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# Decoding the Code - A Focus on the Language Employed in Chapter IX of the Code on Social Security, 2020

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## ABSTRACT

*Social Security is often regarded as a basic human right, but it is imperative that it differs from country to country. In fact, that is one of the major disapprovals of the Indian Social Security Code that it allows different states within the country to have different social security measures. The overarching role of the Government in labour issues in India has been heavily reflected in labour legislations and the Social Security Code is not any different. Welfare “schemes”, divided up between the states and the centre, requiring worker level registrations, without specifying any minimum floor level protections or benefits, are not anywhere near what the objective of the Code is wanting to achieve.*

*This paper would focus on the Social Security benefits for the unorganised sector in India and discern the language of empty promises provided in Chapter IX of the Social Security Code 2020. The scope of this paper would only be limited to the language of the provisions of the Social Security Code under Chapter IX because it is yet to be seen how they would be implemented by the appropriate governments or interpreted by the courts.*

**Keywords:** *Social Security Code 2020, Chapter IX, Language of the Code on Social Security.*

## I. INTRODUCTION

The Social Security Code, 2020<sup>2</sup> (the Code) envisages a broader inclusion of all the workforce in India to be covered under the protection of social security benefits. This vision is exhibited in the objective of the Code which aims at extending social security to all employees and workers, either in the organised or unorganised or any other sector. The Code defines social security qualitatively and explains that it means the measures of protection offered to the workforce like access to health care and income of security, by means of rights conferred on the workforce and schemes framed, under the Social Security Code.<sup>3</sup> Some examples of these

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<sup>2</sup> The Code on Social Security, 2020

<sup>3</sup> Section 2(78), The Code on Social Security, 2020

rights are maternity benefits, work injury compensation, sickness benefits, and compensation for loss of a breadwinner. The definition, however, has been hailed by commentators for a different reason. The protection of social security has also been afforded to unorganised workers, platform workers and gig workers alongside the organised sector employees.<sup>4</sup> The definition ensures these benefits to all these types of workers, be it organised work or unorganised work. This is particularly crucial for India as in terms of employment share, the unorganised sector employs 83% of the work force and only 17% are in the organised sector.<sup>5</sup> There are approximately 92% informal workers in the total employment, including unorganised workers plus informal workers in the organised sector, (with no written contract, paid leave and other benefits) in the economy.<sup>6</sup> Therefore, when the Social Security Code provides any benefits and protections to the unorganised sector, it should rightly be hailed as a measure towards achieving universal social security as a matter of right. However, it is not as simple as that and the Code may not transform into the portrayed knight in shining armour for the unorganised sector in India and deliver the promises made. The provisions of Chapter IX of the Code deal with social security for unorganised workers and they look out of place in an otherwise well drafted and benefit geared Code.

## **II. DECONSTRUCTING THE LANGUAGE OF “SOCIAL SECURITY PROVISIONS” FOR THE UNORGANISED SECTOR UNDER CHAPTER IX OF THE SOCIAL SECURITY CODE**

Section 2(85) of the Code<sup>7</sup> defines “unorganised sector” as an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing services of any kind, where the enterprise employs less than 10 workers.

The definition of unorganised sector under section 2(85) is exceptionally exclusionary and does not match the number of workers employed in India in the unorganised sector. It sees the unorganised sector as being dominated by micro enterprises, but does not include enterprises that may have more than 10 workers but still function in an unorganised manner. This categorization under section 2(85) of enterprises having less than 10 workers potentially leaves a massive block of unorganised sector workers as being employed in the organised sector.

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<sup>4</sup> Ibid.

<sup>5</sup>International Labour Organization, 'India Labour Market Update' (2017) <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new\\_delhi/documents/publication/wcms\\_568701.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_568701.pdf)> accessed 17 May 2021

<sup>6</sup> Ibid.

<sup>7</sup> Section 2(85), The Code on Social Security, 2020

### **(A) Right Conferring vs Power Conferring**

Section 109(1) of the Code<sup>8</sup> provides that the Central Government shall formulate and notify, from time to time, suitable welfare schemes for unorganised workers on matters like life and disability cover, health and maternity benefits, old age protection, etc. Although the inclusion of the word shall is a positive requirement that will require the Central Government to come up with such schemes, this provision is not a right conferring provision for the unorganised workers.

