LABOUR LAW REFORMS AND WOMEN'S WORK IN INDIA:

ASSESSING THE NEW LABOUR CODES FROM A GENDER LENS

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Institute of Social Studies Trust

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Any errors are, of course, my own.

Shraddha Chigateri

28 December, 2020

Abbreviations and Acronyms

ASHA	Accredited Social Health Activist
BMS	Bharatiya Mazdoor Sangh
CITU	Centre of Indian Trade Unions
EPF	Employees' Provident Fund
ESI	Employees State Insurance
ICDS	Integrated Child Development Services
IGMSY	Indira Gandhi Matritva Sahayog Yojana
ILO	International Labour Organisation
ISST	Institute of Social Studies Trust
JSY	Janani Suraksha Yojana
MBO	Member Based Organisation
MoLE	Ministry of Labour and Employment
NCEUS	National Commission for Enterprises in the Unorganised Sector
NDA	National Democratic Alliance
NFSA	National Food Security Act
NPDW	National Platform for Domestic Workers
NREGA	National Rural Employment Guarantee Act
OBC	Other Backward Classes
PIB	Press Information Bureau
PLFS	Periodic Labour Force Survey
PMMVY	Pradhan Mantri Matritva Vandana Yojana
SC	Scheduled Caste
SEWA	Self Employed Women's Association
SNCL	Second National Labour Commission
ST	Scheduled Tribe
UPA	United Progressive Alliance
VVGNLI	VV Giri National Labour Institute

Introduction

In recent years, India has seen a wide-ranging retrenchment of hard-won labour rights with serious consequences for working communities in general, and for the rights of women workers. This has only been exacerbated by the global pandemic, which as elsewhere, has exposed and deepened the fault-lines and the structural inequalities that inhere in Indian society. While the country was already witnessing a serious crisis of unemployment prior to the pandemic, the pandemic and the government's response in the form of a brutal and stringent lockdown that was enforced on 1.3 billion people with 4 hours of notice on 24 March 2020 has had devastating consequences particularly for those in already precarious contexts (Ghosh 2020). This was perhaps emblematically captured in the early days of the pandemic by the heart-wrenching scenes of thousands of migrants, having lost their places of residence and means of livelihood walking for hundreds of miles to reach home with no government support (Biswas 2020; Menon 2020).

Studies have already begun to uncover the scale of the loss in jobs, livelihoods, incomes and increase in the levels of hunger and indebtedness since the period of the pandemic, especially for marginalised communities, including for women generally, and women from marginalised communities in particular (Lahoti et al. 2020). A recent survey by ActionAid India found that 78 percent of all informal workers surveyed – both male and female – lost their livelihoods during the lockdown, and for some sectors of feminised employment, the loss in employment was much higher – for instance, 85 percent of women domestic workers surveyed lost their livelihoods (Sapkal et al. 2020). Further, the period of the lockdown saw an increase in women's unpaid care work burdens, with a survey conducted in Delhi by the Institute of Social Studies Trust indicating that 66 percent of informal women workers from sectors such as home based work, domestic work, street vending, etc. experienced an increase in household domestic chores during the height of the lockdown (Chakraborty 2020).

While a host of relief measures were announced, under the cover of the pandemic and during the most restrictive phases of the lockdown, the government also accelerated the pace of its 'reform agenda' in the name of encouraging investment and reviving the economy. It did this through a range of measures such as the deregulation of agricultural markets, encouraging more fossil fuel extraction, especially in the coal sector, reducing environmental regulations to attract private investors, and privatising public sector enterprises (Ghosh 2020). An important component of this reform agenda was the set of widely contested changes to labour laws initiated by state governments, including the suspension of a majority of labour laws in the states of Uttar Pradesh, Gujarat and Madhya Pradesh, the extension of working hours from 8 to 10-12 hours and the suspension of the right to strike for varying lengths of time for different sectors by several states (Shyam Sundar 2020; Gopalakrishnan 2020; Winnu Das 2020; Ghosh 2020).

The reforms to labour laws during the pandemic, devastating as they are for workers across the country, are not surprising. Since liberalisation, there has been a slow erosion of labour rights in the name of enabling the 'ease of doing business' through 'labour flexibility'. The changes over the years

have been gradual, 'less direct' and piecemeal, in what Rob Jenkins has termed 'reform by stealth'; they have also come through changes at the state level, with much of the change facilitated through administrative procedure rather than formal legal reforms, though this has happened too, particularly since the NDA government came to power in the centre in 2014 (Mitchell, Mahy, and Gahan 2014; Shyam Sundar 2018a; 2020a). What has been significantly different in recent years, however, is the process and the scale of the reform agenda.

In 2014, after the National Democratic Alliance (NDA) government was elected to power, it initiated a series of wide-ranging reforms at the central level through the 'consolidation and simplification' of 44 central laws into 4 Labour Codes on Wages, Industrial Relations, Social Security, and Occupational Safety, Health and Working Conditions. While the proposals for reform reached various stages of formulation and consultation during its first term amidst widespread protests and discontent, when it was returned to power with an overwhelming majority in 2019, the NDA government renewed its commitment to the labour law reform agenda. In August 2019, it enacted the Code on Wages consolidating and amalgamating 4 previous legislations, and in September 2020, it enacted 3 further Labour Codes on Industrial Relations, Social Security, and Occupational Safety, Health and Working Conditions consolidating and amalgamating a further 25 laws. These laws were enacted amidst an opposition boycott in parliament and widespread protests, including a recent national general strike that saw a reported 250 million workers across the country calling for the repeal of the Codes (Rajalakshmi 2020; IndustriALL 2020).

There are a range of changes wrought by the new Labour Codes including new stipulations on union registration, pushback against the rights of collective bargaining through the imposition of restrictions on strikes, legislative sanction to fixed term contracts, and the dilution of protective standards and accountability mechanisms, amongst many others. Along with the changes proposed by the new Codes, there have also been several changes at the state levels which are along a similar vein, including increasing the threshold for applicability of the Factories Act, enhancing overtime, enhancing the threshold for the requirement of prior permission for retrenchments, lay-offs and closures, introduction of compounding of offences, amongst others.

There have also been a series of governance reforms that have been rolled out at the central and in several states, which include reforms of the regime of labour inspections, maintenance of records and submission of returns through the creation of a web portal, with the introduction of new mechanisms such as randomised inspections, voluntary compliance schemes and self-certification, amongst others.[1] In this paper, we examine the effects and consequences of the four new Labour Codes for women workers, particularly for those in the informal economy.

1 See https://labour.gov.in/sites/default/files/Labour_Law_Reforms-06-03-2020.pdf for details of reforms until March 2020. Also see (Shyam Sundar 2018c) for an overview of these changes over recent years. There have been further changes proposed at the state level post-pandemic.

As is widely known, for women workers, the vast majority of whom are in the informal economy, labour laws are, for the most part inapplicable; in fact, it is the very fact that their work falls outside legal protection or regulation that defines their informality. The law reform process then provided a singular opportunity for the government to extend labour rights to women workers – to formalise and secure their working relations, to recognise their rights at work, including the right to the timely payment of a fair wage, the regulation of their working conditions, the right to social security, and so on. However, the Labour Codes have continued with the patchy and piecemeal recognition of the rights of women workers that existed prior to the reform process while hollowing out labour rights for even those in the formal economy. This has thrown new obstacles in the pathways to securing the rights of informal women workers to decent work. Given this context, the paper discusses the way forward for the labour rights of women in the informal economy.

It is important to note that this paper is by no means a comprehensive, fine-grained analysis of the Labour Codes, as that would require a more detailed evaluation of the Codes from the perspective of their implications for women in different sectors of the informal economy, to whom the Codes may have differential impact. The purpose of this paper is to provide an overview of the changes made by the Code as they pertain generally to informal women workers. To contextualise this, the paper locates both the contexts of women's work in India, as well as the wider relationship between labour laws and women's work, including paid and unpaid work. It also draws on the proposals made by the Second National Labour Commission (SNCL), which has formed the basis of the reforms, as well as the reports of the National Commission for Enterprises in the Unorganised Sector (NCEUS), which have made several proposals for regulating the informal economy, to evaluate the import of the Codes for informal women workers.

Women's Work and Labour Laws

Women's Work and Labour Laws

The legal framework for labour rights in India comprises an intricate and complex web of constitutionally guaranteed labour rights, labour legislations at both the state and central levels (labour is in the concurrent list of the Seventh Schedule of the Constitution), judicial and administrative interpretations of labour rights, and international human rights and labour rights instruments. The Fundamental Rights of the right to equality (Article 14), protection from discrimination (Article 15), equality of opportunity for all citizens for public employment (Article 15), the rights to freedom of speech, assembly and association (Article19), the rights to life and personal liberty (Article 21), prohibition of traffic in human beings and forced labour (Article 23), prohibition of employment of children in hazardous employment (Article 24) as well as several Directive Principles of State Policy such as Articles 38, 39, 39A, 41, 42, 43, 43A and 47 which require the state to promote the welfare of the people, to make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and to secure just and humane conditions of work and maternity relief, as well as a living wage and ensuring a decent standard of life, amongst other things, form the bedrock of the Constitutional framework of labour rights in the country.

At the international level, Article 23 (1) of the Universal Declaration of Human Rights on the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, innumerable international instruments on labour rights, including the eight core conventions of the ILO, the ILO Declaration on the Fundamental Principles and Rights at Work 1998, ILO's Decent Work Agenda (which has found expression in the UN Sustainable Development Agenda in the form of SDG 8), and the recently adopted ILO Centenary Declaration on the Future of Work provide some of the key principles of the normative legal framework for labour rights.[2]

Despite the breadth of this normative and legislative landscape, for informal women workers in India, the protections accorded by labour law have been few and far between. Before we turn to analysis of how labour law deals with women's work, particularly in the informal economy, we examine some of the broad features of women's work in India.

Mapping Women's Work in India

Gendered conceptualisations of what constitutes work make the work that women perform particularly vulnerable to falling outside the scope of official categorisations of work, whether this be labour laws or national accounting systems, resulting in the non-recognition, undercounting and undervaluation of the work that women perform. Labour laws and accounting systems are further confounded by some of the key characteristics of women's work, viz., women workers are typically involved in multiple economic activities for survival, not just in terms of both the unpaid work and paid

2 India has ratified 47 ILO conventions and 1 protocol since the inception of the ILO in 1919 (see the website of the Ministry of Labour and Employment for details).

work that they often simultaneously perform, but also in terms of the fluidity with which women move from one livelihood/ employment option to the other, based on seasonality and necessity (see for instance Dewan 2018).

Despite their limitations, macro data sets have captured several trends in women's work in India over the decades. One such stark trend has been a consistent and troublesome decline in women's workforce participation rates since the 1990s with a large-scale and unprecedented eviction of women from the rural workforce pointing to the grave and continuing agrarian and highly gendered unemployment crisis under liberalisation-led growth (Mazumdar and Neetha 2011; 2020). Over the years, feminist economists have identified several reasons for this alarming drop including the absence of decent work opportunities, a contraction of employment in agriculture based on a decline in farm sizes and increased mechanisation, an increase in educational enrolment of girls, and a shift from paid employment to unpaid work which has been attributed to the absence of basic amenities; as well as the significant and continuing problems with the way in which women's work is conceptualised by data sets resulting in the undercounting of women's work (Mazumdar and Neetha 2011; Chandrasekhar and Ghosh 2013; Sudarshan 2014; Rawal and Saha 2015; Naidu 2016; Ghosh 2018; Chandrasekhar and Ghosh 2019).

The recent Periodic Labour Force Survey (PLFS) data for 2017–18 confirms this downward trend with a further dramatic drop in women's work participation rates to 16.5 percent at the all India level, its lowest since independence (Chakraborty and Chatterjee 2020; IWWAGE 2020b; Nikore 2019). This drop is particularly sharp for rural women, and especially for Scheduled Caste (SC) and Scheduled Tribe (ST) women working in rural areas. As Mazumdar and Neetha (2020) show, according to PLFS 2017–18 data, the work participation rates among rural women was 17.5 percent, reflecting an absolute drop of close to a staggering 25 million women workers since 2011–12, and just short of 47 million since 2004–05. Although the decline is notable across all social groups, it is most for women from SC and ST categories, with the work participation rates for ST and SC women dropping by about 10 percentage points between 2011–12 to 2017–18 (also see IWWAGE 2020b; Chandrasekhar and Ghosh 2019; Neetha 2013a; Rawal and Saha 2015).

