

UNIVERSALIZATION OF MINIMUM WAGES AS A PIPE DREAM: MANY DISCONTENTS OF THE CODE ON WAGES, 2019

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The Code on Wages, 2019 ('Code') seeks to universalize the law on minimum wages in India by removing the distinction between scheduled and non-scheduled employment that has been central to the application of the Minimum Wages Act, 1948. The Union Ministry of Labour and Employment claims that the elimination of this dichotomy will extend the protection of minimum wages law to more than an estimated fifty crore workers. This paper posits that the goal of universalization of minimum wages may remain a pipe dream due to several explicit exclusions, definitional limitations, and ambiguities in the Code. As a result, not only would many wage workers still remain outside the ambit of minimum wages protection, the coverage of domestic workers, who were earlier covered under the Minimum Wages Act, 1948, may also be imperilled. Further, the exclusion of employment guarantee programmes from the ambit of the provisions on minimum wages also contravenes the constitutional prohibition against forced labour under Article 23. In addition, the Code also fails to address some of the critical structural barriers in the labour economy that have impeded the implementation of minimum wages law so far. This paper argues that the Code's failure to recognize an entitlement to minimum wages for every wage worker and address the systemic hurdles in the payment of minimum wages undermines the goal of universalization of minimum wages as well as the constitutional mandate on payment of minimum wages.

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I. INTRODUCTION

The Code on Wages, 2019 is the first legislation to have been enacted as a part of the National Democratic Alliance government’s agenda on labour reforms.¹ In an attempt to simplify and consolidate existing labour regulations, the Ministry of Labour and Employment has consolidated 38 central legislations into 4 Labour Codes.² The Code on Wages, 2019 (‘Code’) amalgamated 4 laws – the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976 – into a single statutory instrument and repealed the individual laws. The Statement of Objects and Reasons asserts that the merger of these 4 statutes into a single law “will facilitate the implementation and also remove the multiplicity of definitions and authorities without compromising on the basic concepts of welfare and benefits to worker”.³ It further declares that “[w]idening the scope of minimum wages to all workers would be a big step for equity”.⁴

Indeed, the Code has not only introduced a statutory national floor wage⁵ but has also taken a significant step towards making the right to minimum wages a truly universal entitlement. Until now, the Minimum Wages Act, 1948 applied only to those employments that were listed in the Schedule to the Act.⁶ Apart from a handful of states, there was no statutory obligation whatsoever in other states to pay minimum wages in those fields of employment that were not mentioned in the Schedule.⁷ As a result, estimates indicated that somewhere

¹ ‘India’s New Government to Push Labour Reforms’ (*Asia Times*, 28 May 2019) <<https://www.asiatimes.com/2019/05/article/indias-new-government-to-push-labor-reforms/>> accessed 23 June 2020; TK Rajalakshmi, ‘Amendments to Labour Laws Under the Modi Government: No Love for Labour’ (*Frontline*, 16 August 2019) <<https://frontline.thehindu.com/the-nation/article/28757774.ece>> accessed 23 June 2020.

² Code on Wages; Code on Industrial Relations; Code on Social Security; Code on Occupational Safety, Health and Working Conditions.

³ Code on Wages Bill 2019, Statement of Objects and Reasons.

⁴ *ibid.*

⁵ Code on Wages 2019, s 9.

⁶ Minimum Wages Act 1948, s 3(1).

⁷ Admittedly, several states like Maharashtra, Gujarat, Karnataka, and Tamil Nadu have widened the scope of ‘scheduled employments’ by adding a residuary clause. For example, the Maharashtra Government has added a residuary clause covering ‘[e]mployment in any shop or commercial establishment, other than that covered under any of the other entries in this schedule’. Similarly, Karnataka has notified minimum wages and has amended the schedule to extend minimum wages to ‘employment not covered in any of the scheduled employments to

between 35% and 40% of all wage workers in India fell outside the ambit of that law.⁸ The new Code dispenses with this distinction between scheduled and non-scheduled employment. The removal of this dichotomy is a groundbreaking step, and the government claims that it will extend the protection of minimum wages law to more than an estimated 50 crore workers.⁹ The Code also stipulates provisions on timely payment of wages and permissible deductions that are applicable to all establishments.¹⁰ Consequently, the Code promises to extend a statutory remedy for non-payment of wages to several new categories of employees who were hitherto solely reliant on the illusory and sclerotic protection of civil courts.

