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# A Critical Analysis of the Code on Wages, 2019

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## ABSTRACT

*The said paper is an attempt to highlight the several changes that the Code makes in the present labour law regime. It will discuss the benefits that the Code may provide, along with the shortcomings it may have. In other words, the paper will try to find if the Code is just a simple combination of the various legislation, or is it bringing any reform in the current legal framework.*

## I. INTRODUCTION

India has around 44 central and 100 state legislations that specifically deal with labour-related matters. Since a long time, the Ministry of Labour and Employment was aiming to consolidate the various labour laws to transform obsolete labour laws, widen the scope of the law to encompass a larger working group, ensure compliance and ease of doing business in India, bring clarity by removal of multiple definitions and authorities, and rationalize penalties to increase implementation.

The Code on Wages Act, 2019 [hereinafter referred to as “Code”], consolidated four acts, namely: The Payment of Wages Act, 1936 [POWA], the Minimum Wages Act, 1948 [MWA], the Payment of Bonus Act, 1965 [PBA] and the Equal Remuneration Act, 1976 [ERA].<sup>2</sup> The above acts were repealed.<sup>3</sup> Accordingly, “any action taken under the repealed enactments including any notification, nomination, appointment, order or direction made thereunder or any amount of wages paid shall be deemed to have been done or taken or provided for such purpose under the corresponding provisions of the Code on Wages to the extent that they are not contrary to the provisions of the Code on Wages and until such time that they are repealed under the corresponding provisions of the Code on Wages or by a notification to that effect by the Central Government.”<sup>4</sup>

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<sup>2</sup> Shroff SS, Ramchandani P and Bhattacharyya U, “The Code on Wages, 2019 – Far from Home? – Part I” (*Bar and Bench - Indian Legal news*) <<https://barandbench.com/the-code-on-wages-2019-far-from-home-part-i/>> accessed May 5, 2020

<sup>3</sup> Ibid.

<sup>4</sup> S P and Shroff V, “INDIA CONSOLIDATES AND CODIFIES ITS LABOUR LAWS - THE CODE ON WAGES, 2019” (*NishithDesai* August 6, 2019) <[http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/5616/html/1.html?no\\_cache=1](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/5616/html/1.html?no_cache=1)> accessed May 5, 2020

The Code covers employees working in both organised and unorganised sector and the provisions governing the payment of wages under the Code will apply to all the employees regardless of the type of their employment and their wage ceiling, which has been done by removing the existing eligibility threshold under PWA [applied to factory and other specified establishments and employees with monthly wages of Rs. 24,000].<sup>5</sup> The code has, further, removed the concept of “Scheduled employment”, which means that the minimum wages is to be paid across all the industries.<sup>6</sup>

## II. ANALYSING THE IMPACT OF THE CODE

### A) HARMONISIZATION OF DIFFERENT DEFINITIONS UNDER DIFFERENT LEGISLATIONS

The Code made the harmonisation of different definitions under different legislations, which were subject to diverse interpretation despite being of same subject matter, possible. For e.g. the definition of “wages” in the code, which is present in different legislations in modified forms as salary or remuneration.<sup>7</sup> The Code defined “wages” to envisage all the remuneration through salary, allowances and other components expressed in terms of money.<sup>8</sup> It also specifies a list of items such as gratuity, commission etc., as exclusions under the definition.<sup>9</sup> However, such exclusions should not exceed one half or such other percent as notified by the central government, otherwise the exceeding amount will be treated as wages.<sup>10</sup> The code failed to harmonise the definition of important concepts like employer, employee, worker, establishment, hours of work etc.<sup>11</sup> But it clarified the concepts of “contractor” and “contract labour”, which might facilitate the growth of service agreements, however, there’s no reference of “contract labour” in the code.<sup>12</sup>

### B) SEPARATE DEFINITIONS FOR “EMPLOYEE” AND “WORKER”

The Code differentiated between the definition of an “Employee” and a “Worker”, where the former includes individuals in supervisory, managerial and administrative roles, whereas the latter excludes such individuals, while expressly including working journalists and sales