When women's work is taken as a whole, however, viz., when women's paid work and women's unpaid work are taken together, women's work participation rates have not only been high, they have consistently been higher than that of men, clearly evidencing the extent of women's work, as well as the extent to which the unpaid care economy subsidises the formal economy (Ghosh 2018; 2019). Moreover, women not only do significantly more unpaid work than men, but they also spend significantly more time on unpaid work than men. As the data from the recent pan-India Time Use Survey, which was conducted between Jan – Dec 2019 shows, on average, women spend more than two and a half times the time per day on unpaid activities than men, which increases to three and a half times in urban areas (Chandrasekhar and Ghosh 2020; also see Dewan 2018). The double burden that women bear and the time poverty that they experience, as feminist scholarship has shown, have serious and depleting consequences on their physical and mental wellbeing (Zaidi et al. 2017).

Where women are in paid employment, most of this employment is precarious with 92 percent of women workers in informal employment (Raveendran and Vanek 2020). Moreover, there are high levels of gendered occupational segregation in the workforce with women largely undertaking labour-intensive, informal work concentrated in low-productivity sectors. While agriculture continues to the mainstay of women's employment (73.2 percent in 2017), services, manufacturing and construction constitute the other main sectors where women are employed. For women in urban areas, in 2017, services constituted the largest sector of women's employment (60 percent) followed by manufacturing (about 20 percent) (Nikore 2019). A large proportion of women workers find employment in precarious occupations such as home-based work, domestic work, street vending, waste-picking and construction (Raveendran and Vanek 2020).

In terms of the nature of women's employment, of the three broad categories of regular, self-employed and casual workers,[3] comparative analysis of data from National Sample Survey Employment and Unemployment Survey (NSS EUS) 2011-12 and PLFS 2017-18 shows that while self-employed women workers continue to constitute the largest segment of women workers in rural areas, (59 percent in 2011-12 and 58 percent in 2017-18), there have been shifts in the percentage of causal workers (reducing from 35 to 32 percent between 2011-12 and 2017-18) and regular workers (increasing from 6 to 11 percent between 2011-12 and 2017-18) (IWWAGE 2020a). In urban areas, there has been a more pronounced shift with an increase in the percentage of regular employment (43 to 52 percent between 2011-12 and 2017-18), and a decrease in those who are self-employed (43 percent to 35 percent between 2011-12 and 2017-18) with the percentage of casual workers remaining about the same (14 percent in 2011-12 and 13 percent in 2017-18) (Ibid).

There are a couple of things to note from this data on the nature of women's employment – while a majority of women workers in rural areas (58 percent in 2017-18) are self-employed, the most significant form of self-employment is that of unpaid family helpers; in 2017-18, unpaid family helpers constituted 39 percent of total employment for women in rural areas. Secondly, as feminist economists have shown, although there has been a consistent increase in regular employment for women in urban areas for three decades, this only denotes that women have been able to secure continuous employment, rather than an improvement in the conditions of work (Mazumdar and Neetha 2020). Moreover, men continue to hold almost 80 percent of regular, salaried jobs and the gendered earnings gap continues to remain substantial, with female regular workers only earning about half of male regular workers' earnings, which is more so in rural areas (IWWAGE 2020a).

3 The self-employed category includes own-account workers, employers, and unpaid helpers. Own-account workers operate their own enterprise without hiring workers, while employers hire workers in their enterprise. Unpaid helpers assist household members in running their enterprise, but do not earn a regular wage or salary. Regular wage/ salaried workers work in others' enterprises to earn a wage or salary on a regular basis, while casual labourers earn their wages on a daily or periodic basis (IWWAGE 2020).

Women Workers: Falling through the Cracks of Labour Law

Feminist scholarship on labour law has pointed to its deeply gendered foundations, given that it is based on the fundamental assumption that the 'labour' it is concerned with is paid work, and not the unpaid work that is carried out in the family or the community (Conaghan 2018).[4] This fraught assumption has serious implications for recognising and extending the protections of labour law to women workers in India who are typically involved in multiple and oftentimes simultaneous economic activities for survival traversing a broad swathe of both paid and unpaid work. Moreover, the interconnectedness of paid and unpaid work, and the domains of work and family continue to be brought into sharp relief by law and policy efforts to address 'work-life balance' and the 'reconciliation of work and family responsibilities' (Conaghan 2018).

Even for women whose work is recognised as work in statistical systems, far too many of them (92 percent) are classified as informal workers, for whom there are no adequate legal protections. In fact, it is the very fact that their work falls outside adequate legal protection that defines their informality.[5] There are again several reasons for this – apart from the assumption that the labour of labour law refers to paid work, for the most part laws regulating work have been formulated to provide labour rights and protections to those in a 'standard employment relationship', viz., those in continuous, full time employment in a clear employer – employee relationship (International Labour Office 2016). In other words, laws which have sought to recognise and protect the rights of workers have been too narrow (or have been too narrowly construed) to include those who do not have a traditional 'employer-employee' relationship, either because they are 'self-employed' or because their employment relationship is 'disguised, ambiguous or not clearly defined' (Chen 2012, also see National Commission on Self Employed Women and Women in the Informal Sector 1988).

This conceptual limitation of labour law is once again deeply problematic for women workers in India because as we have seen, most women workers are self-employed (either as unpaid family workers, or own account workers), or casual workers without regular employment. For those in regular employment too such as domestic workers, the employment relationship is often characterised, not

4 The historical foundations of labour law are based on a distinction between 'productive' and 'reproductive' work and the attendant temporal, spatial and conceptual distinctions between work and family that were produced in the context of industrial capitalism (Ibid). There is a rich strain of feminist literature that has critically evaluated the concepts of production and reproduction to locate the difficulties of separating production and reproduction in non-wage situations particularly in rural contexts, as well as the interrelated nature of the relationship between the two (Paltasingh and Lingam 2014).

5 The National Commission for Enterprises in the Unorganised Sector (2008) provides the following definition of informal workers – 'informal workers consist of those working in the informal sector or households, excluding regular workers with social security benefits provided by the employers, and the workers in the formal sector without any employment and social security benefits provided by the employer' (27). It also provides a definition for the informal sector – 'the informal sector consists of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis and with less than ten total workers' (24). The terms informal and unorganised, particularly as it refers to sectors of employment, are used interchangeably in this paper as Indian laws use the term 'unorganised', and internationally the term 'informal' is preferred.

by a singular employer-employee relationship, but by a multiplicity of employers. A recent study by the International Labour Organisation shows that of the vast majority of informally employed women in India, only 11.4 percent are employees, and for those in formal employment too, while 62.4 percent are employees, a significant proportion of them are own account workers (International Labour Office 2018).[6]

Apart from the type of work and the nature of the employment relationship, labour laws are also restricted in their scope by thresholds set for applicability of labour laws such as the size of an 'establishment', type of establishment, sector, geographical location, salary-level and type of worker (Landau, Mahy, and Mitchell 2015; National Commission for Enterprises in the Unorganised Sector 2007; also see Abraham, Singh, and Pal 2014; Papola 2013).[7] Therefore, laws governing the conditions of work and rights to social security for informal women workers, as well as informal workers more generally, are few and far between, and patchy and piecemeal at best. Even so, over the years, through the efforts of mobilisation by unions and labour rights groups, there have been a few laws that cover informal workers, including informal women workers, though some of these too are restricted in their applicability by the nature of employment as well as gendered constructions of what constitutes work. These include the following (National Commission for Enterprises in the Unorganised Sector 2007):

- **The Equal Remuneration Act 1976 and The Minimum Wages Act 1936 (since incorporated into the Code on Wages 2019),**
- **The Bonded Labour System (Abolition) Act, 1976 and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (incorporated into the Code on Occupational Safety and Health and Working Conditions 2020)**
- **The Trade Unions Act 1926 (incorporated into the Code on Industrial Relations 2020),**
- **The Unorganised Workers' Social Security Act 2008 (which has since been incorporated into the Social Security Code 2020), and**
- **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (which has been left out of the reform process).[8]**

6 The areas in the formal sector where women are employed are mainly in large establishments where 1000 or more workers are employed, and these are mainly in the textile industry, the export processing zones, the fish processing industry and call centres (Sankaran 2007, 16).

7 As the 2007 NCEUS report puts it, there are very few laws that apply universally to all workers, whether in the organised or in the unorganised sectors. There are some laws that apply unequivocally to the organised sector. There are other laws that are applicable to some segments of workers in the unorganised sector, which may also (in a few cases) extend to some segments of the organised sector (pp.155-156). For a summary of the legislations that apply to all of some sectors of unorganised workers, see NCEUS 2007.

8 For a wider account of the labour laws that cover women in the organised sector, such as the Maternity Benefits Act 1961, the Factories Act, and the Mines Act, etc. see Abraham, Singh, and Pal (2014).

Most women workers, then, have either only partially covered by labour laws, or not covered at all, which has meant that they live in economic insecurity and precarity with no work/livelihood security, no wage/income security, no voice representation security, with poor working conditions with no fixed hours of work or leave, and limited access to social security including maternity and childcare benefits that are compatible with their needs and hours of work (National Advisory Council, n.d.; Standing 2011).

Expanding Legal Protections for Women Workers

Feminist scholars and groups working with several sectors of informal women workers have sought to both expand the ambit of labour law to women workers and use innovative legal strategies to make their claims as workers. As we have seen, for many categories of informal women workers, the standard employment relationship has proved a conceptual impediment for their inclusion in labour laws. As Sankaran and Madhav (2013) note, many informal women workers 'are neither truly self-employed, in the sense of entrepreneurs who can develop their own independent markets, nor truly wage employed in the sense that they fall under a clear employer-employee relationship' (p.3). The challenge then as Sankaran (n.d.) argues, has been whether to treat such women workers as employees/disguised wage workers, thereby bringing them within the ambit of labour law, or to treat them as a category subject to a different legal regime.

In their research on five occupational groups of women workers (domestic workers, fish workers, forest workers, home-based workers, street vendors and waste pickers), Sankaran and Madhav (2013) found that where it was difficult to attribute employment status to women workers, rather than pursuing claims as an 'employee', the wider notion of 'workers' could be used to raise claims for certain benefits such as a social security against those who purchase their commodities or services. These benefits, they suggest, could range from a higher support price for the price of their produce, to financing of their welfare benefits from the traders/institutions that buy the products from them through a system of cess (Ibid).

Apart from the broadening of the notion of 'worker', feminists, drawing on the recommendations of the NCEUS (on which more below), have also called for an expansion of labour law through a broadened notion of social security that is not just protective but also promotional through enabling access to resources and credit (Sankaran 2007). Sankaran and Madhav (2013) also point to the importance of workers such as forest workers, fish workers and waste pickers, who depend on access to public resources and spaces, to engage with other legal frameworks such as forest laws, coastal regulations, or municipal regulations to protect their rights to livelihood. The Street Vendors (Protection of

Livelihood and Regulation of Street Vending) Act 2014 provides one such instance where the claims for the right to livelihood were made for workers outside the bounds of labour laws.

Given that collectivisation of workers has formed the bedrock for their claims making, Sankaran and Madhav (2013) also point to the need for an expansion in labour jurisprudence in understanding the place of collective bargaining. They suggest that this should not be seen as applicable only to employees, but to a wider range of workers to be able to negotiate, not just with employers, but also with municipalities, governments and policymaking bodies that have an impact on their livelihoods.

Unpaid Care Work and Labour Laws

On the question of unpaid work that women disproportionately perform, feminists have called for work relations to be reconfigured through the adoption of a 'universal caregiver model' such that balancing work and family relations are the norm for everyone, and not just for women. In a similar vein, they have also called for the promotion of 'caring rights for workers' (see Conaghan 2018). This twin approach to addressing unpaid work through both a focus of workers' rights to care in labour law and a universal right to care through social policy on parental leave and benefits and wider social security benefits, finds resonance in India too, though in relation to parental benefits, the focus in India has been mainly on maternity benefits.

