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The Silent Takeover of Labour Rights

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The three new labour codes passed by Parliament without discussion make sweeping changes to labour laws; they reduce the regulatory powers of the government; they hand over some oversight functions to third parties, and, all in all, disempower labour.

Three major pieces of legislation on labour, the Industrial Relations Code , Code on Social Security, and the Occupational Health, Safety, and Working Conditions Code were introduced and passed in both houses of Parliament in record time in September 2020 without any discussion.

The essence of the new Industrial Relations Code is that the government will now minimize its regulatory role and reduce its responsibility for oversight. The Occupational Safety and Working Conditions Code dilutes the duties of the employer, is ambiguous in specifying safety standards and sublets regulatory responsibilities from the state to third parties. In the Code on Social Security, the institutional framework remains fragmentary and the code shifts the onus of financing of social security schemes from the government to a mix of private and public resources.

> Do these major changes to the labour laws have the potential to offer more benefits to those who need them the most…?

Why then would a government not want parliamentary scrutiny of regulatory changes of immense significance? I argue here that the government wanted the country to see them as being written on a clean slate. It did not want any scrutiny of the new legislative proposals in relation to the current labour market conditions; it did not want to claim any learnings from the insights already available in reports of the National Commission on Labour, National Commission of Unorganized Enterprises, and other rich material of the past.

The process of passing of the bills—which have since become laws—discouraged the country from asking a simple question: Do these major changes to the labour laws have the potential to offer more benefits to those who need them the most, compared to the labour rights and entitlements in the previous regulatory regimes?

Making sense of the new labour laws: Evidence based or beyond?

Let us begin by taking stock of the labour market in India. The Periodic Labour Force Survey (PLFS) 2018-19 captured the conditions of the labour market prior to the Covid-19 crisis. The PLFS data tell us that the majority of the workforce in India was precariously employed as unpaid family labour, or as casual labour with no stability of income, or as regular workers with limited social security. It also tells us that there is a compelling need to improve women's absorption in the labour force (see Kapoor 2020). We need to ask how the new laws will help bring back jobs, create employment for women; increase labour force participation rates and improve the precarity of self-employed workers.

A second set of questions to ask is if the new codes will make a difference to those who suffered during the Covid-19 lockdown and the consequent slowdown of the economy. The precarity of India's working people was witnessed within 24 hours of the nation-wide lockdown imposed in end March 2020. Women with children, men with no prospect of work in the cities, small vendors, domestic help, agricultural labourers, sanitation workers, casual labourers and contract workers in the factories and workshops who lived in both the cities, and rural areas—for all of them their livelihoods came to a grinding halt, pushing them into a state of extreme vulnerability. What the country witnessed was workers escaping from the cities, and the state with impunity violating its own laws[1]. Hundreds got killed during the punishing journey to their home states, mainly on foot but also in crammed trucks, auto rickshaws and small carriers.

> The discourse in the media has encouraged the government to construct a policy framework in favour of investors and corporates at the cost of labour.

The Centre for Sustainable Employment at Azeem Premji University has put out a compilation of surveys of migrant and other workers that captures the impact of the lockdown. They suggest that 66% of the surveyed workers had lost their jobs, 77% households were consuming less food than before, and 64% were earning less than before. A recent CMIE estimate of job losses as outlined in an interview by Mahesh Vyas is that out of a total of 87 million salaried jobs in existence earlier, 21 million or nearly 25% had been lost during the lockdown. Of these, the worst affected have been white-collar professionals such as engineers, physicians and teachers who together lost six million jobs[2]. In addition, 26% of industrial workers became unemployed during the lockdown.

The reality is that none of these developments appear to have influenced the legislative changes made to the labour laws.

The discourse in the media has encouraged the government to construct a policy framework in favour of investors and corporates at the cost of labour. This discourse is about what facilitates investment, about how growth has to be achieved first and jobs are just a consequence, about how labour and its inefficiencies makes India uncompetitive, about how no specific initiatives are needed to address concerns about women's labour and the low labour participation of marginalized groups.

Other than claiming that all these labour law changes will create a favourable regulatory environment and therefore bring about economic growth, there is no connection made or claimed between these changes in the labour codes with the rebuilding of the economy. And as far as investments are concerned, the labour laws hardly matter, new or previous ones (see Sood and Nath 2020).

Key elements of change and its Implications

A useful summary of the recent history of labour law changes, and the key differences between a parliamentary committee's recommendations and the bills passed by Parliament is provided by PRS Legislative Research, which is drawn on for the following discussion.