The provision under section 109(1) does not provide for any specific rights or benefits that can be availed from a particular point in time by the unorganised workers. There is no actual protection or benefit provided by section 109(1) to the unorganised workers that they can turn to for protection. The language for the provisions has been framed in a recommendatory manner instead of a mandatory way.<sup>9</sup> As a contrast, for example, the Code provides specific rights to the organised sector employees like liability of the employer for injury or death compensation under section 74<sup>10</sup> in Chapter VII. Section 109(1) only identifies the subject-matter that will potentially come under any welfare schemes that the Central Government shall make for the unorganised sector in Chapter IX. Further, there is no definitive period for the start of any potential benefits that the government shall make, from time to time. The provision under section 109 simply put means that the Central Government can make schemes as per need from time to time that can deal with the subject-matter provided under section 109(1).

Section 109(1) only confirms that the Central Government has the power and the dominion to make welfare schemes on the given subject-matter for the unorganised sector. Section 109(2)<sup>11</sup> has a similar language only that it applies to the State Government and provides the subject-matter for formulation of suitable welfare schemes from time to time on benefits like provident fund, employment injury benefit, housing etc. Therefore, when seen together, the language and content of these provisions indicates that they provide for different areas on which the different governments can exercise their scheme making powers.

The powers of the State Government to formulate welfare schemes under section 109(2) include two of the more widely used and important protections of financial security through provident funds and employment injury benefit. The division of subject-matters like provident funds and employment injury benefit in the State Government list can give rise to issues where

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<sup>8</sup> Section 109(1), The Code on Social Security, 2020

<sup>9</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

<sup>10</sup> Section 74(1), The Code on Social Security, 2020

<sup>11</sup> Section 109(2), The Code on Social Security, 2020

different states can have different schemes with different benefits for unorganised workers. It allows states to adopt their own versions of these welfare schemes, when they feel the need to, with no standardised minimum benefits. This bifurcation of powers between the Central Government and different State Governments, which results in dual authority from the perspective of an individual unorganised sector worker<sup>12</sup> and potentially applies different standards of benefits to them, is not there for organised workers, gig workers or platform workers.

Moreover, if and when the appropriate government uses this power under sections 109(1) and 109(2), and formulates a welfare scheme, it would actually be a scheme or policy that would be different from the Code itself. It is conceded that the appropriate government would take the authority to make any schemes from these sections of the Code, but the scheme would be distinct from the provisions of the Code itself whereas for the organised sector, the provisions themselves provide for the benefits. A criticism of the Code can then arise that if different schemes would be made by different governments at different times for the unorganised sector, the object of the Code wherein it provides for amending and consolidating the laws relating to social security under the Code, is rendered futile.

Another criticism of the language used in Chapter IX is that “welfare schemes” are not legislative instruments and they have to be funded by the government. They are not legislations like the Code itself and do not go through the democratic processes of a potential legislation. As a result, too many substantive provisions have been left for the executive to decide.<sup>13</sup> This means that vital provisions can be worked and re-defined through the executive without the proper participation of all stakeholders or the democratically elected members of Parliament.<sup>14</sup> Whenever a welfare scheme is formulated under these provisions, whether it would be able to provide beneficiaries to move the courts for enforcing any welfare provisions or demand them as a matter of right, is highly doubtful. Moreover, welfare schemes are not legislations and hence are not **permanent rights** giving instruments. They are usually in place for a specific period of time and do not give a sense of confidence to beneficiaries that nobody can take these provisions away.