One of the key recommendations of the National Commission on Self Employed Women and Women in the Informal Sector (1988) was to call for an expansion of maternity benefits to include unorganised sector workers through an employer contribution scheme maintained by a central fund. However, recognising that this would not cover all women workers, especially those who were self-employed, and pointing to the unpaid work that women perform, the report suggested that it was the responsibility of the state to step in to provide maternity benefits and childcare to all women, where the employer contribution mechanism would not cover them for instance when there was no employer, or an employer was not identifiable.

For labour law in India, maternity benefits and childcare provisioning continue to be the central planks through which the law addresses the unpaid care work that women workers perform.[9] However, this has been mainly limited to the organised sector through legislations such as the Maternity Benefits Act 1961, the Employees State Insurance Act (ESI Act) 1948 for the provision of maternity pay and leave (which have since been incorporated into the Social Security Code 2020), and the Factories Act 1948, Plantation Labour Act 1951, Mines Act 1952, the Beedi and Cigar Workers' Act 1966, Contract Labour Act (Regulation and Abolition Act) 1970, Inter-state Migrant Workers (Regulation of Employment and Conditions of Work) Act 1980 and the Building and Construction Workers 1996 (which have been incorporated into the Code on Occupational Safety and Health and Working Conditions 2020) for the

9 For an analysis of the wider context of state policy in India on maternity and childcare, see Chigateri 2017; Lingam and Kanchi 2013.

provision of childcare. The Mahatma Gandhi National Rural Employment Guarantee Act 2005 (NREGA) provides an exception in seeking to provision childcare at worksites for rural women workers in the unorganised sector, as does the Unorganised Workers' Social Security Act 2008 (incorporated into the Code on Social Security 2020) which expects the state to make provision for maternity entitlements for unorganised women workers as part of a wider framework of rights on social security.

Much of the public provisioning for childcare and maternity entitlements for women in the informal economy has come, not through the labour law regime, but through central and state government schemes, for instance through the Integrated Child Development Service (ICDS) (though this is not framed in terms of women's unpaid work), or through schemes such as the Pradhan Mantri Matritva Vandana Yojana (PMMVY) which combines two previous schemes, the Janani Suraksha Yojana (JSY), and the Indira Gandhi Matritva Sahayog Yojana (IGMSY), though this too is conceived as a partial wage compensation scheme. The scheme is now being rolled out as part of the legal maternity entitlement protected in the National Food Security Act 2013 (NFSA). Apart from maternity entitlements and childcare, feminists have looked to other government policies and plans, for instance, on energy and water to locate how women's unpaid work maybe accounted for as well as reduced and redistributed (see Dewan 2018).

Issues with the Implementation of Labour Laws

Apart from the exclusionary aspects of labour law in relation to women's work, outlined above, there have also been concerns with the ways in which labour law treats the work that women perform, even when it falls within its ambit. The Minimum Wages Act 1948, and the Equal Remuneration Act 1976 are two cases in point, where gendered occupational segregation and the undervaluation of women's work have been exacerbated both by the content of the law, as well as the ways in which the law has been used to fix minimum wages for work performed by women.

For instance, feminist scholars have pointed to the caste-based and gender based occupational segregation in domestic work, and its effects on the ways in which domestic work is classified as unskilled and undervalued in minimum wage notifications (Vasanthi 2011; Neetha 2013b; Sankaran 2013; Neetha 2015). Further, the minimum wage notifications do not adequately address issues of whether time-rated or piece-rated fixation of wages works better for different categories of domestic workers and the difficulties of prescribing minimum working time and rest periods for 'part-time workers' (Neetha 2013b).

Similarly, as with so much of the labour laws, where rights are enshrined in the law, for instance on the provisioning of child care or maternity benefits, these are poorly implemented (Datta and Konantambigi 2007; Lingam and Yelamanchili 2011; Ferus-Comelo 2012), bringing to question the infrastructure, processes and resources required for their implementation.[10]

The critique of the poor implementation extends to the provisioning of childcare facilities under NREGA (Savitri Ray and Madhuri Karak n.d.; Zaidi et al. 2017), the poor and patchy implementation of the Unorganised Workers' Social Security Act 2008, including the abysmal budgetary allocations (Upadhyaya 2020), as well as the serious gaps in the implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, for all women workers, including informal workers (Sisters for Change 2016; Sarpotdar 2020) .

10 In its report on the Conditions of Work in the Unorganised Sector, the NCEUS found that the implementation of laws that govern the unorganised sector was abysmally poor. Some of the reasons for this, according to the NCEUS, pertain to the small size of the enforcement machinery in relation to the large and dispersed workforce and inadequate infrastructure; almost exclusive focus on the organised sector; lack of voice for the unorganised workers and no participation of their representatives in ensuring effective implementation; and lack of or inadequate sensitivity among those responsible for implementation (2007 p.166).

Background to the Reform of Labour Laws

Background to the Reform of Labour Laws

Since economic liberalisation, demands by business and employer groups have grown in intensity for a state policy of labour market flexibility through the rationalisation and reform of labour laws in the name of the facilitation of the ease of doing business, job creation and economic growth (Shyam Sundar 2005; 2020b).[11] Simultaneously, trade unions and labour rights groups have also called for the reform of labour laws, but from the perspective of the extension of labour rights to all workers instead of only the relatively miniscule numbers of those currently covered by labour laws.[12]

Over the last twenty years, the demands for labour law reforms have received something of a fillip from various Commissions set up the government, including in recent years, the SNCL and the NCEUS.[13] Although there have been several recommendations on the rationalisation and reform of labour laws from these various committees and commissions, it is the recommendations of the SNCL that have formed the basis of the proposed Labour Codes. In the following sections, the paper briefly examines some of the salient features of the report of the SNCL to contextualise the reforms proposed by the Codes. For a contrast, particularly from the perspective of the informal economy and women's work, the paper also briefly examines the recommendations of the NCEUS on labour law reforms; this, along with an understanding of how labour laws deal with women's work, provide the backbone of a labour rights framework with which to analyse the reforms proposed by the Codes.

11 Since 2003, the World Bank has assessed the 'ease of doing business' in 190 countries of the world by producing a 'Doing Business' report according to criteria such as trading regulations, property rights, contract enforcement, investment laws, and so on. There has been a push by the Indian government to improve its ranking on the index through a range of measures including labour laws and governance reforms (Shyam Sundar 2018b; Venkatachalam 2017). The report has been heavily critiqued over the years, and this year, based on allegations of fraud through the deliberate alteration of data, the report has been suspended (Guild 2020).

12 The understanding that India has too many labour laws and that it overregulates employment relations flies in the face of the evidence that the vast majority of workers in India are in fact outside the purview of labour laws (Papola 2013). For an overview of the labour law reform agenda, particularly post-liberalisation and an analysis of the perspectives of both the need for labour market flexibility and labour rights, see (Shyam Sundar 2015; 2018a).

13 There have also been several other commissions and committees that have made recommendations on the simplification of labour laws, and the extension of rights to workers in the unorganised sector since the 1960s. These include the First National Labour Commission (1969), the National Commission for Self-Employed Women and Women Workers (1988), and the National Commission on Rural Labour (1991). There have also been several Bills that have been proposed to tackle the lack of regulation of work for informal workers (see the report of the National Commission for Enterprises in the Unorganised Sector 2007 for details). For a detailed account of the recent labour law reform process within which the SNCL and NCEUS recommendations sit, see (Shyam Sundar 2018b; 2018c).

Report of the Second National Labour Commission

It is important to note at the outset that there was fairly widespread discontent amongst trade unions with the SNCL even prior to the publication of its report with several national trade unions refusing to collaborate with it during its tenure (John 2003). There were several reasons for this including the process of its constitution, its composition and its proposed methodology (Shyam Sundar 2000). The report was not unanimous in its recommendations with C K Saji Narayanan of the Bharatiya Mazdoor Sangh providing a 'Note of Dissent on Chapter on Review of Laws'; and it was neither well received by trade unions nor by employer groups (Shyam Sundar 2005; John 2003).

The SNCL, which was given the mandate to review and suggest rationalization of all existing labour legislation in the organised sector and to propose an umbrella legislation for ensuring a minimum level of protection to workers in the unorganised sector, came out with a long-ranging, two-volume report that examined the state of the economy in various sectors, the contexts of economic reforms and globalisation, laws on the organised sector, as well as issues specific to those in the unorganised sector, those pertaining to 'women and child labour', on social security, skill development and so on (Second National Commission on Labour 2002a; 2002b).[14]

The SNCL came out with something of a mixed bag of labour law reforms. One of the most significant recommendations it made was the recommendation on the reform of labour laws into a single labour law with 4-5 thematic groups pertaining to industrial relations, wages, social security, safety, welfare and working conditions, which has formed the basis for the simplification and consolidation exercise into the four new Labour Codes. The SNCL also made several other significant recommendations that the SNCL, for instance on a separate, special law for small-scale industries, and the provisioning of social security for all workers, even those that did not fall under the purview of the recommended laws (see Chapter 6, Conclusions and Recommendations, Vol II, Second National Commission on Labour 2002b).

The SNCL purportedly rooted its extensive set of recommendations in constitutionally guaranteed labour rights, international human rights conventions, and the ILO decent work agenda. However, and this is where the report proved to be most controversial, it also rooted many of its recommendations on the ostensible need for labour market flexibility because of the need for industrial efficiency in a context of global competition. This is evidenced especially through the Commission's recommendations to raise the threshold of applicability of labour laws (excluding those in a supervisory capacity from coming under the definition of worker, for instance), expand the use of contract labour (albeit with caveats), its expansion of the restrictions on the right to strike, and through its proposals to provide more flexibility to employers to lay off and retrench workers, amongst

14 Several study groups were set up for each area under consideration, for instance on Review of Laws, Social Security, Umbrella Legislation for the Unorganised Sector, and on Women and Child Labour who themselves produced extensive reports. For a repository of the SNCL report and all the study reports, see the archive produced by M.S. Merian - R. Tagore International Centre of Advanced Studies, available at http://www.icas.eail.org/handle/123456789/291

others (See chapter 6, Conclusions and Recommendations, Vol II; also John 2003; Shyam Sundar 2005; 2015).

To delve into the issues pertaining to 'Women and Children', the Commission drew on the extensive report of the Study Group on Women and Child Labour.[15] It pointed to some of the recommendations on Review of Laws and Social Security as well as its own chapter on chapter on 'Women and Children' as addressing some of the concerns on women. However, a perusal of the recommendations of the Commission across these chapters specifically as they pertain to women, points once again to a mixed bag of recommendations.

Minimum Wages and Equal Remuneration

The Commission made several recommendations on minimum wages – it recommended a national minimum wage below which no wage should be paid, the abolition of the system of notification of employments in schedules with the idea that minimum rates need to be fixed in all work situations even where there is no clear employer-employee relationship, and a piece-rate system of payment is followed. The Commission also recommended that minimum wages should be based on the needs of the worker and 'his' family, supplemented by the recommendations made in the Judgment of the Supreme Court in the *Raptakos* Brett & Co case. However, it also added the caveat that before the appropriate government fixed the minimum wage, it should also keep in mind the capacity of the industry to pay (see pp. 48-49, 90 Vol II).

On non-discrimination while the Commission recommended that the law on wages incorporate the provision of equal pay for equal work. It also recommended that the important provisions of the Equal Remuneration Act other than on wages i.e., on prohibition of discrimination against female workers in matters of recruitment, training, transfers, and promotions should be incorporated either into one of the consolidated laws. The Commission did not incorporate several other suggestions of the study group for instance on its applicability not just within an establishment but across units on occupation, industry, and regional basis, or on the enhanced powers of the Committee set up under the Equal Remuneration Act.