The background to these labour law changes is that the Second National Commission on Labour (2002) found existing legislation to be complex, and with archaic provisions and inconsistent definitions. To improve ease of compliance and ensure uniformity, it recommended the consolidation of central labour laws into broader groups. In 2019, the government introduced four bills in Parliament to consolidate 29 central laws. While the Code on Wages, 2019 was passed in July 2019, bills on the other three areas of industrial relations, social security and occupational health were referred to the parliamentary Standing Committee on Labour. The committee submitted its reports on all three bills between February and July 2020[3]. The government, however, replaced these bills with new ones, which were the ones passed hurriedly by Parliament in September 2020.

I first discuss the larger context around labour and its entitlements that inform the changes that have been contained in the three new codes, highlighting the key features when the codes are seen in an inter-related manner. There is then an analysis of the changes made within each code.

Delegating policy, disempowering labour and dilution of standards

There are hardly any standards, or specific provisions, or targets on working conditions, occupational safety, wages, and social security that are laid out in the codes. There is also no vision nor have national goals for labour standards been laid down.

First, the codes are open ended and broad, they give powers to the government to come up with details via rules. As has been pointed out by PRS commentators, under the Constitution the legislature has the power to make laws and the executive is responsible for implementing them. The framing of policy is usually not delegated. But the new labour codes delegate various essential aspects of the laws to the executive to draw up by making rules. Some examples of where the new codes transfer the responsibility to the executive include in setting (raising) the thresholds in establishments for lay-offs, retrenchments, and closures; setting thresholds for the applicability of different social security schemes; specifying safety standards and working conditions to be maintained by establishments, and deciding the norms for fixation of minimum wages.

Second, if we look at the nature of changes in compliance, enforcement of laws, and resolution of disputes, we get an insight into how labour is being systematically disempowered, and the dilution of labour standards institutionalized. The codes create provisions for web-based inspections in some cases (which may be accompanied by randomized inspections) and for third-party certification in certain classes of establishments. Further, in the Code on Social Security, compliance on different aspects (such as provident fund and insurance) may continue to require reporting to different authorities, making it confusing and therefore difficult for labour to claim benefits.

> The changes in threshold limits of enterprise size in terms of numbers are an example of how simplification has not been introduced.

Third, the bills were presented on the assumption that no previous information was available on the conditions of labour and a fresh endeavour was needed to collect and collate information on labour conditions in India. The new codes propose, for example, that studies on inter-state migrant workers be carried out in 'such manner as may be prescribed by that Government'. They also mention gathering statistics on inter-state migrant workers. This implies that the codes somewhere want to suggest that the government's failure to protect migrant rights during the lockdown was due to the non-availability of information. There is no reflection that shows the use of available estimates (for example, in Srivastava 2020) to safeguard the interests of migrant labour.

Finally, simplification hardly seems to be the purpose of the new laws. The changes in threshold limits of enterprise size in terms of numbers are an example of how simplification has not been introduced. The Social Security and Occupational Safety codes continue to apply to establishments over a certain size (typically, above 10 or 20 workers), but in the Occupational Safety Code the threshold (of 10 or above) will not apply to those establishments in which hazardous activities are being carried out. Further, the Social Security Code makes provisions to notify a separate social security fund for unorganized workers. That said, the code increases the thresholds for factories from 10 to 20 (with power) and 20 to 40 (without power). This code enables the government to formulate schemes for the benefit of unorganized workers, and gig and platform workers. The simplification is not evident both in the use of a range of thresholds but in the scope for exemptions. The Codes on Industrial Relations and Occupational Safety, under clauses 39 and 58, allow the government to exempt any establishment from important provisions of the new laws in public interest.

The Three Codes

The **Code on Industrial Relations, 2020** is a new act that consolidates and amends the laws relating to trade unions, conditions of employment in industrial establishments, and investigation and settlement of industrial disputes. The code gives greater freedom from regulatory control to factory owners, strengthens the unequal bargaining power of employers and limits the role of trade unions. The government has given itself the power to exempt any new industrial establishment or class of establishments from the provisions of the code in public interest. The provisions for establishments to prepare standing orders on matters related to informing workers about working hours, holidays, and wage rates, termination of employment, grievance redressal mechanisms for workers, and classification of workers will now apply to establishments with at least 300 workers. The parliamentary standing committee's proposal that these orders should apply to establishments with more than 100 workers has been significantly changed.

