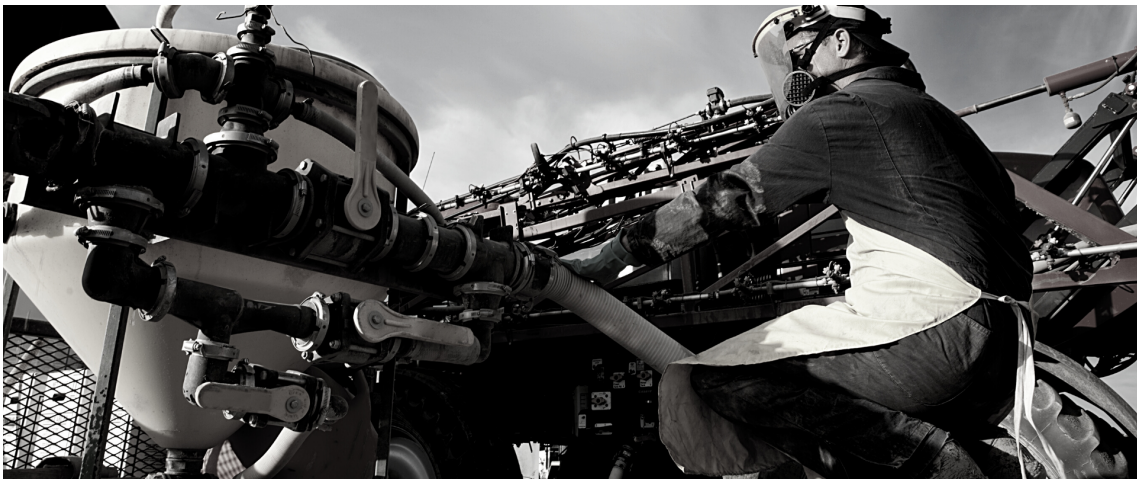


Occupational Safety Continues to be Ignored as a Right

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Newspaper reports of workplace accidents have been appearing with an alarming frequency even as lawmakers have been busy drafting and redrafting the Occupational Safety, Health and Working Conditions Code. During the COVID-19 period alone, 30 industrial accidents occurred in India, killing at least 75 workers and injuring hundreds (IndustriALL Global Union 2020). This article offers a critical review of the code and enforcement machinery to assess whether the new code and the administrative system can ensure safe workplaces.

The Normative and Legal Framework for Occupational Safety and Health

Directive Principles of the State Policy direct the state to devise policies and/or laws to enable both men and women to have the right to livelihood, ensure health and strength of workers (Article 39), provide public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want (Article 41), secure just and humane conditions of work (Article 42), earn living wage and extend conditions of work enabling a decent standard of life and full enjoyment of leisure and social and cultural opportunities (Article 43), among others. This means a secure workplace in all economic activities so that all kinds of workers are able to enjoy uninterrupted employment, and in

the event of an interruption, they should be suitably compensated. Also, the International Labour Organization (ILO) has adopted numerous international labour standards, conventions and recommendations concerning occupational safety and health (OSH) and for implementation of labour laws via labour administration and inspection system (ILO nd). India, however, has ratified only a handful conventions on OSH (C 032, C 115, C 136, C 174) and not the main one, C 155, Occupational Safety and Health Convention, 1981 (No 155).

Occupational Safety, Health and Working Conditions Code, 2019

The National Democratic Alliance government has, in pursuance of the recommendation of the second National Commission on Labour (SNCL 2002), consolidated the numerous central labour laws into four codes, and one of them is the Occupational Safety, Health and Working Conditions Code, 2019 (OSHWCC). It was introduced in Parliament on 23 July 2019 and the same was referred to the Parliamentary Standing Committee (PSC). The OSHWCC “intends to simplify, rationalise and amalgamate the provisions” in 13 central labour laws concerning factories, mines, dock workers, building and other construction workers, plantations labour, contract labour, inter-state migrant workmen, working journalists and other newspaper employees, motor transport workers, sales promotion employees, beedi and cigar workers, cine workers and cinema theatre workers.”^[1] The PSC submitted its report on 10 February 2020 well before the lockdown and did not factor in the undesirable developments especially relating to industrial accidents and the miseries suffered by the migrant workers.

