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THE CODE ON SOCIAL SECURITY, 2020

Relevant for: Indian Economy | Topic: Issues Related to Poverty, Inclusion, Employment & Sustainable Development

Labour falls under the Concurrent List of the Constitution. Therefore, both Parliament and state legislatures can make laws regulating labour. The central government has stated that there are over 100 state and 40 central laws regulating various aspects of labour such as resolution of industrial disputes, working conditions, social security and wages.[1] The Second National Commission on Labour (2002) found existing legislation to be complex, with archaic provisions and inconsistent definitions.[2] To improve ease of compliance and ensure uniformity in labour laws, it recommended the consolidation of central labour laws into broader groups such as: (i) industrial relations, (ii) wages, (iii) social security, (iv) safety, and (v) welfare and working conditions.

In 2019, the Ministry of Labour and Employment introduced four Bills to consolidate 29 central laws. These Codes regulate: (i) Wages, (ii) Industrial Relations, (iii) Social Security, and (iv) Occupational Safety, Health and Working Conditions. While the Code on Wages, 2019 has been passed by Parliament, Bills on the other three areas were referred to the Standing Committee on Labour. The Standing Committee has submitted its report on all three Bills.[3] The government has replaced these Bills with new ones on September 19, 2020.

In this note, we first compare some significant changes made in the 2020 Bills as compared to the 2019 versions. Then we discuss some of the significant issues to consider regarding the three Bills.

PART A: Comparison of key provisions of the 2019 Bills and 2020 Bills

The following section discusses key changes in the 2019 Labour Bills (which have been withdrawn) and compares them with the new Labour Bills that the government introduced in Lok Sabha on September 19, 2020.

A.1 Common Changes across the 2020 Labour Codes

- **Appropriate government for Central PSUs: The 2019 Bills provided that the central government will act as the appropriate government for any central public sector undertaking (PSUs). The 2020 Bills add that the central government will continue to be the appropriate government for a central PSU even if the holding of the central government in that PSU becomes less than 50% post the commencement of the Bills.**

- **Appropriate government for certain specified industries: The 2019 Bills specified that the central government would be the appropriate government for certain industries including railways, mines, telecom, and banking. The 2020 Bills add that the central government will also be the appropriate government for any "Controlled Industry" (that the government may specify). A Controlled Industry has been defined (in the Bills on Occupational Safety and Industrial Relations) as an industry on which the control of the Union has been declared by any Central Act in public interest.**

- **Compounding of offences punishable with imprisonment: The 2019 Bills allowed for compounding (settling) of offences which were not punishable with imprisonment, or with imprisonment and fine, subject to certain conditions. Compounding was allowed for a sum of 50% of the maximum fine provided for the offence. The 2020 Bills on Industrial Relations and Social Security state that the offences punishable with imprisonment up to one year or with fine will be compoundable. For offences with fine, compounding is allowed for a sum of 50% of the maximum fine provided for the offence. For offences with imprisonment, compounding is allowed for a sum of 75%. In the Bill on Occupational Safety, 50% may be compounded where a 'penalty' is levied (e.g., for non-maintenance of registers) and 75% for 'offences' (e.g., for falsification of records).**

A.2 Code on Industrial Relations, 2020

Exemption

- The appropriate government may exempt any new industrial establishment or class of establishments from the provisions of the Code in public interest.

Standing Orders

- **Applicability of standing orders: The 2019 Bill provided that all industrial establishment with 100 workers or more must prepare standing orders on the matters listed in a Schedule to the Code. These matters relate to: (i) classification of workers, (ii) manner of informing workers about work hours, holidays, paydays, and wage rates, (iii) termination of employment, and (iv) grievance redressal mechanisms for workers. The 2020 Bill provides that this will apply to establishments with at least 300 workers.**

- **Powers to the central government to revise the threshold: The 2019 Bill provided that the central government may make the provisions related to standing orders applicable to establishments with less than 100 workers through a notification. The 2020 Bill removes this provision.**

- **Change in employee strength: The 2019 Bill provided that once an establishment is covered under the provisions related to standing orders, these provisions will continue to apply even if its employee strength reduces below the threshold (100 workers) at any time thereafter. The 2020 Bill removes this requirement.**

Closure, lay-off and retrenchment

- **Prior permission of the government: Under the 2019 Bill, an establishment having at least 100 workers was required to seek prior permission of the government before closure, lay-off, or retrenchment. Lay-off refers to an employer's inability to continue giving employment to a worker in the face of adverse business conditions. Retrenchment refers to the termination of service of a worker for any reason other than disciplinary action. The 2020 Bill provides that prior permission will be required for establishments with at least 300 workers.**

- **Powers to the central government to revise the threshold: The 2019 Bill empowered the government to increase or decrease the threshold for the establishments to seek**

prior permission before closure, lay-off or retrenchment. The 2020 Bill only allows an increase in the threshold through notification.

Negotiating Union and Council

- **Sole Negotiating Union: Under the 2019 Bill, if there were more than one registered trade union of workers functioning in an establishment, the trade union having more than 75% of the workers as members would be recognised as the sole negotiating union. The 2020 Bill lowers this threshold to 51% of workers.**

- **Negotiation Council: In case no trade union is eligible as sole negotiating union, the 2019 Bill provided that a negotiating council will be formed consisting of representatives of unions that have at least 10% of the workers as members. The 2020 Bill raises this threshold to 20%.**

New provision under the Bill

- **Disputes relating to termination of individual worker: The 2020 Bill classifies any dispute in relation to discharge, dismissal, retrenchment, or otherwise termination of the services of an individual worker to be an industrial dispute. The worker may apply to the Industrial Tribunal for adjudication of the dispute. The worker may apply to the Tribunal 45 days after the application for the conciliation of the dispute was made.**

A.3 Code on Social Security, 2020

Social security entitlements

- The 2019 Bill mandated social security for certain establishments, based on thresholds, such as the size of the establishment and income ceilings. The 2020 Bill states that the central government may, by notification, apply the Code to any establishment (subject to size-threshold as may be notified).

