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An analysis of the impact of India's Labour Codes on its organized and unorganized sectors

Rajrishi Ramaswamy¹ and Dr. Anuradha Binnuri^{2*}

Abstract: Labour law in India consisted of various legislations, most of whose underlying objectives were furthering social welfare and security. India's labour laws saw a supposed revolution in 2020, with the consolidation of the existing laws into four new Labour Codes. This article focuses exclusively on the impact of the Codes on India's unorganized sector as well as its Information Technology ("IT") Sector in which the pink-slip trend is rampant. It also studies how the inapplicability of the Codes to the unorganized sector adversely affects its stakeholder. This analysis is much needed, especially in light of recent socio-economic trends pertaining to labourers in India, especially in newer sectors like Information Technology, specifically the pink-slip trend in the IT sector which was seen to be rampant during the COVID pandemic period. The analysis on the unorganized sector is also significant as it highlights the lacunae in the existing laws and also emphasizes on the insufficient reforms ushered in by the Labour Codes. The article uses the doctrinal methodology of legal research to gather and analyze the data. It also provides an overview of the labour law regime in India and its culmination into the four Labour Codes and ultimately establishes the insufficiency of the Codes in their existing form and suggests prospective reforms.

Subjects: IT & the Law; Asian Law; Public Law; Human Rights Law & Civil Liberties; Law, Ethics and Professional Values; Social Work Law

ABOUT THE AUTHORS

Rajrishi Ramaswamy is a fourth-year law student at Symbiosis Law School, Hyderabad, with over 21 publications to his credit in the form of journal articles, book chapters and blogs. The instant article is a reflection of the research he has conducted on India's new Labour Codes and how they have affected different stakeholders. Anuradha Binnuri is the Deputy Director of Symbiosis Law School, Hyderabad, who has experience spanning over 30 years in the legal academia field. She is also a published author with numerous publications to her credit in journals of national and international repute. The instant research article is based on research done in pursuant to her specialization subject viz., Labour Laws.

PUBLIC INTEREST STATEMENT

This article focuses on an area of law which is applicable to every person with an employment viz., labour laws. It analyzes the new Indian model of codified labour law legislations and attempts to highlight the fallacies in it. The content in this article is beneficial not only to Indian readers but also to readers who are interested in different kinds of labour law regimen across the world.

| **Keywords:** IT sector; labour; Labour Codes; labour law and unorganized sector

1. Introduction

The genesis of labour law is to provide effective solutions to the clash between the rights of labourers and the existing socio-economic conditions which are violating said rights. In this context, India's labour law regime is very comprehensive, given that there are approximately 16 legislations which govern labourers in the country. These legislations were mainly brought into force during the British colonial rule in India, and most of the said legislations are still in force throughout the country, despite it being around 76 years since India attained independence.

In India, the State is duty-bound under the Constitution to ensure welfare of workers and labourers. The duty of the State to formulate these laws is enshrined in Part-IV of the Constitution of India 1950 which deals with the Directive Principles of State Policy ("DPSP"), specifically through Articles 39, 41, 42, 43, 43A and 54. The Constitution has categorized labour as a subject in the concurrent list (Entries 22 to 24) which therefore enables both the Central Government and State Governments to legislate on the subject. Furthermore, international conventions of the International Labour Organization ("ILO") are also a major source for formulating many of these laws. However, India has only ratified four of the eight core conventions of the ILO, despite the positive influence of the ILO on India's labour policy and organizations has been recognized as long ago as in 1956 (V. K. R. Menon, 1956, pp. 551–571). This has many implications, but the biggest implication that arises is the Legislature's seeming lack of involvement *qua* recognition of the dynamics of workers' rights and accordingly formulating new legislations or updating existing ones so as to bring about correspondence with the contemporary social scenarios.

Albeit Indian labour law is comprehensive, there are certain shortcomings in its applicability to different sectors, which undermine the objectives of these laws. Notably, the Indian regime has also been unable to address the issues faced by employees in the Information Technology ("IT") sector, issues which are blatant violations of the provisions of labour law legislations, especially in recent times. These issues still persist despite the recent "reform" in India through the consolidation of labour law legislations into four "Labour Codes", viz., The Code on Social Security 2020 ("SS Code"), the Industrial Relations Code 2020 (*hereinafter* "IRC"), The Code on Wages 2019 (*hereinafter* "Wage Code") and the Occupational Safety, Health and Working Conditions Code 2020 (*hereinafter* "OSH Code"). Notably, these Labour Codes have yet not been officially notified, which implies that they are not yet enforceable as law. This is crucial because an analysis of the various provisions of the four Codes in the pre-notification stage would result in a higher scope for spotting lacunae and accordingly suggest methods to remedy the same, which is the ultimate objective of this article.

