Labour Law deregulation in India
A threat to the application of international labour standards and workers’ rights
Introduction

The drive for a more flexible labour market in India can be traced to the 1990s. The objective has been to liberalise the economy, ease restrictions on business, and boost investments. The government of Prime Minister Modi stepped up these efforts when he assumed power in 2014. Through the adoption of the “Make in India” policy, the government is intent on “clearing the field” for business to thrive but in a manner that leads to increased labour insecurity, decreases the capacity of trade unions to protect members, and reduces the social accountability of business to the workplace. The human insecurity situation for many Indian workers and their families is feared to worsen.

In 2014, the government announced major legislative reforms involving the review of about 150 labour laws. As the Modi government has returned to power after winning the May 2019 elections, there are concerns that they will embark on a ruthless drive to push through these reforms. According to the government, they aim to consolidate and modernise labour laws in order to build a robust manufacturing sector in line with the “Make in India” policy. The central trade unions and other civil society organisations do not see it this way. In their view, the proposed reforms would increase labour flexibilisation, deepen fears of employment insecurity, increase labour market vulnerability leading to a supply of indecent jobs and the withdrawal of time-tested health and safety safeguards that protect workers. The role of the unions as a genuine, autonomous, and independent representative of the economic and social interests of workers in a democratised labour market will systematically decline.

The Indian labour law reforms are wide ranging and will significantly affect economic and social policy. They cover industrial relations, wages, social security, welfare, labour inspections, trade unions, and special economic zones. With the reforms, the government is also hoping for an improved rating on the World Bank’s “Ease of Doing Business” ranking to catalyse an increase in private sector investments. This comes at the cost of neglecting India’s international labour standards obligations. The government has failed to recognise that focusing on economic growth for its own sake leads to jobless growth and socially unaccountable prosperity. This leaves workers and communities poorer, uncertain, unstable, vulnerable, insecure and unprotected against business harms. The Constitution of the International Labour Organization (ILO) enjoins the government to improve labour conditions by effectively regulating hours of work, labour supply, unemployment, adequate living wage, work-related sickness, disease and injury, and by enforcing principles of freedom of association and collective bargaining, among other issues, impacting social and economic policy. The ILO Constitution is clear that failing to address these issues threatens the peace and harmony of society and undermines other nations that “seek to improve the conditions for workers.”

India is a founding member of the ILO and has been a permanent member since 1922. India has ratified forty-seven (47) Conventions and one (1) Protocol. These include six (6) out of eight (8) fundamental Conventions, three (3) out of four (4) governance Conventions and thirty-eight (38) out of 178 technical Conventions. Thirty-nine (39) of these instruments are in force in addition to the guidance provided by the recommendations of the ILO. As a member, the government is under obligation to, in law and practice, ensure that its laws and actions comply with the standards directly ratified and principles enunciated in the Constitution and Declarations of the ILO.

India’s Central and State governments have taken various steps to reform labour legislation to fit the “Make in India” policy. This report draws attention to the risk to workers and the ways in which the measures proposed and adopted are contrary to international labour standards.

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1 According to the ILO Decent Country Report 2018-2020, India is at an inflection point with the largest youth population in the world and a large informal economy with overlapping levels of industrialisation facing rapid technological progress, climate change, globalisation and migration, among other issues. For example, agriculture employs about 47% and yet about US$9-10 billion is lost to extreme weather events with impact on agriculture projected to increase in severity by 2020.
2 There are 150 labour laws at the central and state government levels. 44 of these laws are major, operating at the central level.
5 See preamble and aims and objectives of the ILO Constitution.
The ILO Constitution obliges members to give full effect, in law and practice and without reservation, to provisions of Conventions it ratifies and associated Protocols, and to receive guidance from relevant Recommendations. Even where it does not ratify a convention, a Member is under obligation to report on the extent to which its law and practice comply with the instrument or on any proposed effect it seeks to give to it in law and practice. The Indian government, like any other Member, is also under obligation to respect and apply the principles of freedom of association and effective recognition of the right to collective bargaining whether or not it has ratified Conventions 87 and 98, on the freedom of association and the right to organise, and the right to organise and collective bargaining, respectively. The obligation to respect these principles regardless of ratification arises from the Constitution, Declarations and Resolutions of the ILO. The sources of guidance for the application of these principles emanate from observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), conclusions of the Committee on Freedom of Association (CFA), conclusions of the Conference Committee on Application of Standards (CAS) and other standards-related follow-up mechanisms of the ILO.