The provisions of the Social Security Code are based mainly on the now-repealed Unorganised

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<sup>12</sup> Sarkar K, 'For Unorganised Workers, New Social Security Code Creates Needless Confusion' *The Wire* (2020) <<https://thewire.in/labour/social-security-code-unorganised-workers>> accessed 14 May 2021

<sup>13</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

<sup>14</sup> Bordoloi M, Farooqui M, and Pandey S, 'Social Security For Informal Workers In India' (Centre for Policy Research 2020) <<https://www.cprindia.org/research/reports/social-security-informal-workers-india>> accessed 16 May 2021

Workers Social Security Act (UWSSA), 2008, whose stipulations and implementation left much to be desired.<sup>15</sup> The Parliamentary Standing Committee on Labour in its report stated that “merely retaining the usual administrative clauses of the previous UWSSA in the Social Security Code without any legal framework will not bring the intended benefits for the unorganised sector worker, nor will it widen the social security coverage in the near future”.<sup>16</sup> This reflection by the Standing Committee is important for two reasons. First, it recognises that the provisions under Chapter IX for the social security of unorganised workers have been merely transferred from the previous UWSSA and are **administrative** clauses. They define powers of the appropriate governments to formulate schemes for unorganised workers, but they do not provide any benefits themselves. Second, because they are only administrative provisions, they will not be able to achieve the social security objectives in the near future as the welfare schemes may be implemented from time to time, **without giving any rights or benefits** as such of now.

### **(B) Funding of Welfare Schemes**

Section 109(3) provides that any welfare scheme which is notified by the Central Government under section 109(1), can either be funded wholly by the Central Government; or partly by the Central Government and partly by the State Government; or partly by the Central Government, partly by the State Government and partly by the beneficiaries of them scheme or the employers.

This provision becomes problematic for various reasons when seen in the context of the unorganised sector. It allows the Central Government to notify a scheme in which the employers of the unorganised sector workers can be required to contribute partly. These unorganised enterprises, as given in section 2(85) of the Code, are enterprises having less than 10 workers and would be considered micro enterprises. The requirement of providing contributions to welfare schemes by an employer of these enterprises can become an intense strain on the resources and finances of a micro enterprise and even put it out of business. If the welfare schemes use employers of unorganised sector as sources of contributions, it will most likely hinder the growth and progress of those micro unorganised enterprises to transform into medium organised establishments. Juxtaposing this provision of funding by unorganised sector employers with the funding of welfare schemes for gig workers and platforms workers, we see

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<sup>15</sup> Singh D, 'India's Informal Workers Need More Than Modi Govt's Labour Code To Get Social Security' *The Print* (2020) <<https://theprint.in/opinion/indias-informal-workers-need-more-than-modi-govts-labour-code-to-get-social-security/535896/>> accessed 15 May 2021

<sup>16</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/Isscommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/Isscommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

that the liability for aggregators is much more defined and limited. Section 114(4)<sup>17</sup> gives protection to the aggregators with respect to how much they can be required to pay for the welfare schemes of gig workers and platform workers. No such limit or protection has been specified for the employers of the unorganised sector. Further, the Code does not contemplate who is going to bear the burden of funding the schemes in cases where the work is self-employed, or an employer-employee relationship cannot be established, or the employer is not capable of funding the scheme.<sup>18</sup> This, by no means is an argument against providing social security schemes for the unorganised workers, but an assertion of the need of introspection into who should fund these schemes and proper protection of the employers.

The funding of State Government schemes is provided for in section 110(1) of the Code<sup>19</sup>. It provides that the State Government may seek financial assistance from the Central Government for the schemes formulated by it.<sup>20</sup> Thereafter, the Central Government may provide such financial assistance on its discretion for such time period and on such terms as it may deem fit.<sup>21</sup> Under section 109(2), a major part of the responsibility for providing welfare schemes for the unorganised sector falls on the State Government. Further, the requirement of mandatory registration under section 113<sup>22</sup> would require major institutional structures to be set up which would also require funding by the appropriate government. However, the State Welfare Boards have serious constraints of financial resources as compared to the tasks they have been assigned through these provisions.<sup>23</sup>

### **(C) Requirement to Register**

The applicability of any potential welfare schemes that would be formulated by the appropriate government also depends upon a mandatory requirement for the unorganised worker to get registered. Section 113(1)<sup>24</sup> provides that every unorganised worker shall be required to be registered for the purposes of Chapter IX. It is subject to the conditions that the worker has completed 16 years of age and submits a self-declaration electronically or otherwise in such form as may be prescribed by the Central Government.<sup>25</sup> This requirement is not complex but the target work force of this mandatory provision might not be in a position to get this