- Further, under the 2019 Bill, the government could notify schemes for unorganised sector workers (such as home-based and self-employed workers), gig workers, and platform workers. Gig workers refer to workers outside the traditional employer-employee relationship. Platform workers are those who access organisations or individuals through an online platform and provide services or solve specific problems. The 2020 Bill makes the following changes for such workers:

- **Social security funds for unorganised workers, gig workers and platform workers: The 2019 Bill empowered the central government to set up social security funds for unorganised workers, gig workers and platform workers. The 2020 Bill states that the central government *will* set up such a fund. Further, state governments will also set up and administer separate social security funds for unorganised workers. The 2020 Bill also makes provisions for registration of all three categories of workers - unorganised workers, gig workers and platform workers.**

- **National Social Security for gig workers and platform workers: The 2019 Bill provided for the establishment of a national and various state-level boards for administering schemes for unorganised sector workers. The 2020 Bill states that in**

addition to unorganised workers, the National Social Security Board may also act as the Board for the purposes of welfare of gig workers and platform workers and can recommend and monitor schemes for gig workers and platform workers. In such cases, the Board will comprise of a different set of members including: (i) five representatives of aggregators, nominated by the central government, (ii) five representatives of gig workers and platform workers, nominated by the central government, (iii) Director General of the ESIC, and (iv) five representatives of state governments.

- **Role of aggregators: The 2020 Bill clarifies that schemes for gig workers and platform workers may be funded through a combination of contributions from the central government, state governments, and aggregators. For this purpose, the Bill specifies a list of aggregators in Schedule 7. These mention nine categories including ride sharing services, food and grocery delivery services, content and media services, and e-marketplaces. Any contribution from such an aggregator may be at a rate notified by the government falling between 1-2% of the annual turnover of the aggregators. However, such contribution cannot exceed 5% of the amount paid or payable by an aggregator to gig workers and platform workers.**

- **Changes in definitions: The 2020 Bill changes the definitions of certain terms in the Code. These include: (i) expanding the definition of 'employees' to include workers employed through contractors, (ii) expanding the definition of "inter-state migrant workers" to include self-employed workers from another state, (iii) expanding the definition of "platform worker" to additional categories of services or activities as may be notified by the government, (iv) expanding the definition of audio-visual productions to include films, web-based serials, talk shows, reality shows and sports shows, and (v), exempting construction works from the ambit of "building or other construction work" if the total cost of construction work exceeds Rs 50 lakhs (and if they employ more than a certain notified number of workers).**

- **Term of eligibility for gratuity: Under the 2019 Bill, gratuity was payable on the termination of employment, if the employee has been in the organisation for at least five years. The 2020 Bill reduces the gratuity period from five years to three years for working journalists.**

Provisions on appeals, assessment, and offences and penalties

- **Appeals: Under the 2019 Bill, authorised officers were empowered to conduct inquiries and decide: (i) disputes regarding the applicability of the provisions of provident fund (PF) and employee state insurance (ESI) to certain establishments, and (ii) determine amounts due from employers under these heads. Any aggrieved party could file for a review of the order. The 2020 Bill removes the provisions for such review.**

- **Determination of escaped amounts: Under the 2019 Bill, after passing orders, the authorized officer could, within five years of the order, reopen any case and pass further orders to re-determine the amounts due from the employer if he had reason to believe that: (i) certain amounts had escaped his notice because of failure of the employer to disclose relevant documents/facts, or (ii) certain amounts had escaped**

his determination because of information received consequently. The 2020 Bill removes this provision.

- **Offences and penalties: The 2020 Bill changes the penalties for certain offences. For example, the maximum imprisonment for obstructing an inspector from performing his duty has been reduced from one year to six months. Similarly, the penalty for unlawfully deducting the employer's contribution from the employee's wages has been changed from imprisonment of one year or fine of Rs 50,000 to only fine of Rs 50,000.**

Other changes

- **Composition of boards for unorganised workers: The Bill expands the representation of central government officials in the National Social Security Board for unorganised workers from five members to 10 members (taking the total count of members from 37 in the 2019 Bill to 42 in the 2020 Bill). Similarly, the number of state government officials in the state Boards for unorganised workers has been increased from seven to 10 members (taking the total members from 31 in the 2019 Bill to 34 in the 2020 Bill).**

- **Additional powers during an epidemic: The 2020 Bill adds new clauses which may become applicable in the cases of an epidemic. For example, the central government may defer or reduce the employer's or employee's contributions (under PF and ESI) for a period of up to three months in the case of a pandemic, endemic, or national disaster.**

A.4 Code on Occupational Safety, Health and Working Conditions, 2020

Exemption

- The 2019 Bill permitted the appropriate government to exempt any establishment or class of establishment from any provisions of the Code. The 2020 Bill empowers the state government to exempt any new factory from the provisions of the Code in order to create more economic activity and employment.

Threshold for coverage of establishments

- **Factory: The 2019 Bill defined a factory as any premises where manufacturing process is carried out and it employs more than: (i) 10 workers, if the process is carried out using power, or (ii) 20 workers, if it is carried out without using power. This was same as the Factories Act, 1948, which is being subsumed by the Bill. The 2020 Code increases the threshold to: (i) 20 workers for premises where the manufacturing process is carried out using power, and (ii) 40 workers for premises where it is carried out without using power.**

- The 2019 Bill excluded mines from the definition of a factory. The 2020 Bill removes this provision.

- **Establishments engaged in hazardous activity: The 2019 Bill defines an establishment as a place where any business, trade, or occupation is carried out with 10 or more workers. The 2020 Bill includes all establishments where any**

hazardous activity is carried out regardless of the number of workers.

