

Monk Prayogshala Working
Paper # 2020-05

October, 2020

LAWLESS: A POLICY PERSPECTIVE ON LABOUR LAWS AND MIGRANT WORKERS DISPLACED BY COVID-19

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Lawless: A policy perspective on labour laws and migrant workers displaced by COVID-19

Abstract

Many of India's 19mn migrant workers have been displaced as a result of the COVID-19 pandemic and associated lockdown. Save for a select few that received assistance from their employers and local governments, many migrants were left to make their own arrangements to return home. This paper investigates the role of labour laws and policies in overcoming the adverse effects of the COVID-19 pandemic, and this unequal impact on migrant workers. Given that consolidation and strengthening of labour laws and codes in India is a recent phenomenon, this paper argues that there is an opportunity to account for vulnerabilities faced by migrant laborers in particular. We review recent bills such as the Occupational Safety, Health and Working Conditions Code recently passed by Parliament (2020). We provide a roadmap of labour laws and policies potentially required to safeguard migrant and minimum wage labourers from such shocks in the future.

Keywords: minimum wage, occupational safety, vulnerability, pandemic planning

१. Introduction

As of October 2020, India has had more than 7 million COVID-19 cases since March and more than 1 lakh individuals have died due to the pandemic. As with other countries such as the United States of America (USA), there are certain sections of the population that are likely to have disproportionately been affected by COVID-19, and face a higher mortality risk on account of comorbidities, lack of access to affordable healthcare, and lack of adequate sanitation facilities to ensure hygiene (Webb Hooper et al., 2020). Furthermore, as Ray and Subramanian point out, even in India there has been a wide variation in how Indian residents have coped with the outbreak and subsequent government-imposed lockdown starting in late March 2020. Of particular concern was the plight of migrant workers employed in India's large informal sector, often with little job security, no employee benefits, and without adequate documentation of work (Estupinan & Sharma, 2020; Kesar et al., 2020). This is perhaps best evidenced by recent admissions in the Indian parliament that the government did not maintain separate data on migrants' job loss as a result of the lockdown (Nath, 2020).

Although precise estimates of the number of migrant workers in India are difficult to ascertain, the number has been suggested to be as large as 450mn individuals as of the Census 2011 (Census, 2012). Srivastava (2020) suggests that this could also be an under-estimate, since much of the survey data relied on to generate these estimates may not fully capture internal migration. Labour organizations such as the International Labour Organization (ILO) have gone so far as to indicate that nearly 400 million migrant workers will be left in poverty as a result of COVID-19 as well as the lockdown restrictions (Nair & Verma, 2020). For the purposes of this paper, we restrict our focus on internal migrants, who travel across or within states of India, typically for employment purposes. Estupinan and Sharma (2020) estimate that the economic cost of the first lockdown (imposed in

late March) was that 104mn workers in the informal sector lost their jobs, and an additional 69.4mn informal sector workers lost their jobs during and after the second lockdown was imposed (middle of June 2020).

Typically, migrant workers in India have been seasonal or temporary in nature owing to a large proportion of them relying on agricultural activities in their place of origin (Salve, 2013). Furthermore, given that a large fraction of migrant workers are either self-employed or work in the informal sector (defined as working with an establishment that is not formally registered or recognized by the economic or government system), it is pertinent to understand the impact of a large disruption such as the lockdown on their livelihoods (Kapoor, 2020). As a result of working in the informal sector (or as self-employed individuals), displaced workers may not have access to provisions that would otherwise protect job security, flow of incomes, and any other pecuniary work benefits. Unlike residents in urban India, the option of work-from-home for such workers is not just absent, but simply a luxury (IndiaSpend, 2020).

In the absence of formal mechanisms to help overcome adversities associated with the sudden loss of work and income, it is likely that migrant workers have faced tremendous hardship. In many developing countries, it is common practice for the state to intervene to ensure that vulnerable populations are safeguarded from adverse outcomes (Rodgers, 2020). As other literature in this domain has found, one of the ways in which governments can ensure that vulnerable migrants are buffered from exogenous shocks from COVID-19 is through provision of social security benefits in employment, travel, and access to public goods and services (Kapoor, 2020; Rahman, 2020). In India, too, there have been efforts from both the Union as well as the state governments to enact laws and implement policies that can enable this. Policy experts across domains have called for

expansion of social security programs in order to stem the possible fallout from mass reverse-migration in light of the pandemic. For example, the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) can be boosted in rural areas where migrant workers returned, particularly in north India (Mishra & Rampal, 2020; Vasudevan et al., 2020).