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<sup>17</sup> Section 114(4), The Code on Social Security, 2020

<sup>18</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

<sup>19</sup> Section 110(1), The Code on Social Security, 2020

<sup>20</sup> Section 110(2), The Code on Social Security, 2020

<sup>21</sup> Section 110(3), The Code on Social Security, 2020

<sup>22</sup> Section 113, The Code on Social Security, 2020

<sup>23</sup> Sarkar K, 'For Unorganised Workers, New Social Security Code Creates Needless Confusion' *The Wire* (2020) <<https://thewire.in/labour/social-security-code-unorganised-workers>> accessed 14 May 2021

<sup>24</sup> Section 113(1), The Code on Social Security, 2020

<sup>25</sup> Section 113(1), The Code on Social Security, 2020

registration done by themselves. The onus is on the unorganised worker to get himself/herself registered by submitting the self-declaration electronically or otherwise. A sizeable part of unorganised workers who are spread out throughout the whole country, because of their position in society, are usually ill-informed about their own rights. The section does not specify what would be the effects of not getting registered, but from the terminology of the section, not getting registered would mean that the unorganised worker can be denied benefits under any welfare schemes if he/she has not registered himself/herself. These are potentially great implications for not being registered while also putting the onus on the workers to get themselves registered.

A possible alternate for self-registration by the unorganised worker could be transferring the onus on the employer to register his enterprises' unorganised workers with the government. This would solve two different issues. Firstly, the issue of accessibility as the employer would be in a much better position to understand the registration requirements and comply with them. Secondly, it would also demarcate that particular enterprise work as unorganised or organised based on the number of workers that are registered with that enterprise. Another option is the role of the appropriate government in registering appropriate types of unorganised workers. For example, with respect to construction workers who mostly come under unorganised work force, the responsibility of registering lies with the respective State Government.<sup>26</sup> Section 106 of the Code<sup>27</sup> provides for such responsibility of the State Government and the State Building Workers Welfare Board.

Section 113<sup>28</sup> also does not provide specific details regarding the implementation of this mandatory registration programme. However, section 112<sup>29</sup> tries to address some of the issues that could arise out of the provision for mandatory registration. It provides that the appropriate government may set up a toll-free call centre or helpline or facilitation centres as may be necessary from time to time to – disseminate information on available social security schemes for unorganised workers; facilitate filing and processing application forms for such registration and assist workers in getting registered; and facilitate the enrolment of registered unorganised workers into the social security schemes. This provision recognises and is intended to help the unorganised sector workers with the accessibility problems that they might face in mandatory registration. However, this does not create an obligation on either the Central Government or

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<sup>26</sup> Sarkar K, 'For Unorganised Workers, New Social Security Code Creates Needless Confusion' *The Wire* (2020) <<https://thewire.in/labour/social-security-code-unorganised-workers>> accessed 14 May 2021

<sup>27</sup> Section 106, The Code on Social Security, 2020

<sup>28</sup> Section 113, The Code on Social Security, 2020

<sup>29</sup> Section 112, The Code on Social Security, 2020



the State Government to create such helplines or facilitation centres. The language of the provision leaves it up to the discretion of the appropriate government to give such assistance if it deems this necessary. The language under section 112 should be changed from “may” to “shall” to bind the government, so that the assistance to the vulnerable unorganised sector is assured to a greater extent.<sup>30</sup>

In 2011, the Working Group on Labour Laws and Other Regulations recommended the creation of a national ‘minimum benefit policy’ that will extend to all workers.<sup>31</sup> This is also echoed in international norms where the importance of minimum social security protections is recognised. The ILO in its Recommendation 204 advises the implementation of minimum social security guarantees to facilitate the transition from an informal to a formal economy.<sup>32</sup> This theme is also incorporated in the spirit of Article 7 of the ICESCR.<sup>33</sup> However, the Code on Social Security, 2020 has not been able to meet these international standards by setting minimum guaranteed benefits for all workers and moving closer to universalization of social security.

