill development schemes, healthcare, sanitation related services, nutrition, etc. or such other alternatives, which are not sufficiently present under the scheme, at the moment. Studies have shown that there has been an increase in unskilled wages for female candidates in MGNREGA. The wage for forest, agriculture related work in Kerala did witness a rise from Rs. 70 to Rs. 80 in 2007, to Rs. 110 to Rs. 125 in 2009. It was even seen that the increase in real wages was more in the case of women as compared to men. In spite of this being a positive sign, this being in

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[15] R. Holmes, N. Sadana and S. Rath, *An opportunity for change? Gender analysis of the Mahatma Gandhi National Rural Employment Guarantee Act,* Policy Briefing No. 53, Overseas Development Institute and Indian Institute of Dalit Studies (2011).

[16] *Making Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) More Care-Responsive*, Programmatic notes for Women's Economic Empowerment Policy and Programming, Institute of Social Studies Trust, (2017) available at https://www.isstindia.org/publications/1509605732_pub_PN_India_Final_Making_MGNREGA_More_Care_Responsive.pdf, last seen on 14/09/2020.

the context of unskilled labour is a cause for concern which further showcases the need for skill development programs for women.[17]

During a period of 12 months, it is noted that only about 33 percent of the workers participated in the Gram Sabha meetings (in six states). Women especially were completely unaware of the provision enabling them to be a part of the Gram Sabha, which is a challenge towards involvement of women in worksite management, social audits, etc.[18] Lack of muster roll verification, fake entries call for digital transformation in this aspect, which the program attempts to address through the latest web-based management information system.[19] The following are considered as offences that shall be punishable under section 25 of the Act:

- Job Cards that are possessed by a Panchayat or other functionaries without proper justification
- Improper entries
- Refusal for accepting an application and provision of receipts with the proper dates
- Non-disposal of complaints within the fixed time
- Delay in payment of wages without sufficient reasons,

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[17] R. M. Sudarshan, *Examining India's National Regional Employment Guarantee Act: Its Impact and Women's Participation,* Institute of Social Studies Trust (2009).

[18] R. Khera, N. Nayak, *Women Workers and Perceptions of the National Rural Employment Guarantee Act* available at https://core.ac.uk/download/pdf/2790414.pdf, last seen on 15/09/2020.

[19] J. Dreze, *'Breaking the Nexus of Corruption', in The Battle for Employment Guarantee*, 241, 245 (New Delhi: Oxford University Press, 2011).

However, the penalty for noncompliance is still low.[20]

7. EFFORTS BY MINISTRY OF RURAL DEVELOPMENT AND SCOPE FOR MEASURES TO ENHANCE OPPORTUNITIES TO WOMEN:

The initiatives taken by the Ministry of Rural Development as a response to the implementation related challenges, are as follows:

- Cluster Facilitation Team: In order to bring about enhancement of assets created in MGNREGA, that is aimed to create better sustainability of livelihood of the web-based rural population, there has been a project for the integration of MGNREGA schemes and the National Rural Livelihood Mission, which has been operating is the 207 blocks that have been identified as the most backward ones, across 8 states in India. The operation of this project happens through the Cluster Facilitation Team, which is also supported by Civil Society Organizations.[21]

- Barefoot Technicians Training: This is a certified training program under MGNREGA, with the objective providing such training to 10, 000 youth from the households of the workers or the supervising mates. This has been carried out in 4 states, as of 2015. 10 other states are involved in the process of recruiting personnel for this program. This will aid in skill development and quality supplementation. However, the lingering

[20] Ministry of Rural Development, Government of India, MGNREGA SAMEEKSHA, *An Anthology of Research Studies on the Mahatma Gandhi National Rural Employment Guarantee Act, 2005: 2006–2012*, (2012).