Coverage Issues of the OSHWCC

The OSHWCC applies to “any industry, trade, business, manufacture or occupation ... a factory, motor transport undertaking, newspaper establishment, audio-video production, building and other construction work or plantation, in which ten or more workers are employed” [2(u)(i) (ii)], even as it excludes in the next clause “factories employing 10-20 not employing power” [2(u)(v)] and in the case of plantations applies to those which admeasure five hectares or more [2(zt)]. There are further cleavages with regard to specific provisions, such as welfare officer, etc, and to that extent, the OSH continues to be narrowly applicable. It is disturbing that even after 70 years of the economic development process, the code must dish out segmented rights, that is, restricting rights through differing and higher thresholds and not comprehensively addressing OSH issues in sectors other than mines and factories.

The code has narrow coverage and leaves out the vast majority of economic establishments, including those in the unorganised sector, that is, those employing less than 10 workers. Note that we are not talking of agriculture where OSH and working conditions are unregulated. According to the Economic Census 2016, establishments employing 10 or more workers accounted for only 1.66% of the total establishments in the non-agricultural sector. Even the sector-wise coverage is poor. For example, in manufacturing, it was 2%, in

construction 1.25%.^[2]

It is interesting, even instructive, to note the exchanges between the PSC and the representatives of the Ministry of Labour and Employment (MoLE) as the former pressed for universal coverage (that is, establishments employing less than 10 workers) and the latter stoutly defending the stipulated coverage. What is instructive is the unusual stress on “effectiveness of inspection” as one of the arguments to deny universal coverage. As I demonstrate later in the article, inspection is virtually impossibly difficult and quite limited. On removing threshold and including unorganised workers, the responses were:

"Sir, it is difficult to do it for every individual. Some threshold has to be there. If a threshold is there, then our inspector can go and inspect" (emphasis added).

"The threshold of 10 creates a balance between the rights of the worker and for survival of the small business. Otherwise even a cycle puncture shop will fall under inspection regime." (MoLE 2020)

Continuing the limited coverage of an important law such as this even after 70 years of economic growth is contrary to the directive principles and also the declaration made by the National Policy on Safety, Health and Environment at Workplace, 2009 that it “recognises safe and healthy working environment as a fundamental human right” and aims to “eliminate work-related injuries and diseases” (DGFASLI and ILO nd).

Poor Drafting

Before we proceed to the technical analysis of the code, it is useful to note that the code suffers from not only poor drafting but also conceptual and operational deficiencies. It suffers from the inherent hazard of consolidating diverse labour laws with differing target groups. The Factories Act 1948 targets “workers,” while laws regulating sales promotion and working journalists deal with “employees.” The carelessly drafted code uses “employees” and “workers” confusingly and interchangeably, notwithstanding their differing definitions, as rightly pointed out by the PSC (MoLE 2020, p 46). This basic confusion will significantly affect the rights and responsibilities of the covered workers/employees with respect to OSH.