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> “Code on Wages, 2017 - An Analysis” (*Lakshmi Kumaran & Sridharan: Top Law Firm in India* September 2017) <<https://www.lakshmisri.com/insights/articles/code-on-wages-2017-an-analysis/>> accessed May 5, 2020

<sup>8</sup> Supra at note 3.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Shroff, SS, Ramchandani P and Bhattacharyya U, “The Code on Wages, 2019 – Far from Home? – Part II” (*Bar and Bench - Indian Legal News* August 28, 2019) <<https://www.barandbench.com/columns/the-code-on-wages-2019-far-from-home-part-ii>> accessed May 5, 2020

<sup>12</sup> Ibid.

promotion employees.<sup>13</sup> This means that such categories of “employees” are covered by the Code, unlike MWA. However, the code only refers to “workers” and not “employees” under the provision concerning the factors of fixation of minimum wages, thereby confusing.<sup>14</sup> From the definition, “workers” seems to be the subset of “employees”.<sup>15</sup> This overlapping and interchangeable nature of the definitions has further exacerbated the confusion.

### **C) DEFINITION OF “APPROPRIATE GOVERNMENT”**

The code by amending the definition of appropriate government helped in clarifying the nature of those establishments, which will fall under the ambit of the Central government for purposes like its regulation, fixation of minimum wages, etc.<sup>16</sup>

### **D) PROHIBITION OF DISCRIMINATION**

The Code prohibits discrimination amongst the employees based on gender in matters concerning payment of wages and based on sex in matters concerning recruitment [except where it is prohibited or restricted under law] by the same employer, in respect of the “same work or work of a similar nature done by any employee.”, but they should have been harmonised, to ensure proper recognition of third gender.<sup>17</sup> The code expanded the scope of “same or similar work” by taking into account the experience of the employees, along with skill, effort and responsibility.<sup>18</sup> While ERA prohibited discrimination between “men and women workers”, the code prohibits discrimination on a wider ground of “gender”. However, the traditional binary classification emanating from Art. 39(d) of the Indian Constitution and the presumption of genders as only consisting of man and woman, may act as an obstacle in ensuring gender neutrality in such employment-related matters, thereby proving to be detrimental to the rest of the disadvantageously placed genders. But prohibition in employment based on caste, religion or social origin, is still missing under the code.<sup>19</sup>

### **E) CONCEPT OF FLOOR WAGE**

The Code introduced a new concept called floor wages, where the central government, after taking into consideration the minimum standards of living and the geographical areas of the

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<sup>13</sup> Gupta A, “Code On Wages 2019: In Simplification, Confusion?” (*BloombergQuint* August 6, 2019) <<https://www.bloombergquint.com/opinion/code-on-wages-2019-in-simplification-confusion>> accessed May 5, 2020

<sup>14</sup> Supra at note 10.

<sup>15</sup> Supra at note 12.

<sup>16</sup> Supra at Note 10.

<sup>17</sup> Ibid.

<sup>18</sup> Gupta A, “Code On Wages 2019: A Leap Forward ” (*BloombergQuint* August 6, 2019) <<https://www.bloombergquint.com/opinion/code-on-wages-2019-a-leap-forward>> accessed May 5, 2020

<sup>19</sup> Supra at note 6.

worker, fixes a floor wage.<sup>20</sup> Further on the basis of this, the appropriate central or state government will determine the minimum wage rates, which cannot be less than the floor wages, but if the existing minimum wage rate is higher than the floor wages, then the same shall not be reduced.<sup>21</sup> The minimum wage rates to be reviewed and revised in intervals no exceeding 5 years.<sup>22</sup>

#### **F) PAYMENT OF WAGES**

The Code inserts a new clause facilitating the payment of wages through digital mode.<sup>23</sup> It also fixed the time limit for the payment of wages for various categories of employees [e.g. Daily wage employees to be paid at the end of the shift].<sup>24</sup> It also provides for the fixation of wage period either as daily, weekly, fortnightly or monthly by the employer, however, the same should not exceed one month.<sup>25</sup> In case of removal, dismissal, retrenchment, resignation, or unemployment of an employee due to closure of an establishment, then wages to be paid with two working days.<sup>26</sup>