[21] *FAQs on MGNREGA Operational Guidelines - 2013* available at https://nrega.nic.in/Circular_Archive/archive/nrega_doc_FAQs.pdf, last seen on 20/09/2020.

question is whether there is provision for inclusion of women in it, in order to make it favorable for the partaking of women.[22]

- Web based Management Information System (MIS) and Information Education and Communication (IEC): All the processes and activities undertaken are uploaded as records, for adjudging the progress, with photographs, etc. This is put up for perusal, in the public domain. The IEC arrangements aid in dissemination of the key messages that MGNREGA aims to convey, while creating awareness about its prevalence, such that it benefits a wider set of population.[23]

- Special Financial assistance for Staffing of Social Audit Units: For the effective implementation of the Audit of Scheme Rules, 2011, financial assistance of 147 crores under a special project has been provided to States for setting up of the independent State Social Audit Units, the engagement of social audit resource persons at the State and District levels and the conduct of social audits as per the mandate of the Act.[24]

- Capacity Building of MGNREGA functionaries: In order to develop a cadre of identified trainers/experts in the in the subject matter of MGNREGA execution in respective States at State level (State Resource Teams), District (District Resource Teams) and Block (Block Resource Teams) orientation programs have been conducted at national, state and

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[22] *Session Plan - Barefoot Technicians Training Programme*, available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/---invest/documents/instructionalmaterial/wcms_447727.pdf, last seen on 13/09/2020.

[23] Ministry of Rural Development, Government of India, *Annual master Circular 2019-2020*, available at https://nrega.nic.in/Netnrega/WriteReaddata/Circulars/2390Annual_Master_Circular_2019-20.pdf, last seen on 14/09/2020.

[24] Ministry of Rural Development, Government of India, *Report No. M-13015/2/2012-MGNREGA-VII*, available at http://mnregaweb4.nic.in/netnrega/SocialAudit/guidelines/document/Special%20Project%20on%20Social%20Audit.pdf, last seen on 10/09/2020.

district levels. Functionaries were trained as part of State Resource Teams from all states and union territories.[25]

- Intensive and Participating Planning Exercise (IPPE): This realization of this exercise was through rural appraisal techniques, aimed to address the concerns of the rural poor and elevate their living standards. In 2015, during the course of preparation of the budget for labour in the financial year 2016-17, IPPE was initiated in 2500 blocks that were chosen amongst roughly one lakh Gram Panchayats. IPPE exerts focus on provision of livelihood opportunities for the vulnerable individuals and households, while blending this with natural resource management. The four schemes that converge under the IPPE are: National Rural Livelihoods Mission, Indira Awaas Yojana, National Social Assistance Programme and Deen Dayal Upadhyaya Grameen Kaushalya Yojana. Through IPPE, states are to assess the demand for work empirically in households that fall under categories of: Scheduled Castes; Scheduled Tribes; Nomadic Tribes; Denotified Tribes; Families below poverty line; households headed by disabled persons and women; beneficiaries under Indira Awas Yojana, the Schedules Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and small and marginal farmers. This planning exercise is said to lead to the State Rural Development Plan.[26]

- MGNREGA - EB project: Environmental Benefits of the Mahatma Gandhi National Rural Employment Guarantee Act Project

[25] Ministry of Rural Development, Government of India, *Report on Capacity Building of Functionaries on Operational Guidelines under MGNREGA,* available at https://nrega.nic.in/Circular_Archive/archive/Report_Capacity_Building_Report.pdf, last seen on 10/09/2020.
[26] Ministry of Rural Development, Government of India, *MGNREGA Act, 2005: The Journey of a Decade*, available at https://nrega.nic.in/Circular_Archive/archive/RTP2016_English.pdf, last seen on 10/09/2020.

Commissioned by: German Federal Ministry for Economic Cooperation and Development (BMZ) and executed by the Ministry of Rural Development (MoRD) in India has resulted in carrying out afforestation programs, groundwater recharge wells, participatory irrigation management, drainage line treatments, etc.[27] The efforts towards awareness generation under this project have manifested itself in the form of a 20% increase of female labour participants in the primary working areas under MGNREGA. With the availability of special training programs designed for women for supervision, and inclusion of women in asset management with priority under this project, have showcased the women friendly efforts endeavors in this respect.[28]

In spite of the initiatives, the solution of employment provision for rural poor, uneducated women, stands as one marked by inadequacies without further feminization. Moreover, in spite of ventures such as IPPE, the lack of sufficient monitoring mechanism to scrutinize the implementation of the same, proves to be a gender related challenge that needs to be addressed.