This article seeks to achieve the aforementioned objective in a two-fold manner viz., it takes into account the viability of the new Codes in both the unorganized and organized sector (through an analysis of the IT sector) and then proceeds to enlist various solutions by way of modifications to the Codes as they exist.

Thus, the research questions on which this article is based are: (a) what is the viability of the new Codes *qua* India's organized and unorganized sector? and (b) what are the remedies that can be implemented to eliminate the threats to its viability?

To research on the aforesaid questions and prove the stated hypothesis, this article uses doctrinal methodology of legal research; also known as armchair methodology, this methodology is defined by the usage of secondary sources of data in order to formulate the objectives, questions and hypothesis of the research. Moreover, all the articles referred to have been duly cited and the respective authors have been duly identified and credited.

This article further has a dual scope, whereby it addresses both generic and specific impacts of the Labour Codes. Incorporation of the IT sector analysis alongside the analysis of the impact of the four Codes on the unorganized sector is being done for two reasons: (a) such analysis would lead to a more holistic understanding of the various issues faced by the respective labour classes and the remedies for the same which have been provided to them under the new regime and (b) the IT sector in India has assumed a mammoth status ever since 2012, when its aggregate revenues had crossed US\$ 100 billion and through its exponential growth in the years that followed (Bhattacharjee & Chakrabarti, 2015); however, the law governing the employees in the sector has remained static and this position remains unchanged even after introduction of the new Codes.

It is acknowledged that some of the implications discussed in the unorganized sector may seemingly overlap with the implications in the IT sector analysis. However, it is to be noted that the discussion on the unorganized sector is more provision-oriented, whereby specific provisions of the Codes are examined and their insufficiency highlighted *qua* the unorganized sector. On the other hand, the IT sector analysis is much more generic in nature and addresses the ramifications of non-extension of certain legislations to the sector even in the post-Codes regime.

Before embarking on the analysis, it is crucial to define a few key terms which recur in this article. Since the legislative definitions are discussed at appropriate sections, generic explanations of the same are hereby discussed. “Organized sector” is characterized by the presence of systematic activities and larger number of employees, whereas “unorganized sector” is characterized by self-employed persons and other individuals and which has not more than ten workers (fixed under the law). Another key term is “pink-slip”, which is nothing but a term colloquially used to describe the dismissal or removal of employees from employment.

Ultimately, this article hypothesizes that the new Labour Codes have failed to meet their fundamental objectives in both organized (specifically the IT sector) and unorganized sectors and are unviable in terms of bringing reform to India’s labour, at least in their existing form. It also enlists solutions to address the Codes’ failure and modify them so as to align them with their objectives.

2. Labour law in India—differentiating employees and workers

Under the Indian labour law regime, three key terms on which the applicability of the laws are based are: “employee”, “workmen”; and “worker”. In order to better understand the labour law regime in India, it is imperative to differentiate between “workman” and “employee”, especially from the lens of the Industrial Disputes Act 1947.

2.1. Pre-Labour Codes

Before the Codes were introduced, the differentiation between workman and employee under the Indian labour law regime was primarily left to the Courts, as the Legislature did not provide for any express differentiation in that regard, in the ID Act. However, the definition of “employee” was separately provided for under the Employee State Insurance Act 1948, but even that definition is specific to the scope of that Act and cannot be used interchangeably with other labour-law legislations.

The definition of “workman” under the Act excludes certain classes of employees including those in a managerial or supervisory capacity, with an income lesser than Rs. 10000/- per month. Interpreting this definition, Indian Courts have over the years identified key factors to be taken into consideration when determining whether or not an employee is a workman under the ID Act. An important judgement in this regard is *Arkal Govind Raj Rao vs. Ciba Geigy of India Pvt. Ltd.*,¹ in which the Supreme Court held that the basic and primary duties of the employee are to be taken into account, which would exclude any additional duties. The observation is in-line with clause (iii)

of Section 1(s), which excludes employees in an administrative capacity from the purview of workman under the Act.

Notably, the Courts have also considered whether or not different types of employees are included or excluded from the purview of “workman”; these types include employees in a supervisory capacity as held in *G.M. Pillai v. A.P. Lakshmikar Judge*,² part-time employee as recognized in *Bombay Dyeing and Manufacturing Co. Ltd. v. R.A. Bidoo*,³ employees in a technical capacity, etc.

Therefore, under the old regime, it was the Courts and not the Legislature which played a key role in determining which classes of employees would be considered “workmen” under the Act. This determination was crucial because the existence and enforceability of a myriad of rights by an employee, was contingent upon such determination.