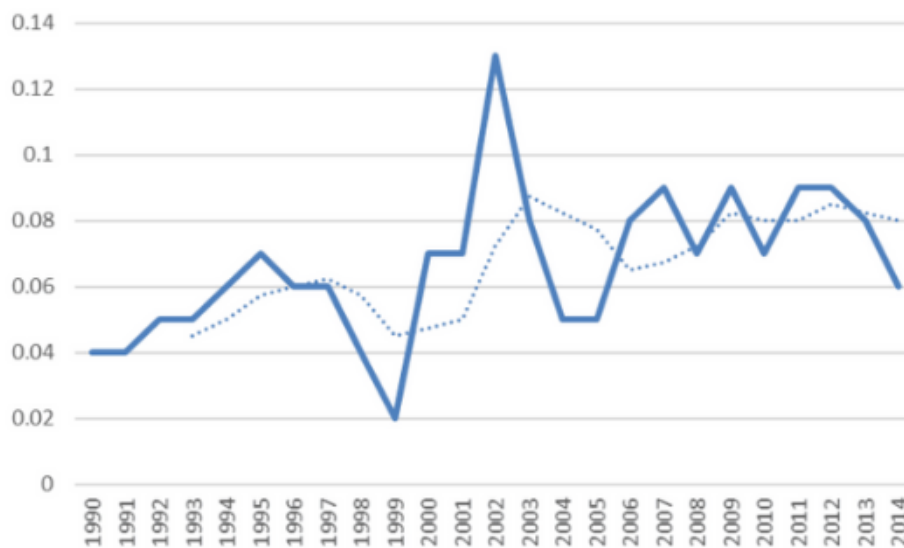
There is another domain confusion which will again in several ways affect OSH. The PSC made persistent queries seeking the views of the MoLE on the applicability of “appropriate government” [Section 2(1)(d)] as the code has made the central government as the appropriate government in most places and some state governments objected to this. The response of the ministry to the PSC speaks volumes of the drafting skills of lawmakers: “Sir, our intention is that in case of factory and minor ports, the appropriate government is the state government. There may be some issue with the language but there is a (sic) clarity in our mind.” (emphasis added) (PSC, p 9). Further, the code is notorious for leaving even substantive clauses to be “prescribed” later, which creates uncertainties and scope for

differences. The author found 89 such instances in this code.

OSH Clauses—More Deficiencies than Improvements

Industrial injuries in India are a serious concern, even though they are highly under-reported and statistics concerning them are incomplete in terms of coverage. Notwithstanding the limitations of statistics on industrial injuries, we can see a rising trend in factories from Figure 1.

Figure 1: Trends in the Incidence Rate of Fatal Industrial Injuries per 1,000 Workers Employed in Factories in India



Note: The dotted line is the three year moving average trend line.
Source: Indian Labour Statistics, various issues.

While the code claims that it seeks to “impart flexibility in adapting dynamic factors and technological changes, in the matters relating to health, safety, welfare and working conditions of workers;” and “(vii) to make a provision for the constitution of “Safety Committee,” we evaluate these claims below.

Chapter IVA in the FA, which was introduced in 1987 after the Bhopal Gas Tragedy, needs to be revisited in view of the technological developments concerning hazardous processes in all the sectors that the code deals with. The code defines “hazardous process” as in the FA, but has omitted the clause empowering the state governments to add or delete industries in the First Schedule (inserted in 1987 after the Bhopal Gas Tragedy) that contains a list of industries involving hazardous process. Even though the list containing 29 industries has not been updated since 1987, it has been reproduced in the code. Does this mean that technological developments have remained static over three decades since 1987? Further, Section 41F of the Factories Act clearly specified the values of maximum permissible threshold limits of exposure of chemical and toxic substances in all kinds of manufacturing processes in the Second Schedule attached to it and based on experts’ views, suitable changes may be made to the schedule. However, the code has inexplicably removed the said schedule and left the entire matter to be “prescribed by the state government” (Section 83).

On the other hand, the code has also diluted Chapter VIA. Section 41G under “Workers’ participation in management” clearly stipulates that in every factory where hazardous process is employed, the occupier shall constitute a bipartite safety committee. The code demolishes the statutory requirement of the constitution of it. Now, the government, by a general or special order, may require any establishment or class of establishments to

constitute a safety committee in the prescribed manner. Hence, the rights of workers as far as OSH is concerned become diluted. Section 14 empowers workers to communicate their concerns relating to OSH either directly to the employers or through the safety committee, "if constituted by the employer for such purpose ..." (emphasis added). What was legitimately and correctly a statutory right has now become a matter subject to whims and fancies of employers and/or labour administrations. Further, it is unclear why the appointment of safety officers has been limited only to factories and building/construction sites employing 500 or more workers and 100 or more workers in case of mines.