8. NEED FOR APPLICATION OF CAPABILITIES APPROACH AND TRANSFORMATIVE EQUALITY

The capability approach proposed by Amartya Sen views development as a means and process through which the freedom of people is broadened, such that they come to value their life. It has been described as "a broad normative framework for the evaluation and assessment of individual well-being and social arrangements, the design of policies, and proposals about interventions and

[27] *Environmental Benefits of the Mahatma Gandhi National Rural Employment Guarantee Act* (MGNREGA-EB), available at https://www.giz.de/en/worldwide/29773.html, last seen on 11/9/2020.
[28] P. Thakur and S. Kumar, *Gender Impact Assessment of Project Environmental Benefits through MGNREGA,* Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (2019).

social change in society." So, the capability approach views development as freedom. It is described as a composition of two parts: an opportunity aspect (the availability of chances for attain valuable things) and a processional aspect (the capacity to take action). There is a need to utilize participatory tools to utilize the capabilities of women, in terms of what they find desirable as well.[29] In this respect, MGNREGA does have elements of Political Freedom, Economic Facilities, Social Opportunities, Transparency Guarantees and Protective Security, through power decentralization via the role of Gram Sabhas, enhancement of resources and opportunities, food security, devolution of responsibility, etc. However there has been no direct adoption of this approach by the MGNREGA program, however the lack of more institutional arrangements in terms of monitoring and in addressing cultural and societal barriers happens to be a challenge in the application of this approach.[30] There is a need for more emphasis on portraying this program as a means for women to achieve freedom.[31]

Transformative equality focuses on four aspects which are: discontinuing the cycle of disadvantage, addressing differences through changes in the existing structure, promotion of respect of an individual by accentuating their worth and dignity, social as well as political inclusion. The societal and power relations of women within and outside the household pose a challenge to the empowerment of women through MGNREGA.[32]

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[29] I. Sinha, *Understanding Women's Well-being Using the Capabilities Approach,* Department of Policy Studies TERI School of Advanced Studies (2019) available at https://ic-sd.org/wp-content/uploads/2020/01/Ishita-Sinha_Final-project-report-UGVS.pdf, last seen on 12/09/2020.
[30] K. K. Yadav, *MGNREGA and Capability Approach: A Theoretical Analysis*, 3(1) Imperial Journal of Interdisciplinary Research 329 (2017).
[31] M. Nussbaum, *Women and Human Development: The Capability Approach*, (Cambridge University Press, 2000).
[32] F. Bárcia de Mattos Sukti Dasgupta, *MGNREGA, paid work and women's empowerment*, Employment Policy Department, Working Paper No. 230, International Labour Organization (2017) available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_613735.pdf, last seen on 20/09/2020.

9. CONCLUSION

For proper enforcement of MGNREGA, effective planning is the need of the hour and hence in the labour budget, it is highly necessary to analyze the anticipated magnitude of the demand for work and also assess the time of timing of demand for work alongside. Moreover, A well drafted plan that indicates the volume and details about the work that would be given to the ones making the demand. The heavy reliance of women on natural resources such as forest produce, water, etc., is a fact as women are generally associated with household chores. As MGNREGA is proximately related to regeneration of natural resources through creation of sustainable assets, the program is making the livelihood of women more secure. However, the sustainable asset generation process in this respect must be made inclusive in terms of the utility derived from it, such as right of maintenance, sharing, etc. There is also a need for setting up of help centers to generate awareness. Low institutional capacity in this respect is a barrier in generation of demand for work. Denial of work and corruption within the system also affects this. In some states, the wage actually paid is lesser than the one notified under the scheme. Lack of proper supervision results in low productivity, which ultimately affects the beneficiaries as well. As women contribute significantly to rural economic growth, gender neutrality vis-à-vis the effectiveness of the program is the need of the hour. Therefore, by addressing the above issues and enforcing full proof implementation of the scheme, MGNREGA must become a tool for the empowerment of women, and act as mitigate their exposure to poverty, vulnerability and social risks.

ASHAS AS WORKERS: BETWEEN VOLUNTEERISM AND EXPLOITATION?