However, it is not the case that the Legislature has absolutely not taken any step with respect to clearly delineating workmen and employees. One instance of legislative recognition of this difference is the 2009 Amendment which was made to the Workmen’s Compensation Act 1923, through which its name was changed to Employees’ Compensation Act. Penfold (2009) was enacted to give effect to the recommendations of the Second National Commission on Labour which was established in 2002 (Second National Commission, 2002). *Inter alia*, the report recommended changing the word “workmen” in the short title of the Act to “employee” in order to extend legal protection to employees who are excluded from the ambit of “workman” under labour law legislations (Second National Commission, 2002). By enacting this amendment, the Legislature had shown its willingness to provide an express differentiation between employees and labour. Unfortunately, this differentiation was limited only to the aforementioned Amendment Act and no step in that regard was taken in the future, which led to ambiguities persisting as to the scope of many other labour law legislations in the country.

Since this article revolves around the new Labour Codes, it is imperative to examine whether or not the Labour Codes have taken a step in the direction of expressing legislative differentiation between workmen and employees.

2.2. Post-Labour Codes

With the introduction of the Labour Codes, the focus has seemingly shifted from the Courts to the Legislature. This is because the Codes have uniformly adopted the definitions of “employee” and “worker”; with the only exception being the Social Security Code, which does not contain the definition of “worker”. Under the Code, an employee has been defined as a person working in an establishment, other than Apprentices, employed on wages to do *inter alia*, skilled, semi-skilled and unskilled work, whether terms of employment are implicit or express. As opposed to a single definition of worker, the SS Code differentiates between different types of workers (unorganized worker, gig worker, etc.) and defines them separately.

Thus, it can be inferred that the bases for distinction between an employee and a workman have been retained in the new labour Codes, with higher emphasis being laid on the form of remuneration received by an employee as a factor.

In this context, the definition of “wages” under the Codes becomes relevant. As per said definition, wages mean all remunerations including salary, allowances, etc., expressed in monetary terms or capable of being expressed as such and which is paid to a person upon fulfillment of the necessary conditions in his employment, whether such conditions are expressed or implied. Wages also include basic pay, dearness allowance and retaining allowance but do not include *inter alia*, bonus, conveyance allowance, etc. Table 1.

Although the above definition *per se* is not problematic, it is the provisos to the same which cause confusion as to the applicability of wages. This is because both the clauses to the

Table 1. Brief description of the scope of legislations referred to in this article and their relevance to it. The new Codes have not been included in the below table

Name	Scope	Relevance to article
Employee's State Insurance Act 1948;	Furnishing employee with insurance benefits in cases of sickness, maternity, injuries, etc.	These legislations encapsulate the nature of the regime governing India's unorganized sector in the pre-Codes era. They are relevant to the instant article as their provisions have been replicated in the Social Security Code, through Section 164.
Employee's Provident Funds and Miscellaneous Provisions Act 1952;	Establish a Provident Fund to be used for inculcating savings habit among employees.	
The Employment Exchanges (Compulsory Notification of Vacancies) Act 1959;	Compulsory notification of vacancies to employment agencies.	
The Maternity Benefits Act 1961;	Provisions regarding maternity benefits across organizations in different sectors.	
The Payment of Gratuity Act 1962;	Provisions for paying gratuity to employees in different organizations.	
The Cine-Workers Welfare Fund Act 1981;	Establish a Fund specifically for workers in the cinema sector.	
The Building and Other Construction Workers' Welfare Cess Act 1996;	Incorporate and charge a cess dedicated for welfare of construction workers.	
The Unorganized Workers' Social Security Act 2008	Provisions relating to social security of employees in the unorganized sector	These legislations encapsulate the nature of the regime governing India's IT sector in the pre-Codes era. They are relevant to the instant article as their provisions have not been taken into consideration <i>qua</i> the IT sector (and organized sector generally) in the new Labour Codes
Trade Unions Act 1926	Provisions to regulate registration and functioning of Trade Unions in applicable organizations	
Payment of Gratuity Act 1936	Provisions for paying gratuity to employees in different organizations.	
Minimum Wages Act 1948	Ensure fixation, revision and payment of minimum wages to specified employees	
Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013	Safeguard women employees from sexual harassment at the workplace	

subsections of the provision as well as the provisos dealing with calculation of wages, equal remuneration to genders, etc., mention only the wages paid by an *employer* to an *employee*. Due to this, either the differentiation between an employee and a worker becomes redundant or it is to be understood that “wages” are not applicable to workers. This perhaps also explains the poor implementation of these laws, especially such as laws on equal remuneration, which have not done an adequate job in minimizing the large wage differential between men and women (Agarwal, 2014, pp. 329–340). Therefore, to uniformize the definition, either of the following modifications have to be made:

- (1) The term “wages” must be specifically attributed to employees as well; and
- (2) The provisos need to use the word “worker” in place of “employee” so as to avoid ambiguities.

It is further recommended that the current basis for distinction between the two terms be shifted to a sectoral basis; viz., on the basis of whether the person is employed in the organized or unorganized sector. The reasons for this proposition have been elaborated in the subsequent

sections of this article, when dealing with the provisions of the SS Code which deal with the unorganized sector.