In this regard, the government is under obligation, in accordance with the 1998 declaration on fundamental principles and rights at work, to respect, promote and realise the principles on fundamental rights at work and to do so in good faith, including (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. It is worth noting further that the Indian government, in accordance with the ILO Constitution, is obliged not to violate the fundamental principles and rights at work in order to gain comparative advantage in trade with other countries and/or to use such for protectionist purposes.

The Conventions ratified by India include fundamental and governance Conventions; C029 - Forced Labour Convention, 1930 (No. 29); C100 - Equal Remuneration Convention, 1951 (No. 100); C105 - Abolition of Forced Labour Convention, 1957 (No. 105); C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111); C138 - Minimum Age Convention, 1973 (No. 138 - Minimum age specified: 14 years); C182 - Worst Forms of Child Labour Convention, 1999 (No. 182); C081 - Labour Inspection Convention, 1947 (No. 81) Excluding Part II; C122 - Employment Policy Convention, 1964 (No. 122); and C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

The government has also ratified the following 38 technical conventions including C001 - Hours of Work (Industry) Convention, 1919 (No. 1); C005 - Minimum Age (Industry) Convention, 1919 (No. 5); C011 - Right of Association (Agriculture) Convention, 1921 (No. 11); C014 - Weekly Rest (Industry) Convention, 1921 (No. 14); C018 - Workmen’s Compensation (Occupational Diseases) Convention, 1925 (No. 18); C019 - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19); C026 - Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); C042 - Workmen’s Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42); C088 - Employment Service Convention, 1948 (No. 88); C089 - Night Work (Women) Convention (Revised), 1948 (No. 89); P089 - Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 ratified on 21 Nov 2003 (In Force); has ratified the Protocol of 1990, C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107); C123 - Minimum Age (Underground Work) Convention, 1965 (No. 123) minimum age specified: 18 years; C127 - Maximum Weight Convention, 1967 (No. 127); C141 - Rural Workers’ Organisations Convention, 1975 (No. 141); C142 - Human Resources Development Convention, 1975 (No. 142); C160 - Labour Statistics Convention, 1985 (No. 160), with acceptance of Article 8 of Part II; C174 - Prevention of Major Industrial Accidents Convention, 1993 (No. 174).
Contrary to its obligations, the government of India is engaging in a process of labour law reforms, at the Central and State level, without respect for the full application of international labour standards.

Already, the supervisory bodies of the ILO have raised issue with aspects of the reform proposals.

On forced labour, the Committee of Experts has expressed concern about the increased prevalence of sexual exploitation of women and children and has called on the government to strengthen the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, expediting the process of adoption and ensuring that there are sufficiently effective and dissuasive penalties for those who engage in trafficking.

The Committee of Experts has also seriously disapproved aspects of the Kerala Essential Services Maintenance Act (KESMA), 1994, which subject persons who engage in peaceful strikes to compulsory labour. The Committee has called on the government, regarding its obligations under the convention on the abolition of forced labour, to ensure, both in law and practice, that no sanction involving compulsory labour can be imposed for merely participating in a peaceful strike.

The government’s obligations under the Rural Workers’ Organisations’ Convention was highlighted by the Experts as they requested information on the impact of the proposed labour law reforms, especially the draft Code on Industrial Relations Bill, 2018, on rural workers, given the dire prognosis made by the Palamoori Migrant Labour Union (PLMU).

Further, the Committee of Experts has already noted that section 26 of the draft Industrial Relations Bill, 2018, is contrary to the freedom of association obligations of India to the extent that it dictates the amount of trade union subscription to be paid by members. It emphasised the protection of the internal administration of trade unions noting that such matters should be left to the discretion of the members of workers’ organisations, without any interference by the public authorities. The Committee called on the government to take steps to amend those sections.