Unorganised Sector: Proposal for a Separate Law

While reviewing the unorganised sector, the Commission recognised the high percentage of women employed in the unorganised sector, noting the higher share within female labour of casual labour and self-employed workers, compared to that among male workers. It also located several other characteristics of the unorganised sector, including low wages and low earnings, employment of family labour, piece-rate payments, home-based work, or contractual work, seasonal or intermittent employment, lack of organisation into trade unions, casual and multiple jobs, existence of debt bondage, dependence on others for supply of raw material, less access to capital, existence of health

15 See Appendix 1 for a summary of some of recommendations of the Study Group on Women and Child Labour.

hazards, etc. It also reviewed the contexts of a wide range of unorganised workers including home-based workers, domestic workers, sex workers, construction workers, waster-pickers, vegetable vendors, plantation, and mine workers, and so on (Chapter 7). The Commission categorically found that current labour laws 'do not offer protection and welfare to workers in the unorganised sector' and that 'whatever exists is inadequate' (p. 74, Vol II).

The SNCL therefore proposed a separate umbrella legislation for those in the unorganised sector (for which it appended an indicative Bill) that would focus on the 'protection and welfare' of workers in the unorganised sector. The Commission envisaged that this law would ensure

- the generation and protection of jobs,
- protection against the exploitation of their poverty and lack of organisation,
- protection against arbitrary or whimsical dismissals,
- denial of minimum wages and delay in payment of wages, and regulation of other conditions of work,
- access to compensation for injuries sustained while engaged in work, and
- entitlements to provident fund, medical care, pension and maternity benefits and childcare (pp. 77, Vol II).

Importantly, the Commission also recommended that where necessary, the Government could bring in special laws for different employments or sub-sector laws as needed (Ibid). While it recommended that workers such as domestic workers would be better covered under a proposed umbrella legislation for the unorganised sector, it also proposed the broad outlines of specific laws and policies for certain categories of workers like home-based workers, agricultural workers, manual workers, vendors, and domestic workers (p.90, Vol II).

Recognising the importance of organising women workers, the Commission also made important recommendations on Member-Based Organisations (MBOs). Amongst others, it recommended that the government should allow widespread registration of MBOs of women workers under the Trade Unions Act, promote Mutually Aided Co-operative Acts in each State and issue special guidelines for the registration of such co-operatives of women workers. It also proposed that the government should issue identity cards to all women workers and where possible, recognise MBOs as implementing agencies for Government schemes (p.94, Vol II).

Social Security including Maternity Benefits and Childcare

Specifically, on social security, the SNCL recognised social security as a fundamental human right and recommended a system in which the state bears the responsibility for providing and ensuring an elementary or basic level of security, while leaving room for partly or wholly contributory schemes. It recommended the formulation of a national policy on social security and a national plan to achieve the objectives set out in the policy. Envisaging not a single scheme but a combination of schemes that would encompass the whole population with its diverse needs, the SNCL recommended the institution of a system of social security comprised of four tiers

It also recommended the institution of an administration for the formulation of the policy, as well as for the coordination, monitoring and review of the programmes under the policy (pp. 86-87, Vol II).

On specific aspects of social security, especially on maternity benefits and childcare, the Commission again had a mixed bag of proposals. They acknowledged that 'there was undoubtedly a need for a separate legislation for providing maternity benefits' for women in the unorganised sector, and they envisaged a statutory scheme for the implementation of maternity entitlements that would cover all women under income criteria. This would provide financial support for childbirth, childcare and breast-feeding in the first few months of the child's life. However, maternity benefits would be rooted in a policy that discouraged having more children, so it would be restricted to two live children (pp.92-93, Vol II).

The Commission recommended a 'multi-dimensional mechanism' for the delivery of childcare,

through labour laws as well as through schemes such as the Integrated Child Development Services (ICDS) programme. On labour legislation, importantly, the Commission recommended a gender-neutral policy and suggested that the requirement of creches should not be dependent on the number of women workers or the number of children; instead, it should be mandatory for every establishment employing 20 or more workers. Where individual enterprises were not in a financial position to run their own creches, the Commission recommended that enterprises may jointly establish and operate them. Another mechanism could be creches provided by panchayats or local bodies or local tripartite groups run creches, with employing units being asked to make a proportionate contribution to the costs. The Commission also recommended the redesign of ICDS to include child under three, with weaknesses in implementation of the ICDS taken up at the policy level (pp.92-93, Vol II).

After the SNCL came out with its extensive report, the Ministry of Labour and Employment proposed a comprehensive legislation, the Unorganised Sector Workers Bill 2004, which was subsequently revised by the Ministry in 2005, which focused on the regulation of employment and conditions of service of unorganised sector workers and to provide for their safety, social security, health and welfare. The Draft Bill covered both wage workers as well as self-employed workers, in all the sectors. However, only workers in scheduled employments were proposed for coverage (NCEUS 2007, p.199).

While this Bill did not go much further during the tenure of the NDA government, as we know, when the NDA was returned to power, it set about the overhaul of labour laws recommended by the SNCL. The proposed Codes are avowedly based on these recommendations of the SNCL, but as we shall see, in translating these recommendations into proposed law, while many of these recommendations have been taken on board, there have also been several slips, particularly on the recommendation of the SNCL to have a separate umbrella legislation on the unorganised sector, which has serious implications for the extension of labour laws to informal workers, including women workers. Before we move onto analysing the Codes themselves, we examine the proposals by the NCEUS on labour law reform in the unorganised sector.

The Report of the NCEUS on the Conditions of Work and Promotion of Livelihoods in the Unorganised Sector

In 2004, after the United Progressive Alliance (UPA) came to power, the National Commission for Enterprises in the Unorganised Sector (NCEUS) was instituted to fulfil a key commitment to do so in its Common Minimum Programme. The terms of reference before the NCEUS reflected the ideological leanings of the left parties that formed the coalition in UPA-I (Shyam Sundar 2018b). It covered a range of issues including the status of the unorganised/informal sector in India, constraints faced by small enterprises, recommendations for the legal and policy environment that should govern the informal/unorganised sector, review the social security system available for labour in the informal sector and so on. Over the course of its tenure (2004-2009), the NCEUS produced nine reports on various themes including on social security, conditions of work, livelihoods for unorganised sector

workers and so on.[16] A significant, albeit highly criticised, outcome of the NCEUS was the enactment of the watered-down Unorganised Workers Social Security Act 2008 (Ibid).

Contextualising the Proposals for Law Reform by the NCEUS

One of the key terms of reference of the NCEUS was to 'suggest the legal and policy environment that should govern the informal/unorganized sector for growth, employment, exports and promotion' (National Commission for Enterprises in the Unorganised Sector 2007, 342). The NCEUS addressed this in its wide-ranging Report on the Conditions of Work and Promotions of Livelihoods in the Unorganised Sector (2007), which examined many aspects of the conditions of unorganised workers, including the work of women workers in several vulnerable occupations such as home-based work, street vending domestic work, and agricultural work. Based on this, the NCEUS came out with numerous findings and recommendations.

The NCEUS found that there was a high congruence between informal work status, poverty, and vulnerability. The report contrasted the Indian growth story with the miserable working and living conditions of 77 percent of India's population who are poor and vulnerable, which included Dalits and Adivasis, OBCs and Muslims. It also found that the working conditions, including the physical conditions of work, for the vast majority of unorganised workers were inhuman, and that they did not have any legal protection of their jobs, working conditions or social security (2007, pp. 5-10).

Examining the context of women workers, the Commission found that women constituted a marginalised category within the class of workers whose access to and conditions of work were exacerbated by structural factors and the economic sectors to which they belong. In a separate chapter on the conditions of women-workers in non-agricultural occupations, the report laid out the double burdens that women bear and the gendered norms on mobility which structure their working lives. The report also showed that the non-conventional places of women's work, as well as the lack of a clear employer-employee relationship in many sectors of women's employment added to the invisibility of their work. Further, it brought attention to the gendered discrimination that structure women's working lives, including the sexual division of labour that results in job-typing and occupational segregation into low-paid, purportedly low-skilled work. It also found that while there was a greater disadvantage for women workers, those

16 For a repository of the various reports of the NCEUS, see http://sanhati.com/articles/8325/

belonging to rural as well as Scheduled Caste and Scheduled Tribe communities were particularly disadvantaged because of various factors including inherited disadvantages of lower social status, limited asset position, access to resources, and low levels of education and skill (pp.75-92).

To address the challenge of ensuring 'minimum livelihood security to the poor self-employed and wage employed workers and to improve their livelihoods on a sustained basis', the NCEUS located the importance of public interventions that addressed workers' capabilities, including on education, health and sanitation, and housing. The NCEUS also recommended that that 'the conditions of work including a minimum of social security should be an entitlement backed by national legislation' and for the promotion of livelihoods, 'there should be a public programme and an institutional mechanism to monitor, review and further develop from time to time with a dedicated National Fund' (2007, 10).

Proposed Legislations to Secure the Rights of Unorganised Workers

The NCEUS also found that the needs of the agricultural and non-agricultural workers regarding their working conditions were very different, and therefore it proposed two separate laws, one each for agricultural and non-agricultural workers. Both proposed legislations would provide for a social floor (below which nobody would be allowed to fall as a matter of social priority) on five issues:

- issues related to working conditions and welfare (including physical conditions of work, and the duration and timings of work),
- issues relating to remuneration and wages,
- issues relating to social security benefits,
- issues relating to industrial/labour relations, and
- issues relating to conditions of work of disadvantaged workers (such as such as forced labour, bonded and child labour and disadvantaged groups arising from discrimination based on gender, caste, religion or any such characteristic of the workers).

The proposed law on agricultural workers would be applicable to unorganised agricultural workers, including all agricultural wage workers excluding those eligible for protection under the Plantation Workers Act, and all marginal and small farmers, and the proposed law on non-agricultural workers would be applicable to the unorganised non-agricultural workers in the unorganised sector as well as unorganised workers in the organised sector who were not protected by existing laws applicable to that sector, subject to an income ceiling.

More specifically, for both the agricultural and non-agricultural unorganised wage workers, the NCEUS recommended some minimal conditions of work. It recommended that these conditions of work include

- an 8-hour workday with at least a half-hour break,
- one paid day or rest per week,
- a National Minimum Wage for employments not notified under the state's Minimum Wages Act,
- piece-rate wages to equal time-rated wages,
- employments specifically done by women to be brought on par with employment certified as equivalent,
- the right to organise and non-discrimination on the basis of gender, social origin, incidence of HIV AIDS and place or origin
- the provision of adequate safety equipment, compensation for accident,
- protection from sexual harassment, provision of childcare and provision of basic amenities at the workplace etc (NCEUS 2007).

Further, for the promotion of livelihoods, as Sankaran (2007) notes, the NCEUS envisaged this to be implemented through tripartite boards which would be mandated to develop policies to ensure access to resources, public spaces, town planning bodies and credit facilities (p.220).

While the recommendations of the NCEUS were only partially taken up through the watered-down Unorganised Workers' Social Security Act 2008, calls for the rationalisation of labour laws continued to be made through other committees set up by the government. Drawing on the recommendations of the SNCL and the NCEUS, the Working Committee on Labour Laws for the Twelfth Plan too recommended the consolidation of labour laws into four cognate groups of laws on Industrial Relations, Wages, Social Security, Working Conditions and Welfare, and Welfare Cess Laws 'to reduce the multiplicity of laws and for better enforcement and more effective compliance'. It too recommended that any reform measure should protect the interests of 94 percent of those in the unorganised sector, by 'providing them the minimum living wage, improved regulatory activities, basic social security and labour welfare schemes and improved health and safety facilities.' It also proposed a National Floor Level Minimum Wage, amongst other recommendations to reforms of several other legislations.

Analysing the Codes from a Gender Lens

Analysing the Codes from a Gender Lens

After a fraught period over the last term of the government, when the four Bills were in various stages of formulation and consultation, the NDA government, after it returned to power with a stronger majority, enacted all four Codes, the Code on Wages in August 2019, and the three Codes on Industrial Relations, Social Security, and Occupational Safety and Health in September 2020. In July 2020, the Government also issued the Draft Code on Wages (Central) Rules 2020, followed in October 2020 by the Draft Code on Industrial Relations (Central) Rules 2020, and in November 2020 by the Draft Code on Social Security (Central) Rules 2020, and the Draft Code on Occupational Health and Safety and Working Conditions (Central) Rules 2020.[17]

The exercise of 'simplification and consolidation' of labour laws leading to the enactment of these labour codes that have heavily contested by labour rights groups and unions both in terms of the process through which they have been enacted, as well as in substantive terms. The most recent expression of the discontent against the labour codes came on 26 November 2020, when a reported 250 million workers joined a national strike calling for the repeal of the 'anti-worker' Codes. The Parliamentary Standing Committee on Labour which reviewed the Bills prior to the enactment of the laws also made significant recommendations for how the laws could be amended to address the labour rights of both formal and informal workers.