In this regard, the laws of the United Kingdom can be used as a reference point to incorporate separate definitions of employees and workers. Under the UK labour law regime, there are a total of four distinct definitions pertaining to who are covered under the regimes; they are worker, employee, jobholder, apprentice (Deakin & Morris, 2019). The laws also define what an “employment relation” is and this definition covers a separate set of rights (Deakin & Morris, 2019). Thus, it can be seen that under the UK laws, there is a clear demarcation of various types of workers and employees and the rights of each type have been safeguarded and provided for through legislative enactments. Under this regime, workers are recognized to be the more vulnerable class who require higher degrees of protection as opposed to employees and thus the provisions pertaining to workers have more weightage than compared to the provisions relating to employees or the other two aforementioned types, as was recognized in *Lawrie-Blum v. Land Baden-Württemberg*.⁴ Notably, the differentiation incorporated under the UK regime is also in accordance with the themes which are recognized by the ILO for comparing labour law regimes of different countries (Almutairi, 2020).

Given the commonalities between Indian laws and UK laws, there is very little doubt that modifying the present definitions under the Indian labour laws to make them similar to those under the UK laws would benefit all stakeholders involved. Such a step would also lead to the Legislature finally providing an express differentiation between employees and workmen, a move which has been long pending since the aforementioned Amendment Act passed in 2009.

3. Interplay between labour law, social security and the unorganized sector

Before the labour laws in India were consolidated into the Labour Codes, most of the legislations under it were social-security-centric. These legislations were repealed and replaced by the SS Code, under Section 164; they include:

- (a) The Employee’s Compensation Act 1923 (previously known as the Workmen’s Compensation Act, 1923);
- (b) Employee’s State Insurance Act 1948;
- (c) Employee’s Provident Funds and Miscellaneous Provisions Act 1952;
- (d) The Employment Exchanges (Compulsory Notification of Vacancies) Act 1959;
- (e) The Maternity Benefits Act 1961;
- (f) The Payment of Gratuity Act 1962;
- (g) The Cine-Workers Welfare Fund Act 1981;
- (h) The Building and Other Construction Workers’ Welfare Cess Act 1996; and
- (i) The Unorganized Workers’ Social Security Act 2008.

From their titles itself, the social character of these legislations can be inferred. In other words, the long titles of these Acts read with their respective Preambles clearly highlight that these legislations all have one aspect in common viz., all of them have social justice and social welfare as underlying objectives for their enactment. Correspondingly, their objectives too focus on social security. Therefore, it is not unreasonable to expect that the SS Code, which is a consolidation of all these aforementioned legislations, would rectify all the shortcomings in said legislations, so as to further their objectives without any hindrances.

The primary shortcoming (which the SS Code has unfortunately not done much to rectify) is that all these social security legislations were practically not applicable to the unorganized sector, because of the restrictive definitions contained therein. For instance, establishments in the

unorganized sector rarely have persons who meet the essentials in the definition of an “employer” due to the unique natures of work in the sector.

These issues are also prevalent in another legislation which specifically pertains to the unorganized sector viz., the Unorganized Worker’s Social Security Act 2008 (*hereinafter* “2008 Act”). The Act does not define the term “worker” but only defines what the unorganized sector is that too in arbitrary and restrictive terms. The Act merely defines “unorganized worker” and applies the definition to all workers in the sector.

Unfortunately, the definitions contained in this legislation, along with the provisions of the same, have simply been replicated into the SS Code without any significant amendment, which means that the shortcomings in the 2008 Act, along with the shortcomings in the other relevant legislations, have been consolidated into the said SS Code. Therefore, in order to understand the issues in the applicability of social-security legislations (now the mentioned Code), it is necessary to elaborate upon the issues in the Code:

- (1) Arbitrary and restrictive definition of the unorganized sector: The definition of unorganized sector has been copied from Section 1(l) of the 2008 Act and pasted as Section 1(85) of the Code. The definition classifies unorganized sector as an “enterprise owned by individuals and self-employed workers engaged in production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.” “Unorganized worker”, as per Section 1(86) of the Code, also includes home-based, self-employed or a wage worker.

Notably, the definition of unorganized sector does not relate the sector to unorganized workers. A plain reading of the provision gives the meaning that unorganized sector comprises of individual or self-employed workers who provide goods or services; it does not mention wage workers, who are considered unorganized workers as per the definition in subsection. (86)

Furthermore, the provision arbitrarily places a restriction of a maximum of “ten” workers being employed by an enterprise, for it to be considered unorganized. This restriction is problematic because it raises a mere technicality on which basis the benefits to an enterprise which is actually in the unorganized sector, can be denied to it.

- (2) Definition of “gig worker”: Under Section 1(35) of the Code, a gig worker is “a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship”.