However, despite these interventions and changes, this paper argues that a closer look at India's drive to formalize labour and employment is warranted. This is because recent changes in labour laws in India have been long due (Sharma, 2006) and that making changes in favour of workers (pro-worker reforms) have been shown to be associated with *lower* unemployment and other economic outcomes (Deakin & Sarkar, 2011). Thus, a critical review of current changes in labour laws most relevant to migrant workers is vital to ensuring design of systems and institutions that can protect vulnerable workers in the pandemic. This paper reviews the (*The Occupational Safety, Health And Working Conditions Code, 2020*, 2020), which replaced prior laws and regulations on labour in India. This code subsumes the erstwhile Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act of 1979.

The remainder of this paper is organized as follows. Section 2 contains a brief motivation and context to the issue of migrant workers and their labour in India. Section 3 critically examines the Occupational Safety, Health and Working Conditions Code (2020) and other associated labour laws. Section 4 discusses the implications of such regulations and points to the way forward on protecting migrant workers in India. Section 5 concludes.

2. Background and Motivation

Why do workers migrate internally in India? Economic theories of migration suggest that simple wage differentials between rural and urban sectors in a country do not fully explain intra-country migration (Ghatak et al., 1996). Furthermore, the channels through which migrants in India, for example, might seek work is typically through on-the-job search for alternate opportunities, and through social networks developed over the period of migration (Banerjee & Bucci, 1995). Thus, it is evident that any disruptions in the short term to their livelihoods is likely to significantly affect the incidence of migration, as well as their employment status.

Figure 1 shows the heat map of migration that highlights the flows of migration within the country (Government of India, 2017). A large fraction of migrants work in Maharashtra, Gujarat, Tamil Nadu, and West Bengal, and originate from Bihar, Jharkhand, Uttar Pradesh, and Madhya Pradesh. It is no coincidence that the same report suggests that a large fraction of migrants travel in search of work to these states -- nearly 51mn migrant workers stated that they migrate solely for economic reasons (nearly 11% of the total workforce as of 2011).