Sreeparvathy G.*

Abstract

ASHAs, India's community health workers, play a critical role in the country's public health delivery system. They act as an interface between the community and the formal health system, making it easier for the state to access the community and achieve the targets. There is wider societal recognition of their services particularly in the wake of the covid-19 activities, where the strong community roots of this all-female group have been effectively tapped by most of the states. However, concerns have been raised by the associations of ASHAs as well as other members of the civil society regarding the manner in which the state engages with ASHAs. According to them while the state is eager to exploit the services of these workers available at lower cost, it refuses to recognize them as workers and provide them with the benefits that they truly deserve. The paper is an attempt to critically evaluate the ASHA system, in order to understand the challenges, they face as 'workers' and the conditions under which they work. The paper, after providing an overview of ASHA system and its evolution over the years, proceeds to examine the various aspects of their engagement with state as workers such as nature of employment, wages, working conditions and social security benefits.

1. INTRODUCTION

Since its inception in 2003, the Accredited Social Health Activists (hereinafter ASHAs), has been playing a central role in the country's public health delivery system acting as an 'interface between the community and the health system'.[1]

*CUSAT, Kochi

[1] National Health Mission, available at

Contribution of this all-female volunteer force in improving the positive community health indicators such as maternal mortality rate and infant mortality rate is documented in many studies.[2] Their services, to a large extent compensate the inadequacies of the formal public health system including insufficient public funding.[3] Availability of ASHAs with strong community connections throughout the country has been a major advantage for the state in the containment and treatment of covid-19 pandemic. It has to be pointed out that many states effectively utilized their services not only in containment activities but also, in making sure that other health needs of the community such as maternity and delivery are not ignored in the pandemic induced health emergency. The work of ASHAs especially during the pandemic has given them more visibility and recognition from the civil society, however ASHAs remain aggrieved with many terms of their engagement. This led the ASHAs to go on a two-day nationwide protest highlighting issues such as inadequate and delayed payment, excessive hours of work, lack of protective equipment against covid-19 and harassment.[4] Part I of the paper gives an overview of the ASHA system in its historical perspective highlighting its origin, purpose and the way it has evolved over the one and half decades presenting also the research regarding its outcomes. Part II contains a critical appraisal of ASHAs interactions with the

https://nhm.gov.in/index1.php?lang=1&level=1&sublinkid=150&lid=226, last seen on 18/01/21.

[2] See Mane Abhay B, Khandekar Sanjay V, *Strengthening Primary Health Care Through Asha Workers: A Novel Approach in India*, 4: 149 Primary Health Care (2014).

[3] See *Decent work for community health workers in South Asia; A path to gender equality and sustainable development*, Public Service International (2018) for an analysis of how inadequate government expenditure on public health in south Asian countries, is compensated by employing community health workers who are poor and underpaid, available at https://www.world-psi.org/en/decent-work-community-health-workers-south-asia-psi-report-0, last seen on 19/01/21.

[4] Sruthy Srivastava, I*ndia's army of 6 lakh virus hunting ASHA workers go on strike today*, The Print (7 /08/2020), available at https://theprint.in/india/indias-army-of-6-lakh-virus-hunting-asha-workers-go-on-strike-today/476654/, last seen on 18/01/21.

state concentrating on the terms of their engagement, conditions of service, compensation and other occupational concerns.

2. ASHA UNDER NHM- AN OVERVIEW

It was the National Rural Health Mission (hereinafter NHRM) 2005, which for the first time introduced an all-female volunteer cadre named ASHA. The program was extended to urban areas in 2013, under the National Urban Health Mission (NUHM) which conceived of an urban community health worker or an urban community health activist.[5] Thus, NHRM and NUHM, constitute two sub-missions under the NHM. Applauded as 'one of the key components of NHRM', ASHAs are supposed to act as a bridge between the community and the formal health care system. In addition to compensating the limitations of the formal health care system in catering to the needs of millions of populations, especially the rural population, these volunteers have been successful in developing strong community connections as they come from the community itself.