Regarding the Code on Wages, 2017 Bill (the 2017 Bill), the Committee of Experts has called on the government to clarify the consultative functions of the social partners including the Central Advisory Board and to ensure that the principle of equal pay for work of equal value is clearly incorporated in the law to address gender-based pay discrimination.

At the centenary International Labour Conference held recently, the Committee on Application of Standards called on the government to ensure, in consultation with social partners, that the draft legislation, in particular the Code on Wages, and the OSH and Working Conditions Act, is in compliance with Convention No. 81.

The law-making process and India’s obligation International Labour Standards

The Constitution of India grants law-making powers to both the Parliament of the Union and the States’ legislatures depending on the subject matter. Matters falling under the “Union List” will ordinarily be in the exclusive law-making jurisdiction of the Union’s Parliament. Matters under the “State List” will ordinarily be in the exclusive law-making jurisdiction of the States’ legislatures. There are matters that fall under the “Concurrent List” granting both the Union Parliament and the State legislature law-making jurisdiction. However, the principle of federal supremacy espoused by the Indian Constitution will ensure that in the case of conflict over jurisdictions on matters related to the “Concurrent List”, the Union’s Parliament and not the State legislature will exercise default jurisdiction.

The “concurrent list” approach means that State legislatures may create exceptions to Central labour laws and practices and as a result create conflicting and inconsistent norms in labour law compliance, adjudication and enforcement.

For example, in the State of Rajasthan, the BJP government has adopted amendments to the Contract Labour (Regulation and Abolition) Act (CLRA), 1970; the Factories Act, 1948; and the Industrial Disputes Act (IDA), 1947 – all subsequently approved by the President becoming the law of the State. In Rajasthan, therefore, protections afforded by the Contract Act, 1970 (as amended) will be applicable to enterprises with 50 or more workers instead of the existing national threshold of 20 workers. The implications are clear: in Rajasthan, employers of forty-nine (49) workers and below can disregard protections for workers covered under the Contract Act making fixed-term, casual and other forms of atypical forms of employment the routine. While this leads to lower employment costs for businesses operating employment numbers below the threshold, the corollary is that one in three

8 See article 254 of the Indian Constitution
manufacturing workers in Rajasthan will be thrown into vulnerable, insecure and precarious employment with serious social implications. In spite of this, Rajasthan will gain a competitive advantage in trade and investments, all things being equal, sparking a competitive race to the bottom among the States. Already, it is reported that many other States, such as Haryana and Madhya Pradesh, are leading in the search for a competitive advantage for investments by the business community leveraging their labour markets.

This approach to labour regulations and standards setting, if not consistently monitored to ensure compliance, heavily undermines India’s constitutional obligation to the ILO. The ILO Constitution expects that whenever an instrument is adopted, the Member, whether in a federal or non-federal State, will be responsible for undertaking steps to comply with the convention. In a Member State with a federal governing structure, the Member is responsible for ensuring coordination within the federation to give effect to the instrument to which it is bound or with respect to those specific States within its federation which are bound by the instrument.

Therefore, the Indian government is responsible for the uniform application of standards of the ILO throughout the federation and must ensure, in compliance with the Constitution of India, that there is a conflict between labour standards at the federal and state levels, the conflict is resolved and harmonised in favour of international labour standards. As noted earlier, the Constitution of the ILO obliges India not to violate the fundamental principles and rights at work in order to gain comparative advantage in trade with other countries and/or to use such for protectionist purposes. It will be interesting to see if the Constitution is applied in a manner that removes this safeguard and permits such internal competition among states within a federation resulting in a race to the bottom. The government must address this issue urgently.

Secondly, so far, the Indian government has failed to meaningfully consult social partners, especially workers’ unions, on the ongoing labour law reforms. In a couple of meetings called to engage on the draft Bills, the meetings were unsuccessful for lack of good faith on the side of the government. The central trade unions have complained that outside the aborted meeting of the 2015 Labour Conference, no genuine, meaningful and comprehensively planned consultations have taken place at the Central level. In 2017 and 2018, an agenda was adopted by the Standing Labour Committee for a meeting of the India Labour Conference, which was unilaterally cancelled by the Prime Minister. The situation is worse at the State level where there are no tripartite consultations. Industry level consultations at the State level are alleged to be compromised because, among other concerns, the State governments unilaterally nominate workers representatives and typically do so on a political basis and without reference to ILO standards.