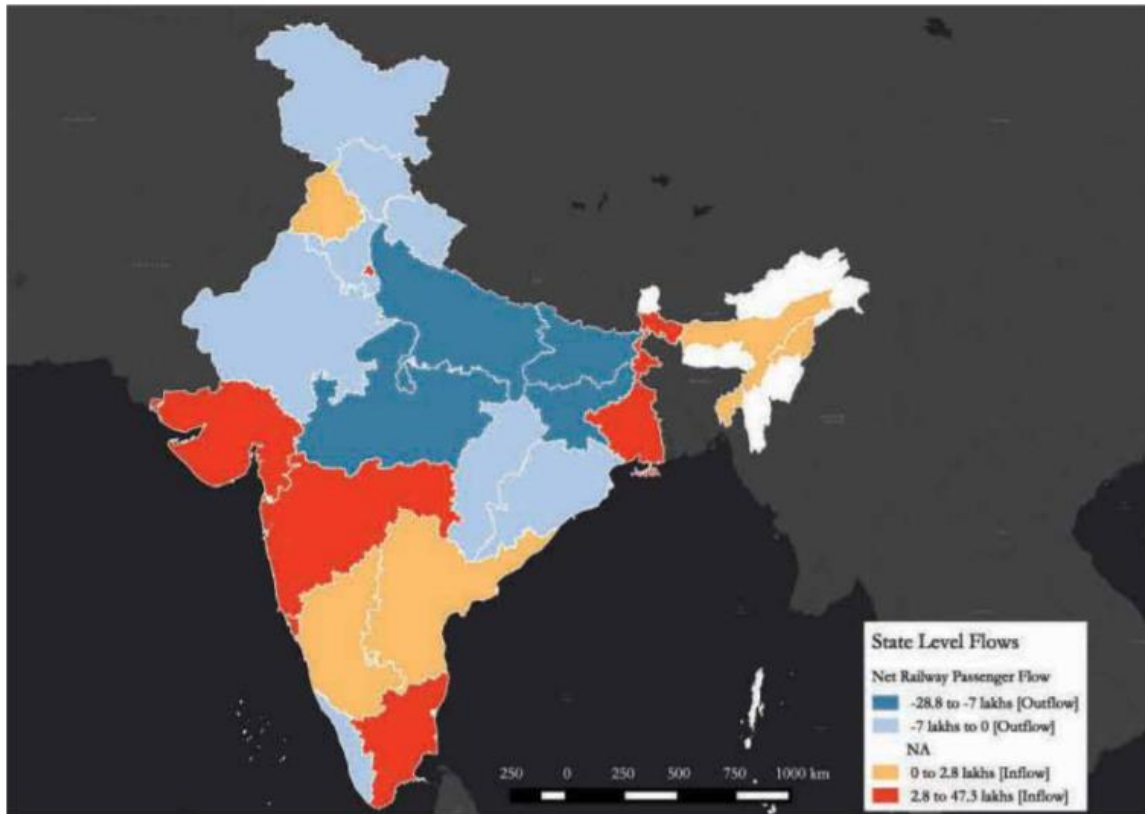


Figure 1: Inter-state migrations flows in India

Source: Economic Survey of 2017 (Ministry of Finance, 2017; ch.12)

Figure 2 contains state-level data on how “friendly” state policies are to migrant workers as estimated by the Interstate Migrant Policy Index (IMPEX; India Migration Network, 2020). This index compiles a list of policies in place at the state-level that are considered amenable to migrants and enabling their integration into society. Among other areas, there are two indices that measure how open the labour market is to inter-state migrants, as well as another that measures whether migrant workers are able to avail social benefits despite not being originally from the state. We find that states such as Sikkim, Madhya Pradesh, and Maharashtra are leading in both indices (a higher score implies more amenability to migrant workers). Take for example the case of Sikkim Labour Protection Rules, 2006, which contains detailed rules on registering migrant workers, accounting for penalties to employers, and provision of benefits (housing, safety equipment, among others) to

employees without discrimination. In Madhya Pradesh, however, there have been recent developments in amending these migrant-centric codes with blanket changes to industrial labour policies as of May (Ram, 2020).

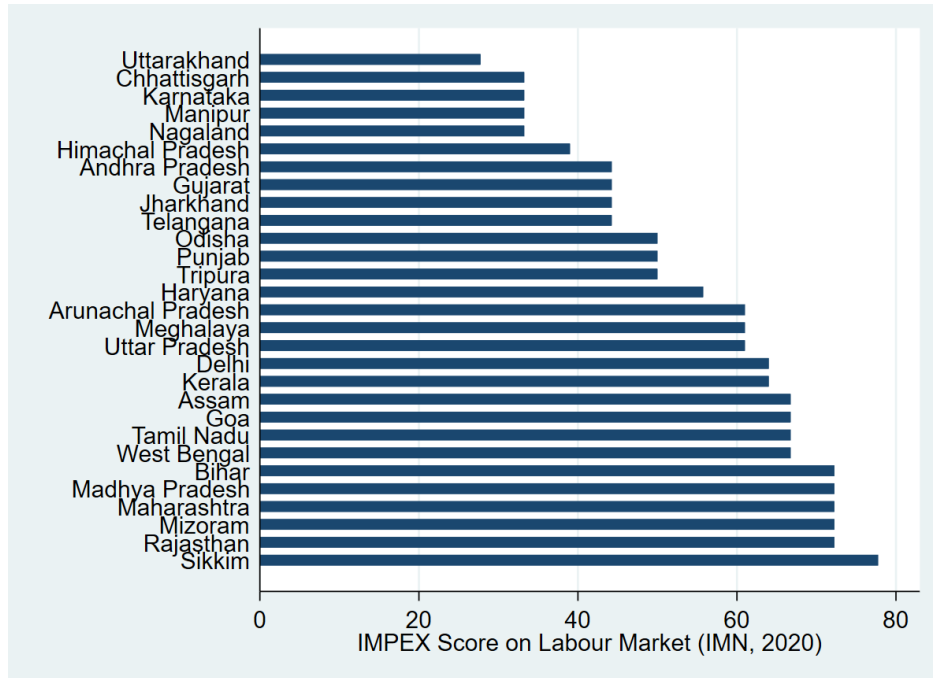


Figure 2a: IMPEX Scores on Labour Markets (IMN, 2020).