According to S 84 of the code, the occupier of every factory involving hazardous processes shall disclose information relating to dangers and health hazards to the workers, inspectors, and the general public. The same "disclosure principle" could be made applicable for all establishments and workers and the public relating employers' and employees' duties and rights under S (6)(2) and (14) (2). Article 13 of the ILO Convention C 155 on OSH empowers and protects the workers to remove themselves from perceived risky workspaces perceived to cause "imminent serious danger" to their lives/health. This important clause needs to be incorporated in the code. The government would be well-advised to refer to the ILO Conventions on OSH in various sectors (for example, C 167, C 176). If workers contract COVID-19 or any contagious diseases due to workplace contacts, then they ought to be included under the occupational diseases. Lessons from the pandemic need to be assessed with a pragmatic and an inclusive sense to strike a balance between the needs of business and the welfare of workers. Even the ILO has admitted that it has not devised instruments and responses to protect workers and working environments in the case of biological hazards like COVID-19 (ILO 2020).

The clauses regarding the reporting of industrial accidents should be redrafted with suitable modifications to include all kinds of industrial injuries of varying magnitude, not merely "certain accidents" (S 10), as this is merely a reproduction of S 88 in the FA. Currently, only deaths and bodily injuries that prevent persons from working for 48 hours are covered. Article 14 of C 155 requires the publication of "occupational accidents, occupational diseases and other injuries to health," which means the coverage of S 10 needs to be expanded considerably. This is one of the reasons that the Labour Bureau reports limited statistics on industrial injuries (Shyam Sundar 2020a). It is also disturbing to note that the inspector-cum-facilitator (ICF) shall make inquiries into accidents causing death only (why not all serious body injuries also) within two months as opposed to the existing time frame of one month in FA [see 88(2)].

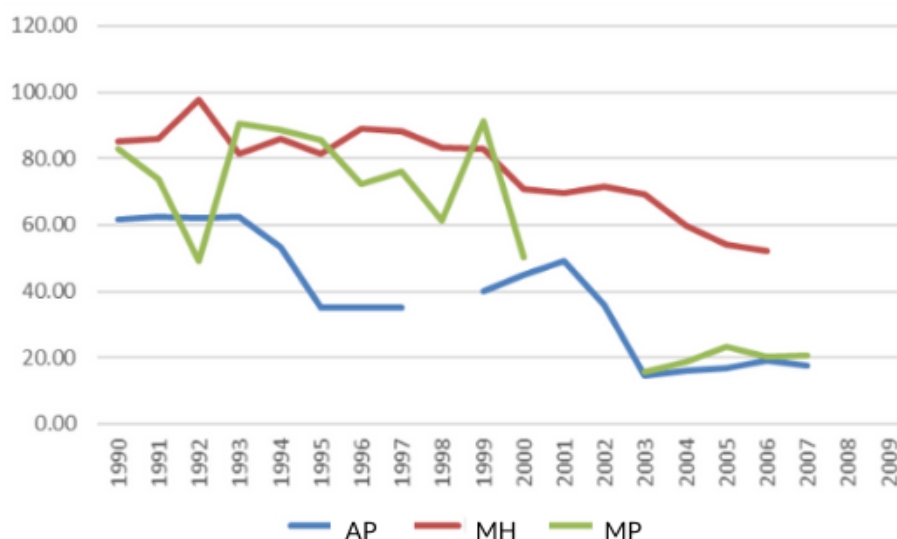
Enforcement Deficit and OSH

The MoLE while justifying its new term "ICF" in lieu of "inspector" made a very telling observation: "To meet requirements of ILO convention (No 81), the (sic) inspections cannot be diluted ... "Sir, they (ILO) recognise the word 'Inspector'. If we put Assistant Director, then they will say we have totally done away with the inspections and we do not want any

inspections to be done." Safe workplaces can be ensured by inspection systems conforming to ILO Labour Inspection Conventions.