Likewise, the new law provides that prior permission of the government before closure, lay-off, or retrenchment will be required for establishments with at least 300 workers, and not 100 workers as earlier. The code allows for an increase in the threshold through a notification but does not allow for a lowering of the threshold. The new law, however, lowers the threshold to be recognized as the sole negotiating union to 51% from 75% of workers in any establishment that has more than one registered trade union.

> The Industrial Relations Code replaces the previous industrial courts/tribunals with two-member labour tribunals (with one judicial and one administrative member), which dilutes the legal safeguard for workers.

The code weakens collective bargaining rights by prohibiting strikes and lockouts in all industrial establishments without giving notice, with a further proviso that no unit shall go on strike in breach of contract without giving notice 60 days before the strike, or within 14 days of giving such a notice, or before the expiry of any date given in the notice for the strike. It further says that there should be no strike during any conciliation proceedings, or within seven days of the conclusion of such proceedings, or during proceedings before an industrial tribunal or 60 days after their conclusion or during arbitration proceedings.

The Industrial Disputes Act, 1947, had placed restrictions on announcing strikes only in public utility services. However, the Industrial Relations Code extends it to all establishments. Any violation of these provisions of notice periods can lead to a strike or lockout being classified as illegal. The curtailment of rights descends to new depths in the code with Section 64 stating that 'No person shall knowingly spend or apply any money in direct furtherance or support of any illegal strike or lockout'.

The Industrial Relations Code replaces the previous industrial courts/tribunals with two-member labour tribunals (with one judicial and one administrative member), which dilutes the legal safeguard for workers. In the case of maternity benefits and settlement of claims for injury and disability, the power to adjudicate and settle entitlements stays with an authority nominated by the government. The code

also removes the provisions for authorized officers to conduct inquiries and decide disputes regarding the applicability of the provisions of provident fund and employee state insurance (ESI). The maximum imprisonment in the act for obstructing an inspector from performing his or her duties and the penalty for unlawfully deducting the employer's contribution from the employee's wages have both been reduced.

Code on Social Security, 2020: The objective here is to extend social security to all employees and workers in both organized and unorganized enterprises. The code replaces nine laws related to social security[4]. In its provisions the code falls short of safeguarding the interests of unorganized sector workers and articulates a framework of social security that is dependent on the goodwill of the corporates.

> In the name of social security for unorganized workers, gig workers and platform workers, the code has an interesting offer to make—the idea of a scheme with no details.

It retains existing thresholds based on the size of establishment for making certain benefits mandatory[5] and continues to treat employees within the same establishment differently, based on the wages earned. For instance, provident fund, pension, and medical insurance benefits are only mandatory to employees earning above a certain threshold level of income (as may be notified by the government) in eligible establishments. The 2020 code also retains the existing fragmented set up for the delivery of social security benefits[6].

On maternity benefits, the details show that no serious thinking has gone into framing the provisions. They categorically state that no woman shall be entitled to maternity benefits unless she has actually worked in an establishment of the employer from whom she claims benefits for a period of not less than 80 days in the 12 months immediately preceding the date of her expected delivery. With women's overwhelming presence in the unorganized sector and as self-employed workers, how does this provision ensure maternity benefits for all working women?

> The government does not appear to be taking responsibility for providing social security to the unorganized sector workers, even after the precarious conditions of their lives became evident during the recent lockdown.

In the name of social security for unorganized workers, gig workers and platform workers[7], the code has an interesting offer to make—the idea of a scheme with no details. Clause 109 of the Social Security Code says that the central government and governments shall frame and notify 'suitable welfare schemes' from time to time for the social security of these workers. A careful reading of the proposed financing structure of these schemes suggests that the focus is on creating a special purpose vehicle using Corporate Social Responsibility funds and contribution by beneficiaries, with partial contributions by the central and state governments. The government does not appear to be taking responsibility for providing social security to the unorganized sector workers, even after the precarious conditions of their lives became evident during the recent lockdown. Many state governments have already demonstrated their intent to dilute labour rights and entitlements through legislative changes even before the legislative changes were enacted by Parliament. Given the overall direction of centre-state relations in the last few years, funding of schemes dependent on coordination between the two is likely to be a non-starter. The failure of the social security code in this respect will be borne by the most precarious sections of the workforce, the 90% of workers who are in the unorganized sector.

Adding insult to injury to the industrial workers is the power that the government has retained for itself to grant exemption to an establishment or employees or class of employees, from any or all of the provisions of the social security code.