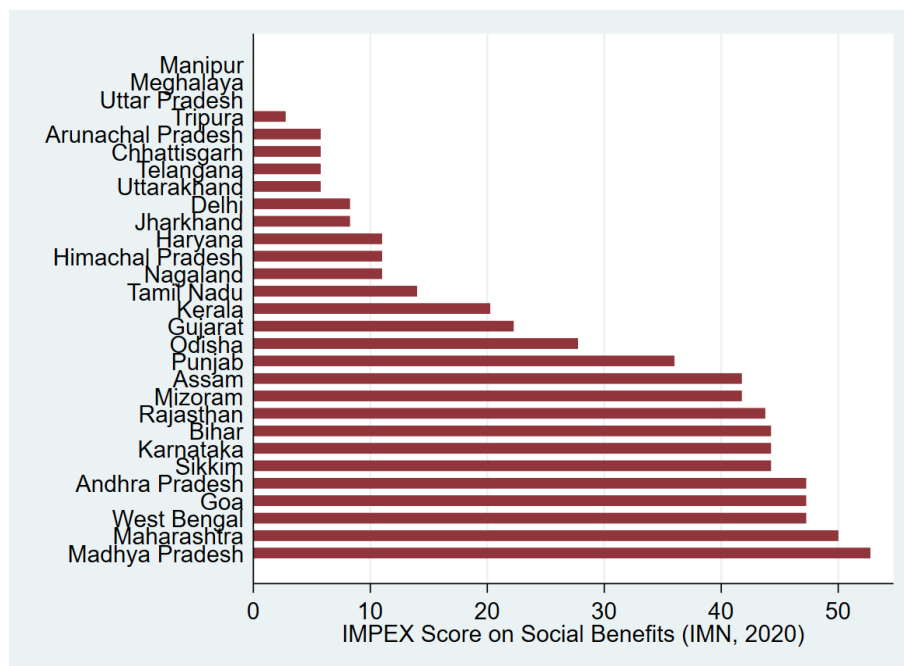


Figure 2b: IMPEX Scores on Social Benefits (IMN, 2020).

In terms of COVID-19, the state is likely facing an unlikely trade-off between maintaining public health (a low caseload) and economic productivity (where economic losses are mounting due to closure of manufacturing units and places of employment). Thus, amendments or changes to existing labour laws that have taken place are likely to have both intended and unintended consequences. For instance, the Uttar Pradesh government has implemented the Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020 which aimed to distil all labour laws down to specific core provisions for labour protection (Ram, 2020). These included provisions on wages, health and safety, work hours, compensation, bonded labour, and laws related to women and children. Other regulations related to social security, industrial disputes, and unions did not find a mention, leading to speculations that for the next three years, these would be held in abeyance. Thus, one could argue that state governments have taken a stance to ensure that industrial units in their state continue to operate without significant losses due to COVID-19, but also in a manner that imposes conditions on the security of tenure for workers in their state.

Interestingly, Uttar Pradesh is among the top-five states in India in terms of COVID-19 caseload. As of October 2020, the state has witnessed nearly 0.5mn cases, and almost 6500 deaths. This is therefore a pressing problem in particular for the UP Government, and could provide an important way forward in terms of tackling the effects of COVID-19 and the Indian economy as well, keeping in mind that a substantial fraction of migrant workers originate from the state. Safeguarding them and their work could be key to ensuring not just sustained economic recovery for the state, but also for providing more opportunities for them to work within the state rather than having to migrate for productive work. In the following section, we link changes in the labour code to the COVID-19 pandemic, with special reference to migrant workers employed largely in the informal sector in India.