However, this paper posits that the Code suffers from several lacunae in that it may imperil the progressive goal of universalization of minimum wages. *First*, the Code fails to extend the right to receive minimum wages to all the wage workers. This failure stems from certain limitations and contradictions in the definition of ‘employee’ under the Code. Significantly, these lacunae may also undermine the scope of gender anti-discrimination provisions contained in the Code concerning equal remuneration. Additionally, these definitional ambiguities may also risk the coverage of domestic workers who were earlier covered under the Minimum Wages Act. *Second*, this paper draws attention to the explicit exclusion of employment guarantee programmes from the ambit of the provisions on minimum wages in the Code and argues that such exclusion not only impedes the goal of universalization of minimum wages but

the schedule to the Act’. Indeed, the Karnataka High Court has also observed that the notification has made minimum wages universal. See *Karnataka Small Scale Industries Association v Secretary* (2019) 2 LLJ 740: 2019 Indlaw Kar 8824 (High Court of Karnataka). However, even some of these residuary clauses are limited in their ambit. For example, the residuary clauses in Gujarat and Maharashtra extend the schedule to shops and commercial establishments covered by the Bombay Shops and Establishments Act 1948. As such, they fail to embrace all workplaces and employments. Secondly, the abovementioned states are exceptions, since most states, along with the Central Government, have continued to follow the rigid binary classification between scheduled and non-scheduled employment. See Ministry of Labour and Employment, ‘Report on the Working of the Minimum Wages Act for the Year 2014’ (Government of India 2016) <http://labourbureaunew.gov.in/UserContent/Report_MW_ACT_2014.pdf?pr_id=wEIJppAkILE%3d> accessed 23 June 2020.

⁸ Patrick Belsler and Uma Rani, ‘Extending the Coverage of Minimum Wages in India: Simulations from Household Data’ (2011) 46(22) *Economic & Political Weekly* 47; Anwarul Hoda and Durgesh K Rai, ‘Labour Regulations in India: Rationalising the Laws Governing Wages’ (2017) ICRIER Working Paper 346 <https://icrier.org/pdf/Working_Paper_346.pdf> accessed 23 June 2020; ‘India Wage Report: Wage Policies for Decent Work and Inclusive Growth’ (International Labour Organization 2018) <https://www.ilo.org/wcmsp5/groups/public/asia/robangkok/sronew_delhi/documents/publication/wcms_638305.pdf> accessed 23 June 2020.

⁹ Ministry of Labour and Employment, ‘Lok Sabha Passes the Code on Wages Bill, 2019’ (*Press Information Bureau*, 30 July 2019) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=192386>> accessed 23 June 2020.

¹⁰ In contrast, the Payment of Wages Act 1936 is applicable to a limited set of establishments specified in Section 1(4) of that Act or to establishments notified by the appropriate government. See *Payment of Wages Act 1936*, s 1.

also contravenes the constitutional prohibition against forced labour. *Third*, the paper alludes to the structural barriers in the realization of minimum wages in India and avers that universalization of minimum wages cannot be achieved in isolation from an appropriate response to such barriers.

II. UNDERMINING UNIVERSALITY BY A DEFINITIONAL QUAGMIRE

As mentioned earlier, the protections under the Minimum Wages Act, 1948 extended only to persons in scheduled employments.¹¹ The dichotomy between scheduled and non-scheduled employment had its genesis in the history of the minimum wages law in India. In 1931, the Royal Commission on Labour in India had suggested the introduction of statutory minimum wages only in a few “sweated industries”, where the wages were inadequate and collective bargaining was not possible.¹² This blueprint for extending minimum wages to only a few select occupations was adopted by the postcolonial state through the Industrial Policy Resolution, 1948, which called for the fixation of statutory minimum wages in “sweated industries” only.¹³ The newly enacted Minimum Wages Act, 1948 incorporated this policy and limited the applicability of the Act to only those employments listed in the Schedule.¹⁴ The list of categories of employments covered by the Schedule incrementally grew from 13 categories to 376.¹⁵ In fact, there existed more than 1,054 different minimum wage rates in the country.¹⁶ Yet, around one-third of the wage workers in the country were still not covered by the Minimum Wages Act, 1948.¹⁷ The dichotomy between scheduled and other employments significantly contributed to their exclusion from the Act’s protection.

The Code abolishes this erstwhile distinction between scheduled and non-scheduled employment. Section 5 of the Code makes an emphatic assertion that “no employer shall pay to any employee wages less than the minimum rate of wages notified by the appropriate Government”. Consequently, there is no scope for classification of employments into scheduled or non-scheduled categories. However, the apparent universality of the obligation to pay minimum

¹¹ Minimum Wages Act 1948, s 3.

