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RGICS LEGISLATIVE BRIEF (December, 2017)

The Code on Wages Bill, 2017

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KEY MESSAGES

- Although the legislation aims at empowering workers, the Bill in essence reflects a **shift towards increasing flexibility in the labour market by restricting basic rights of workers.**
- Even though the Bill includes workers and employees in both organised and unorganised, **there is no provision for the implementation of the Act in the unorganised sector.**
- While the proposed national minimum wage will fix a wage floor, it could lead to a **dilution in the minimum wages set by the state governments.**
- That the sole provision prohibiting **discrimination is limited to gender based discrimination**, highlights the government's narrow approach towards securing equal rights and security as it does not take into consideration the discrimination faced by the third gender. It is also silent about discrimination on the basis of caste and religion.
- The Bill lacks a progressive, forward looking approach as it **excludes workers engaged in contractual labour and in the on-demand economy-a growing sector of economy.**
- Curtailing the freedom to organise peaceful protests and a trade union's right to access audit reports might have **long-term implications on the freedom of trade organisations and freedom of expression** as well as on labour rights
- The Code is biased in favour of employers and **dilutes provisions ensuring compliance by removing inspection, penalties and immediate prosecution.**
- The Code provides **limited recourse to law for workers** especially those in the unorganised sector since it implicitly ousts the jurisdiction of courts and redressal is confined to the quasi judicial authority to be set up under the Code.

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PART I: INTRODUCTION

The object of the Code on Wages is to consolidate four existing labour legislations relating to wages, i.e, the Minimum Wages Act, 1948; the Payment of Wages Act, 1936; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. Evidently, all these legislations govern different aspects of the same subject and thus a rationalization of the labour legislations was considered necessary to ensure uniformity regardless of geographical locations. It is essentially a move towards rationalisation of the various definitions relating to the same subject matter, which until now were interpreted differently. The codification of these labour laws into one Act aims to remove the multiplicity of definitions and authorities leading to ease of compliance without compromising wage security and social security to the workers. It comprises of chapters dealing with minimum wages, payment of wages and payment of bonus with provisions related to equal remunerations.

The salient provisions of the Code on Wages 2017 are as follows:

| Sections | Provisions |
|----------|---|
| 1 | Extends to whole of India |
| 3 | No discrimination between employees on wages |
| 5 | No employer shall pay anything below the minimum wage as computed and fixed by the appropriate government |
| 8 | State governments have the power to compute the minimum wage on the basis of skill, geographical location etc |
| 9 | Minimum wage shall not be less than the minimum wage set by the Centre |
| 15 | All wages are to be paid in current coin or currency notes by cheque or through digital or electronic mode or by bank transfers |
| 18 | No deduction on wages except on issues identified by the Code; deduction on any ground cannot exceed 50% |
| 19 | Fines imposed on employees shall not exceed 3% of their salaries |
| 26 | All employees must be paid a minimum bonus of 8.33% |
| 29 | Bonus can be denied only if employees are dismissed on the grounds of fraud, riotous, violent behavior in the premises, theft, misappropriation of funds and conviction for sexual harassment |

| | |
|----|--|
| 43 | There will be an advisory committee formed by the Central government to advise on the minimum wage benchmark |
| 51 | Facilitators will be appointed for a speedy dispute resolution mechanism |
| 52 | No court shall take cognizance of any offence under this Code save on complaint made by or on authority of the appropriate government officer on this behalf, or by an employee or registered trade union. |

Source: Code on Wages Bill 2017 as introduced in the Lok Sabha

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PART II: KEY FEATURES OF THE BILL

The Bill aims to provide for essential elements relating to wages, equal remuneration, its payment and bonus.

Minimum wage:

- The central government may notify a national minimum wage for the country. States may fix different minimum wage for different states or geographical areas not below the national minimum.¹ The provisions are applicable to all employments covering both organised as well as the unorganised sectors.
- The power to fix minimum wages remains under the shared jurisdiction² of the state and central government although a universal minimum wage rate will be fixed by the government.
- The central government will make wage-related decisions for its authorities, and establishments related to railways, mines, and oil fields, among others. State governments will make decisions for any other establishments. The power to determine the deciding factors for³ fixing a minimum wage for different categories of employees is vested upon the appropriate government.

Payment of wages⁴ :

- It enables payment of wages through different modes especially digital and electronic in what is termed by the government as a huge move towards digitalization.
- Under the Code, an employee's wages may be deducted on certain grounds including: (i) fines, (ii) absence from duty, (iii) accommodation given by the employer, or (iv) recovery of advances given to the employee among others.