#### **G) PERMISSIBLE DEDUCTIONS**

The provision relating to deductions under the code is consistent with POWA, and includes fines, absence from duty etc. as some of the grounds of deduction.<sup>27</sup> Deductions should not exceed 50% of the total wages of the employees, but in case it exceeds, then the same should be recovered in the prescribed manner by the employer.<sup>28</sup> Further, the clawback clauses are not legalised by such permissible deductions.

#### **H) PAYMENT OF BONUSES**

The provisions relating to the payment of bonus are consistent with POBA and will apply to those establishments with atleast 20 employees, or to those establishments where there were atleast 20 employees on any day in the relevant accounting year.<sup>29</sup> The bonuses payable to all the employees within the specified salary threshold who have worked in the relevant accounting year for at least 30 working days, should be within the range of 8.33% - 20% of their wages.<sup>30</sup> The Code also changed the eligibility criteria for payment of bonus and the way

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<sup>20</sup> Supra at note 3.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> The Code on Wages, 2019, S. 16

<sup>26</sup> Supra at note 3.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> The Code on Wages, 2019, S. 26

it is calculated. Earlier, the eligibility depended on the prescribed wage ceiling, which will now be appraised by the government.<sup>31</sup> The Code provides that for eligibility for the bonus, the wages should not exceed the notified wage ceiling, but the wages may exceed the notified wage ceiling for the purpose of calculating the bonus.<sup>32</sup> This creates confusion.

The code added conviction for sexual harassment as an additional ground of disqualification for the payment of bonus [which did not exist under the previous PBA].<sup>33</sup> This step of inserting conviction for sexual harassment as a ground for disqualification of bonuses, will act as a deterrent to the instances of sexual harassment at workplace, as it will prevent the convicts from receiving any sort of bonuses. In addition to placing such convicts in an economically disadvantageous position, this insertion would further strengthen and support the aim of the elimination of sexual harassment, particularly of women, at the workplace.

#### **I) DEATH OF AN EMPLOYEE**

The Code provides for payment of dues to the persons nominated by the employee, upon his death, however, if there is no nomination or if the amount cannot be paid to the nominated person, then it will be deposited with the specified authority under the rules.<sup>34</sup>

#### **J) INSPECTOR-CUM-FACILITATOR**

The code replaces the "Inspector" under the existing legislation with that of Inspector-cum-Facilitator, who will, along with the powers of the inspector [to inquire and investigate], be assigned the role of providing information and advice to the employers and employees on effective compliance with the code, so as to eliminate arbitrariness and malpractices in inspection.<sup>35</sup> The facilitator to also provide the employers an opportunity to obey with the facilitator's written orders, before initiating prosecution for noncompliance.<sup>36</sup> This will help in reducing the number of needless prosecutions for un-witting non-compliances. It also provides for calling of information and web-based inspection.<sup>37</sup>

#### **K) RECORDS, RETURNS AND NOTICES**

The Code mandates the employers to maintain a single register containing details such as details of employees, wages, bonuses, etc., which would do away with the redundant procedure

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<sup>31</sup> Supra at note 1.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> The Code on Wages, 2019, S. 44

<sup>35</sup> Supra at note 6.

<sup>36</sup> Supra at note 10.

<sup>37</sup> Supra at note 17.

of maintaining separate records under different laws.<sup>38</sup> As the Code does not prescribe the form and manner of maintenance of the register, it would be possible to maintain it electronically.<sup>39</sup> This provision helps in adapting to the present trends towards digitalization and makes it easier for employers to maintain records. This will result in a more effective way of maintaining register as it will, i) make it easier and faster to search, access, share, or review information, ii) encourage paperless culture, iii) help in maintaining the privacy of data, and iv) reduce the risk of errors prone to manual entry of information. This may also create difficulties for some sections as they may not be technically sound to effectively maintain electronic records. Other problems include the risk of potential security and privacy related issues like hacking, etc.