A bare reading of this provision gives the impression that it is the definition of a worker in the unorganized sector. By separately and inadequately defining the terms “unorganized sector” and “unorganized worker”, the SS Code has effectively stopped the applicability of the definition of a gig worker to the unorganized sector, which therefore means that the benefits available under the SS Code can be enjoyed by gig workers, but not workers in the unorganized sector.

Notably, this definition could also have been modified based on the definition of “*badli workers*” contained in the Explanation to Section 25C of the ID Act. By not doing the same, *badli workers* have been deprived of the benefits under the Code.

- (3) Non-implementation of Section 5: Section 5 of the Code, borrowed from Chapter-III (comprising Section 4) of the 2008 Act, provides for the establishment of the National Social Security Board for Unorganized Workers and State Unorganized Workers’ Board. In the 14 years since the enactment of the 2008 Act, this National Board has not yet come into existence. It is hoped that the Board will be constituted expeditiously, post-notification of the Codes.

In fact, one of the only ten State Boards constituted under this Act which is presently functioning is the Uttar Pradesh Unorganized Workers Social Security Board, which caters only to the Northern State of Uttar Pradesh (UPSSB). Twenty-three other states had still not established the Board as of 2013, i.e., five years after the 2008 Act was enacted. Therefore, by not establishing the National

Board and not ensuring the establishment of State Boards by all the States, the objectives of the 2008 Act stand defeated.

Moreover, the functions of the National Board enumerated under the mentioned provisions give it only an administrative and supervisory character, which are insufficient for it to perform actions which will actually benefit the unorganized sector.

- (4) Central Government Schemes under Section 45: Section 45 of the SS Code enables the Central Government to frame schemes for unorganized workers, gig workers and platform workers. However, the enacting of such schemes is not a mandate under the SS Code but has been left to the discretion of the Central Government, by the use of the word “may” to qualify the Central Government’s power to enact said schemes.

By leaving such an important task to the discretion of the Central Government, the SS Code yet again puts its main objectives in jeopardy, as the lack of a mandate undermines the assurance of the formulation of such schemes. It is therefore imperative that this position be changed and a more forceful mandate be imposed on the Central Government, in furtherance of not only the objectives of the Code, but also of the Constitutional provisions in that regard.

Moreover, Chapter IX of the Code, particularly Section 109, provides for the implementation and funding of the aforesaid schemes. Subsection (4) mandates the Central Government to provide for matters necessary to implement the provisions of the schemes including its scope, authority, etc. However, this mandate becomes irrelevant when the formulating of such schemes itself is a matter of discretion. Therefore, although this provision is effective, it cannot be given true effect unless and until the abovementioned changes are brought about.

- (5) Registration Procedure: The registration procedure envisaged under Section 113 of the SS Code has been borrowed from Section 10 of the 2008 Act, with a few additions being made. In essence, the provision provides that in order to avail the benefits under the SS Code as well as the schemes formulated by the Central Government for the unorganized workers, they are to be mandatorily registered. Additionally, under subsection (1), the person is to be older than 16 years of age and also must have submitted a self-declaration electronically or otherwise. The remaining procedure entails the workers to make an application for registration to the Central Government by furnishing *inter alia*, his Aadhaar card.

Given the state and nature of the unorganized sector, this registration procedure only brings unnecessary complexities and bureaucracy into a legislation whose effective implementation would be done if such complexities are avoided in the first place. Moreover, the provision fails to consider the underlying objective of the Code, i.e., provision of social security, by subjecting it to fulfillment of a bureaucratic condition.

Although it is understood that registration is necessary to ensure that the benefits of the schemes under the SS Code are not misused, the procedure can be simplified and extensive focus has to be laid on its implementation, lest it becomes like the case of the National Social Security Board.

Apart from the aforementioned issues with the SS Code as well as the 2008 Act, another glaring issue relates to the National Social Security Fund, which was envisaged to be established, in the budget for the Financial Year 2010–2011. Although its establishment is to fulfill laudable objectives, the Fund has served no real purpose, especially during the lockdowns induced due to the Pandemic. Furthermore, studying the audit reports of the Comptroller and Auditor General of India for the Financial Years 2010 to 2017 reveals that the Fund is mismanaged and not utilized for its true purpose (Upadhyaya, 2020).

Therefore, the above analysis of the relevant provisions of the Social Security Code, which are mere replications of the 2008 Act, reveal that there are numerous issues with the applicability of social-security legislations in India to the unorganized sector. The most concerning aspect is that many of these issues arise from the shortcomings within the provisions of the SS Code itself, something which requires immediate rectification. Other issues mentioned arise from lack of implementation of provisions of the Code, whose implementation can actually benefit the workers in the unorganized sector.