Code on Occupational Safety, Health and Working Conditions, 2020: This is a legislation that intends to amalgamate, simplify and rationalize the relevant provisions of 13 central labour enactments relating to occupation, safety, health and working conditions of workers[8]. Occupational safety continues to take a back seat in the new code with a wider range of exemptions, increased scope for hiring contract labour, and the absence of common 'minimum mandatory entitlements' across states for construction, unorganized and migrant workers to enable portability.

The 2020 code has a threshold of 20 workers for premises where the manufacturing process is carried out using power, and 40 workers for premises where it is carried out without using power. In the 2019 version of the bill, the threshold was 10 and 20 workers, respectively. The 2020 law that has been enacted has empowered the state government to exempt any new factory from the provisions of the code in order, it is claimed, to create more economic activity and employment.

> The legal scope for employing contract workers has got very much enlarged in the new codes.

The 2019 version empowered the government to prohibit employment of contract labour in some cases, including where the work is of a perennial nature, or where the same work is carried out by regular workmen in the establishment. The 2020 code instead prohibits contract labour only in core activities, except where the normal functioning of the establishment is such that the activity is ordinarily done through contractors, where the activities are such that they do not require full-time workers for the major portion of the day, or where there is a sudden increase in the volume of work in the core activity that needs to be completed in a specified time. The appropriate government will decide whether an activity of the establishment is a core activity or not. However, the code defines a list of non-core activities where the prohibition would not apply. This is a list of 11 works including sanitation, security services, and any activity of intermittent nature even if it constitutes a core activity of an establishment. In essence, contract workers will be allowed in both non-core activities and in core activities, subject to some qualifications. The legal scope for employing contract workers has got very much enlarged in the new codes.

In Chapter VII of the Social Security Code, on the hours of work, wages and annual leave, the discussion seems oblivious to the reality of employment conditions in India. The chapter mentions earned leave and medical leave but there is no elaboration on how it will get implemented when regular workers in the formal sector increasingly do not have any benefits (Sood, Nath, Ghosh, 2014). Significantly, despite the crisis that migrant labour has faced, this code removes the provision in the 2019 bill requiring contractors to pay a displacement allowance to inter-state migrant workers.

The code fixes the maximum limit at eight hours for a working day and provides for women to be employed in all establishments for all types of work (no prohibition of employment of women for undertaking hazardous or dangerous operations) under the act (Chapter X, Clause 43). This is allowed on the condition that the government may require the employer to provide adequate safeguards prior to their employment. This completely overlooks the years of work and recommendations that have been made earlier by women's trade unions and gender equality advocates right from the pioneering report *Towards Equality* onwards, which forcefully recommended in 1974 that women's working conditions be improved. These recommendations found their way into the Factories Act that stipulated that no woman worker shall be allowed to work in a factory except between 6 a.m. and 7 p.m. and imposed prohibitions on women workers being made to work in hazardous occupations.

By way of a conclusion

What is the rationale for continuing with the size of the establishment an indicator—a threshold—for deciding access to basic protections related to wages, social security, and working conditions? Should these benefits not apply to all establishments?

Take another regulatory change: it is presumed that compliance costs on permanent labour and economic considerations have resulted in increased use of contract labour. It is acknowledged that contract labour has been denied basic protections such as assured wages. However, the Industrial Relations Code introduces a new form of short-term labour: fixed term employment. Is it the burden of compliance that compels the use of contract labour, or is it the preferred option to squeeze labour costs to ensure India's global competitiveness?

The current belief is that a multiplicity of labour laws has led to a heavier compliance burden on firms. The reality is that the labour enforcement machinery has been ineffective because of poor enforcement, inadequate penalties, and corruption of the inspectors. How the changes in legislation will address these concerns is anybody's guess. The name of the game is simplification to reinforce the bargaining power of the corporates vis-à-vis the most vulnerable sections of the work force. The government had stated that 40 central labour laws would be subsumed. The four codes made into law in 2019 and 2020 only replace 29 laws. What have been left out are key legislations that impact the most marginalized workforce, namely, the Manual Scavengers Act, the Sexual Harassment at Workplace Act, and the Bonded Labour System (Abolition) Act. We have not heard of plans for these important acts.

> Scale exemptions from labour laws in these codes also do not really inspire much confidence about job creation or output growth being incentivized.

The rationale offered for the regulatory changes that have been made is that they will lead to job creation and protect work. The current state of the labour market and the level of unemployment are well known. Questions remain for the 70% of the regular wage/salaried employees in the non-agricultural sector who do not have a written contract, the 54% who are not eligible for paid leave

and the 52% who do not have any social security benefit (PLFS 2018-19). How will the new laws ensure benefits to these categories of workers?