- **Contract workers: The 2019 Bill applied to establishments or contractors employing 20 or more contract workers (on any day in the last one year). It also allowed the appropriate government to notify a lower threshold for this purpose. The 2020 Bill replaces this provision. It specifies that the Code will apply to establishments or contractors employing 50 or more workers (on any day in the last one year).**

- The 2019 Bill empowered the government to prohibit employment of contract labour in some cases including where: (i) the work is of a perennial nature, or (ii) the work performed by contract workers is necessary for the business carried out by the establishment, or (iii) the same work is carried out by regular workmen in the establishment. The 2020 Bill instead prohibits contract labour in core activities, except where: (i) the normal functioning of the establishment is such that the activity is ordinarily done through contractor, (ii) the activities are such that they do not require full time workers for the major portion of the day, or (iii) there is a sudden increase in the volume work in the core activity which 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 Bill defines a list of non-core activities where the prohibition would not apply. This includes a list of 11 works including: (i) sanitation workers, (ii) security services, and (iii) any activity of intermittent nature even if that constitutes a core activity of an establishment.

- The Bill allows the appropriate government to exempt contractors from the provisions of the Bill in case of an emergency, subject to such conditions as may be notified.

- The 2019 Bill provided that it will not be applicable to the offices of the central and state governments. The 2020 Bill clarifies that the Code will apply to contract labour engaged through a contractor in the offices of the central and state governments (where the respective government is the principal employer).

- **Building or other construction work: Under the 2019 Bill, construction works employing 10 or more workers were considered as building or other construction works. The 2020 Bill removes this condition.**

Work hours and employment conditions

- **Daily work hour limit: The 2019 Bill allowed the appropriate government to notify the maximum daily work hours for workers. The 2020 Bill fixes the maximum limit at eight hours per day.**

- **Employment of women: The 2019 Bill allowed the appropriate government to prohibit employment of women for undertaking dangerous operations. The 2020 Bill provides that women will be entitled to be employed in all establishments for all types of work under the Bill. It also provides that in case they are required to work in hazardous or dangerous operations, the government may require the employer to provide adequate safeguards prior to their employment.**

Inter-state migrant workers and unorganized workers

- **Definition: The 2019 Bill defined inter-state migrant worker as a person who: (i) has been recruited by an employer or contractor for working in another state, and (ii) draws wages within the maximum amount notified by the central government. The 2020 Bill adds that any person who moves on his own to another state and obtains employment there will also be considered an inter-state migrant worker. The 2020 Bill also specifies that only those persons will be considered as inter-state migrants who are earning a maximum of Rs 18,000 per month, or such higher amount which the central government may notify.**

- **Benefits for inter-state migrant workers: The 2020 Bill provides for certain benefits for inter-state migrant workers. These include: (i) option to avail the benefits of the public distribution system either in the native state or the state of employment, (ii) availability of benefits available under the building and other construction cess fund in the state of employment, and (iii) insurance and provident fund benefits available to other workers in the same establishment.**

- **Displacement allowance: The 2019 Bill required contractors to pay a displacement allowance to inter-state migrant workers at the time of their recruitment, which was equivalent to 50% of the monthly wages. The 2020 Bill removes this provision.**

- **Database for inter-state migrant workers: The 2020 Bill requires the central and state governments to maintain or record the details of inter-state migrant workers in a portal. An inter-state migrant worker can register himself on the portal on the basis of self-declaration and Aadhaar.**

- **Social Security Fund: The 2020 Bill provides for the establishment of a Social Security Fund for the welfare of unorganised workers. The amount collected from certain penalties under the Code (including the amount collected through compounding) will be credited to the Fund. The government may prescribe other sources as well for transferring money to the Fund.**

PART B: Issues to consider

B.1 Some common issues across the three Labour Bills

Definition of 'appropriate government'

All three Labour Bills specify that the central government will act as the appropriate government for any central public sector undertaking (PSUs). The central government will continue to be the appropriate government for a central PSU even if the holding of the central government in that PSU becomes less than 50%. It is unclear as to why the central government should continue to exercise jurisdiction over an establishment in which it does not own controlling stake (even in cases where it has sold its entire stake). Note that while examining the earlier versions of the Codes on Industrial Relations and Social Security, the Committee had recommended that the central government should exercise powers only over those PSUs in which it has more than 50% stake.[3]

Delegated Legislation

Under the Constitution, the legislature has the power to make laws and the government is responsible for implementing them. Often, the legislature enacts a law covering the general

principles and policies, and delegates detailed rule-making to the government to allow for expediency and flexibility. However, certain functions and powers should not be delegated to the government. These include framing the legislative policy to determine the principles of the law. Any Rule should also remain within the scope of the delegating Act.

The three labour Bills delegate various essential aspects of the laws to the government through rule-making. These include: (i) increasing the threshold for lay-offs, retrenchment, and closure, (ii) setting thresholds for applicability of different social security schemes to establishments, and (iii) specifying safety standards, and working conditions to be provided by establishments under the occupational safety Code. The question is whether the power to decide such matters should be retained by the legislature or whether these could be delegated to with the government.

While examining the 2019 Social Security Bill, the Standing Committee on Labour had noted that the Bill delegates various aspects for rule-making by the government, especially in relation to defining the entitlements, benefits and contributions under the Bill.[3] It suggested that the Ministry review all such instances of delegation in the Bill.

Power to exempt establishments

The 2020 Bill on Industrial Relations provides the government with the power to exempt any new industrial establishment or class of establishment from any or all of its provisions if it is in public interest. The 2020 Bill on Occupational Safety also gives the appropriate government the power to exempt any establishment for a period to be specified in the notification. Further, it enables the state government to exempt any new factory from its provision in the interest of creating more economic activity and employment. Note that the Factories Act, 1948 permitted exemptions from its provisions only in cases of public emergency, and limited such exemption to three months.