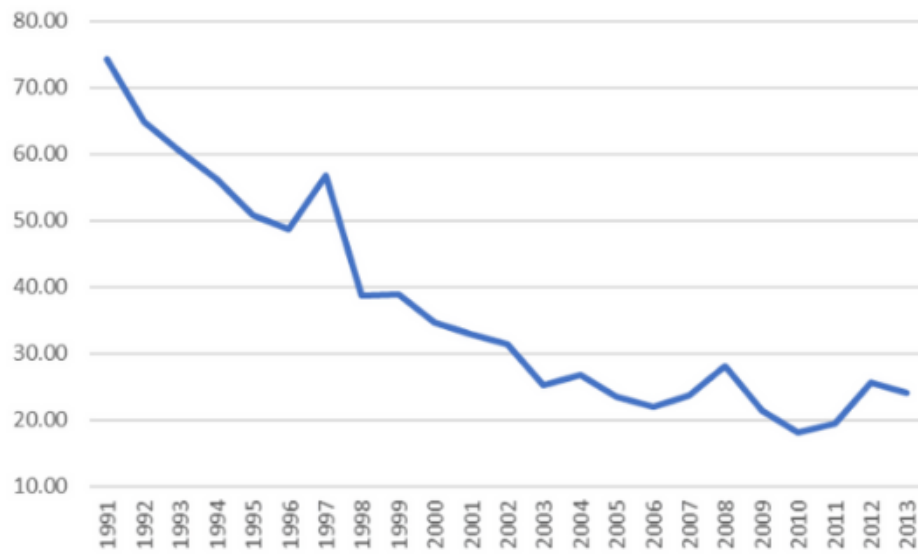
The statistics regarding inspections in India suffer from shortcomings on counts of validity (coverage issues) and reliability (inconsistent measurement or data transmissions). The inspection rates, that is, the proportion of factories inspected dipped considerably in major states like Andhra Pradesh, Maharashtra, Madhya Pradesh (Figure 2) and in West Bengal (Figure 3). The fact that the drop in the inspection visits is not peculiar to factory inspectorate, but is generic is borne out by the steep declining trend in the number of visits under all labour laws in Maharashtra during 1987-88 to 2012-13 (Figure 4).

Figure 2: Percentage of Registered Factories Inspected in Andhra Pradesh, Maharashtra and Madhya Pradesh, 1990-2009



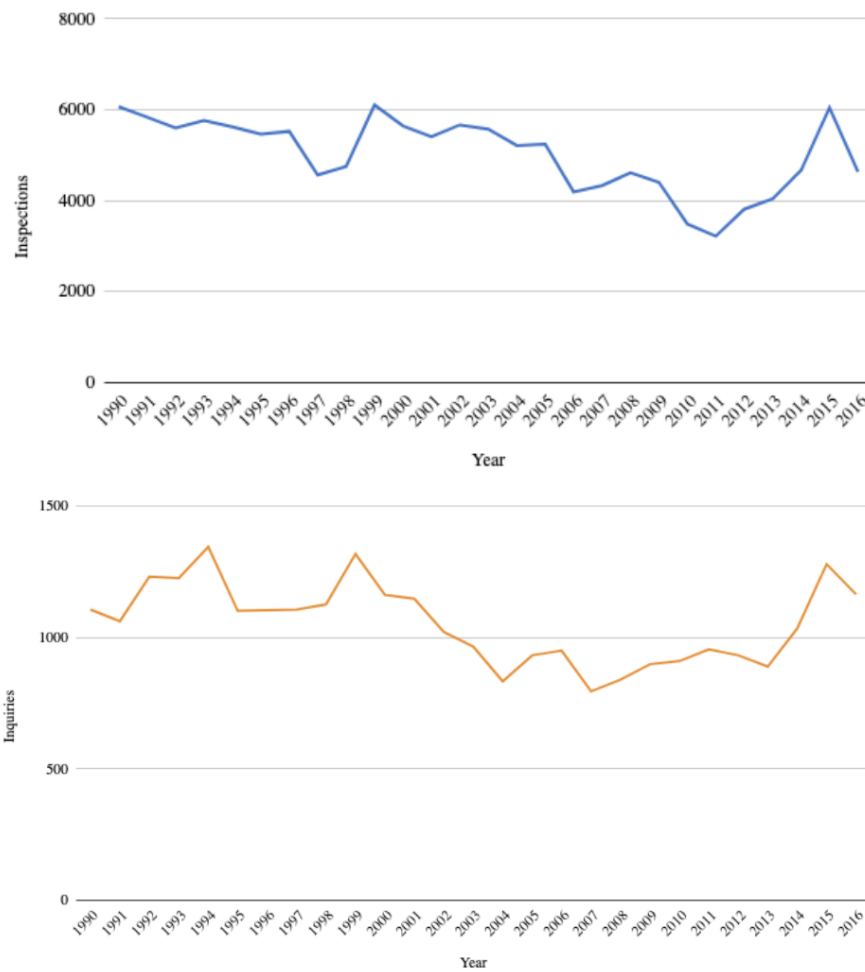
Source: Indian Labour Year Book (various issues).