4. Indian labour law and the pink-slip trend in IT sector

As seen in the preceding section of this article, the question as to whether a particular industry or a particular employee would fall within the meaning of “industry” and “workman” under the provisions of the ID Act was determined on a case-to-case basis in the pre-Labour Code regime. However, such determination was not made expressly in any judgement of the Supreme Court, in the context of the IT sector.

However, IT employees were expressly recognized to be a “workman” under the ambit of the IT Act by the Tamil Nadu Government and the Karnataka High Court. The Tamil Nadu Government through a circular in 2016 declared that employees in the IT sector will be covered by the provisions of the ID Act, in the context of formation of trade unions (Singhania and Partners, 2016). The Karnataka High Court, in *The Commissioner of Income Tax and Anr. v. Texas Instruments India Pvt. Ltd.*⁵ held that an employee in the IT sector would be considered a “workman”, for the purpose of computing tax exemptions under Section 80(JJAA) of the Income Tax Act, 1961.

However, given that both the above circular and judgement are only applicable to Tamil Nadu and Karnataka, respectively, they cannot be taken into account when analyzing the entire Indian legal regime as a whole.

Therefore, it would be crucial to firstly identify which legislations expressly apply to the IT sector, based on which the validity of the Pink Slip trend and its future in Indian IT sector can be analyzed.

4.1. Legislations applying to the IT sector

India’s labour law regime is designed ambiguously in respect of its applicability to the Indian IT sector, whereby many legislations in the regime do not apply to the IT sector. Some of the legislations which supposedly apply are:

The Trade Unions Act 1926: Section 1(g) of the Act defines “trade dispute” and the definition also defines “workman” as “all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises”. The right of employees to form a trade union is constitutionally-backed and has also been recognized by Courts. Interestingly, trade unions were formed in Indian IT companies in the past (R. Menon, 2021). Four states in India have recognized that the Act applies to IT companies within their territories (Sinha, 2019). Furthermore, organizations such as Union for ITES Professionals (UNITES), the IT Professionals Forum (ITPF), and the Young Professionals Collective (YPC) have been recognized as pioneers in the professional mobilization of India’s IT professionals, as early as in the year 2010. (Stevens & Mosco, 2010)

The Payment of Gratuity Act 1936: The definition of “employee” given under Section 1(e) of this Act is a “means and includes” definition which is inclusive in nature and which extends to *inter alia*, all shops and establishments to which the Act applies. Under Section 1(3), what constitutes shops and establishments has been left to the relevant legislations of the States.

The Minimum Wages Act 1948: Under the First Schedule to this Act, the employments to which the Act extends have been enlisted. The definition of employee as provided under Section 1(i) is largely inclusive and expressly excludes members of Air Forces of the Union from its purview.

The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013: This legislation, which was brought in force to give legislative recognition to the guidelines of the Supreme Court in *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011),⁶ also has an inclusive definition of “employee”, defined under Section 1(g). However, this Act faces a dichotomy *qua* its implementation, whereby although it is a labour law legislation (usually implemented by the Ministry of Labour and Employment), it is implemented by the Ministry of Women and Child Development (Chigateri, 2021). Naturally, this dichotomy can have adverse implications with respect to presence of the provisions in the new Codes and their implementation.

While the inclusive definitions under the abovementioned legislations give a *prima facie* view that they are also applicable to IT companies, in the absence of legislative recognition or a binding precedent of the Supreme Court, this view cannot be taken to be the correct position of law, as there is still scope for interpretation of the provision.

Specific to the context of pink-slips, the relevant legislation is the ID Act, which also seems to *prima facie* be applicable to the IT sector. However, this assumption cannot be treated as unequivocally true, in the absence of express laws or precedent. This is despite the fact that the Supreme Court in *Bangalore Water Supply and Sewage Board v. A. Rajappa and Ors.* extensively widened the ambit of “industries” within the Act by propounding the triple test.

The triple test laid down in *Bangalore Water Supply and Sewage Board* to identify whether the Act applies to an industry is as follows:

- (1) Presence of systematic activity irrespective of profit motive;
- (2) Systematic activity should result from co-operation between employer and employee; and
- (3) Organizations which have elements of philanthropy cannot be out of the ambit of industry.

Although this test can be used to gauge applicability of the ID Act to the IT sector, there is still ambiguity as to such applicability. Moreover, to better understand why legislative or judicial recognition is much-needed in this context, the assumption of its inapplicability will have to be taken to be true.

The direct consequence of this assumption being true is that the Pink Slip trend would continue to be rampant, without any checks or balances to counter the same. As it is, in the status quo, private sector employees receive lumpsum amounts at the time of their retrenchment; the calculations behind these amounts and whether or not they are inclusive of gratuity, retrenchment compensation, etc., are best-known to the employer and are ambiguous to the employees.