The role and functions of the ASHAs as provided in the NHRM are manifold as it conceives her to be, a volunteer, a care-worker and an activist. That involves activities that are preventive, curative and promotional in nature.[6] The range of activities in which the ASHAs are involved include maternal and child health, immunization, family planning, prevention of communicable and non-communicable diseases, sanitation etc. The ASHAs are also conceived as an integral part of the Health and Wellness center under the Ayushman Bharat scheme for providing universal healthcare benefits.[7] In addition to the purposes conceived at the national level, there are state level policies and schemes

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[5] National Health Mission, Ministry of Family and Health, Government of India; See https://nhm.gov.in/ last seen on 19/01/21.

[6] Mathew Sunil George, Shradha Punt, *Motivating and demotivating factors for Urban Community health workers, A qualitative study in urban Slums of Delhi, India*, 6(1), WHO South-East Asia Journal of Public Health (2017).

[7] Ministry of Health and Family Welfare, Government of India, *Update on ASHA Programme, July 2019.*

implemented through ASHAs. Thus, their work profile shows considerable variation depending on the state they belong to.[8] As per the latest statement released by the Government of India, there are 10,47,324 ASHA workers in the 36 States and Union territories.[9] The NHRM mandated one ASHAs per thousand population. The ASHAs must have education till tenth grade wherever available and in the absence of which they may be recruited from those who have completed 8th standard. As far as incentives are concerned, there were no wages or honorarium, originally conceived under the NHRM.

They are provided with performance-based incentives for each task performed. There are about 40 tasks currently at the national level for which ASHAs receive remuneration.[10] Fixed incentive of Rs. 1000/- for routine and recurring activities was introduced in 2013 which was later increased to Rs.2000/- in 2018.[11] In addition, states like Arunachal Pradesh, Sikkim, Kerala, Rajasthan, Haryana, West Bengal, Karnataka, Chhattisgarh, Tripura, Odissa etc. have introduced fixed monthly honorarium.[12]Thus, there is a state-level disparity in the payments received by ASHAs and the tasks they perform. The central government has extended the application of three schemes covering life insurance, accident insurance and pension benefits to ASHA workers.[13] Acknowledging the great deal of work the ASHAs had to perform in connection with Covid-19, in addition

[8] For instance, the state of Kerala implements its palliative care programs and cancer care programs through ASHAs. See https://arogyakeralam.gov.in/2020/03/23/accredited-social-health-activists-ashas/ last seen on 18/01/21.
[9] Press Information Bureau, Ministry of Health and Family Welfare, Government of India (2020).
[10] Ibid.
[11] Supra 7 at 6.
[12] Ibid.
[13] The schemes are Pradhan Mantri Jeevan Jyoti Beema Yojana, Pradhan Mantri Suraksha Beema Yojana and Pradhan Mantri Shram Yogi Maan Dhan.

to their routine work, an additional incentive of Rs.1000/- was decided to be paid.[14]

3. WORKERS VS. VOLUNTEERS

ASHAs are placed in a peculiar employment relationship with the state. They are conceived as a group of volunteers who are paid incentives for the particular tasks they perform. The issue of non-recognition of ASHAs as 'workers' is at the core of the precarious working conditions and lack of social protection. In the global context they are classified as Community Health Workers (hereinafter CHWs). Taking in to account the wide variety of community health worker models existing world-wide WHO has proposed a very wide definition of the term. According to WHO, "Community Health workers should be members of the communities where they work, should be selected by the communities, should be answerable to the communities for their activities, should be supported by the health system but not necessarily a part of their organization, and have shorter training than professional workers."[15]

The terms 'link workers' and 'scheme workers' are often used to highlight different aspects of their engagement. A link worker may be defined as someone who is not "alien" to the neighborhood, is accepted by the village community and who can discuss intimate human relations and practices.[16] Thus, the term 'link worker' captures the interlinking purpose for which ASHAs are engaged. Sometimes, they are regarded as scheme workers, making clear that they are part of a scheme viz. NHM rather than a part of the state health system as such.[17]

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[14] Letter written by Vandana Gurnani, Mission Director (NHM), Ministry of Health and Family Welfare, Government of India, No.D.O. No. V-18015/4/2020-NHM-II dated 20th April 2020.
[15] World Health Organization, Policy Brief, *Community Health Workers: What do we know about them?* (2007).
[16] Ministry of Health and Family Welfare, Government of India, *Link Worker Scheme Operational Guidelines, National AIDS control Organisation*, (2007).
[17] *Kumari Renu v. State of Bihar*, Letters Patent Appeal No. 673 of 2016.