3. Implications of the Occupational Safety, Health and Working Conditions Code (2020)

3.1. *New Labour Codes, 2020 (Social Security Code, 2020; Occupational Safety, Health and Working Conditions Code, 2020; Code on Wages, 2020):*

In the Monsoon session of the Parliament this year (2020), three Bills regarding the labour laws were introduced in The Lok Sabha. The overarching idea of the consolidated labour codes can be traced back to the June 2002 report of the Second National Commission on Labour. The idea was to incentivize economic growth while upholding the interests of the workers (The Hindu, 2020). The report suggested that existing legislations were complex with archaic provisions and unclear definitions. As Sood et al. (2014) suggest, much of the policy dialogues around labour reform focused on extending labour “flexibility” to Indian companies, where freeing up Indian firms from such restrictive labour practices were likely to improve economic growth and output. The proposed laws aim to resolve these caveats (Ram, 2020) and is the latest in a long line of bills proposed by lawmakers to provide exemptions to certain classes of establishments, particularly in the manufacturing sector (Sood et al., 2014).

The Industrial Relations Code, 2020 consolidates features of three of the most intrinsic labour laws—the Industrial Dispute Act (IDA), 1947, The Trade Unions Act, 1926 and the Industrial Employment (Standing Orders)¹.

This statute contains definitive and exhaustive duties of the employers. While it is broader than erstwhile labour codes in its scope, it does include a greater spectrum of workers than the previously existing Interstate Migrant Workers Act. For instance, there are parts of the act which are dedicated

¹ The IDA in particular has been subject to a long line of empirical and socio-legal analyses (Bhattacharjea, 2006), with papers such as Besley and Burgess (2004) that show a decline in manufacturing output as a result of the IDA’s clause on retrenchment of workers in large (>300 workers) industrial units. As Bhattacharjea (2006) argues, there were many legal contestations on these clauses between 1978 and 1993, when it was finally upheld by the Supreme Court.

to the women and contract labour exclusively. While there are provisions for migrant workers in this statute, they are very briefly described and the laws which were earlier elaborately provided for in great detail.

There was substantial pushback in the Parliament by the opposition parties regarding the three bills which were passed; and a total of 223 changes were recommended, of which 174 were included. While there was much dismay regarding the ethicalities regarding the passage of the bill, it has also been criticized to exclude some of the most vulnerable forms of laborers like domestic workers and self-employed workers among others (Shetty, 2020).

At the time of writing, various members of the opposition have sent a common memorandum to the president requesting to return the bill, citing flawed and unfair procedure (Shetty, 2020). The widely contested aspect about these bills has been their passage without due discussions in the House. As an immediate response, the bill was met with widespread protests among the opposition in the house. Some of the common critiques were regarding the hasty manner in which the Bill was passed, without due discussion (The Hindu, 2020).

There have been similar concerns among labour unions across India since there was little documentation of public deliberation or stakeholder consultation on the bills. Some have voiced concerns that certain provisions of the Bill are heavily skewed in favour of firms and employers when offering flexibility, while disregarding(/compromising on) the rights and welfare of the employees (The Hindu, 2020). Indeed, as recent changes in the labour code in states like Uttar Pradesh suggest, there is little role for unions in potential industrial disputes arising during the COVID-19 pandemic and what is assumed to be the subsequent recovery period.

For instance, the new set of bills have reduced the threshold from 300 to 100 for employees to prepare standing orders for classification of workers, mode of intimidation for periods and hours of work, holidays etc., among others. In the formerly applicable bill (2019). The increase of limit from 100 to 300 employees has been more liberating for the employers for making termination and exit decisions (The Hindu, 2020). Thus, laying off workers, particularly those who may not have access to social security or other rights as they could be migrant workers, might make them more vulnerable. This limit was also increased in the context of permissions for layoffs, retrenchments etc. from the government for organizations. Earlier establishments with 100 or more employees would require permissions; however, under the new code, only establishments with over 300 employees require permissions for this.