Payment of bonus⁵ :

- The employer will pay each employee an annual bonus of at least[⊕] i) 8.33% of his wages, or (ii) Rs 100, whichever is higher.
- The employer will distribute a part of the gross profits amongst the employees. This will be distributed in proportion to the wages earned by an employee during the year
- An employee can receive a maximum bonus of 20% of his wages. This will include any amount distributed as allocable surplus.

¹ Section 9, Code on Wages Bill, 2017

² Section 5, Code on Wages Bill 2017

³ Section 7, Code on Wages Bill 2017

⁴ Section 15, Code on Wages Bill 2017

⁵ Section 26, Code on Wages Bill 2017

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Other key features:

- It replaces the role of inspectors with facilitators who will be appointed by the government and will advise the employers and workers on the best way of implementing the proposed legislation.⁶
- It empowers the government to set up an appellate authority but bars the jurisdiction of courts over labour disputes.⁷
- It curtails the rights of workers to go on strikes which can be interpreted as violating the right to freedom of speech and expression.
- It provides for graded penalties for violation of different provisions of the proposed legislation and gives the employer time to comply with the provisions in the first stage of violation.⁸

⁶ Section 51, Code on Wages Bill 2017

⁷ Section 52, Code on Wages Bill 2017

⁸ Section 20, Code on Wages Bill 2017

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PART III: KEY ISSUES

Undoubtedly, the consolidation of four extant acts into one uniform code will offer compliance benefits and ease of doing business. All the features of the Code are bound to enhance investor confidence and promote investment in the country. The Code claims to offer the same set of labour rights and protection related to their wages while at the same time extending its ambit to include the informal sectors which is not covered by the current legislations. However, as can be seen from the stiff opposition mounted by the workers, this Code might not be as beneficial for the labour as the government claims it will be. What is worrying is that most of the provisions of the 2015 draft Bill which received scathing criticism have been retained in the present Bill without any changes. Few of the major issues that have emerged are-

- The concept of a national minimum wage is likely to be construed as a state level wage since each state has the discretion to fix their own minimum wage although it cannot be below the floor fixed by the Centre.
- Equal remuneration is limited to two provisions and there is no mention of a third gender or discrimination in payment of wages and employment on the basis of caste and religion.
- Section 20(2) implicitly restricts the right of workers to collective bargaining by imposing fines on absence for participating in an unauthorised strike
- The Code decriminalises first instances of contravention of the law unlike the current legislation which prescribes imprisonment in the first instance. It also excludes the jurisdiction of courts to take cognisance of disputes under this Code

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PART IV: CRITIQUE OF THE BILL

1. National minimum wage:

It has been argued that imposing a universal minimum wage undermines differences in topography, demographics and living standards across India. It was in view of this that the Wage Code proposes that the minimum wage can be set by the state governments and can be augmented based on the skill required, the arduousness of the work assigned to the worker, geographical location of the place of work and other factors which the appropriate government considers necessary. Economists have also expressed concern that the negative response towards a national minimum wage by the industry could impact hiring and result in retrenchment and higher rates of unemployment. A recent study published by National Bureau of Economic Research points at evidence that a hike in minimum wage Seattle, Washington, resulted in a 9% decrease in the number of hours worked in low-wage jobs. They argue that at a time when India is facing job losses and the rate of creation of new jobs is a serious concern, a higher minimum wage will only worsen the situation.⁹ However, in a country where majority of the workers are employed in the unorganised sector with no access to basic rights and protection of law, opposing minimum wages due to concern for rising unemployment is a misleading argument. Economists in support of fixing a minimum wage have argued that the concept of minimum wage has been long prevalent when a national floor level minimum wage was set as a non statutory structure. The State Governments were persuaded to fix minimum wages such that in none of the scheduled employments, the minimum wage is less than National Floor Level Minimum Wage so that disparity in the wages across the country is reduced.¹⁰

While the introduction of a minimum wage is drawing both criticisms and apprehensions from one end of the spectrum for being anti-employment and growth, the government has sought to justify it as pro-worker legislation. However, scathing criticisms from trade and workers' unions make this claim contentious. The Bill is being opposed by the workers on 3 main grounds:

- Different minimum wages across the country, diluting the concept of national minimum wage
- Fixation of minimum wage
- Exclusion of the Schedule of Employment