The Committee on Freedom of Association (CFA) obliges members to consult tripartite social partners on matters affecting their interests and of social relevance. The obligation rests on effective application of the principles of freedom of association and effective recognition of the right to collective bargaining. The CFA has also referenced the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113) calling on governments to put in place measures to promote effective tripartite consultation and co-operation, particularly in the preparation and implementation of laws and regulations affecting the interests of tripartite social partners. India’s obligation to consult also arises from the principles in Convention 144 on tripartite consultation and its Recommendation 152 and as well from the principles of social dialogue, which is foundational to the Constitution of the ILO and reflected in the 1944, 1998, 2000 and 2019 Declarations. The principle requires that consultations are meaningful and carried out in good faith with confidence, mutual respect and sufficient time for parties to engage in full and with a view to reaching an agreement. Trade unions must choose their own representatives in this process and must not be dictated to or their autonomy and independence undermined.

The government of India (and the State governments) must therefore establish a predictable and time-bound consultative process with tripartite social partners within the Central level tripartite structures for meaningful consultations on the proposed law reforms. Once the government has achieved reasonable consensus on the proposals and has been assured of its compatibility with its obligations under international labour standards, the Bills could be submitted to parliament for enactment.

9 See article 19 of the ILO Constitution. Also, specific conventions emphasis this obligation
The case for law reforms in India is not without merit. Currently, the labour law regime mainly reflects its colonial past with different laws covering the same area of law. For example, there are different laws, covering wages, working conditions, industrial relations, occupational safety and others – both at the Central and State level. Reforms may be needed to reflect the changes in the economy and to provide protections for the new risks faced by workers. However, in practice, the economy is still largely traditional and informal and many of the proposed reforms will have the effect of rolling back protections for workers. Contrary to what is required, there is no evidence that the reforms will lead to the creation of decent jobs for India’s growing youthful population. The refrain among union leaders and civil society is that the government aims to “deform” and not reform the Indian labour market with these proposals. This is because, so far, the reforms are following the failed neoliberal ideas of an unregulated free market which has historically been responsible for the jobless and socially unaccountable growth that has resulted in increased poverty, an exploded crisis of inequality, and threatened the cohesion of societies and world peace.

The Indian reforms are characterised by the adoption of a range of flexible labour market practices that weaken and undermine unions, remove regulatory burden on harmful business conduct, disempower the individual worker and weaken social cohesion and mutual responsibility at the workplace.

This was done by replacing predicable and long-term employment contracts with fixed-term, flexible, temporary contract labour and other categories of precarious work, engaging in practices that preferred workers’ committees over trade unions and turning a blind eye to employers who engaged in anti-union practices including failing to recognise and negotiate with representative trade unions. Additionally, actions have been taken to reduce inspections and prosecutions, delay registration of unions and weaken enforcement mechanisms in general.

The reforms are consolidating some forty-four (44) Central labour laws into four (4) labour codes covering the following: Labour Code on Industrial Relations, Labour Code on Wages, Labour Code on Social Security and Labour Code on Occupational Health Safety and Working Conditions. Others of the 150 labour laws are undergoing various actions from administrative actions to routine legislative amendments.

—The Labour Code on Industrial Relations, Bill 2018, comprises the Trade Union Act, 1926, the Industrial Employment Standing Order Act, 1946 and Industrial Disputes Act 1947. Under this code, the government is proposing the formation of a grievance redressal committee in addition to already existing conciliation and grievance processes in law and collective agreements. This will create jurisdictional confusion among complainants and delay the finality and certainty that a grievance process must deliver. Additionally, it will prevent unions from embarking on strikes and other industrial action given that they must exhaust all these mechanisms with very high increases in penalties for illegal strikes. In any case, the guidance provided by the supervisory bodies is that Members must not act in a manner that renders the rights arising from the principle of freedom of association meaningless – indicating that dispute settlement processes and other legal procedures should not be used to render the right to take industrial action including strikes nugatory\(^{10}\). Also, an illegal strike must not be defined to include a peaceful strike whether or not it exhausted all legal procedures. The code also maintains the existing threshold for the registration of unions at 10% or the enrolment of 100 workers in an establishment or industry whichever is less. This threshold remains arbitrary and unreasonably high.