Across the Codes, there has been an attempt to simplify and consolidate the Codes by bringing uniformity in the definitions of employee, worker, employer, industry, establishment and so on, as the previous legal framework had various definitions spread across numerous legislations. [18] However, there continues to be ambiguity in the effects of this consolidation exercise for informal workers generally and for informal women workers. This is because in previous formulations of the Codes, although there were many issues with the ways in which it was sought to be done, there was at least a clear effort to extend the applicability (albeit partially) of at least 3 of the 4 Codes to unorganised/informal workers. However, in the current Codes, this effort is no longer clearly visible. In fact, there is now an ambiguity about the applicability of the Code on Wages to waged informal women workers (on which more below), which is a serious setback from the rights that some groups such as domestic workers had under the previous laws, even if these were piecemeal and patchy.

Similarly, where the Codes are applicable to informal women workers, for instance in the chapter in the Industrial Relations Code on trade unions, the recommendations of the SNCL for the law to make a concerted effort to recognise member-based organisations have not been considered. On social security, although the Code proclaims its interest in extending social security benefits to the

17 See the Ministry of Labour and Employment website for details, https://labour.gov.in/

18 This exercise has by no means been uniform in all respects, for instance on the definition of contractor (PRS India 2020c).

unorganised sector, it is a far cry from previous versions of the Code that were rooted in an understanding of the right to social security and which made concerted efforts to put in place a system for the 'progressive universalisation of social security', even if these efforts also created several issues for the delivery of social security. The Code on Occupational Health and Safety and Working Conditions, in its previous draft incarnations made no effort to address the issues of informal women workers, and this continues to be the case.

Overall, there are several issues that cut across the Codes. The use of delegated legislation is one such issue, as many features of the law are no longer specified in the Codes but have been delegated to be prescribed by the government through Rules, for instance on the norms for setting minimum and floor wages, the threshold for the application of various social security schemes, specifying safety standards and working conditions, and the power to increase the threshold for establishments that have to seek permission before retrenchment (Madhavan 2020; Sood 2020). The Parliamentary Standing Committee on Labour (2020) in its evaluation of the Social Security Bill had exhorted the government to review all equivocal and cryptic provisions such 'as may be specified', 'as may be prescribed', 'as may be framed', etc. (p.11). However, these continue to find a place in the Codes. This is particularly problematic given the poor oversight that parliament has exercised over delegated legislation which as lawyer Arvind Abraham argues, can lead to the abrogation and abuse of ruling making powers by the executive (A. K. Abraham 2019).

The Codes have introduced a new category of inspector-cum-facilitators whose role it is to both carry out inspections framed by the government as well as advise employers and workers to comply with the provisions of the Code (see s 51 of the Code on Wages). Previous versions of the Bills, for instance the Code on Wages Bill 2015 had replaced the 'inspector' of the Minimum Wages Act with a 'facilitator', so this modification evidences a concession by the government in the face of protests by trade unions. However, the changes wrought on the inspection regime in the Codes must be understood within the wider context of the changes to mechanisms of labour governance and the minimisation of the government's regulatory role and the reduction of its responsibility for oversight through the creation of web-based inspections, randomized inspections, and so on (Sood 2020; Shyam Sundar 2018c).

The Codes also weaken employer accountability by allowing for the compounding (settling) of offences. For instance, the Codes on Industrial Relations and Social Security state that the offences punishable with imprisonment up to one year or with fine will be compoundable (PRS India n.d.). The National Platform for Domestic Workers has argued that such provisions pose serious issues for workers and trade unions especially in the informal sector, who can only have effective protection against acts of anti-union discrimination and unfair labour practices like denial of wages or sexual harassment cases when the law provides for sufficiently dissuasive sanctions that would deter them from adopting such practices (NPDW 2018).

There are several other changes wrought by each of the Codes some of which we examine further in our analysis of each of the Codes.

Code on Wages

The Code on Wages 2019 consolidates and amends four laws relating to wages, bonus, and related matters – the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Payment of Bonus Act 1965 and the Equal Remuneration Act 1976. It was introduced on the floor of the Lok Sabha by the Labour Minister, Santosh Kumar Gangwar with the proclamation that the Code would benefit all 500 million workers in the country, including a range of informal workers such as agricultural workers, domestic workers, dhaba workers, chowkidars, and so on.[19] A similar argument that the Code would ensure minimum wages to one and all, and timely payment of wages to all employees irrespective of the sector of employment and without any wage ceiling was made in relation to a previous version of the Bill that contained the same threshold of applicability (Press Information Bureau 2017).

The expansion of applicability to all employer-employee relationships, without an apparent threshold limit, is a welcome move as it seemingly enables a wider range of waged workers to fall under the purview of the Code, including presumably informal women workers such as domestic workers.[20] However, for several reasons, the idea that the Code does not in fact have this inclusive ambit persists (Mazumdar and Neetha 2020).

This is because nowhere does the Code specify this inclusive ambit – it makes no reference to informal or unorganised workers, nor does it refer to women workers, except in the specific circumstances of discrimination and the constitution of Boards under the Act. This is a stark contrast to the Code on Social Security which makes a specific reference to unorganised workers and includes domestic workers in the ambit of waged workers even as it retains the verbatim definition of employee and differentiates the applicability of the Code on this basis. Moreover, as Mazumdar and Neetha (2020) argue, the definition of employees and workers in the Code on Wages is tied to an understanding of establishment. This in turn is linked to the categories of industry, trade, business, manufacture or occupation and industry, and categories such as establishment and industry have been used to exclude domestic workers from the ambit of labour laws, not to mention the long-standing difficulties that labour law has had with regulating households (Vasanthi 2011). Moreover, in the submission to the Parliamentary Standing Committee on Labour on the Social Security Bill, when the Ministry of Labour and Employment (MoLE) was asked whether the verbatim definition of establishment in that proposed Code covers agricultural holdings and households, the Ministry clarified that it did not cover either of the two (2020, p.28). This ambiguity is particularly problematic as domestic workers in several states have managed to gain rights to minimum wages in several states (Neetha 2015).

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19 See the text of Lok Sabha Debates on Code on Wages, http://164.100.47.194/Loksabha/Debates/Result17.aspx?dbsl=1116

20 Employee is defined under s 2 (k) of the Code – 'any person [...] employed on wages by an 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.

Establishment is defined under s 2 (m) – 'any place where any industry, trade, business, manufacture or occupation is carried on and includes Government establishment'

Employer is defined in s 2 (l) – a person who employs, whether directly or through any person, or on his behalf or on behalf of any person, one or more employees in his establishment [...] (emphasis added).

The Code also makes no effort to include home-based workers, that comprise high numbers of women, under its purview. Similarly, it does not include 'honorary and scheme workers' such as ASHA and anganwadi workers, who have not been recognised as workers by the government, but who ought to enjoy all the benefits associated with employment, including minimum wages. The Code's specific exclusion of apprentices from its purview also have adverse implications for the entitlement to minimum wages for 'sumangali workers' who are designated as apprentices (Mazumdar and Neetha 2020). The ambiguity and exclusion from applicability is a serious blow to so many sectors of informal women workers who have fought for years to be recognised as workers and have minimum wages extend to them. It presents a step back from hard-won if piecemeal gains under the Minimum Wages Act 1948.

National Floor Wage and Criteria for Fixing Minimum Wages

One of the commendable features of the Code is that it does away with the schedule of employment, which has provided a barrier for the inclusion of several sectors of employment, including sectors of women's employment such as domestic work. Another laudable feature of the Code is its attempt to provide for a national floor wage, below which no state government can fix the minimum wage. However, this too has come under fire for being poorly conceptualised (Chandru 2020). While a National Floor Level non-statutory Minimum Wage had been mooted by the National Commission of Rural Labour in 1991 and reiterated by both the SNCL (2002) and the NCEUS (2007), the provision for a national floor wage in the Code has been qualified by enabling the government to fix different national floor wages for different geographical areas (see s. 9(1)).

On the criteria for fixing minimum wages, the Code enables the appropriate Government to determine the factors by which the minimum wages shall be fixed for different categories of employees, and only provides overly broad norms such as the skills required, geographical area, the arduousness of the work like temperature and humidity, hazardous nature of the work, leaving the norms to be prescribed by the appropriate government (s 5).

Some of these norms are highly gendered – for instance, women's work has generally been associated with low skill and arduousness with men's work. Significantly, the criteria for fixation of wages in the Code ignores Supreme Court jurisprudence in a series of cases, including *Hydro (Engineers) P. Ltd. v. Workmen (1969 AIR 182) and Workmen Represented by Secretary v. Management of Raptakos Brett (1992 AIR 504)*. These cases relied on long-standing labour jurisprudence which established that minimum wages should be defined by needs-based criteria which extend beyond physical needs, and which include nutrition requirements, clothing and housing needs, medical expenses, family expenses, education, fuel, lighting, festival expenses, provisions for old age and other miscellaneous expenditure (Working Peoples' Charter 2017; Bhattacharjee 2016, p.45).[21]

21 Needs-based criteria based on Raptakos have been specified in the Draft Rules that the central government must draw on for setting minimum wages for central sector employees (s. 3 of the Rules). The Draft Rules, however, do not prescribe a methodology to determine the floor wage despite the Standing Committee on Labour recommending that a methodology should be prescribed to decide floor wage to remove any arbitrariness or discretion in its determination (PRS India 2020a; n.d.b)

It is important that the appropriate governments when setting wages, apart from long-established Supreme Court jurisprudence on the criteria for fixation of minimum wages, take cognisance of gendered norms associated with work. This is no easy task as not only is women's work undervalued, and the criteria for how to in many occupations in which women are employed, there is extensive gendered occupational segregation, with a preponderance of women in some occupations, for instance in paid domestic work, homebased work, etc. The question of how to shake the 'sticky floor' of women's employment will have to animate the criteria that are set for determining minimum wages.

Non-Discrimination in Employment

The Code prohibits discrimination on the basis of gender in matters related to wages as well as during recruitment and in the conditions of employment (s.3). This is a welcome move as a previous version of the Bill prohibited discrimination only on the basis of wages, which was a complete departure from the Equal Remuneration Act, which it sought to consolidate. The section also refers to gender, which can be seen to include non-discrimination against transgender employees in line with the Supreme Court judgement in National Legal Services Authority v. Union of India (Writ Petition (Civil) No. 604 of 2013 (2014)). However, the ambiguity of its applicability to transgenders persists given that a previous version of the Code specifically made reference to the applicability of the Code to transgender communities (Jha 2017; Bhattacharjee 2016).

Importantly, the Code floundered an opportunity to be more inclusive in its approach to substantive equality for all, by including a non-discrimination provision against a wider group who face widespread discrimination in employment based not just on gender but also caste, religion, disability, and sexuality minority status. This is a serious setback of the right to equality of women and other minorities at the workplace, and a sadly missed opportunity to bring conceptual and legal heft to the concept of non-discrimination in employment.

In the Code, the criteria for evaluating discrimination based on gender for wages is the same as in the previous law – 'same work or work of similar nature done by any employee', which has been inadequate in addressing the occupational segregation that women workers face, and the attendant low wage rates. Feminists have called instead for shifting the criteria to 'work of equal value' which would 'permit disparate jobs to be assessed and evaluated for the value they add to the production process even if they are different from jobs performed by another person' (Sankaran 2007, p.18). This is again another missed opportunity in the Code that could have brought international principles into the Code to address deep-rooted structural discrimination that women face at work.