Therefore, the central and the state government have wide discretion in providing exemptions from these Bills. Every factory would generate employment, and public interest could be interpreted broadly. The exemptions could cover a wide range of provisions including those related to hours of work, safety standards, retrenchment process, collective bargaining rights, contract labour.

Certain workers not covered under the Bills

The Bill on Industrial Relations applies to all establishments, with separate thresholds for layoffs, retrenchment and closure, and for requirement of standing orders. On the other hand, the Bills on social security and occupational safety continue to apply to establishments over a certain size - the Occupational Safety Bill covers establishments with 10 or more workers while the Bill on Social Security requires only establishments over a certain size (typically, 10 or 20) to provide mandatory benefits (such as provident fund and pension). Further, the Bills on industrial relations and occupational safety allow the government to exempt any new establishment from their provisions in public interest. This raises the question of the extent to which establishments should be covered by the Bills.

It has been argued that the application of labour laws based on the number of employees is desirable to reduce the compliance burden on infant industries and to promote their economic growth.[4],[5] However, low numeric thresholds may create adverse incentives for establishments sizes to remain small, in order to avoid complying with labour regulation.[4,5] To promote the growth of smaller establishments, some states have amended their labour laws to increase the threshold of their application. For instance, Rajasthan has increased the threshold of applicability of the Factories Act, 1948, from 10 workers to 20 workers (if power is used), and

from 20 workers to 40 workers (if power is not used). The Economic Survey (2018-19) noted that increased thresholds for certain labour laws in Rajasthan resulted in an increase in growth of total output in the state and total output per factory.[5] Note that the Bill on Occupational Safety makes similar changes to the size to the thresholds for factories - from 10 workers to 20 workers (if power is used), and from 20 workers to 40 workers (if power is not used). Further, it increases the threshold of applicability of provisions regulating use of contract labour from 20 workers to 50 workers.

On the other hand, some have argued that basic provisions for enforcement of wages, provision of social security, safety at the workplace, and decent working conditions, should apply to all establishments, regardless of size.[2,4] Towards, this the 2020 Bill on Occupational Safety states that the applicability thresholds (of 10 or above) will not apply in those establishments in which hazardous or life-threatening activities (as notified by the central government) are being carried out. The Standing Committee while examining the earlier versions of the Bills on Occupational Safety and Social Security stated that: (i) the Occupational Safety Code should include a mechanism to notify provisions to safeguard the health and safety of unorganised workers and insert chapters in the Code specifying the safety, health and working conditions for inter-state migrant workers and plantation workers, (ii) the Social Security Code should provide a framework to achieve universal social security within a definite time frame. It made several recommendations towards expanding coverage.[3] While the 2020 Occupational Safety Bill incorporates the recommendations of the Committee (provides for a social security fund for unorganised workers and adds separate chapters for migrant and plantation workers), the 2020 Social Security Bill does not address them.

In this regard, the 2nd National Commission on Labour (2002) had recommended a separate law for small scale units (having less than 20 workers) with less stringent provisions for conditions such as payment of wages, welfare facilities, social security, retrenchment and closure, and resolution of disputes. For unorganised sector establishments (which fall outside the purview of labour laws), the National Commission for Enterprises in the Unorganised Sector (NCEUS) made several recommendations to address the social security and minimum conditions of work for both agricultural and non-agricultural workers and suggested two Bills – one for each sector.[6] Note that the Economic Survey (2018-19) estimates that almost 93% of the total workforce is informal.[5]

Note that most countries do not exempt smaller enterprises from labour regulation entirely. The International Labour Organisation (2005) notes that only 10% of its member states had exempted micro and small enterprises from labour regulation altogether.[7] Most countries adopt a mixed approach to labour regulation. For instance, health and safety laws in the United States, United Kingdom, South Africa and Philippines provide universal coverage to all workers (except for domestic help in the US and UK).[8] However, certain obligations under these laws are only applicable to enterprises with employees over a certain threshold. For example, record-keeping obligations for work-related accidents in the US only apply to establishments with at least 10 employees or in "low hazard" industries. In South Africa, only enterprises with 20 or more workers are required to designate a health and safety representative.[8]

B.2 Key Issues in the Industrial Relations Code, 2020

Strikes and lock-outs may become difficult for all establishments

The 2020 Bill requires all persons to give a prior notice of 14 days before a strike or lock-out. This notice is valid for a maximum of 60 days. The Bill also prohibits strikes and lock-outs: (i) during and up to seven days after a conciliation proceeding, and (ii) during and up to sixty days after proceedings before a tribunal. This may impact the ability of workers to strike and

employers to lock-out workers.

The Bill requires prior notice before a strike or a lock-out, which has to be shared with the conciliation officer within five days. Conciliation proceedings will start immediately and strikes or lock-outs will be prohibited during this period. If the conciliation is not successful and there is an application to a Tribunal by either party, the period of prohibition on strikes or lock-outs will be further extended. This time could extend the beyond the 60-day validity of the notice. Therefore, these provisions may impact the ability of a strike or lock-out on the appointed date given in the notice.