\(^{10}\) See para 789 – 793 Compilation of decisions of committee on freedom of association 2018.
making unionisation in the private sector practically insurmountable. The threshold requirements are without regard to the individual worker’s right to join or form unions and the employee density in an average enterprise or economic sector. The government must be mindful that placing requirements that operate as previous authorisation for the establishment of a union is contrary to the principle of freedom of association. The code has determined the period of union elections as every two (2) years. This is an interference in union administration and operates contrary to the principles of freedom of association and the right of unions to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. As democratic organisations, union members are better placed to determine how best to run their organisations to serve the interests of their members and not the government. In the enforcement of this right, public authorities are to refrain from any interference that would restrict or impede its lawful exercise.

In respect of the threshold for collective bargaining negotiations, the code established a requirement of sixty-six (66) per cent before a union can negotiate a collective agreement or perform its representative functions. This threshold is overly burdensome and unreasonably higher than even the thirty-five (35%) set by the Madras High Court in its Indian Railways Case – a decision subsequently affirmed by the Indian Supreme Court. The guidance from Recommendation 163 is for objective criteria to be established including taking account of the representative character of the union. Fixation with percentages to determine majority instead of the most representativeness may be counterproductive. This is because in some cases, the objective criteria adopted may require that the most representative union consult minority unions and other non-unionised workers in collective bargaining negotiations. This accords with the purpose of peaceful industrial relations, democratic values and the requirement of non-discrimination in conditions of service among similarly situated workers rather than a strict requirement of a simple or substantial majority. We note that both the Court and the government are wrong for dictating the threshold without consultation with the unions. Establishing an objective criterion requires consultation with unions. The CFA has indicated that it is possible to have different collective agreements in an establishment representing a multiplicity of unions and workers; this, however, must not lead to discrimination against similarly situated workers. To set a threshold requirement of sixty-six (66) per cent or any other that prevents a representative union from functioning, including carrying out collective bargaining, undermines the principles of freedom of association and effective recognition of the right to collective bargaining, which ILO members are obliged to respect in law and practice.

The code also dictates that trade union office bearers must be employed in the establishment. In the case of the informal or unorganised sector, the requirement is for a maximum of two (2) office bearers to be employed in the establishment where the trade union is engaged. This provision will be contrary to the right of workers and employers to elect their representatives in full freedom. The supervisory bodies strongly discourage public authorities from determining the eligibility criteria for holding a union office because it may impair the enjoyment of the right. Members of an independent trade union are better placed to make this determination. The CFA has noted that for the authorities to set such a condition for holding a trade union office is inconsistent with the right of workers to elect their representatives in full freedom. The government must therefore refrain from interfering with this right.

The code, in providing for amalgamation and merger of unions, makes detailed prescriptions regarding funds and methods of merger that amount to interference in the right of members to form or join a union of their choosing. The law must also be clear on the procedure for the recognition of trade unions at Central and State levels and must make provision to address any disputes that arise in that regard.

—The Labour Code on Social Security and Welfare, Bill 2018, replaces 13 labour laws pertaining to social security and CESS such as Employee’s Provident Fund and Misc. Provisions Act, Employees State Insurance, Employee Compensation Act, Building and other Construction Workers Welfare Act, Payment of Gratuity Act, Maternity Benefit Act, Unorganized Workers Social Security Act, Plantation Labour Act, Welfare Fund Act, etc. There appears to be the risk of creating gaps in protection when merging all these social security and welfare laws, and the government should re-consider whether consolidation is appropriate in this case. Under this code, the government has determined many issues arbitrarily, including the provision to deduct 1% of the 2% CESS to go towards collection charges, and the penalty for delayed payment of contributions, the coverage of the informal or unorganised sector and the criteria for nomination of members to the National Social Security Board. In accordance with international labour standards relating to social security, we recall the