Worse, employees will also not be able to seek compensation for their lay-off or retrenchment or challenge the amount paid to them by the employer before any Court or Tribunal, because whether or not the rights under the ID Act are enforceable by them, is ambiguous. When this situation arises, employers find it easier to lay-off or fire their employees *en masse*, a trend which is rampant in recent times (Kashyap, 2023). Therefore, the only effective counter to this issue is to include IT employees within the ambit of “workman”; three benefits arise out of such inclusion:

- (1) The employees will be enabled to seek retrenchment compensation and the remedies available thereunder in cases of insufficient compensation;
- (2) There will be greater transparency to the employees regarding what compensation or benefits they are being offered at the time of retrenchment; and
- (3) In case of mass lay-offs, each of the employees or all the employees together will be empowered to approach the relevant judicial fora if aggrieved.

Absence of an express legislation or provision which extends the benefits under the IT Act (as well as other labour law legislations) to the IT sector would imply that the State has contravened Directive Principles of State Policy (*hereinafter* “DPSPs”) enshrined under Articles 39 (Certain principles to be followed by State), 41 (Right to work, education and public assistance in some cases), 42 (Provision of just and humane conditions of work and maternity relief), 43 (Living, wages, etc., for workers) and 43A (participation of workers in management of industries) of the Constitution of India 1950. Although DPSPs are not enforceable before the Court of law, the Apex Court in *State of Madras v. Champakam Dorairajan*⁷ has recognized its significance and its need to run subsidiary to the Fundamental Rights guaranteed under the Constitution.

In light of the State's duties as well as the ramifications of non-applicability of ID Act to the IT sector, express legislative or judicial precedent becomes extremely crucial for employees in the sector to be able to enforce their rights, especially in case of those employees who have been handed the pink slip.

4.2. Post Labour Codes

In the light of the provisions of the ID Act not being of any considerable use to IT sector employees who receive pink-slips, the next consideration would be on if and how this position has changed under the Labour Codes. The Code that becomes relevant here is the IRC, which repealed the ID Act. Unfortunately, as was the case with the Social Security Code, provisions of the ID Act have simply been replicated in the IRC.

This means that the following issues are still persisting in relation to IT sector employees:

- (1) Lack of awareness on Labour Laws which can assist them at least in bringing about representations regarding their pink-slips;
- (2) The law itself being unclear about its applicability to the IT sector; and
- (3) Employees being deprived of possible remedies against pink-slip.

From the above analysis of the relevant provisions of the ID Act and the Labour Codes, it is clear that the pink-slip trend in India's IT sector has not yet been viewed from the legislative lens, which is extremely problematic, as the trend by itself defeats the very objectives of labour laws. This trend becomes especially concerning in light of the plight suffered by IT sector employees during the COVID-19 pandemic, when retrenched or laid-off employees were hesitant to seek legal redressal against their termination from employment, as shown in a study conducted in December, 2020 (Dash & Dash, 2020, pp. 703–716). All these issues are further magnified by *inter alia* rampant corruption, poor execution of the laws, nascency of the sector and other factors, which are also seen as reasons for the “off-shoring trend” to arise in India, which is however not within the scope of this article (Penfold, 2009, pp. 91–106).

Although in case of job losses, the IRC does provide for benefits under the Atal Bimit Vyakti Kalyan Yojana, these provisions have to see from the definition of “worker” in the Code, which has been discussed in the preceding sections. When seen from that perspective, the substantive value of this scheme becomes doubtful.

The position of IT employees under the Indian labour law regime is inferior to that of employees under the UK regime. For instance, laws in UK focus on areas such as privacy of IT employees, which is an aspect not at all provided for under Indian law (Jeffery, 2002). Therefore, it is evident that Indian legislations were always lacking in provisions pertaining to protection of rights of IT employees. While the new Labour Codes could have dealt with this issue in many different ways, it is unfortunate that no such initiative has been taken by the Legislature, which therefore places the rights of Indian IT employees at an inferior stage to IT employees in foreign jurisdictions.

5. Labour Codes—have they achieved their objectives?

The analysis of the provisions of the SS Code and the IRC reveals that the provisions are in no way shape or form an improvement from the pre-existing legislations. In fact, all that the Labour Codes have done in the name of consolidation is to actually replicate the provisions of the previous legislations.

This therefore means that not just the effective provisions from the previous legislations have been carried forward into the Codes, but even the ineffective provisions which needed modifications have been incorporated into the Codes, as argued hereinabove.

A booklet published by the Ministry of Labour and Employment of the Government of India on the new Labour Codes makes it evident that the primary objective of the Codes is to provide an escape to the employees from the “web of legislations”, which made them file multiple forms for claiming even a single benefit (Kashyap, 2023).

It is acknowledged that the objectives behind the Codes are laudable. In fact, by consolidating 29 labour law legislations into four Codes, the primary objective of the Codes is seemingly fulfilled. However, the long titles of the Codes clearly specify that the Codes are for both the amendment and consolidation of the laws. It is in the amendment-aspect that the Codes have proved ineffective and hence need to be revised. More particularly, the amendments need to be done in the area of definitions in the Code, especially in terms of properly differentiating employees and workmen as well as recognizing and defining other classes and sub-classes of labour.