Figure 3: Percentage of Factories Inspected in West Bengal, 1991-2013



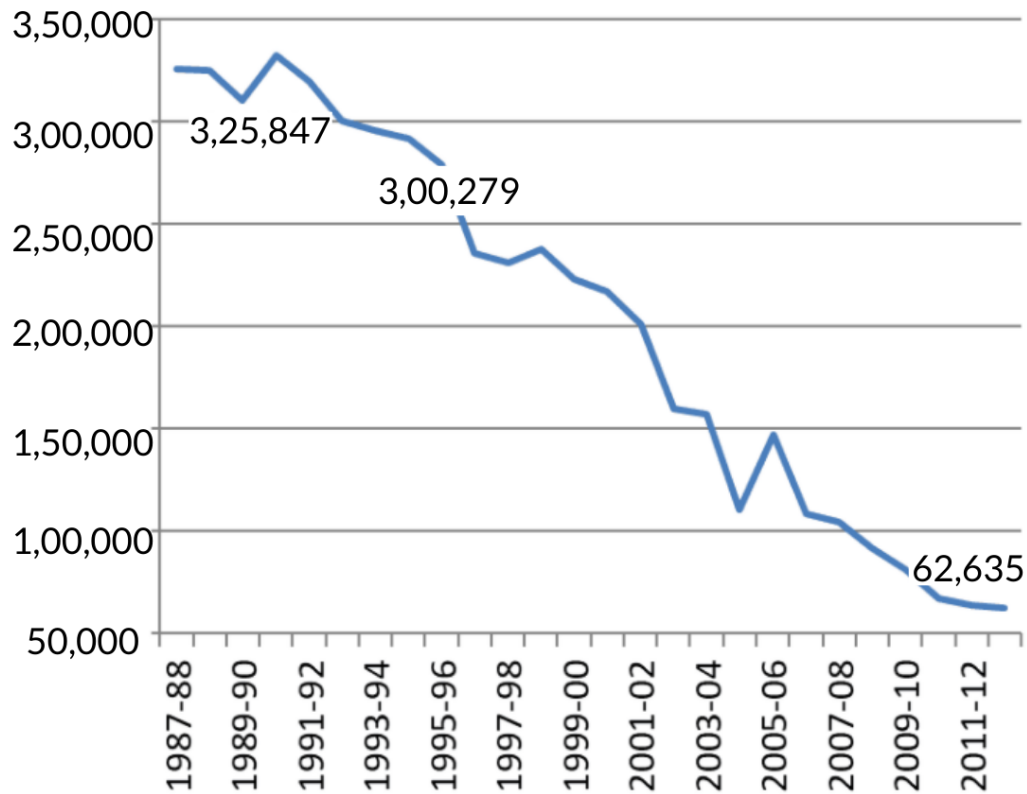
Source: Chakraborty et al (2019).