The Industrial Disputes Act, 1947 contains similar provisions for public utility services. A public utility service includes railways, airlines, and establishments that provide water, electricity, and telephone service. However, the National Commission on Labour (2002) had justified the rationale of treating such industries differently, considering their impact on the lives of a vast majority of people.[2] The rationale for extending the provisions on notice to all establishments is unclear. The Standing Committee while examining an identical provision in the 2019 Bill had recommended that the restriction on strikes should only apply to public utility services.[3]

Power to government to modify or reject tribunal awards

The 2020 Bill provides for the constitution of Industrial Tribunals and a National Industrial Tribunal to decide disputes under the Bill. It states that the awards passed by a Tribunal will be enforceable on the expiry of 30 days. However, the government can defer the enforcement of the award in certain circumstances on public grounds affecting national economy or social justice. These circumstances are when: (i) the central or state government is a party to the dispute in appeal, or (ii) the award has been given by a National Tribunal. The appropriate government can also make an order rejecting or modifying the award. The notification and the order will be tabled in the legislature. The question is whether such a provision would violate the principle of separation of powers between the executive and the judiciary, since it empowers the government to change the decision of the tribunal through executive action. Further, it raises the question of whether there is a conflict of interest, as the government may modify an award made by the Tribunal in a dispute in which it is a party.

The Industrial Disputes Act, 1947 had similar provisions. In 2011, the Madras High Court (affirming a 1997 Andhra Pradesh High Court judgement) struck down these provisions on constitutional grounds and held that the power to the executive to decline enforcing an award or to modify it, allows the executive to sit in appeal over the decision of the Tribunal, and therefore violates the separation of powers between the executive and the judiciary, which forms a part of the basic structure of the Constitution.[9],[10] This provision has been replicated in the Code. Therefore, it may violate the principle of separation of powers between the executive and the judiciary. The Standing Committee on Labour while examining an identical provision in the 2019 Bill had recommended removing this provision in view of these judgements.[3]

Provisions for formation of a negotiation council may be restrictive

Under the 2020 Bill, a sole union will be the negotiation agent with the management of the company. If there is more than one registered trade union of workers, the trade union having more than 51% of the workers as members would be recognised as the sole negotiating union. In case no trade union meets these criteria, a negotiating council will be formed with representatives of unions that have at least 20% of the workers as members. Note that trade unions must have membership of at least 10% or workers or 100 workers, whichever is lesser, to be registered. It is unclear as to what will happen in case there are multiple registered trade unions which enjoy this support (of 10% of members) but no union has the required support of at

least 20% workers to participate in the negotiating council.

Note that under the 2019 Bill, the threshold for participation in negotiating council was 10% instead of 20%.

Provisions on fixed term employment

The 2020 Bill introduces provisions on fixed term employment. Fixed term employment refers to workers employed for a fixed duration based on a contract signed between the worker and the employer. Provisions for fixed term employment were introduced for central sphere establishments in 2018.[11] We discuss below the pros and cons of introducing fixed term employment.

Fixed term employment may allow employers the flexibility to hire workers for a fixed duration and for work that may not be permanent in nature. Further, fixed term contracts are negotiated directly between the employer and employee and reduce the role of a middleman such as an agency or contractor. They may also benefit the worker since the Code entitles fixed term employees to the same benefits (such as medical insurance and pension) and conditions of work as are available to permanent employees. This could help improve the conditions of temporary workers in comparison with contract workers who may not be provided with such benefits.

However, unequal bargaining powers between the worker and employer could affect the rights of such workers since the power to renew such contracts lies with the employer. This may result in job insecurity for the employee and may deter him from raising issues about unfair work practices, such as extended work hours, or denial of wages or leaves. Further, the Bill does not restrict the type of work in which fixed term workers may be hired. Therefore, they may be hired for roles offered to permanent workmen. In contrast, under the Contract Labour (Regulation and Abolition) Act, 1970 the government may prohibit employment of contract labour in some cases including where: (i) the work is of a perennial nature, or (ii) the work performed by contract workers is necessary for the business carried out by the establishment, or (iii) the same work is carried out by regular workmen in the establishment. Note that the 2nd National Commission on Labour (2002) had recommended that no worker should be kept continuously as a casual or temporary worker against a permanent job for more than two years.[2]

The Standing Committee on Labour examined identical provisions in the 2019 Bill and recommended the conditions under which, and areas where fixed term employment may be utilised should be clearly specified.[3] Further, a minimum and maximum tenure for hiring fixed term employees should be specified.

The ILO (2016) noted that several countries restrict the use of fixed term contracts by: (i) limiting renewal of employment contracts (e.g., Vietnam, Brazil and China allow two successive fixed term contracts), (ii) limiting the duration of contract (e.g., Philippines and Botswana limit it up to a year), or (iii) limiting the proportion of fixed term workers in the overall workforce (e.g., Italy limits fixed term and agency workers to 20%).[12]

Table 1 below compares the provisions of fixed term employment, permanent employment and contract labour.

Table 1: Comparison between fixed term employment, permanent employment and contract labour

Feature	Fixed Term Employee	Permanent Employee	Contract Labour

Type of employment	■ Employment under written contract. No contractor or agency is involved. ■ On the payroll of the establishment.	■ Employment directly under a written contract. ■ On the payroll of the establishment.	■ Engaged in an establishment through a contractor or agency. ■ Not on the payroll of the establishment.
Term	■ Stipulated fixed term. ■ Employment lapses on completion of term, unless renewed. No notice is required to be given for retrenchment.	■ Employed on a permanent basis ■ Notice has to be given for termination of employment.	■ Based on terms negotiated with the contractor.
Nature of work	■ Not specified.	■ Hired for routine work.	■ Employment may be prohibited in certain cases, e.g., if similar work is carried out by regular workmen.

Sources: Contract Labour Act, 1970; Industrial Disputes Act, 1947; Notification GSR 976(E), Ministry of Labour and Employment, October 7, 2016, Notification GSR 235(E), Ministry of Labour and Employment, March 16, 2018; 2020 Bill; PRS.

Certain terms not defined in the Code

The 2020 Bill defines a 'worker' as any person who work for hire or reward. It excludes persons employed in a managerial or administrative capacity, or in a supervisory capacity with wages exceeding Rs 18,000. However, it does not define the terms 'manager' or 'supervisor' in this context. These terms are also used in the remaining three labour Codes, i.e., on Occupational Safety and Health, Wages and Social Security. The Standing Committee which examined the OSH Code recommended that the terms 'supervisor' and 'manager' be clearly defined in the Bill as it determines the categories of persons who would be excluded from the definition of 'workers'.