The Bill reduces the idea of a 'national minimum wage' to a state wise minimum wage by providing for different minimum wages to be fixed for different states instead of providing for a uniform national minimum wage for the entire country. Despite the Labour Ministry proclaiming its intention to improve the wage levels and ensure a minimum living standard to workers, section 9(1) of the Bill states that 'different national minimum wage may be fixed for different states or different geographical areas'. The underlying competitive federalism inherent in this shift of responsibility severely dilutes the concurrent nature of 'labour' as outlined in Article 246, Schedule 7 of the Constitution. CITU in its document critiquing the Bill have described the whole concept as a deceptive ploy. It argues that the Code is totally silent on the formula for fixation of minimum wages as unanimously recommended by the 15th Indian Labour Conference along with the Supreme Court

⁹<http://www.livemint.com/Opinion/WgZM9HZxouo9qiByArRETP/Having-a-minimum-wage-law-is-a-mistake.html>

¹⁰<http://labour.gov.in/sites/default/files/doc1.pdf>

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judgment in the Raptakos and Brett case, which was repeatedly reiterated in the 44th and 46th ILCs.¹¹ The minimum wage computed by 15th ILC as well as the Supreme Court and ILO directive suggests that a minimum wage of Rs 18000 be fixed nationally. The Seventh Pay Commission for the central government employees appointed by the BJP led government has recommended Rs 18000 as minimum wage. However the Bill does not mention any minimum and has been left to the government to decide with the help of the advisory board although its recommendations are not binding. There has also been no mention of a methodology for determining the wages of the unorganised sector.

Another concern is that the Code has removed the Schedule of Employment, which lists the industries governed by labour laws. Since the standardised minimum wage irrespective of industries will be set as the threshold, the NTUI memo puts forth an argument that it is likely that the thresholds will be fixed according to the wages paid to the poorest workers.¹² There is no clarity if the set wage will be similar for all industries, especially the ones where the minimum wage under the current law is higher and could lead to a race to the bottom among the States to lower wages. Instead of ameliorating the condition of workers, it could lead to further distress. The Bill in its present form comes across as ensuring ease of doing business at the cost of the rights and protection of the workers. Hence the provision of ‘national minimum wage’ being projected by the government as an improvement in the present Bill is rendered meaningless for the workers by the provisions of the Bill itself.

2. Restriction on freedom of trade unions and collective bargaining

Article 19(1)(c) of the Constitution of India guarantees to all its citizens the right to form associations and unions. As per the Industrial Disputes Act, an union may go on strike if both parties fail to reach a consensus. A public utility sector employees must provide six weeks’ notice of a strike, and may strike fourteen days after providing such notice.¹³ The Code renders trade unions toothless in a number of ways. Section 20(2) of the Bill seeks to reverse prior legislations enabling trade unionism by giving unfettered power to the employer and the government to declare a strike or union activity illegal and liable to be penalised. The provision deems a worker participating in a strike as absent and imposes a penalty equivalent to not more than eight days’ of wages of the worker. This is despite the fact that current legislations extend the right to workers to strike for 14 days after providing prior notice.¹⁴

Section 31(2) states that audited accounts of companies shall not be questioned, thus doing away with a union’s right to ascertain the allocable surplus and bargain for bonus above the minimum level. It also denies the right of the workers or their unions to question the accuracy of the balance sheet of the company or demand clarifications, which is available in the present Bonus Act.¹⁵

The Code further restricts the functioning of trade unions and workers’ organisations as it limits the scope of trade union members forming independent funds for their own welfare or other activities; removes right of trade unions to legally access audited accounts and balance-sheets of employers and limits possibility of scrutinizing

¹¹ <http://www.citucentre.org/documents/citu-documents/mahadharna/394-stop-the-anti-worker-amendment-to-the-labour-laws>
¹² <https://newsclick.in/trade-unions-reject-wage-code-bill-2017>

¹³ Section 18 of the IDA ¹⁴ http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf
¹⁵ <http://www.citucentre.org/documents/citu-documents/mahadharna/394-stop-the-anti-worker-amendment-to-the-labour-laws>

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the financial claims of the employer. This is a clear abrogation of workers' right to collective bargaining in respect of bonus by the government.