Further, as the National Platform for Domestic Workers, the Working People's Charter and others have pointed out, a previous version of the Code has diluted and eliminated mechanisms aimed at promoting equality of opportunity and non-discrimination. This holds true of the present Code too – the Code has reduced the representation of women on Advisory Boards from 50 percent (which was the case in the Equal Remuneration Act) to 33 percent (see s.42 of the Code; National Platform for Domestic Workers 2018; Working Peoples' Charter 2017; Mazumdar and Neetha 2020).

Code on Industrial Relations

In substantive terms, the Code on Industrial Relations 2020 seeks to amalgamate three major laws that currently regulate industrial relations: Trade Unions Act 1926, Industrial Disputes Act 1947, and Industrial Employment (Standing Orders) Act 1946. It brings together regulations on trade union registration, the making of rules and model standing orders by the central government, as well as regulations on strikes, lockouts and layoffs, retrenchment, and closures. It also provides for the procedures, powers, and duties of authorities such as conciliation officers and tribunals instituted under the Code.

The Code on Industrial Relations 2020 has been particularly controversial, given that it deals with the rights of collective bargaining and industrial relations. Critics have argued that the Code has been 'drafted keeping in mind only employer demands for greater labour market flexibility and labour discipline' and not labour rights (Gopalakrishnan and Shyam Sundar 2015). This is evidenced by several provisions of the Code – it has given legislative sanction to fixed-term employment (s 2(o)), that had already been introduced by amendment to the Rules on the Industrial Employment (Standing Orders) Act in 2018 (Mazumdar and Neetha 2020).

In a blow to organised sector workers, after a bit of back and forth on this in various versions of the previous Bills, the Code has increased the threshold of workers for seeking prior governmental permission in the case of lay off, retrenchment and closure from 100 to 300. However, this increase in threshold in the name of the 'ease of doing business', should also come as no surprise. As Prof Shyam Sundar points out, this increase in threshold has already been made in nine states and union territories (Interview, 24 December 2018).

The issues with the Code are also with the ways in which it deals with the rights to freedom of association and collective bargaining – the understanding that these rights (guaranteed by the Constitution and by international Conventions such as Freedom of Association and Protection of the Right to Organise Convention 1948 and the Right to Organise and Collective Bargaining Convention 1949) are fundamental for the survival of all workers including informal workers has animated the critiques of the Code, on which more below.

Registration of Unions

On the right to freedom of association, one of the positive features of a previous version of the Code (Code on Industrial Relations Bill 2015) was that it recognised the right to freedom of association within the unorganised sector even where there may

be no easily discernible employer-employee relationship (s 5). It did this by suspending the requirement that the union achieve 10 percent membership in the concerned establishment, undertaking or industry for registration. However, this clause no longer appears in the 2020 Code. Although the Code is applicable to unorganised sector workers for the purpose of Chapter III of the Code dealing with trade unions, the Code no longer recognises the difficulties of registering unions for informal workers.[22] As Mazumdar and Neetha (2020) argue, all the 2001 amendments to the Trade Union Act 1926, which were introduced as part of the neoliberal restrictive agenda for unionisation have been incorporated in the Code.

This is a blow to informal workers generally, but also to informal women workers, especially since one of the recommendations of the SNCL was on the importance of the recognition of trade unions and other member-based organisations in the unorganised sector by the law. Specifically, it recommended the 'widespread registration of MBOs [Member-Based Organisations] of women workers under the Trade Unions Act and the promotion of cooperatives in each state with special guidelines for the registration of such cooperatives of women workers' (p. 94, Vol II).

A controversial provision from the 2015 Bill was one that restricted the number of 'outsiders' that could hold trade union positions within the establishment or industry (s 27). While there was an exception for trade unions representing workers in the unorganised sector (where only 2 people could be the office bearers but not as President or Secretary), labour rights groups and unions argued that the provision was overreaching and would interfere with trade union autonomy as trade unions would be deprived of the experience and expertise of outsiders, which could weaken trade union activities in the unorganised sectors (NPDW 2018). Even so, in the new Code, there are restrictions on the number of outsiders who can be office-bearers of trade unions in the unorganised sector (at least half of the office-bearers must be persons actually engaged or employed in the establishment or industry except if the appropriate government decides otherwise) (s.23).

Right to Strike

The Code also curbs the powers of collective bargaining for trade unions by effectively making it impossible to exercise the right to strike. It does this by extending the prohibitions on strikes and lockouts that under the principal Act only applied to public utilities to all industrial establishments (Bhattacharjee 2016; Mazumdar and Neetha 2020). The Code stipulates a period of 60 days' notice and prohibits any strike within 14 days of such notice (s 62). It also prohibits strikes during the pendency of conciliation proceedings and 7 days after the conclusion of such proceedings, during the pendency of proceedings before a tribunal and 60 days after the conclusion of such proceedings, during the pendency of arbitration proceedings and 60 days after the conclusion of such proceedings, and during any period in which a settlement or award is in operation (Ibid).

22 The definition of unorganised worker is the same as the one under the Unorganised Workers Social Security Code 2008 (s.2 (zp)), which has since been incorporated into the Code on Social Security. See below.

These regulations seriously curtail strike action, if not render them impossible, because employers could press for conciliation or adjudication, which might go on for weeks if not months. In effect, workers would be unable to strike in the middle of continuous dispute resolution proceedings (Shyam Sundar 2020b). Moreover, the Code also extends the definition of 'strike' to include instances where 50 percent of workers take casual leave simultaneously (s.2 (zk)) – this as Bhattacharjee argues curbs the freedom of association as well by preventing workers from attending meetings, rallies, demonstrations, etc (2016, 67).

All trade unions, without exception, have opposed the Code for imposing these restrictions. The stipulations, as we have seen, have made it increasingly difficult to register unions, especially for informal women workers such as home-based workers and domestic workers (Mazumdar and Neetha 2020).

Code on Social Security 2020

The Code on Social Security 2020 amalgamates and consolidates the provisions of 9 central labour laws relating to social security – The Employee's Compensation Act 1923, The Employees' State Insurance Act 1948, The Employees' Provident Funds and Miscellaneous Provisions Act 1952; 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 Unorganised Workers' Social Security Act 2008.

The Preamble to the Code declares its goal of extending social security to all employees and workers in both the organised and unorganised sectors. However, this Code has a far from ambitious scope and aspiration when compared to previous versions of the Code which were drafted with the intention to realise the 'progressive universalisation' of social security benefits for all workers irrespective of whether they are in the organised sector or unorganised sector or wage workers or self-employed workers (see Draft Code on Social Security 2018). While the previous versions of the Codes were heavily critiqued too for several reasons (see (Gopalakrishnan 2017; Sen 2017; Saji Narayan 2018; Mathew 2018), at least they made a serious effort to grapple with the issues of extending social security to all workers, including informal workers.

The previous efforts to provide for a 'progressive realisation' of social security drew on the recommendations of the SNCL. Recognising social security as a fundamental human right, the SNCL in its report had recommended a system in which the state bears the responsibility for providing and ensuring an elementary or basic level of security, while leaving room for partly or wholly contributory schemes (SNCL 2002). It had also recommended that the social security system should apply to all establishments, the existing wage ceilings for coverage should be removed, and that there should be a functional integration of the administration of existing schemes (PRS India n.d.).

The Parliamentary Standing Committee on Labour (2020) in its evaluation of the Draft Social Security Code had also exhorted the government to clearly spell out 'the principles to be followed for provision

of Social Security benefits to all workers in accordance with the provisions stipulated in the Constitution of India, ILO Conventions, and other International Instruments which espouse and guarantee various labour rights.' (p.14). However, the Code on Social Security continues to have a differentiated approach to social security that has informed the law on social security in India thus far – it differentiates the provisioning of social security based on the size and nature of establishments (see Schedule I of the Code), as well as on whether workers fall under the definition of 'employees', 'building or other construction workers', 'unorganised workers' and the newly included 'gig and platform workers'.

The Code incorporates the definition of unorganised worker that was in the Unorganised Workers Social Security Act 2008 which defines unorganised workers to specifically include home-based workers, self-employed workers, and waged workers such as domestic workers (see ss. 2(86) and 2(90) of the Code). The provisions for social security for the unorganised sector are set out in Chapter IX of the Code, and s 109 mandates the central government to frame and notify suitable welfare schemes relating to life and disability cover; health and maternity benefits; old age protection; education; and the state government to frame and notify schemes relating to provident fund; employment injury benefit; housing; educational schemes for children; skill upgradation of workers; funeral assistance; and old age homes. The mechanisms for funding of these schemes include funding wholly by central or state governments, a combination of state and central funds, contributions collected from beneficiaries, and funding from other sources including corporate social responsibility funds (ss. 109, 110).The Code also envisages the setting up of a National Social Security Board and a State Unorganised Workers' Social Security Board (s.6) to administer and disburse the funds, again replicating the structures provided under the UWSS Act.[23]

One of the serious issues with the Social Security Code is that much has been left to delegated legislation. This is true of the entitlements for unorganised workers (s 109), establishment and administration of funds (s 141) and contributions (ss. 109, 110). In other words, much is left to the executive without sufficient legislative scrutiny. Atul Sood, in his analysis of the Code argues that the government does not appear to take any responsibility for unorganised workers. The scheme that is on offer is one without any details. On the proposed financing structure of the schemes, he argues that the inclusion of Corporate Social Responsibility as a means of financing the scheme, as well as the overall direction of centre-state relations which diminish the possibilities of coordination between the two, do not portend well for securing the rights to social security for unorganised workers (Sood 2020).

23 The Code retains the existing institutional structures for the delivery of social security for workers in both the organised and the unorganised sectors. This includes a central board of trustees to administer the EPF, EPS and EDLI Schemes, an Employees State Insurance Corporation to administer the ESI Scheme, national and state-level social security boards to administer schemes for unorganized workers, and cess-based labour welfare boards for construction workers (Sood 2020). While this goes against the SNCL recommendation of having a functional integration of the administration of social security, previous versions of the Code were also heavily critiqued for dismantling relatively well-functioning systems of social security without having an adequate alternative. As Tapan Sen of Centre of Indian Trade Unions (CITU) had argued, 'it would mean letting off the "birds in hand" in quest of those flying in the sky' (Sen 2017).

One of the critiques against the UWSS Act was that it did not provide a justiciable social security entitlement for unorganised workers, with no penalties for employees or bureaucrats that violate the provisions of the Act (John 2008). The Code does not seem to have addressed this critique, providing only for grievance redressal mechanisms for unorganised workers as notified under each scheme (s.109 (4) (vi)).

Registration under the Code

Registration forms the basis upon which an employee or a worker under the Code can claim social security, and this applies to unorganised workers too, provided she is 16 years of age, makes a self-declaration, and is registered as prescribed by the central government (s.113). To enable the registration of unorganised workers, and their enrolment in the schemes, as well as for the dissemination of information on schemes, the Code suggests that the appropriate government may set up a tollfree call centre or helpline or a facilitation centre (s.112). In prescribing the process for registration, the Code mandates that the application documents shall include her Aadhaar number (s.113 read with s.142).

Apart from the fact that that making Aadhaar mandatory for registration to secure social security entitlements whose expenditure is not incurred from the Consolidated Fund of India may violate the judgement of the Supreme Court in *Justice K.S. Puttaswamy (Retd) v Union Of India Supreme Court*, Writ Petition (Civil) 494 of 2012, September 26, 2018) (PRS India n.d.), the issues with registration and the production of identity documents to claim rights are complex and numerous. The multiplicity of registrations and identity documents required to access entitlements across the country, both as citizens and workers are also complicated by the portability of entitlements. On this, the Parliamentary Standing Committee on Labour had recommended that the Code provide for a unified registration and compliance platform, and that the Code provide for common 'minimum mandatory entitlements' across states for construction and unorganised workers to enable portability; however, these recommendations of the Standing Committee have not been addressed (PRS India 2020).[24]

Social Security Benefits, including Maternity Benefits, under the Code

As mentioned before, Schedule 1 of the Code provides a differential application of the each of the benefits listed based on a range of thresholds of applicability. For instance, the Employees' Provident Fund is applicable only to establishments in which twenty or more employees are employed, and the Employees' State Insurance and Gratuity are applicable to establishments in which ten or more employees are employed. Similarly, amalgamating the provisions of the Maternity Benefits Act 1961, Chapter VI of the Code deals with maternity benefits, and it is made applicable only to every

24 In the Code on Occupational Safety, Health and Working Conditions, there are provisions for the portability of benefits for inter-state workers; it also mandates that central and state governments maintain or record the details of inter-state migrant workers in a portal (s. 21 of the Code; also see (PRS India 2020b). However, inter-state migrants are migrants who work for an establishment (which has a threshold for applicability), and therefore there is a threshold for a worker to fall under the category of inter-state migrant and to avail of benefits accorded to them. See more on section on Code on Occupational Safety, Health and Working Conditions below.

establishment in which ten or more employees are employed.