This implies the state's unwillingness to consider them as an employee of the state, though they work as the face of state health system in the community.

Voluntary work, in general terms, refers to services that are rendered for the community with altruistic concerns. One important element of voluntariness can be said to be 'free will' to render services irrespective of the returns expected. It would be quite unrealistic to imagine women from lower economic strata of the society to render their services in the real sense of voluntariness. Many studies have already established how financial incentives motivates the community health workers to render their services.[18] The NHM has conceived ASHAs to be rendering 'part-time' services that does not interfere with their daily livelihood.[19] However, according to trade unions ASHAs work 8-9 hours a day in hospitals and field.[20] Though, theoretically every ASHA is supposed to cater to 1000 persons, they actually cater to larger populations, primarily owing to shortages in the formal health system.[21] The volume of activities and the actual target population they serve has made it quite impossible for them to pursue another paid employment. This becomes even more significant considering the high level of unpaid care work, burden on women[22] within the age category of 25 and 45. Moreover, though ASHA is a centrally sponsored program, it allows considerable flexibility for the state to incorporate changes suiting their local

[18] Abdel-All M, Angell B, Jan S, *What do community health workers want? Findings of a discrete choice experiment among Accredited Social Health Activists (ASHAs) in India BMJ Global Health* 2019;**4: e**001509.

[19] Infra 29

[20] Summary Record of Discussions of the 45th Session of Indian Labour Conference 18 (2013), Vigyan Bhavan, New Delhi, (Annexure 1)

[21] T. Eruthickal, *Role of ASHA workers in rural development with reference to Kottayam District*, Minor Research Project (2016) submitted to UGC, available at https://ijrcm.org.in/article_info.php?article_id=7005 last seen on 19/01/21.

[22] Jacques Charmes, *The Unpaid Care Work and the Labour Market. An analysis of time use data based on the latest World Compilation of Time-use Surveys*, International Labour Office – Geneva: ILO, 2019- Women perform 90.5% of unpaid care work in India, whereas men's contribution is 9.5%. Chart 4, women's and men's share of total unpaid care work, 22.

needs and even assign them tasks under the state programs.[23] This considerably enhances the workload of these workers. Thus, it can be seen that the idea of ASHAs being volunteers who render part-time services out of altruistic concerns is ill placed and has no connect with reality.

It is important to understand the 'motivation' for these women to serve as ASHAs in order to appreciate the 'voluntariness' of their work. Many factors have been identified by various studies that motivate and demotivate ASHAs. In one such study conducted in the urban slums of Delhi, the authors have found factors such as support of family members for their work, improved self-identity, job satisfaction and a sense of social responsibility, prior experiences of ill-health, the opportunity to acquire new skills and knowledge, social recognition and status conferred by community, and flexible work and timings. Negative experiences in the community and health centers, constraints in the local health system in response to the demand generated by the community and poor pay as demotivating factors.[24] A study conducted in Bihar, pointed out that though the ASHAs remain intrinsically motivated and committed to the population they serve, challenges in the implementation of the program in the state has led them remain widely dissatisfied with their working conditions and incentives.[25]

4. GENDERED LABOUR

Another important dimension about the ASHA program is its gendered nature. It is a quite established fact that care work is highly gendered. Many scholars consider its gendered nature as contributing to undervaluation and under-payment. The ASHA system is a telling example of how the work of women is

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[23] Infra 29.

[24] George MS, Pant S, Devasenapathy N, Ghosh- Jerath S, Zodpey SP. *What motivates and demotivates community health workers in urban settings: a qualitative study in the urban slums of Delhi, India*, 6(1) WHO South-East Asia J Public Health 82–89 (2017).