3. Limited provisions related to equal remuneration and prevention of discrimination

The Code significantly weakens the Equal Remuneration Act, one of the four laws it seeks to replace. The entire Equal Remuneration Act, 1976 has been limited to one section in the code, referring to as "Prohibition of discrimination on ground of gender". The Draft Bill released last year included reference to the third gender as well which has been deleted from the current draft. Moreover, the Equal Remuneration Act has been completely diluted by restricting it to gender discrimination only in respect of payment of wages, conditions of service such as promotion, vocational training, transfer. There is no mention of other serious grounds of discrimination like caste and religion which are constitutional grounds for reservation. Many activists have argued for a blanket prohibition against discrimination, pointing out that in a diverse country like India where discrimination is not only prevalent but is an issue of serious gravity, the government has not given it due importance by expressly prohibiting all forms of discrimination. The Code also reduces participation of women in the Central Advisory Board for Minimum Wages from 50% to one third.

4. Jurisdiction of courts and judicial appellate authority

Under the Code, recourse to law is limited to the authority to be appointed by the appropriate government. The narrow scope of this provision ensures that workers' access to justice is confined to a quasi judicial body and an appellate authority to be set up as per the Code. A claim can also only be filed by the appropriate authority, an employee or registered trade union. This places most workers in the unorganised sector in a very vulnerable situation as the grievance redressal mechanism is not just restricted but will mostly debar them from accessing legal remedy if the claim is not filed through a trade union. Moreover, ousting jurisdiction of courts might result in violation of the workers' right to seek remedy in the event of non payment of wages or other violations.

Section 9 of the Civil Procedure Code prescribes that the court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. However when the jurisdiction of a civil court is barred, either expressly or by necessary implication, it cannot be said that the jurisdiction is altogether excluded. A court has jurisdiction to examine whether the provisions of the act and the rules made thereunder have or have not been complied with, or the order is contrary to law, malafide, ultra vires, perverse, arbitrary, 'purported', violative of the principles of natural justice, or is based on 'no evidence' and so on. A suit in a civil court will always lie to question the order of a tribunal created by statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or acts in violation of its provisions. The CPC mandates that every law or decision made under its authority be subjected to review by judiciary. Thus the provision barring review by any authority apart from the appellate authority set up under the Act cannot stand the test of law. A dispute might be presided over by the Authority but a complete exclusion from judicial purview cannot be sustained. The government's claim that the provision of an Appellate Authority will lead to speedy, cheaper and efficient redressal of grievances and settlement of claims cannot justify the curtailing of the basic right of remedy of the workers.

5. Scope of employer-employee definition under the Code

The Wage Bill expands the scope of application of existing labour laws concerning wages to all establishments without any monetary limit. However while this expansion is reflected in the amendments to the definition of an employee, the scope of an employer remains narrowly defined. Under the new Bill, an employee is ‘any person’ employed on wages by any establishment without prejudice to the type of establishment. It also defines a worker as any person employed in any industry through express or implied terms of employment. Although this seeks to bring into purview workers from all the sectors, the execution and extension of the benefits under the Bill to the unorganised sector remains ambiguous throughout the Bill mainly because of the limited scope of who qualifies as an ‘employer’. Moreover, even though section 2(j) and 2(y) defining employees and workers respectively can be interpreted as a blanket provision, there is no mention of workers in the rapidly growing on demand economy and the measures adopted to cover them.

Thus while the Bill has been hailed as a landmark one for the rights of workers, it is unsure to what extent this can be realized practically. Some of the concerns and challenges that are unaddressed in the Bill are-

- Exclusion of workers in the on-demand economy: The recent UK judgment on Uber drivers being included as workers with employment rights and entitled to paid holiday and the national minimum wage and not independent contractors signifies the growing consensus globally about the need to make labour laws pervade across all sectors.
- Silent on the implementation of the laws in the unorganised sector: Although the Bill interprets employees as a blanket provision, there is lack of guidelines on how to apply the laws to an economy that is still largely unorganised. This frequent exclusion of workers like domestic help which constitute a significant percentage of workers is because they are a floating informal working population which difficult to be regulated. The government had recently announced a policy for the protection of domestic workers but is not clear on details such as what role the employers will have in ensuring social security benefits and by when the ministry wants to formally implement the proposal. This Bill , although guaranteeing rights and protection to every worker, does little in bringing these sections of unorganised workers under the purview of a formal policy.