Figure 4: Total Number of Inspections and Inquiries in Coal, Metal and Oil Mines in India, 1990-2009



Source: Indian Labour Year Book (various issues).

Figure 5: Number of Inspection Visits under All Labour Laws in Maharashtra, 1987-88 to 2012-13



Source: Commissioner of Labour Office, Government of Maharashtra.

The following table provides an idea of the enforcement machinery system in some states in India. The choice of states depends on data availability.

States	% of Working Factories Inspected	Working Factories per Appointed Inspector	Inspected Factories per Appointed Post	% of Sanctioned Posts Appointed
Andhra Pradesh	35.26	480	169.41	74.55
Assam*	36.49	163	59.63	79.41
Bihar	13.26	788	104.46	52.00
Chhattisgarh	34.54	151	52.31	89.66
Goa*	15.83	73	11.60	90.91
Gujarat	46.85	297	139.17	57.39
Himachal Pradesh*	24.78	113	27.93	84.31

Jharkhand	45.53	329	149.65	68.00
Puducherry*	58.88	220	129.67	75.00
Rajasthan*	9.12	516	47.08	54.35
Telangana	19.24	516	99.18	96.55
Uttarakhand	4.13	1705	70.50	100.00
Total	30.71	328	100.74	69.09
Note: *For these states, the data relates to 2015. For all others, the data relates to 2014 Source: Statistics of Factories (2014; 2015)				

All states listed in the table have poor inspection rates ranging from 4.13% to an outlier of 59%. Overall, only about 31% of working factories have been inspected. The inspection load, that is, the number of working factories per appointed inspector is impossibly high. In many states, this is around and over 500. Not surprisingly, these states also had poor appointment rates (marked in red). Uttarakhand, for example, has only two inspectors to cover 3,410 working factories. The inadequacies of the enforcement machinery, especially the factory inspectorates, have been noted by the National Commission for Enterprises in the Unorganised Sector (NCEUS) (NCEUS 2007, pp 166-167). The system does not fulfil crucial clauses sufficiently staffed in every sense (Article 10 in ILO Convention).

The code further weakens the inspection system in several ways. For example, the ICFs are supposed to conduct “web-based inspections,” and this assumes a comprehensive and updated database on the universe of inspections, compliance history of firms, union presence in them, number and composition of workers, processes followed, technological changes, etc. In fact, several states have also framed similar systems, but they are likely to not promote inspection efficiency as visualized by the ILO in Convention 081 (that is, the Labour Inspection Convention 1947). The substantial data deficits will not aid in designing effective inspection systems and OSH as well as other objectives of laws will remain unfulfilled. To make matters worse, the code does not provide for powers of inspectors envisaged by ILO Conventions such as free entry at any time and without prior notice (Article 12) and as frequently as possible to secure effective enforcement of laws (Article 16).

Some More Concerns

There are four concerns that have grave implications for OSH. One, regional laws and regulations concerning coverage of factories, hours, and inspection systems hurt national lawmaking, even as the latter suffers from several shortcomings. Several state governments like Assam, Bihar, Gujarat, Himachal Pradesh, Goa, Haryana, and Karnataka have revised the thresholds for application of the FA from 10 to 20 (with power) and 20 to 40 (without power), and Madhya Pradesh from 10 to 50.^[3] Several union territories and states like Chandigarh, Gujarat, Haryana, Assam, Goa, Gujarat, and Odisha have, through ordinances, extended hours of work from eight to 12 hours a day and 48 to 72 hours a week. Extension of working hours could have harmful consequences for OSH (Shyam Sundar 2020b). Several state government have introduced self-certification-cum-random-online inspection systems,

third-party audits, etc, for shops and establishments, contractors, and factories, which in principle reduces the frequency of inspections or exempts inspections altogether (Shyam Sundar 2019).^[4] The rising incidence of reforms by state governments using ordinances rather than by legislative amendments erodes the relevance of lawmaking at the national level (Shyam Sundar 2020c).