Further, the Bill uses the term 'contractor' while defining certain terms. For example, 'employer' is defined to include a contractor. However, the Bill does not define the term 'contractor'. Note that the remaining three Bills define the term to include persons who deliver work using contract labour, or supply manpower through contract labour. Similarly, the Bill defines the term "industrial establishment" to mean an establishment in which industry is carried on. However, it does not define the term 'establishment'. The remaining three Bills define the term to refer to any place where an industry, trade, business, manufacture or occupation is carried on.

B.3 Key Issues in the Code on Social Security, 2020

Purpose of the Bill

The 2020 Bill replaces nine laws related to social security. The National Commission on Labour (2002) (NCL) had emphasised the need for universal and comprehensive social security coverage to avoid deprivation of basic needs of workers, and recommended the simplification and consolidation of existing laws towards this end.[2] The Statement of Objects and Reasons of the Bill states that it seeks to simplify and amalgamate the provisions of these laws in line with the NCL recommendations.[13]

The NCL recommended that: (i) the social security system should apply to all establishments, (ii) the existing wage ceilings for coverage should be removed, and (iii) there should be a functional integration of the administration of existing schemes. Further, every employer and employee may make a single contribution for the provision of all the benefits, with a ceiling prescribed for such contributions. However, the Bill largely retains the current set up and does not fully implement these recommendations.

First, the Bill continues to retain thresholds based on the size of establishment for making certain benefits mandatory. 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., unorganised 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 unorganised workers are governed by a different law (being subsumed by the Bill) under which voluntary schemes are notified for such workers.[14] A large numbers of workers may continue to be excluded. Note that the Periodic Labour Force Survey Report (2018-19) indicates that 70% of regular wage/salaried employees in the non-agricultural sector did not have a written contract, and 52% did not have any social security benefit.[15]

Second, the Bill continues to treat employees within the same establishment differently based on the amount of wages earned. For instance, provident fund, pension and medical insurance benefits are only mandatory to employees earning above a certain threshold (as may be notified by the government) in eligible establishments.

Third, the Bill continues to retain the existing fragmented set up for the delivery of social security benefits. 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 unorganised workers, and (iv) cess-based labour welfare boards for construction workers.

The Standing Committee on Labour (2020) had examined the 2019 Bill with similar provisions and recommended that the Code should provide a framework for achieving universal social security within a definite time frame.[3] It made several recommendations for expanding the coverage of establishments, employees, and types of benefits. These include: (i) re-considering establishment-size based thresholds and expanding the definition of "establishment" to include other enterprise categories such as agricultural and own account enterprises, (ii) expanding definitions of "employees" to include Asha and Anganwadi workers, and "unorganised workers" to include agricultural workers, (iii) creating a separate fund for inter-state migrant workers, (iv) introducing unemployment insurance for unorganised workers and (v) and re-introducing labour welfare funds for workers in certain industries such as iron ore mines and beedi establishments.

Table 2 below compares the 2019 Bill, the recommendations of the NCL, the recommendations of the Standing Committee, and the extent to which the 2020 Bill incorporated these changes.

Table 2: Comparison of Bill with existing laws and NCL recommendations

Feature	NCL Recommendations	2019 Bill	Standing Committee Recommendations	2020 Bill
Coverage	■ Move from the current fragmented social	■ Retains	■ Code does not clearly define benefits and	■ Standing Committee

	security system to an integrated universal one with: (i) mandatory state-funded social security for the poor, (ii) contribution-based system for workers earning up to a certain wage (with part state-subsidy for unorganised workers), and (iii) voluntary schemes for others.	coverage as per existing laws, with limited modifications. ■ The Bill additionally permits the government to frame schemes for gig workers and platform	entitlements for several categories of workers. ■ Code should provide a framework to achieve universal social security for all workers with firm entitlements and within a defined time frame.	recommendations not addressed

		workers.		
Registration	■ Move from differing registration requirements to a comprehensive system of registration of workers and establishments.	■ Establishments to register with respective organisations. ■ Aadhaar-based registration for all eligible workers.	■ Provide for a unified registration and compliance platform. All establishments should mandatorily register with a single authority.	■ Standing Committee recommendations not addressed
Portability	■ Address lack of portability by issuing cards with unique social security number to enable portability	■ No explicit provision for portabil	■ Provide for common “minimum mandatory entitlements” across states for construction and unorganised workers to	■ Standing Committee recommendations not addressed

		ity of benefits.	enable portability. ■ Ensure portability for migrant workers.	
Delivery	■ Move to a decentralised mechanism with: (i) national authority chaired by the Prime Minister, (ii) central board for managing the scheme, (iii) state boards for delivery and implementation, and (iv) local committees for identification and registration of beneficiaries.	■ The Bill retains the same organisational set up as under existing laws.	■ Code continues with the existing fragmented structure for delivery of benefits. Committee recommended that the government consider putting in place a more compact system of governance of social security.	■ Standing Committee recommendations not addressed

Sources: Existing social security Acts; 2nd Report of NCL; Report of the Standing Committee on the 2019 Bill; 2019 Bill; 2020 Bill; PRS.

Provisions on gig workers and platforms workers are unclear

The 2020 Bill 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 organisations or individuals through an online platform and provide services for payment. The Bill also creates provisions for unorganised workers. An unorganised worker is defined as one who works in the unorganised sector, and includes workers not covered by the Industrial Disputes Act, 1947, or other provisions of the Bill (such as provident fund or gratuity). It also includes self-employed workers. The Bill mandates different schemes for all these categories of workers. However, there may be some overlap between their definitions. We illustrate this below.