[25] S. S Wahid, W. Munar, *Characterizing mechanisms of motivation to perform among Accredited Social health Activists (ASHA) in Bihar*, 35 Health Policy and Planning, 58 (2020).

undervalued even when it is socially critical. There is a general conception that there is a 'dichotomous relationship between money and love'.[26] Therefore, because care work is intrinsically motivated by empathy and love, improvements in terms of monetary compensation would not be relevant at all.

5. PERFORMANCE BASED PAYMENT SYSTEM

Despite the success of the scheme for improving the community standards, drop out and attrition rates have been a matter of concern as far as the sustainability and expansion of programs is concerned. The ASHA workers all over the country have been demanding a fixed salary in place of performance-based incentives, over the years. Financial motivation has been found to be one of the key motivating factors affecting the performance of community health workers in low-income countries.[27] The ASHAs have started receiving a monthly honorarium from 2013 onwards. The ASHA incentives for the routine activities were enhanced to Rs.2000 in 2018 as opposed to the Rs.1000 paid previously.[28] However, there remains state-level disparities as some of the state governments notifying honorariums above the minimum required by the central government. Even in states where fixed honorariums are paid it falls below the level of minimum wages fixed at the national level.[29]When the incentives are performance based, there are possibilities that certain tasks that fetches more incentives for ASHA is given more attention. At the same time, the current PBI system provides relatively less incentives to tasks where ASHAs provide most

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[26] N. Folbre, *The Invisible Heart: Economics and Family Values*, 14, 49 in *ASHAs' health services-Social Service or Care Work*, (R. Kammowanee, New York: New Press, 2001).

[27] Hong Wang, Rajni K. Juyal, Sara A. Miner & Elizabeth Fischer, *Performance-Based Payment System for ASHAs in India: What Does International Experience Tell Us?* (2012).

[28] *PM announces pay hike for Anganwadi and Asha workers*, Times of India (12/09/2018) available at https://timesofindia.indiatimes.com/india/pm-announces-pay-hike-for-anganwadi-asha workers/articleshow/65776254.cms last seen on 18/01/21.

[29] The national floor level minimum wage, below which no wage should be fixed is Rs 176 per day. See B. Sivaraman, *Fair wage is about rights of anganwadis, so why are ASHA workers denied minimum wages, benefits?* The Leaflet (2018), available at https://www.theleaflet.in/fair-wage-is-about-rights-of-anganwadis-so-why-are-asha-workers-denied-minimum-wages-benefits/#

of their time. For instance, child immunizations that studies show takes up a considerable amount of time, is remunerated at the rate of Rs.100/- for complete immunizations per child below the age of one year.[30] However, there are competing standpoints as to how a shift from performance-based incentive to a fixed wage is going to affect the work of ASHAs. A view is expressed by some that regularizing and monetizing their services will disengage them from the role of a village activist and relegate them to the bottom of medical bureaucracy. However, there are others who emphasize on the right of the ASHAs to be paid as a regular health worker.[31]

6. NON-MONETARY INCENTIVES AND SOCIAL SECURITY

Non-monetary incentives in the nature of career prospects, family health check-ups, scholarships for higher studies and skill development can be thought after keeping in perspective the social strata they come from and the probable social benefit such measures might produce. A 2019 study conducted in a district in Andhra Pradesh found that 85% of the ASHAs prioritized recognition and prospects of promotion as important factors.[32] Social security benefits are yet another concern for these workers as they lack job security and a stable income. In the year 2018, the benefits of two social security schemes namely Pradhan Manthri Jeevan Jyoti Bheema Yojna and Pradhan Manthri Suraksha Bheema Yojna were introduced for eligible ASHAs.[33] The 45th Session of the Indian Labour Conference' recommended extension of ESI/EF benefits to ASHAs. The New Code of Social Security, unlike its earlier drafts, omits ASHAs from the

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[30] Press Information Bureau. Ministry of Health and Family Welfare, Government of India, March 2020.

[31] *ASHAs Health Services AU, Rochana Kammowanee,* Economic & Political Weekly, 12.

[32] Abdel-All M, Angell B, Jan S, *What do community health workers want? Findings of a discrete choice experiment among Accredited Social Health Activists (ASHAs) in India* BMJ Global Health 2019;4: e001509.