Even in terms of consolidation, all the Labour Codes have seemingly done to categorize the legislations into four classes and accordingly *compile* them in that order; here, compilation cannot be equated to consolidation, which therefore means that the Labour Codes have not met even their primary objective.

Furthermore, based on the previous official communications made by the Ministry of Labour and Employment of the Government of India, it seems unlikely that the Codes would be notified sooner (Press Information Bureau, 2022). This effectively means that the provisions of the Codes still can be modified so as to bring about a revolutionary shift in the Indian Labour Law regime (Desai Associates, 2022). Based on the above analysis, it is clear that the modifications which are required to be made are largely with respect to the applicability and extent of the Codes, whereby the Codes are to extend to all industries, notwithstanding the sector they belong to, so that the underlying objects behind enacting the Codes are fulfilled.

6. Conclusion and suggestions

As is, there are many lacunae in the Indian labour law regime. A study conducted in 2021 whereby 1500 minimum wages were analyzed; the study found out that though there were laws in place (which themselves had shortcomings), the glaring difference between *de facto* and *de jure* regulation of minimum wages which was created due to poor execution (Mansoor & O'Neil, 2021). In this context, the lack of proper legislation itself is a major concern and the issue of non-execution becomes secondary. However, it is also worth noting that in the past, it was identified that the BRICS countries including India had benefitted from more protective labour laws which safeguarded social rights, without affecting employment (Deakin et al., 2014).

Simplifying of legislations for the benefit of the stakeholders is almost always a needed initiative. This becomes all the more necessary when concerns regarding the effectiveness of the Codes have been raised by labourers themselves (Siddaramu, 2021) as well as other stakeholders such as Trade Unions (Mohan et al., 2021). Although the Labour Codes seem to be a right step in this direction, this step is taken rather inefficiently, which defeats the very purpose of the Codes. Seemingly, the Codes have failed to take into consideration the different lacunae present in Indian labour law legislations, which render their existence indifferent.

Therefore, it is submitted that the hypothesis viz., “the new Labour Codes have failed to meet their fundamental objectives in both organized (specifically the IT sector) and unorganized sectors and are unviable in terms of bringing reform to India’s labour, at least in their existing form”, stands proved through the above analysis.

Accordingly, the following suggestions are made:

- (1) Define and differentiate “employee” and “worker” not on the type of work performed but based on the sector they work in, so as to clearly provide for the members in the relevant sector, which can also be done by taking inspiration from the labour laws of UK;

- (2) Modify the definitions of “unorganized sector”, etc. such that it is more inclusive and has more clarity;
- (3) Provide legislative recognition to the pink-slip trend in India, especially in the IT sector and make stringent provisions pertaining to the same (along with law extending applicability of all other labour legislations to the sector);
- (4) Simplify the registration and other procedures specified under the Labour Codes, even if they mean deviating from the previous legislations;
- (5) Undertake more research into the various lacunae in all of India’s labour law legislations and the amendments that can be made to them before they are included as part of the Labour Codes, for which purpose a Standing Committee similar to the one constituted in 2009 may also be constituted; and
- (6) After the abovementioned research has been undertaken and subsequent amendments to the labour laws have been formulated, present the same to the public and give them an opportunity to present their views, opinions and suggestions pertaining to the modifications. This will result in a more democratic process behind the Codes and would ultimately lead to larger stakeholder satisfaction.

Additionally, it is acknowledged that although involving public opinion in the process of modifying the Codes will raise numerous complexities, the ultimate authority lies with the Legislature to draft modifications based on a combination of the research undertaken and the insights given through public opinion. Therefore, the complexities which arise can be managed easily and are not a cause for concern.

These suggestions are pertaining to the overall Codes, as well as more specifically to the SS Code and the IRC. If implemented properly and efficiently, it is strongly opined that the changes that would consequently be brought in would benefit all classes of employees and workmen in India, as well as lead to a better labour law regime in the country. It is thus hoped that modifications to this effect will be made before the Codes are notified.

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Notes

1. Arkal Govind Raj Rao vs. Ciba Geigy of India Pvt. Ltd., 1985 AIR 985.
2. G.M. Pillai v. A.P. Lakhmikan Judge, III Labour Court, 1998 LLR 310.
3. Bombay Dyeing and Manufacturing Co. Ltd. v. R.A. Bidoo (1989) (2) BomCR 367.
4. Lawrie-Blum v. Land Baden-Württemberg, [1986] ECR 2121.

5. The Commissioner of Income Tax and Anr. v. Texas Instruments India Pvt. Ltd., (2021) 435 ITR 1.

6. Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

7. State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

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