For informal women workers and unorganised workers more generally, who are the vast majority of workers, as well as the most vulnerable of workers, what is provided for is a range of schemes, to be provided by either the centre or the state. There is, however, no mechanism to ensure that they are registered and covered by each scheme (the appropriate government may set up a mechanism to enable such registration, they are not mandated to do so), or that they are covered when they move from state to state as migrant labour (no mechanism for portability especially for schemes for which the appropriate government is the state). Further, here is no clear sense of what each scheme will provide, and whether there will be further eligibility requirements, and what those will be. The Code only provides that the appropriate government will 'frame suitable schemes'; the responsibility for framing a suitable scheme for life and disability cover, health and maternity benefits, old age protection and education lie with the centre, and the schemes relating to provident fund, employment injury benefit, housing, educational schemes for children skill upgradation of workers, funeral assistance, and old age homes lie with the state. This is a far cry from a system to realise a justiciable right to social security for unorganised workers.

Chapter VI of the Code on maternity benefits, which applies only to the organised sector, continues to suffer from all the issues that the amended Maternity Benefits Act 1961 (amended in 2017) suffers from, and on which commentators have commented on at length (Raha 2016; Sasikumar 2017; Mazumdar and Neetha 2020). Here, the government lost an opportunity to address some of these criticisms. For instance, the Code continues to restrict the benefit of the longer period of maternity benefits of 26 weeks to only women who are pregnant with either the first or their second child. A woman with two or more surviving children is entitled to only 12 weeks of maternity benefits, which was the entitlement under the previous iteration of the Maternity Benefits Act (this restrictive time frame applies to adoptive and commissioning mothers too). The conditionalities of maternity benefits schemes have been heavily criticised on moral, justice and health grounds, and these criticisms apply here too (Raha 2016; Sinha et al. 2016; Sinha 2017; Atmavilas 2016; Institute of Social Studies Trust 2016; Lingam and Kanchi 2013).

As regards maternity benefits for unorganised workers, there are no criteria set in the Code, as with the other schemes for unorganised workers, for framing the scheme. As Mazumdar and Neetha argue, considering that schemes such as the Pradhan Mantri Matru Vandana Yojana is equivalent to just 22 days at wage rates under the Mahatma Gandhi National Rural Employment Guarantee Scheme in Haryana and 35 days for Bihar, the absence of any criteria for calculation of maternity assistance for unorganised sector workers that could be equal to 26 or even 12 weeks of paid maternity leave, is particularly glaring (Mazumdar and Neetha 2020).

Code on Occupational Safety, Health and Working Conditions

The Code on Occupational Safety, Health and Working Conditions (OSH) 2020 amalgamates 13 central labour laws relating to safety and health standards, health and working conditions, welfare provisions for employees, and leave and hours of work. The 13 labour laws that have been amalgamated in the Code include the Factories Act 1948, the Mines Act 1952, the Dock Workers (Safety, Health and Welfare) Act 1986, the Building and Construction Workers (Regulation of Employment and Conditions of Service) Act 1996, the Plantation Labour Act, the Contract Labour (Regulation and Abolition) Act 1970, and the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 and the Beedi and Cigar Workers (Conditions of Employment) Act 1966.

The Code perhaps best illustrates the issues with the law reform process – it seeks to amalgamate a range of diverse laws that serve different purposes, for instance those that address sector-specific issues relating to occupational safety and health, those that regulate working conditions, and those that address specific categories of workers such as contract workers and inter-state migrants (Shyam Sundar 2018d; Mazumdar and Neetha 2020). Moreover, the Code has no applicability for the vast majority of informal women workers. This is because it has a threshold of applicability of ten or more workers in the definition of establishment (s 2(u)) to whom the Code applies.[25] Further, the threshold for the applicability of the Code to contract workers and interstate migrants have also been increased under the Code – the Code applies to establishments that employ 50 or more contract workers, and to establishments that employ 10 or more inter-state migrants, though the definition of interstate migrant has been expanded to now include those who move on their own to another state and obtain employment in an establishment there (Chapter XI).

Overall, then, all the stipulations in the Code relating to health and working conditions (potable drinking water, ventilation, sufficient lighting, arrangements for latrine), and weekly and compensatory holidays, extra wages for overtime, annual leave with wages, on creches, and so on do not apply to informal women workers.

Occupational Hazards and Diseases in the Informal Economy

The Code has not taken cognisance of some of the policy-level work that has been undertaken in the last several years on occupational health and safety at the workplace, especially as it pertains to workers in the unorganised sectors. These include the National Policy on Safety, Health and Environment at the Workplace (Ministry of Labour and Employment 2009), the Report of the Working Group on Occupational Safety and Health for the Twelfth Five Year Plan (Working Group on Occupational Safety and Health 2011), as well as the recommendations of the National Advisory Council on Occupational Safety and Health of Workers in India (National Advisory Council, n.d.).

A recent report of the Directorate General Factory Advice Service under the Ministry of Labour and

25 The Code is applicable only to those employees who work in an establishment which is defined as any 'place where any industry, trade, business, manufacture or occupation is carried on in which ten or more workers are employed' (s 2 (u)). However, the threshold is not applicable to establishments where hazardous activities are being carried out (s 2 (v)).

Employment points to the particular issues of lack of awareness, poor occupational health and safety and poor working conditions faced by workers in the unorganised sector. It sees the issue as an inter-departmental problem with a role for several ministries including the Ministry of Agriculture, Rural Development, Urban Development, Environment and Forest, Health and Family Welfare, Shipping and Transport, Industries and Chemicals and Fertilizers. It recommends that a task force be set up to discuss and finalise the modalities by which occupational health and safety of the workers employed in agriculture and other unorganised sectors such as homebased work, domestic workers, and street vendors, could be addressed. This task force, the report suggests could recommend necessary changes to be brought out in the existing legislation or for the enactment of new or special legislation for the agriculture and unorganized sector (Directorate General Factory Advice Service and Labour Institutes and International Labour Organisation 2018, 23).

Overall, there is insufficient understanding of the nature of hazards and occupational diseases in the various sectors of the informal economy barring a few pilot surveys and studies (Working Group on Occupational Safety and Health 2011). As the National Advisory Council puts it, 'the absence of specialized data and adequate information on the magnitude and nature of OHS makes it hard to plan for the well-being of workers' (National Advisory Council, n.d.,707). Where studies do exist, for instance in sectors such as mining, construction, and stone-crushing, they have brought out the prevalence and severity of injuries, pneumoconeosis, silicosis and other diseases (Ibid). Sample surveys in the agriculture sector, where a vast majority of women work, have found that the hazards and accidents in this sector are due to agriculture hand tools and implements, farm machinery, chemical agents, climatic agents, animal/snake bites, etc. Workers are also exposed to many types of hazardous substances, which have a potential to cause serious occupational diseases such as asbestosis, silicosis, lead poisoning, etc. (Working Group on Occupational Safety and Health 2011, 134).

Similarly, epidemiological studies show that the workforce engaged in waste management are exposed to high health risks and frequently suffer from respiratory tract infections, gastrointestinal problems, worms, etc (Ibid, 133). Studies of homebased workers such as garment workers and embroiderers also reveal that long hours of work give rise to complaints like back pain, pain in the limbs, shoulders and neck, and eye strain (National Advisory Council, n.d., 707). Similar musculoskeletal disorders such as back and neck injuries have been found amongst fish workers, both men and women, though there was a higher prevalence of such injuries amongst women (Tripathi, Kamath, and Tiwari 2017).

The Code missed an opportunity to address the issues of occupational health and safety, and working conditions specific to informal women workers.

Omission of the Sexual Harassment Act

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 is a landmark legislation that has included unorganised women workers, including domestic workers. Further, it has revolutionised the understanding of workplaces by including households as places of work. However, this is one of the laws that has not been amalgamated into the labour law reform process, either in the Code on Occupational Safety, Health and Working Conditions, or in the Code on Industrial Relations. As feminist scholars have argued, the exclusion of this Act points to the difficulties that the labour law framework has had with including this law within its ambit as a law that regulates the conditions under which women work. This has added to both the continued absence of gender perspectives in labour laws, and the denial of workers' entitlements to a large contingent of women workers (Mazumdar and Neetha 2011).

The effects of the ambiguity with which the labour law regime treats the Act has meant that there are serious gaps with the implementation of the law for all women workers, including informal workers (Sisters for Change 2016; Sarpotdar 2020). There is no clear line of authority or coordination for the effective implementation of the Act. The authority to enforce the Act lies with the District Magistrate or the Collector. However, the implementation of the Act is monitored by the Ministry of Women and Child Development, and the inspection regime for labour laws is under the Ministry of Labour and Employment.

Conclusion: Way forward for the Rights of Women as Workers

Conclusion: Way forward for the Rights of Women as Workers

A vast majority of women in paid employment in India are informally employed. They do not have well-defined employer-employee relationships (or no employer-employee relationship at all), no fixed place of work, none, or limited bargaining power, little or no work and income security, and limited access to social security entitlements such as healthcare, pension, disability benefits, sickness benefits, unemployment benefits, compensation for workplace injuries, and maternity entitlements and childcare benefits that are compatible with their needs and hours of work.

Women workers are typically involved in multiple economic activities for survival, not just in terms of both the unpaid work and paid work that they often simultaneously perform, but also in terms of the fluidity with which women move from one livelihood/ employment option to the other, based on seasonality and necessity. They migrate to cities or other locations in search of work, and often undertake activities that can be detrimental to their health. Their working conditions are varied with no fixed hours of work or leave. They face gender discrimination and disadvantage at work, in terms of both occupational segregation and unequal wages, and in relation to their reproductive roles (See National Advisory Council, n.d., 706).

Given this context, the labour law reform process provided a unique and singular opportunity to rehaul labour laws to formalise the informality of women's work by ensuring employment/livelihood security, wage/income security and social security for women workers, and by promoting decent work options for women. Instead, the Codes have continued with the patchy and piecemeal inclusion of informal workers generally and of informal women workers.

The SNCL called for an inclusion of informal workers through a removal of the schedules of employment and called for the inclusion of all waged workers, including those on piece-rates. While the Code on Wages has indeed done away with the schedules of employment, there continues to be ambiguity on the inclusion of informal women workers because the Code does not specify either its intent of including such workers or specify such workers in the Code. Instead, it continues to use categories such establishment and industry, which have historically been used to exclude informal women workers. This ambiguity is a serious blow to so many sectors of informal women workers who have fought for years to be recognised as workers and have minimum wages extend to them. It presents a step back from hard-won if piecemeal gains under the Minimum Wages Act 1948.

Recognising the importance of member-based organisations, the SNCL had recommended that the state enable the registration of member-based organisations under the Trade Unions Act and the promotion of cooperatives in each state. However, while the section of the Industrial Relations Code that pertains to trade unions is applicable to informal women workers, the Code does not recognise the difficulties of registering unions for informal workers. Moreover, the Industrial Relations Code

represents a step back for labour rights in general, with the Code not only making it increasingly difficult for informal women workers to register unions, but also by bringing in a range of measures that seriously curtail strike action in a severe blow to labour rights of all workers.