11 See para 419 and 435 of Compilation of decisions of committee on freedom of association 2018.
12 See article 3 of convention 87 on freedom of association and the right to organise.
13 See para 609 decisions of Committee on Freedom of Association 2018.
requirement for consultations with social partners on such government initiatives, especially with workers being both beneficiaries and contributors with an interest in the scheme’s efficient functioning. The ILO recognises social security as a right interwoven with the fundamental principles and rights at work. This means that workers’ organisations have the right to participate in the effective functioning of social security institutions including participation in its governing bodies. This the social partners must do without interference whatsoever and with full autonomy and independence. Ordinarily, the labour inspector will ensure that the independence of unions and requirements of international labour standards are respected. Unfortunately, the government has proposed to introduce the role a facilitator to replace the labour inspectors, labour enforcement officers and conciliation officers. The facilitator is to, among other responsibilities, receive complaints from workers on the functioning of the system. This will undermine the effectiveness of the inspectorate under Convention 81 to which the government must comply. Provision has also been made for workers who complain to solicit assistance from non-governmental organisations or other voluntary organisations or advocates but not trade unions.

This, if allowed to stand, will amount to anti-union discrimination, especially if trade union members who are part of the scheme are prevented from complaining to their unions.

—the Labour Code on Wages consolidates four Central Labour Laws, namely: Payment of Wages Act 1936, Minimum Wages Act 1948, Payment of Bonus Act 1965, and Equal Remuneration Act 1976. The wages code defines “employees” and “workers” differently. It categorises supervisory, managerial and administrative staff as “employees” and skilled, semi-skilled, unskilled, manual, operational, technical, and clerical staff as “workers”. The risk here is to create different categories of workers to which basic standards of protection will be applied differently. For example, workers by this definition will be more exposed to vulnerable and precarious employment contracts and conditions under the Contracts Bill. The code also sets out conditions for eligibility and payment of bonuses as well as disclosure of relevant information to workers and their organisations, which undermine the effective recognition of the right to collective bargaining. This code does not clearly outline the consultative role of representative unions in the minimum wage fixing machinery at the Central, State and Regional and other levels. The code permits different minimum wages to be established at the Central, State, Regional, Sectoral and Industry levels without making clear that the national minimum wage sets the floor below which no employer must pay. The code further determines that the national minimum wage will be reviewed every five years without making provision for the factors to be considered in the determination of the minimum wage and the circumstances under which a review may take place outside the five (5) year cycle. The central unions are particularly concerned that the code ignores the recommendations made by the 44th Indian Labour Conference held on 14-15 February 2012 calling for the adoption of the formula for minimum wage determination agreed at the 15th Indian Labour Conference and supported by Indian Supreme Court in the Raptokos and Breet Case. It is also a matter of major concern that the wages code does not provide for the inspection and enforcement of payment of minimum wages, contrary to the Convention 131 and Recommendation 131 on minimum wages ratified by India. Additionally, the code is silent on whether workers will be treated as privileged creditors in the situation of bankruptcy or judicial liquidation as provided under Convention 95 on protection of wages. The structure for the determination of wages including minimum wage fixing mechanisms and collective bargaining is crucial to the fair and equitable allocation and payment of wages with implications for the society as a whole.

—the Code on OSH and Working Conditions 2018 sets off a major process that consolidates the Factories Act; Contract Labour (Regulation and Abolition) Act; Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act; Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act; Plantation Labour Act; Mines Act; Dock Workers (Safety Health and Welfare) Act; Working Journalists (Conditions of Service and Miscellaneous Provision) Act; Working Journalist (Fixation of Rates) Act; Beedi and Cigar Workers (Condition of Employment) Act; Cine Workers and Cinema Theatre Workers Act; and Sales Promotion Employees (Condition of Service) Act.

The OSH code excludes a number of workers from the protection of the law, exposing them to health and safety dangers and risks. For example, “building or other construction work” has been defined to cover only building or other construction of any factory or mine or any others, which employs less than ten (10) workers or building or other construction work in the nature of a residential property limited in cost to an amount to be determined by the Central government. This will immediately exclude workplaces with nine (9) or less workers from the protection of the