### **L) OFFENCES**

The Code has enhanced the degree of penalties for non-compliance such as imprisonment [only] for serious offences, if repeated, and the compensation payable in case of any default can go up to ten times the claim determined by the relevant authority.<sup>40</sup> It has also decriminalised all the offences except where the offence is repeated within 5 years.<sup>41</sup> It provides for compounding of first offences.<sup>42</sup> These measures may incorporate a compliance culture. By decriminalising the offences except where there is a repeat offence, and by allowing compounding of first offences, the Code enables a person to settle the matter by avoiding cumbersome court proceedings. However, at the same time, by prescribing stricter punishment such as imprisonment for repeating serious offences and large fines in compensation, the code maintains a nice balance. Such strict punishments will act as a deterrent for the first-time offenders from committing any further offences. The code also increases the limitation period for filing claims to three years from [six months to two years], but it ignores the administrative and economic effect on the employer due to this.<sup>43</sup> It expressly shifts the entire burden of demonstrating compliance only to the employer under a claim, which is quite employee friendly.<sup>44</sup>

Further, there also needs to be clarity as to why the Code prohibits the imposition of fines on employees below fifteen years of age as the Child Labour Act prohibits employment of only

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<sup>38</sup> Supra at note 6.

<sup>39</sup> Ibid.

<sup>40</sup> Supra at note 17.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Supra at note 10.

<sup>44</sup> Supra at note 1.

children below the age of fourteen.<sup>45</sup> This creates a loophole as there may be instances where a person who although is eligible for employment [i.e. he is above fourteen years of age] but may escape from the fine just because he is below the threshold of fifteen years of age as provided under the code. This also shows a lack of harmonization between different legislations having overlapped subject matter.

### M) MISCELLANEOUS

The provisions for rectification of arithmetic and clerical errors made by the Appropriate government are not there.<sup>46</sup> It also does not differentiate between small, medium and large sized establishments based on compliance requirements. The question of whether the performance of an employee is relevant or not in determining bonus is still unanswered.

## III. CONCLUSION

Through this code, India seems to have complied with the International Labour Organisation guidelines on minimum wages, by ensuring statutory minimum wages to all the groups of wage workers in India.<sup>47</sup> The guidelines also require an approach that takes into consideration the needs and the economic factors of the workers and their family members.<sup>48</sup> The Code provides for fixation of floor wages after considering both the geographical areas and the minimum standards of living of the workers.<sup>49</sup> It also provides for the establishment of a minimum wage system, involving full consultations with social partners.<sup>50</sup>

Finally, Code appears to be an important development in the Indian labour law regime, but a close scrutiny of the changes brought by the Code points out to the need of having more clarity in this regard. The code, instead of being a reform, turned out to be a mere compilation of different laws. Such a merger of four labour laws and reduction in compliance requirements, is not likely to resolve the bigger issue of increasing unemployment, never-ending litigations etc. As we know that, apart from the Wage code, three other codes have been proposed, it is important that the rules under those codes are in conformity with that of the Code of Wages, and vice-versa, for effective implementation. The provisions under the Wage code and the three proposed codes, should take into consideration, the existing rules relating to registers, filings & forms, of the Ministry of Labour and Employment, to simplify compliance-related

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<sup>45</sup> Supra at note 10.

<sup>46</sup> Ibid.

<sup>47</sup> “श्रम एवं रोजगार मंत्रालय” (*Ministry of Labour & Employment*) <<https://labour.gov.in/whatsnew/report-expert-committee-determination-methodology-fixation-national-minimum-wagewages>> accessed May 15, 2020

<sup>48</sup> Ibid.

<sup>49</sup> Supra at note 3.

<sup>50</sup> Supra at note 46.

procedures. The revised laws should not only reflect the current practices, but should also be ready to deal with the challenges of the future like artificial intelligence, increasing automation etc., and should go beyond their present form.

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