The SNCL in its report had recognised social security as a fundamental right, and it had recommended a system in which the state bears the responsibility for providing and ensuring an elementary or basic level of security to all workers, including unorganised sector workers, while leaving room for partly or wholly contributory schemes. However, while previous versions of the Code on Social Security attempted to accommodate these recommendations of the SNCL through a framework that envisaged a progressive realisation of the right to social security, the final Code that was enacted was an exercise that was mostly an amalgamation of previous legislations dealing with social security. The Code provides a range of schemes, without instituting a mechanism to ensure that they are registered and covered by each scheme, or that they are covered when they move from state to state as migrant labour. Further, here is no clear sense of what each scheme will provide, and whether there will be further eligibility requirements, and what those will be. This is a far cry from a system to realise a justiciable right to social security for unorganised workers.

The Code on Occupational Safety, Health and Working Conditions perhaps best illustrates the issues with the law reform process – it seeks to amalgamate a range of diverse laws that serve different purposes, and amidst all of this, it has nothing pertinent to say about the occupational safety, health and working conditions of the vast majority of informal women workers.

Overall, then, the labour law reform process has spectacularly failed to address the needs of informal workers, and of informal women workers. Further, by pushing back against labour rights for all workers, whether in the formal or informal sector, it has given legitimacy to discursive claims that see the 'ease of doing business' and 'reviving and growing the economy' as being rooted in labour flexibility, which is antithetical to hard-won labour rights.

How unions and groups of informal women workers will regroup to reclaim lost ground and importantly push for their rights as workers is still unclear as the reforms are so recent. The SNCL had recommended a separate law for unorganised workers, and that could provide the way forward for informal workers generally and for informal women workers too.[26] The law could provide broad parameters for the rights of informal workers, while having sector-specific sections to deal with the specificities of women's work, and of informal work in different sectors.

There are some broad parameters that any law reform process in the future will have to engage with to address the concerns of informal women workers and to realise the rights of women as workers:[27]

26 This was proposed by Prof Babu Mathew, National Law School of India University (NLSIU) at a workshop on domestic work organised by King's College London in August 2020.

27 The recommendations draw on conversations and inputs provided by participants to the workshop on the labour codes organised by ISST in September 2018.

Recognise women's work in all its complexity. Women are producers of economic goods and services. The engage in multiple economic activities, both paid and unpaid, and as self-employed women (whether as own account workers or unpaid family helpers) and employees, as migrants, and as so-called 'honorary' workers

Apart from a range of workers, *recognise a range of sites, including homes, as sites of work* for various workers such as homebased workers, street vendors and waste pickers

Recognise the gendered and other intersectional forms of discrimination and disadvantage faced by women workers. There are high levels of gendered occupational segregation and wage discrimination in the economy. Non-discrimination in employment, whether in recruitment policies, payment of wages, promotions, and other aspects of employment must form the bedrock of any intervention in the unorganised sector

Sexual harassment at the workplace must be acknowledged as part of the labour law framework and incorporated as such both through an inclusion in the current Codes, and in any future law for the unorganised sector

Recognise a range of other women's collectives, apart from unions, such as women's cooperatives, especially for women in self-employment, and enable the 'ease of doing business' for cooperatives

Recognise a justiciable work-based right to social security, set up infrastructure and funds to realise the right

Voice and representation for informal women workers is essential for the complexities of women's work to be properly addressed by law. Tripartite representation is vital in the institutions created by the law, and women's collectives, including unions and cooperatives should have a place on the table. Where possible, whether it is internal workplace committees, committees on agriculture or urban local bodies, laws should enable representation of informal workers, especially women, so that there is voice and representation for informal women workers

Enable access to universal public entitlements and public infrastructure (including the provisioning of clean water, housing, sanitation, health services, etc.) at worksites, and regulate access to common properties and public resources, particularly primary environmental resources on which many women's livelihoods are dependent

Acknowledge the challenges of migration (both interstate and intrastate) and take measures (such as the regulation of placement agencies, the expansion and proper implementation of the Inter-State Migrant Workers Act) to protect the rights and livelihoods of migrant women workers.

Appendix 1: Findings of the Study Group on Women and Child Labour

To delve into the issues pertaining to 'Women and Children', a Study Group on Women and Child Labour was formed, which drew up an extensive report that located the context of women's work in India in' very low-paid insecure, and unprotected work' across an array of sectors, and made a wide set of recommendations for the Commission's consideration (Jhabvala 2001). These recommendations ranged from the definition of workers, to policies for the generation of employment of women, sector-specific recommendations, recommendations on social security (particularly on maternity benefits and childcare), on amendments to labour laws, women's organising, and so on (pp. 205-219). It is worth outlining the recommendations of the study group in some detail, as they provide a useful conceptual frame for assessing the new Labour Codes from a gender lens.

On labour laws, the study group made recommendations for changes to several laws to better address gendered inequalities at work in both the informal and formal sector. It recommended the inclusion of all trades in the Minimum Wages Act, including workers under piece- rates regardless of whether an employer-employee relationship could be proved or not and a strict implementation of the Act with high penalties for breach to assure a minimum level of income and security to women workers regardless of where and under what employment relations they work (p.207).

On the Equal Remuneration Act (ERA), the study group, amongst other recommendations, suggested its amendment,

- To apply across units on occupation, industry, and regional basis, not only within an establishment
- The replacement of the phrase 'same work or work of a similar nature' with the phrase 'work of equal value'
- To enable intervention in the process of wage fixing, especially the need to remove incompatibility between piece rate and time rate
- Conversion of the advisory committee under the ERA to an empowered committee with the power to oversee the functioning of the Act (p.214).

On the Inter-State Migrant Workmen Act 1979, it recommended that the ambit of the Act be widened to include establishments where not less than five migrant workmen from another state are working and who have migrated on their own (p.215). Similarly, it called for the extension of the coverage of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996 to include contractors and construction projects involving less than 10 workers, as well as the provisioning of creches under the Act, regardless of whether workers are male or female (p.215). It also recommended that creches be mandated in factories employing more than 10 workers, regardless of whether they are men or women under the Factories Act 1948 (p.216). On night work, the study group recommended that night work be permitted on a case-by-case basis only if transport and adequate security are provided (p.216).

It also recommended the formulation and implementation of laws and policies on the following:

- **National policy for Home-Based Workers**
- **Agricultural Workers Act**
- **Domestic Workers Act**
- **Manual Workers Act**
- **National Policy on Vendors**
- **Protective measures for Women Workers in EPZs**
- **"Umbrella" Legislation for the unorganised sector (p.208).**

The study group also called for stronger mechanisms for the enforcement of labour laws, including the widening of the enforcement machinery, the creation of a tripartite and multipartite systems of enforcement, and the recognition of organisations of women workers, through the widespread registration of member-based organisation under the Trade Unions Act based on special guidelines prepared for all Labour Departments. It also recommended the issue of identity cards to all women workers, and the recognition of member-based organisations as the initiators and implementing agencies for government schemes (p.218).

On social security, the study group prioritised childcare and maternity, and they recommended the mechanisms of welfare funds and tripartite and multipartite boards for the implementation of social security in the unorganised sector. They recommended that law and policy ought to make childcare the responsibility not only of the woman worker, but also but also of the family and of society. Specifically, on the Maternity Benefit Act 1961, it recommended the introduction of 15 days of paternity leave as well as the expansion of the ambit of the Act to cover the following:

Shops and establishments employing fewer than 10 employees

Unorganised workers who complete 180 days of work in a year

The study group also recommended the setting up of a National Statutory Scheme for the implementation of maternity entitlements. It was envisaged that the scheme, the funds for which would be multi-sourced including a combination of employer, employee, and state contributions, would cover all women under an income criterion and would provide financial support for childbirth and care in the first few months of the child's life. It would be linked with the maternal and child-health provisions of the public health system and would apply to all childbirths without a limit on the number of children.

On childcare, the study group recommended

- Creation of a flexible, autonomous childcare fund,
- Labour legislation to be mandate the provisioning of creches where there are 10 or more workers irrespective of gender
- Strengthening of the ICDS system
- Childcare to be recognised as part of the education policy
- Recognition of childcare as part of the education policy
- Low-cost community-based approaches to be encouraged and multiplied
- Recognition and compensation of the important role of the childcare worker
- Training and upgradation of skills of childcare workers to be taken up as a large scale programme

The study group also recommended the setting up of new decentralised welfare funds for the following:

It also recommended that a pension scheme within the existing Provident Fund Act should be devised for women in the unorganised sector which would provide them coverage for old age, disability, and widowhood; and it recommended that decentralised systems of micro-insurance be devised to provide insurance to women in the unorganised sector.

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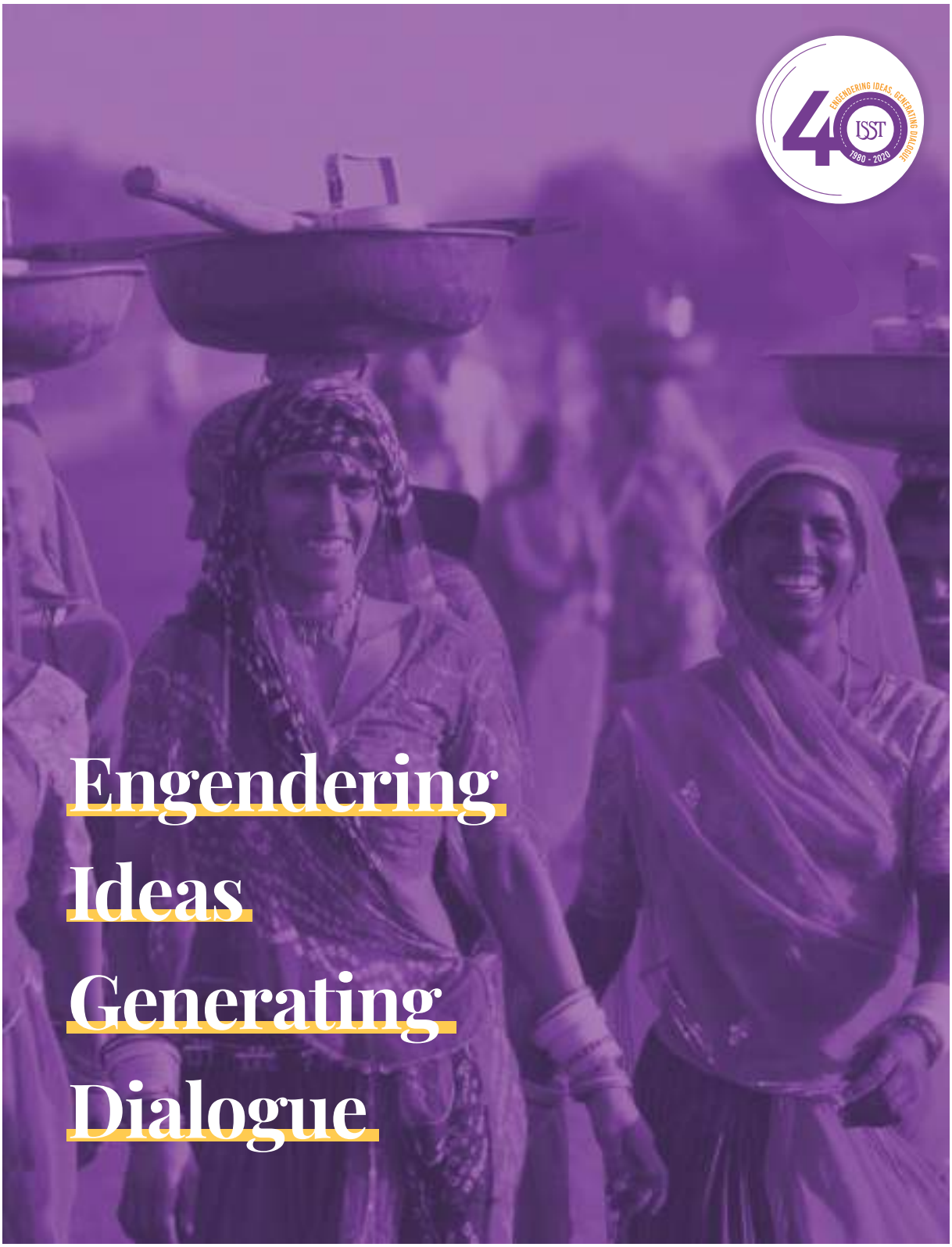

Engendering Ideas Generating Dialogue

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