15 The code gives power to the “appropriate Government” to fix any other “wage period” under 17(3) of the Code, not acceptable to workers.
law, and there no provisions to protect workers under such conditions. Under special provisions for Contract Labour and Inter-State Migrant Workers, establishments with 19 or less workers are excluded from the scope of the legislation. The obligation of the Indian government under the OSH convention is clear. Occupational health and safety measures must cover all workers for the period they are at work. The apparent creation of an underclass of workers unprotected by the law is contrary to its obligations. In that same vein, the code defines a factory to exclude factories with up to 10 workers where manufacturing takes place with power and up to 20 workers where manufacturing takes place without power exempting mines or armed forces mobile units or a railway running shed, a hotel, restaurant or eating places. With the exception of the mobile unit of the armed forces, there is no reason to exclude any worker from the protection of occupational health and safety laws. Already, the National Policy of Occupational Health covers all workers, and therefore the code must be aligned with the policy. This must include workers in agriculture, fisheries, forest workers and informal/unorganised workers such as domestic workers and the self-employed. Again, the code as proposed excludes workers on plantations below five (5) hectors. Employers with 10 employees or more are obliged to register under the code. Here we emphasise the importance of ensuring that all employers engaged in commercial activities provide occupational health and safety protections to workers (whether managerial or technical). The provision is restrictive and limiting in terms of protective value and must rather focus on the commercial and other nature of the activity and not a threshold that excluded workers from OSH coverage.

The OSH code has proposed the setting up of a Central OSH authority, the National Occupational Safety and Health Advisory Board, without an express role for representative workers and employers’ organisations. The government is under obligation to consult, on a regular basis, representatives of workers and employer organisations both at the Central and State levels. Therefore, the government must ensure that workers representatives serve on any central authority coordinating or supervising OSH matters at all levels. This is in compliance with international labour standards. At the workplaces, the code mandates the establishment of a workplace committee for workplaces with 100 or more workers. The principle, under international labour standards, is to set up joint safety and health committees to facilitate cooperation between employers and workers regarding implementation of OSH measures. This is required in all workplaces and must not be exclusive to workplaces of a certain numbers of workers. Currently, the proposals permitting 100 – 125 hours of compulsory overtime per quarter of three consecutive months undermine the health and safety of workers. These new rates have been determined without consultations with the workers’ unions. The added danger is the changes in the national inspectorate system with the role of the labour inspectors being replaced by a facilitator – in this case, the Chief Facilitator having the power to exclude persons from overtime. Matters related to overtime and rest periods must be agreed in consultation with workers’ and employer’s representatives and must be based on utmost considerations for health and safety and international standards on working time.

The Committee on Application Standards (CAS) of the ILO examined India’s application of Convention 81 on Health and Safety at its 109th session. It was clear that weakening health and safety laws will affect the application of other labour-related laws and standards including those proposed for reforms. Concern was expressed over the large-scale exclusion of workplaces and workers from the coverage of labour inspections, the need for an effectively functioning labour inspectorate and the absence of an adequately resourced, coherent and centralised labour inspections system. The government justified the rollback of regulations on labour inspection through the provision of technology-driven reforms to reduce the complexity of compliance. It highlighted the centrality of a web-based self-inspectorate system for businesses to self-assess their OSH obligations and standards and issue report. It was clear that with this, labour inspectors will only be invited to the enterprise where the self-assessment report reveals a violation or where a complaint has arisen. The government has been unable to provide a response to the question of how it hopes to verify the self-assessments of businesses. This is important because the new approach to inspections departs from the underpinning of rational of checks-and-balances to guarantee a robust enforcement and compliance system to self-policing of self-conduct without regard for conflict of interest. We note that the Committee of Experts has previously inquired of the government about how it expects to verify the self-assessed reports from businesses. The government has been unable to provide a reassuring response. Looking into the matter further, we find that the self-assessed report does not automatically trigger inspections. The facilitators must determine whether an inspection is merited in each case. Obviously, these changes will weaken the inspectorate system. In any case, it violates article 6 of the Convention, which requires that inspectors perform their duties with full independence. States, under this new
regime, are allowed to prescribe their own conditions for conducting inspections including web-based inspections taking them out of a centralised and coordinated inspectorate system. This is contrary to the government’s obligations under Convention 81. The CAS called on the government of India to comply with their obligations under the Convention. For example, the Convention expects that there is a centralised authority to coordinate a coherent inspectorate system between States, Regions and Central government. There also ought to be, in law and practice, authority for inspectors to enter premises for inspections without prior notification and to act to address OSH breaches. By duplicating the functions of inspectors and facilitators, the government is creating jurisdictional doubts among the agencies and inhibiting their full execution of mandates to protect workers. The CAS also concluded with a call on the government to ensure that there is effective labour inspection in all workplaces, including the informal economy and all SEZs. The government is also to ensure that labour inspectors have full powers to undertake routine and unannounced visits and to initiate legal proceedings, including pursuing its efforts towards the establishment of registers of workplaces at the Central and State levels.
Conclusions and Recommendations