6. Pro-employer system of inspection and certification

Section 51 of the Bill empowers the government to appoint facilitators and provide a web based system of inspection schedule. His primary responsibility is to to facilitate compliance with the laws and to advice employers and workers regarding the same. This position replaces the previous role of an inspector who was empowered to scrutinise an employer’s compliance with the laws, check documents and penalise if required. Citing malpractices and arbitrariness in inspection, the system of inspection has been tilted in favour of employers wherein the role of an inspector has been rendered obsolete and replaced by facilitators whose role is to merely ensure compliance through an advisory mechanism. It also gives additional opportunities to the employer in cases of contravention before actually initiating prosecution proceedings against him. Graded penalties have been introduced such that offences which were earlier compoundable is now punishable only after a compliance warning has been served and not been adhered to within a year. In essence, this provision tempers down the system of checks and balances which ensured that rights of workers are upheld and the laws are not abused by the employers.

7. Ease of Doing Business vs rights of workers

As the Government strives at making India one of the most favorable destinations to do business and to improve the business environment in the country, it has introduced new legislations to meet the benchmarks set by the Doing Business Project of the World Bank. The Doing Business Report on ease of doing business computes the ranks of countries on the basis of 10 core parameters. The indicators used for devising the index are: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency. Despite key reforms like GST were not taken into consideration in this year's report, India's climb to the 100th position was attributed to easing of labour market regulation as well as boosting the power sector. NITI Aayog in its recommendations on future policy reforms suggested further flexibility in the labour laws since firms in labour intensive sectors find compliance with labour-related regulations particularly arduous.¹⁶

This appears to be exactly the government's motive behind its recent move to amend existing labour legislations citing them as redundant and a barrier to doing business in the country. As with other economic reforms like GST and the stress on coal production which will facilitate the 'post filing index' and 'getting electricity' (both of which have been recently incorporated as a parameter for the ranking index), labour reforms undertaken in the past year also reflect a similar approach of catering to the requirements of ease of doing business.

- Codification of labour laws

- i) The Ministry of Labour and Employment has started the process of codification and amalgamation of 44 central labour laws into 4 codes to simplify the same. The four codes will pertain to labour, industrial relations, social security & welfare and safety and working conditions.
- ii) The Code on Wages Bill 2017 is the first code which seeks to consolidate Payment of Wages Act, 1936, Minimum Wages Act, 1949, Payment of Bonus Act, 1965, and Equal Remuneration Act, 1976 and introduce minimum wages across all sectors.

Although these legislations claim to be pro worker with the stated objective being upliftment of the conditions of workers, a closer look at the provisions of the bills reveal that these laws encroach on the rights of workers rather than ameliorating their situation. In its attempt to reconcile the labour market with the requirements for Ease of Doing Business, the government has diluted provisions empowering workers and has made it convenient for big businesses to bypass the laws. The changes in these prominent legislations appear to be motivated by the sole aim of bringing in more clarity and alleviation in conducting businesses. Through both legislative as well as governance reforms, the Ministry has taken various steps to endorse and uphold the scheme of 'Ease of Doing Business in India while neglecting its duty to protect and safeguard the interests of workers. Thus, it may be argued that the proposed labour reforms may prove to be more harmful than helpful if its priority remains to serve the interests of the corporates rather than being focused on the promotion of welfare and providing social security to the labor force both in organized and unorganized sectors workers.

¹⁶ <http://www.moneycontrol.com/news/economy/policy/ease-of-doing-business-niti-aayog-recommends-flexibility-in-labour-laws-accelerating-power-sector-reforms-2372659.html>

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PART V: CONCLUSION

The Code on Wages Bill is the first step of the four staged legislative reforms that the government has planned to introduce to simplify and rationalise multiple labour laws in the country. It aims to create a more effective, rationalized, transparent and user-friendly labour law system in the country with a two pronged motive of uplifting the conditions of workers while at the same time easing the rules of doing business in India. However on one hand while it is being argued that higher, uniform minimum wages across the country as is proposed could lead to a possibility of low-income states suffering de-industrialization leading to wide regional income disparity, trade unions are also protesting the Bill because of its allegedly anti worker provisions. A law aimed at uplifting the conditions of the workers should aim to address their issue instead of catering to the corporate houses and industries. The issues highlighted above as well as issues of dilution of overtime pay, replacement of judicial authority with a non judicial body are all matters of serious concern which might hinder the effective implementation of the law and prevent the benefits from reaching its target audience. The Bill in its present form is only likely to perpetuate the dismal situation of the workers especially in the unorganised and hence, their demands should be recognised and incorporated accordingly in the Bill.

The Code seems to be a step towards easing the process of doing business in the country and along with the other legislations on industrial relations and social security could revamp the system of labour regulation in India. What is worrying is that it seems to be an attempt towards attuning the laws to a growth and development based model which could end up undermining the livelihood and working conditions of the majority of the population.