The Industrial Relations Code, 2020 defines 'workers' as--- "*all persons employed in the trade or industry*" as well as that stated in the Unorganized Workers' Social Security Act, 2008; and 'fixed term employment' as "*engagement of a worker on the basis of a written contract of employment for a fixed period*". According to this law, these contract workers should be considered at par with the fixed term employees with respect to wages, working hours, allowances and other benefits (Venkatramanan, 2020).

According to the new laws, the threshold for membership has been reduced to 51% from 75% in earlier versions of the codes. If a case were to arise where no union qualified, the employer would constitute a 'negotiating council' consisting of representatives from other unions representing at least 20% of its employees. The Code also prohibits strikes and lockouts without prior notice. While such a setting existed previously in the Industrial Disputes Act, 1947; it only applied to those employed in relation with public utility services. This was also one of the recommendations of the Standing Committee which was disregarded in the drafting of the bill.

However, there are also positive developments as a result of the recent bid to change labour laws in India. For instance, the law is now beginning to seriously examine regulation in the informal sector as well as the contractual market, or the gig economy. The commitment of the Social Security Code for the establishment of the National Social Security Board for the provision of social security funds for unorganized workers, gig performers as well as platform workers; has been welcomed by critics (The Hindu, 2020).

३.२. Formerly Existing Laws:

The Unorganized Workers' Social Security Act, 2008:

This was a statute which was introduced for the addressal of the unorganized labourers and safeguarding their rights and welfare. Schedule I of this Act provided for policies to be made by the State and Central government of the country. Under this code, various policies were introduced like the Indira Gandhi Pension Scheme, Aam Aadmi Bima Yojana and Rashtriya Swasthya Yojana, among others. Under Schedule II of the Act, various comprehensive laws were introduced like the Industrial Disputes Act and the Maternity Benefit Act .

Inter State Migrant Workers (Regulations of Employment and Conditions of Service) Act, (1979):

This statute has now been proposed to be replaced by the Social Securities Act, 2020, pending the report of the standing committee and a subsequent approval in the Parliament.

However, this was the statute which regulated the employers and establishments who were hiring the migrant workers as a measure to safeguard their rights while also requiring such employers the duties which fall upon them with such employment. For example, as Chapter five of the Act specifically states, contractors hiring migrant workers are required to provide journey allowances

from the place of residence to the place of work and residential accommodation for the workers as well² (Chief Labour Commissioner, 1979).

This was one statute which was unique in addressing the migrant laborers in specificity; although there exists the Unorganized Laborers' Social Security Act, 1927 which is much wider in its scope of addressing the kinds of laborers. This code specifies duties and responsibilities of the employers as well as employees. It also established the registrations and licensing thresholds and requirements of the employers in addition to the duties and wages and welfare facilities which must be made available for the migrant workers. Similarly, Industrial Disputes Act, 1947, Maternity Benefit Act and other such statutes which included exhaustive provisions have been proposed to be replaced by the new laws.

3.3. Changes during COVID-19 Lockdown

The lockdown imposed and the subsequent policies imposed by the centre government in light of the pandemic were under the Disaster Management Act, 2005. The Act bestows the Central government with various powers irrespective of the ones in force at the time, to make laws in response to the disaster situation (Ram Mohan & Alex, 2020).

The National Disaster Management Authority (NDMA) has 30 guidelines formulated on a plethora of natural disasters one of which is the 'Guidelines on Management of Biological Disasters, 2008'. The National Disaster Management Plan of 2019 also suggests exhaustive guidelines in relation with Biological Disaster and Health Emergency.³ A useful summary of the state responses to the COVID-19 pandemic can be found in Das et al. (2020). In general, the invoking of this act has

² Furthermore, the Constitution of India provides for movement and occupational liberties to the citizens of the country under Chapter III regarding Fundamental Rights.

³ NDMA and their state counterparts are mandated to provide 'minimum standard of relief' to disaster affected persons (Ss 12 and 19), including relief in repayment of loans or grant of fresh loans on concessional terms (S. 13).

implications for how labour is regulated, especially in terms of mandating the types of permitted activities within a particular jurisdiction (typically a state). Thus, specific activities that were barred during the lockdown could have disproportionately impacted those in the informal sector (e.g. street vendors, service professionals who do not operate under the gig economy or under aggregators), say in terms of food insecurity in the agricultural sector (Ramakumar, 2020) or mental health (Choudhari, 2020). This means that many of them would have had to return to their place of origin, without recourse and additional uncertainty about resumption of such work. As Srivastava (2020) notes, the complications of not being able to access social benefits during the lockdown may have further exacerbated the decline in welfare of migrant workers.