It is worth reiterating, in conclusion, the government’s obligation to ensure that all its people, irrespective of race, creed or sex, enjoy the right to pursue their “material well-being in conditions of freedom and dignity, of economic security and equal opportunity”.16 In setting these conditions, the government is required to respect and fulfil its obligations under international labour standards in good faith and in consultation with social partners. This ensures that economic and social policy achieve the requisite tones of harmony that engenders social peace and progress. However, it is clear that the government is failing to discharge this obligation. The government must address these failings in line with its obligations. To do that:

1. The government must return to tripartite dialogue through the formal national tripartite structures ensuring that there is meaningful consultation with trade unions, in the law and practice, on the ongoing law reforms. The government of India and the States as well must adopt a predictable and time-bound consultative process in this regard.

2. The government must, in consultation with social partners, conduct an impact assessment of the draft Bills on social policy focusing on its effect on workers in the formal and informal economy. The assessment must include how the new proposals will hasten the informalisation of the formal economy and deepen employment insecurity, socialise precarious contracts, weaken collective bargaining and minimum wage fixing, and risk the viability of pensions among other concerns. We recall that the Committee of Experts has already called for a report from the government on the impact of the draft Code on Industrial Relations Bill, 2018, on rural workers, given the dire prognosis made by the Palamoori Migrant Labour Union (PLMU).

3. The government must also assess the impact of the ongoing reforms on the regulatory environment in the Indian labour market and the extent to which existing protections are enforced or not.

4. The government must, in consultation with workers’ and employers’ organisations, assess the impact of the self-certification inspectorate system on its obligations under Convention 81 and in the light of the conclusions of the ILO Committee on Application of Standards.

5. The government must withdraw anti-union proposals relating to the right to strike, registration of unions, recognition of unions and promotion of collective agreement, elections procedures and terms for trade union offices and trade union dues deductions. We recall that the Committee of Experts has already noted that section 26 of the draft Industrial Relations Bill, 2018, is contrary to the freedom of association obligations of India to the extent that it dictates the amount of trade union subscription to be paid by members. It emphasised the protection of the internal administration of trade unions noting that such matters should be left to the discretion of the members of workers’ organisations, without any interference by the public authorities. The Committee called on the government to take steps to amend those sections.

6. In the same vein, the government must review proposals to increase the hours of compulsory overtime from 50 hours to between 100-125 hours per quarter. We recall regarding the Code on Wages, 2017 Bill, that the Committee of Experts has called on the government to clarify the consultative functions of the social partners including the Central Advisory Board and also to ensure that the principles of equal pay for work of equal value is clearly incorporated in the law to address gender-based pay discrimination.

7. The government must ensure that economic relations among States are not driven by a competitive race to the bottom, mindful of India’s constitutional obligation not to violate the fundamental principles and rights at work in order to gain comparative advantage in trade or to use for protectionist purposes.

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16 See ILO Philadelphia Declaration.
Acknowledgement

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Note

We received information as we finalized this report, that the Indian government had sped up the process to pass these Bills into law regardless of the concerns raised by social partners, the CEACR and the CAS. Already, the Code of Wages has been passed by both Houses of Parliament and has received the President’s assent making it law. We call on the government to suspend the enforcement of the law and conduct a review of the problematic areas in consultation with social partners and in recognition of their obligations under international labour standards.

17 Lawyer Rama Priya served as the ILO consultant at the National Trade Union Conference held in 2015 in India and is the author of “Labour Law Reforms of 2014-2015: Workers’ Concerns A handbook analysing the changes proposed to the central labour laws of India and the changes recently effected from a workers’ perspective.”