Scale exemptions from labour laws in these codes also do not really inspire much confidence about job creation or output growth being incentivized. From the existing evidence[9] it is difficult to argue that exemption from labour laws to small firms will cover a significant proportion of workers. Other significant suggestions for decent working conditions have hardly been debated. The National Commission of Labour had recommended a separate law for small-scale units having less than 20 workers covering payment of wages, welfare facilities, social security, retrenchment and closure, and resolution of disputes. The National Commission for Enterprises in the Unorganized Sector had recommended addressing the social security needs and minimum conditions of work for both agricultural and non-agricultural workers. How and why the new codes take the route of deregulating labour rights as the best way of benefitting the workers has nowhere been explained by the government in its discourse around the codes. The justification is just repeated without substantiation by industry associations and the media houses controlled by corporates.

The hurried passage of the legislation through Parliament and the content of the new legislation themselves appear to be working in tandem to strengthen the silence that will help hand over India's resources to global and Indian capital. Hope lies in the very resistance that these new labour codes intend to kill.

Footnotes:

1 The relevant laws were The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (which makes it obligatory for the state to regulate the conditions of employment of the migrant workers, which include wage payment, a journey allowance to and from the home state) and the legislation dealing with industrial establishment and payment of wages that mandates payment of wages to the workers by employers in a situation similar to a lockdown.

2 Mahesh Vyas tells us that the decline in jobs is most apparent in small industrial units because the sector was badly affected by the lockdown. Evidence also suggests that though the unemployment rate has come down to 6.7% in September compared to 8.4% in August, the labour participation rate has fallen very sharply, and 20 million people are no longer looking for jobs. Vyas also said that India needs around 7-8 million jobs a year to cater for annual additions to the labour market (some others put the figure at around 9 million).

3 Report No. 4: "Occupational Safety, Health and Working Conditions Code, 2019", Standing Committee on Labour, Lok Sabha, February 11, 2020; Report No. 8: "Industrial Relations Code, 2019", Standing Committee on Labour, Lok Sabha, April 23, 2020; Report No. 9: "Code on Social Security, 2019", Standing Committee on Labour, Lok Sabha, July 31, 2020.

4 These 12 laws are, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952; the Employees' State Insurance Act, 1948; the Employees' Compensation Act, 1923; the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Cine-workers Welfare Fund Act, 1981; the Building and Other Construction Workers' Welfare Cess Act, 1996 and the Unorganized Workers Social Security Act, 2008

5 Benefits, such as pension and medical insurance, continue to be mandatory only for establishments with a minimum number of employees (such as 10 or 20 employees). All other categories of workers (i.e., unorganized workers), such as those working in establishments with less than 10 employees and self-employed workers may be covered by discretionary schemes notified by the government. This is similar to the current system where unorganized workers are governed by a different law.

6 These include: (i) a central board of trustees to administer the EPF, EPS and EDLI Schemes, (ii) an Employees State Insurance Corporation to administer the ESI Scheme, (iii) national and state-level social security boards to administer schemes for unorganized workers, and (iv) cess-based labour welfare boards for construction workers.

7 The Code on Social Security introduces definitions for 'gig worker' and 'platform worker'. Gig workers refer to workers outside the "traditional employer-employee relationship". Platform workers are those who are outside the "traditional employer-employee relationship" and access organizations or individuals through an online platform and provide services.

8 The Factories Act, 1948; The Plantations Labour Act, 1951; The Mines Act, 1952; The Working Journalists and other Newspaper Employees (Conditions of Service and Miscellaneous Provisions) Act, 1955; The Working Journalists (Fixation of Rates of Wages) Act, 1958; The Motor Transport Workers Act, 1961; The Beedi and Cigar Workers (Conditions of Employment) Act, 1966; The Contract

Labour (Regulation and Abolition) Act, 1970; The Sales Promotion Employees (Condition of Service) Act, 1976; The Inter-State Migrant workmen (Regulation of Employment and Conditions of Service) Act, 1979; The Cine Workers and Cinema Theatre Workers Act, 1981; The Dock Workers (Safety, Health and Welfare) Act, 1986; and The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

9 Forty-seven per cent of factories, as per the ASI data 2017-18, have less then 20 workers, who are exempted from many of the provisions of the new codes. These 47% factories employ just around five percent of the workforce, four percent of output and 2.2 percent of net value added.

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