8. Discussion

Forming (and consolidating) labour laws in India has always been a challenge for governments, regardless of their political orientations or objectives. In the immediate aftermath of new laws being passed, both the Social Security Codes have met with considerable criticism on account of not adequately accounting for migrant workers in the informal sector.

Disincentives for hiring:

The Inter State Migrant Workers Act, (1947), among others, imposed limits on establishments for registration in order to hire migrated individuals. This imposes restrictions on establishments less than the required limit to hire these workers, and even if they do by skirting the laws.

Additionally, the restrictions so imposed in the new laws provide no regulations for establishments with less than 10 employees (the requisite for an establishment to register) for employing individuals who have migrated. Thereby, disregarding a sizable part of the Indian economy.

Additionally, while the government has regulated the employment of migrated individuals; they have not (and cannot) regulate the choice that these individuals make to migrate in search of employment; owing to their fundamental rights as a citizen of the country. This imbalance in regulation might accentuate vulnerabilities which might be seen in the case of the migrant labourers. As Kapoor (2020) notes, there is likely to be a short-term imbalance in labour supply in urban areas as migrants displaced due to the lockdown may not be able to return and resume work when restrictions are eased. In this way, not just the livelihoods of migrant workers are affected, but also those who might rely on their labour. Developing social protection policies to complement creation of 'flexibilities' in labour laws is one way in which such adverse outcomes could be overcome (Sengupta & Jha, 2020)

Implementation of policies:

While the policies regarding labour and wages appear well intentioned theoretically, their feasibility in implementation remains to be seen. This is not just because of bottlenecks in state capacity during the lockdown and COVID-19, but also due to the transition time from becoming a law to being implemented at local levels (Ghosh et al., 2020). Moreover, the mitigating factors being the welfare of the migrated individuals and the economic development of the country; the former often being traded off in measured amounts for the latter in the form of ease of doing business for the industries. While the policies themselves are likely to leave migrant workers in the informal sectors more vulnerable, heterogeneities in effective implementation of the existing policies could further add to these vulnerabilities.

Potential Policies:

The overarching aim of the policies and laws being to ensure that the vulnerabilities of the community are addressed while also ensuring economic development. The mitigating factors in trading off the welfare of the migrant and minimum wage workers must first ensure the resilience building of these workers. This may be done by further building on and clarifying wage laws of the country or by following past examples of including informal sector workers in the workforce. A useful example is that of the *mathadi* workers in Maharashtra (Jatav & Jajoria, 2020), where after a protracted period of lack of regulation, casual workers (previously unorganized) were brought into the regulated workforce.

As Sapkal (2020) argues, greater clarity on the role of unions in protecting vulnerable workers is important for future policy. Indeed, Serrano and Xhifa (2016) suggest that when informal/unorganized sector workers come together to unionize, they are not only able to have better collective bargaining abilities, but that they are also likely to result in better social security for their workers. This can particularly be explored not just by public policy, but also by civil society organizations working to provide relief to migrant workers affected by the COVID-19 crisis.

4. Concluding Remarks

The situation with the pandemic, has exposed many vulnerabilities of those employed in the unorganized sector in the country. Recently announced policies are targeted at ensuring that the economy is buffered from the seemingly adverse COVID-19 and lockdown events. However, it is important that such laws do not overlook the effects on the most vulnerable in Indian society, with little to no access to formal social security -- migrant labourers in the informal sector (as well as their families).

The government today faces a trade-off between ensuring that industrial units are able to resume work despite the pandemic and lockdown and protecting the livelihoods of workers in these industrial units, who are typically migrant workers. The recent labour bills are an important step in consolidating labour laws and regulations that previously were subject to extensive litigation. They provide an opportunity to build the resilience of the labour market of the country while also building resilient industries.

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