Consider the example of a driver working for an app-based taxi aggregator. Here, there is no employee-employer relationship. For example, appointment letters are not issued, social security benefits are absent, work hours are not regulated by the employer, and the driver may choose to work for a competitor taxi aggregator. Therefore, the nature of the work involved may lie outside the purview of a ‘traditional employer-employee relationship’, making him a ‘gig worker’. However, the driver is able to pursue this job only through an online platform. This would meet the definition of a ‘platform worker’ as well. Such a driver may also be an

'unorganised worker' as he may be self-employed. With such overlap across definitions, it is unclear how schemes specific to these categories of workers will apply. The Standing Committee on Labour examined similar provisions in the 2019 Bill and recommended: (i) expanding the definition of "unorganised workers" to include gig and platform workers, (ii) making the definition of "gig worker" more specific to avoid misinterpretation, and (iii) expanding the definition of "platform worker" to enable inclusion of future models of work.[3] The 2020 Bill only incorporates the last recommendation.

Provisions on gratuity for fixed term workers unclear

Under the 2020 Bill, gratuity is payable if the employee has served a continuous period of five years. However, this time period will not apply if the contract term of a fixed term worker expires. The Bill further states that in the case of fixed term employment, the employer will pay gratuity on a pro rata basis (i.e. proportionate to the fixed term period). However, the Industrial Relations Bill, 2020 while defining fixed term workers, states that such workers will be eligible for gratuity only if they complete a one-year contract. Therefore, the two Bills contain different provisions on gratuity for fixed term workers and it is not clear whether a fixed term employee with a contract of lesser than one year will be entitled to gratuity under the Code on Social Security, 2020.

Mandatory linking with Aadhaar may violate Supreme Court judgement

The 2020 Bill mandates an employee or a worker (including an unorganised worker) to provide his Aadhaar number to receive social security benefits or to even avail services from a career centre. This may violate the Supreme Court's *Puttaswamy-II* judgement.[16] In its judgement, the Court had ruled that the Aadhaar card/number may only be made mandatory for expenditure on a subsidy, benefit or service incurred from the Consolidated Fund of India. Applying this principle, the Court has struck down the mandatory linking of bank accounts with Aadhaar. Since certain entitlements such as gratuity and provident fund (PF) are funded by employers and employees and not by the Consolidated Fund of India, making Aadhaar mandatory for availing such entitlements may violate the judgement. Note that the Employees' Provident Fund Organisation (EPFO) had made Aadhaar linking with PF accounts mandatory in 2015. After the judgement, the EPFO issued orders against the enforcement of these provisions.[17] Further, the rationale for seeking mandatory linking of Aadhaar for availing career centre services is unclear. Note that while examining the provision on mandatory linking of Aadhaar for registration of unorganised workers (in the 2019 Bill), the Standing Committee noted the government's assurance that this provision will be re-examined.[3]

Recommendations of the Standing Committee

The Standing Committee on Labour (2020) had given certain other recommendations on the 2019 Bill. Further, some of the Committee's recommendations on the 2019 Occupational Safety, Health and Working Conditions (OSH) Code, 2019, also applied to the 2019 Bill. We summarise these recommendations below and the extent to which the 2020 Bill incorporates these recommendations:

- **Reduction in term for gratuity: Under the 2019 Bill, gratuity is payable if the employee has served a continuous period of five years. The Committee recommended reducing this to one year and extending gratuity to all other categories of workers including contract, seasonal, and piece-rate workers.[3] The 2020 Bill only reduced gratuity entitlement for working journalists from five years to three years.**

- **Employment Exchanges: One of the laws replaced by the 2019 Bill governs employment exchanges, where certain employers are required to report vacancies and job seekers may track openings. The Committee noted that this law is not connected with social security and recommended its removal from the Bill. This recommendation has not been incorporated in the 2020 Bill.**

- **Social security for plantation workers: The OSH Code contains health and safety provisions for workers in plantations measuring at least five hectares. In its report on the OSH Code, the Committee noted an assurance of the Ministry that workers in plantations measuring less than five hectares would be covered in the Code on Social Security. However, the definition of a "plantation" in the 2019 Bill retained the five-hectare threshold.[3] This recommendation has not been incorporated in the 2020 Bill.**

The 2020 Bill also defines the term 'employer' to mean a person who employs any persons and specifically includes certain categories of workers. In the case of a factory, employer means the occupier of a factory, i.e., the person with ultimate control over the affairs of the company. However, the remaining three labour codes define the term 'employer' to include occupier *as well as* the manager of the factory. It is not clear why managers of factories have not been included in the definition. Further, the Bill also does not define certain terms used to define an 'establishment'. These include the terms 'industry', 'trade', 'business', 'manufacture' or 'occupation'.

B.4 Key Issues in the Code on Occupational Safety, Health and Working Conditions, 2020

Rationale for some special provisions unclear

The 2020 Bill replaces 13 laws regulating health, safety and working conditions of workers. The National Commission on Labour (2002) recommended consolidation and simplification of these laws.[2] Further, the Statement of Objects and Reasons of the Bill states that it seeks to simplify and amalgamate the provisions of the 13 Acts.[18] While the Bill consolidates existing Acts, it falls short of simplifying their provisions. We illustrate this below.

The Bill contains general provisions which apply to all establishments. These include provisions on registration, filing of returns, and duties of employers. However, it also includes additional provisions that apply to specific type of workers such as those in factories and mines, or as audio-visual workers, journalists, sales promotion employees, contract labour and construction workers.

It may be argued that special provisions on health and safety are required for certain categories of hazard-prone establishments such as factories and mines. It may be necessary to allow only licensed establishments to operate factories and mines. Similarly, special provisions may be required for specific categories of vulnerable workers such as contract labour and migrant workers. However, the rationale for mandating special provisions for other workers is not clear.