### III. CONCLUSION

The Social Security Code aims to provide all the benefits enumerated in the progressive definition of social security in section 2(78) to all workers in India. The benefits specified under the Social Security Code ideally should have been applied to all workers whether organised or unorganised, as is envisioned in the objective of the Code. However, any section under Chapter IX of the Code does not any specify any rights or social security protection for the unorganised sector workers. Therefore, the purpose that the Code set out to achieve for social security of all employees or workers either in the organised or unorganised sector has not been given effect in the provisions. The recognition of unorganised workers as being covered by social security under the Code, who have been excluded till now from the ambit of these welfare policies and protections, does not have a lot of meaning when any actual rights or benefits are left for the appropriate governments to make when they think necessary.

This approach of the Code, whereby it does not provide specific social security rights to the

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<sup>30</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

<sup>31</sup> The Working Group on “Labour Laws & Other Regulations”, 'Report For The Twelfth Five Year Plan' (Ministry of Labour and Employment 2011) <[https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgp12/wg\\_labour\\_laws.pdf](https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgp12/wg_labour_laws.pdf)> accessed 18 May 2021

<sup>32</sup> International Labour Organisation, 'Transition from the Informal to the Formal Economy Recommendation No. 204' (International Labour Organisation 2015)

<sup>33</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 10 May 2021]

unorganised sector like it does for the organised sector, completely undermines the status of the unorganised workers and reduces them to being classified as beneficiaries of charity programmes or schemes, instead of seeing them as workers with entitlements.<sup>34</sup> Now, it is imperative that when these provisions are implemented and interpreted by the courts, they take steps in the direction of achieving universal social security protection for all.

The applauders of the new Social Security Code maintain that it is a first step in the right direction towards universalization of social security. However, the categorization of subject-matters for any potential welfare schemes is given more in a language of administrative identification of separation of powers between appropriate governments rather than a rights identification that the workers can use to get social security. The objective of a single code cannot be to merely consolidate previous Acts and in no way, to advance on the legal framework.<sup>35</sup>

The current eligibility criteria for a worker or an employee to be deemed eligible for social security, is based on a minimum number of workers or employees in the enterprise. The current provisions on social security need to be re-examined to ensure minimum country-wide and sector-wider social protection benefits that will be entitled to every worker. In the case of *Municipal Corporation of Delhi v Female Workers (Muster Roll)*<sup>36</sup>, the court had upheld the ideal that maternity benefits specified in the Act should be applied to all female workers whether permanent or informal.

The earlier two drafts of the Code on Social Security, 2019 had firmly reiterated a commitment towards a rights based universal social security system for all workers.<sup>37</sup> In 2020, the Standing Committee on Labour impressed upon the government to make necessary modifications in the appropriate sections and provisions so that the Code can ensure a legally binding universal social protection for all unorganised sector workers within a definite time frame.<sup>38</sup>

The Code has a great potential to implement social security in the wider context of socio-economic upliftment. Maybe once the application of this code is done and schemes are built, it

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<sup>34</sup> Agarwal S, 'India'S New Social Security Code Is Progressive, But Definition Loopholes May Deprive 4.2 Cr Home-Based Workers Of Benefits' *Firstpost* (2020) <<https://www.firstpost.com/india/indias-new-social-security-code-is-progressive-but-definition-loopholes-may-deprive-4-2-cr-home-based-workers-of-benefits-9010811.html>> accessed 18 May 2021

<sup>35</sup> Mehrotra S, 'How India Can Strengthen Its Social Security Code To Include The 422 Million Workers Left Behind' *Scroll* (2020) <<https://scroll.in/article/964108/how-india-can-strengthen-its-social-security-code-to-include-the-422-million-workers-left-behind>> accessed 15 May 2021

<sup>36</sup> *Municipal Corpn. of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224

<sup>37</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

<sup>38</sup> Standing Committee on Labour, 'The Code On Social Security' (Ministry of Labour and Employment 2020) <[http://164.100.47.193/lssccommittee/Labour/17\\_Labour\\_9.pdf](http://164.100.47.193/lssccommittee/Labour/17_Labour_9.pdf)> accessed 15 May 2021

could take a step further towards achieving the objectives of providing social security for all, but there would need to be significant changes in the approach and language towards providing benefits for the unorganised sector workers.

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