[33] Ministry of Health and Family Welfare, Government of India, *Letter by Joint Secretary NHM*, F. No. 7(84)/2018, dated 28 September, 2018.

definition of employees and thus deprives them of the statutory guarantee of social security.[34]

Skill and knowledge enhancements are found to be key factors in improving the performance of community health workers.[35] Lack of follow up training and irregular maintenance of drug kit were found to be one of the challenges faced by ASHAs.[36] During the pandemic, many states have launched mobile apps for surveillance without providing smart phones or adequate training to ASHAs. For instance, in the state of Punjab, Ghar-Ghar Nigrani App was made mandatory for ASHA workers for door-to-door surveillance without providing them with smart-phones or adequate training.[37] Thus, providing adequate training and resources are cardinal for ASHAs to perform their role effectively.

7. OCCUPATIONAL SAFETY

Ensuring occupational safety has lately emerged as a significant concern for community workers. There were instances of manhandling and violence being reported against the ASHAs during their surveillance activities in connection with the pandemic. [38] The Epidemics Amendment Act brought about to address the issue of violence and harassment of health workers extends its protection to

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[34] K.RS Sundar, *Social Security Code: Another historic opportunity missed*, The Leaflet (11/10/2020), available at https://www.theleaflet.in/social-security-code-another-historic-opportunity-missed/# last seen on 19/01/21.

[35] Gopalan SS, Mohanty S, Das A. *Assessing community health workers' performance motivation: a mixed-methods approach on India's Accredited Social Health Activists (ASHA) programme.* BMJ Open 2012;2: e001557.

[36] A. Joseph, *Problems faced by Accredited Social Health Activists (ASHAs) in the delivery of primary health services in selected districts of Kerala*, 6 AUREOLE (2015) available at http://188.166.246.49/index.ph p/aureole/issue/view/1/showToc, last seen on 19-01-21.

[37] R. Radhakrishnan, *Protecting bodies and rights in disease surveillance during covid-19 in India*, DNG policy brief (2020) available at https://datagovernance.org/report/dgn-policy-brief-08-protecting-bodies-and-rights-in-disease-surveillance-during-covid-19-in-india, last seen on 19/01/21.

[38] *Coronavirus: ASHA workers endure abuse and assault on field*. Deccan Herald (22/04/2022) available at https://www.deccanherald.com/national/west/coronavirus-asha-workers-endure-abuse-andassault-on-field-828525.html.

community health workers as well.[39] They also suffered from absence of protective equipment especially when the work involved close interaction with community in connection with contact tracing, community awareness through home visits, facilitating access to testing surveillance and supply of essentials to those who are in quarantine. The Mission director NHM had to write to the States to take measures to provide the ASHAs with masks and sanitizers. The letter further directs the States to facilitate movement of ASHAs in groups and also to deploy them preferably in their own village where they would have the support of family and friends.[40] However, a strong support mechanism by the state would be essential for these women workers if they have to perform their tasks especially when it involves field visits.

8. CONCLUSION

ASHA literally meaning 'hope' has become a ray of hope for the country's community health initiatives aimed at providing universal health coverage and realizing the Sustainable Development Goals connected therewith. There has been a considerable progress in the health indicators especially in the rural areas and the role of ASHAs need not be emphasized in this regard. However, there are many issues that demand urgent attention of stakeholders if the benefits of the system are to continue. There are many systemic changes that are to be adopted to sustain and institutionalize ASHA. The experience of the past 15 years has testified it to be a successful model and it is only prudent to make the necessary corrective measures so that the grievances of the community workers are addressed. As discussed above the role of ASHAs in improving the health conditions throughout the country is undeniable. They can no longer be considered 'part-time' employees on account of the tasks and the time they

[39] S.1A (b) (i) of the Epidemics Diseases Act, 1897 as amended by The Epidemic diseases' amendment ordinance, 2020.

[40] Ministry of Health and Family Welfare, Government of India, *Letter written by Vandana Gurnani*, Mission Director (NHM), No. NHSRC/20-21/EDsectt/Covid 19/04, dated 3/04/2020.

invest in such services. Recognition as workers, payment of a fair wage, and provision for social security are maters that require serious consideration of policy makers.

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