For example, the Bill requires that any person suffering from deafness or giddiness may not be employed in construction activity which involve a risk of accident. The question is why such a general safety requirement is not provided for all workers. Similarly, the Bill provides for registration of employment contracts for audio-visual workers, raising the question of why there is a special treatment for this category.

Further, the Bill specifies additional leave for sales promotion employees. It also specifies that working journalists cannot be made to work more than 144 hours in four weeks (i.e. an average of 36 hours per week). For all other workers covered under the Bill, the minimum leave and maximum work hours are prescribed through rules. The rationale for differential treatment with regard to working conditions between working journalists and sales promotion employees on the one hand, and all other workers on the other hand, is unclear.

Note that, if any sector-specific provisions are needed, the Bill empowers the government to notify them.

Table 3 below sets out the general provisions in the Bill applicable to all workers and the additional special provisions applicable to specific categories of workers and establishments under the Bill.

Table 3: Comparison of the general provisions and special provisions in the 2020 Bill

Feature	General Provisions	Specific provisions
Duties of Employers	■ Duties include providing a safe workplace, issuing appointment letters, and complying with the provisions of the Code.	■ **Factories, mines, docks, plantation and construction: Employer must provide a risk-free workplace and instruct employees on safety protocol.** ■ **Inter-state migrant workers: Employers/contractors have to: (i) notify specified authority of both states in case of fatal accidents and serious bodily harm, (ii) ensure suitable work conditions, and (iii) extend medical check-up and other benefits like provident fund and ESI entitlements which other workers in the establishment may be entitled to.** ■ **Mines: The owner and agent of the mine will be jointly responsible for providing a safe work environment.**
Working conditions and welfare facilities	■ To be notified by the central government. These may include bathing spaces, canteens, and first aid boxes.	■ **Factories, mines, plantation, construction, and motor transport undertakings: Appropriate government may require provision of added facilities like ambulance rooms, welfare officers, and temporary housing.** ■ **Factories, mines, plantation, and motor transport undertakings: Appropriate government may appoint medical officers to examine, certify, and supervise the health of workers.** ■ **Factories involved in hazardous processes: Maximum permissible limits of exposure to chemical and toxic substances in manufacturing processes will be prescribed by state government.**

		Further, it may specify medical examinations for workers, among other facilities. ■ **Interstate migrant workers: Employers must provide suitable conditions of work, medical facilities and journey allowance. They must also be given an option to avail benefits of the public distribution system in their native or destination state where they may be employed.** ■ **Plantations: Employer to provide welfare facilities such as housing accommodation, creches, educational, health and recreational facilities.**
Dangerous operations	■ No general provision for hazardous and dangerous operations.	■ **Factories involved in hazardous processes: Emergency standards may be set. The National Advisory Board may give recommendations in cases of extraordinary occurrences.** ■ **Plantations: Arrangements must be made for the safety of workers in connection with use, handling, storage and transport of insecticides, pesticides and chemicals and toxic substances.**
Inspector	■ Inspector-cum-Facilitators may inquire into accidents and conduct inspections, among others.	■ **Factories, mines, docks, and construction work: Inspector-cum-Facilitators may limit number of employees working or prohibit work in an establishment, if it appears that workers are in danger.**
Licenses and other registration requirements	■ All establishments with ten or more workers must register with the appropriate government.(or in hazardous establishments as notified by the government)	■ **Factories: Additional licenses may be required.** ■ **Beedi workers and contract labour: License required for beedi and cigar establishments (except for family establishments). Contractors must either obtain a five-year license or obtain work-specific licenses.** ■ **Audio-visual workers: A signed agreement between the employer or contractor and worker must be registered with the government.**
Work hours	■ Maximum eight hours per day.	■ **Working Journalists: Work hours cannot exceed 144 hours in 4 weeks.**
Leave	■ Workers are entitled to one day off for	■ **Sales promotion employees and working journalists are entitled to leave for 1/11th of**

	every 20 days of work and one day off every week.	**time on duty, and medical leave for 1/18th of time on duty. Motor transport workers are entitled to one day off in every 10 days, in certain cases.**
Disability	■ No general provision in the Code.	■ **Construction work: No employer can hire workers with defective vision, deafness, or a tendency for giddiness, if there is a risk of accident.**
Age	■ No person below the age of 14 may be allowed to work.	■ **Mines: No worker below the age of 18 or apprentice/trainee below the age of 16, may work in a mine.**

Sources: Bill on Occupational Safety, Health and Working Conditions, 2020; PRS.

Civil Court barred from hearing matters under the Code

The 2020 Bill bars civil courts from hearing any matters under the Bill. In some matters where persons are aggrieved by the orders of authorities such as, by the order of the Inspector-cum-facilitator in the case of factories, or by the revocation of a license for contractors, the Bill provides for an administrative appellate authority to be notified. However, it does not provide a judicial mechanism for hearing disputes under the Bill.

Under the existing 13 health and safety laws, claims which affect the rights of workers such as wages, work hours, and leave, are heard by labour courts and industrial tribunals. However, the Bill bars the jurisdiction of civil courts, and does not specify that such disputes arising under it may be heard by these labour courts and tribunals.

Further, there may be other health and safety-related disputes. For example, an employer may wish to challenge an order passed by an Inspector which identified certain safety violations at the workplace. In such a case, the employer may file a case in the civil court for seeking remedy against the orders passed by the Inspector. Appeal may be filed before the High Court and ultimately before the Supreme Court. However, the Bill bars civil courts from hearing any dispute under the Bill. As a result, employers who are aggrieved by the orders of the Inspector and by the notified administrative appellate authority will not be able to challenge it in a civil court. The only recourse available to them would be to directly file a writ petition before the relevant High Court. It can be argued that the bar on civil courts from hearing matters under the Bill may deny aggrieved persons an opportunity to challenge certain issues before a lower court.

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