Two, several states like Goa, Bihar, Tripura, Himachal Pradesh, Karnataka, Punjab, Gujarat and Madhya Pradesh have increased the threshold of Contract Labour (Regulation and Abolition) Act, 1970 (CLRAA) for both principal employers and contractors from 20 to 50. Contract workers employed by small-sized contractors will be outside the purview of the CLRAA and due to the increasing of FA's applicability, contract, as well as other workers (including regular), will be outside the scope of OSH regulations. Flexi-category workers like contract workers will probably work for more hours for maximising income and also to retain their jobs. They are less likely to be trained and be given protective gears. According to calculation from the Annual Survey of Industries data, the proportion of contract workers in the organised factory sector increased from 13.24% in 1993-94 to 36% in 2016-17. Though there is no formal data on the incidence of industrial accidents among contract workers, anecdotal evidence shows that they are somewhat more vulnerable to industrial injuries that can often be fatal (Hindu Businessline 2020; Safe India 2015; Newslick 2020). S 47 of the code allows for granting of "work-specific licenses" to contractors, even if they do not fulfil the prescribed criteria. This has grave implications for OSH.

Three, the state-afforded flexibilities seen above in pursuit of the elusive ease of doing business objective and the managerial strategies to achieve more flexibility on the sly, together pose considerable threats to OSH among other labour rights. The recent episodes of fatal industrial accidents bear testimony to a lax OSH culture in India.

Four, even though the mainstream trade unions have stridently battled the neo-liberal reform agenda in India, adopted inclusive and expanded agenda for struggle (Shyam Sundar 2015) and issued stiff protests (Madhu Gopal 2020), highlighted deteriorating industrial safety conditions (Banerji 2020), and demanded inquiries into major accidents (Business Standard 2020), their protest actions concerning OSH have not been encouraging and loud enough. For example, OSH issues have not been included in their 10- or 12-point demands (CITU Centre nd). In fact, going on massive struggles or even strikes on issues like OSH, skills deficits, etc, would have earned the much-needed legitimacy for trade unions and would have kind of cross-subsidised their mainstream struggles on trade union and employment security rights.

Finally, the PSC submitted its report well before the onset of the COVID-19 pandemic, which has shown the darker side of the labour market. OSH has assumed new dimensions as work from home (WFH) has become the new normal. Biological hazards have grave implications not only for conducting normal economic activity, but also for the health of workers and they pose new challenges for defining and redefining OSH issues. The

government must ask the PSC or an expert committee to review the OSHWCC in light of these developments.

In Conclusion

It is clear that the OSHWCC suffers from several serious shortcomings. The code has missed an important opportunity to comprehensively address the issues surrounding OSH. This deficiency along with poor enforcement system and improper envisioning of labour inspection on the pretext of enabling ease of doing business is a cause for grave concern. Further, the regional reforms challenge the relevance of national lawmaking, however inadequate it is. The International Labour Standards framework of the ILO and the Directive Principles of State Policy of our Constitution should guide the redesigning of the institutional framework relating to OSH.

End Notes:

[1] See the code:

http://164.100.47.4/billtexts/lbilltexts/asintroduced/186_2019_LS_Eng.pdf

[2] See Table 4.13 in

http://www.mospi.gov.in/sites/default/files/economic-census/sixth_econom...

[3] All notifications from Simpliance: <https://www.simpliance.in/gazette-notifications..>

[4] For recent instances, for Puducherry, see

<https://legalitysimplified.com/wp-content/uploads/2020/08/Inspections-Un...> and for

Telangana, see

<https://blog.sgcservices.com/wp-content/uploads/2020/07/Inspections-Unde...>

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