¹² ‘Report of the Royal Commission on Labour in India’ (Royal Commission on Labour in India 1931) 211-214 <<https://archive.org/details/in.ernet.dli.2015.11111/page/n1/mode/2up>> accessed 23 June 2020.

¹³ Sahab Dayal, ‘The Development of Modern Wage Concepts and Labour Legislation in India—An Analysis’ (1978) 12(2) *Indian Journal of Industrial Relations* 147, 148.

¹⁴ The Statement of Objects and Reasons had indicated that the ‘items in the schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour’. See Minimum Wages Act 1948, Statement of Objects and Reasons.

¹⁵ *International Labour Organization* (n 8) 77.

¹⁶ Uma Rani and others, ‘Minimum Wage Coverage and Compliance in Developing Countries’ (2013) 152 (3-4) *International Labour Review* 381.

¹⁷ *International Labour Organization* (n 8) 75.

wages in this provision is only a chimera. This part of the paper will show that the definition of key terms like ‘employee’, ‘workers’, and ‘employer’ have indirectly resulted in qualifications on the applicability of minimum wage provisions under the Code, thereby excluding a considerable number of workers from the protection of the Code.

A. Definition of ‘Employee’ and Qualifications on Nature of Work

An ‘employee’ is granted the right to be paid minimum wages under Section 5 of the Code. Consequently, not every wage worker will be automatically entitled to minimum wages. In other words, Section 5 necessitates that a wage worker must fall within the definition of ‘employee’ before they can claim a right to minimum wages under the Code. This emphasis on the relationship of employment can act as a significant hurdle in the path of complete universalization of minimum wages, as several categories of wage workers can be excluded from the definition of ‘employee’.

Despite the centrality of the status of employment in labour and employment, there has been considerable divergence over the appropriate legal standards for defining it.¹⁸ Indeed, it is doubtful whether every worker would meet the technical-legal standards formulated through centuries of evolution in common law.¹⁹ Admittedly, the classical common law’s standard of control and supervision²⁰ has been overtaken by more holistic modern standards that allow for the balancing of several factors.²¹ Yet, supervision and control still remains a crucial factor in proving the existence of a relationship of employment. This is indicated in *Balwant Rai Saluja v Air India Ltd*,²² which spoke of effective and absolute control. Earlier, the Supreme Court had distinguished between primary and secondary control in *International Airport Authority of India v International Air Cargo Workers’ Union*,²³ and asserted that primary control is

¹⁸ Guy Davidov, ‘The Subjects of Labour Law: “Employee” and Other Workers’ in Mathew Finkin and Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015) 115; Richard R Carlson, ‘Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying’ (2001) 22(2) *Berkeley Journal of Employment and Labour Law* 295, 296–301.

¹⁹ Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52(4) *The University of Toronto Law Journal* 357.

²⁰ *Dharangadhra Chemical Works Ltd v State of Saurashtra* AIR 1957 SC 264 (Supreme Court of India); *Shankar Balaji Waje v State of Maharashtra* 1962 Supp (1) SCR 249 (Supreme Court of India).

²¹ *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans* (1952) 1 TLR 101 (Court of Appeal); *Cassidy v Ministry of Health* (1951) 2 KB 343 : (1951) 1 TLR 539 (Court of Appeal); *Birdhichand Sharma v First Civil Judge* AIR 1961 SC 644 : (1961) 3 SCR 161 (Supreme Court of India); *DC Dewan Mohideen Sahib v United Beedi Workers’ Union* AIR 1966 SC 370 : (1964) 7 SCR 646 (Supreme Court of India); *Silver Jubilee Tailoring House v Chief Inspector of Shops and Establishments* (1974) 3 SCC 498 (Supreme Court of India); *Workmen of Nilgiri Cooperative Marketing Society Ltd v State of Tamil Nadu* (2004) 3 SCC 514 (Supreme Court of India).

²² (2014) 9 SCC 407 (Supreme Court of India).

²³ (2009) 13 SCC 374 (Supreme Court of India).

necessary for employment. Therefore, contract labourers were not considered as employees, due to absence of primary control.

The absence of direct control over work potentially excludes a large swath of contract labour, sub-contracted workers, home-based workers, dependent entrepreneurs, and gig workers from the ambit of employment. This is amply evident from the Supreme Court's decision in *Managing Director, Hassan Co-operative Milk Producer's Society Union Limited v Assistant Regional Director, Employees' State Insurance Corporation*, where drivers engaged by a milk cooperative through contractors were held outside the purview of 'employees' as defined by the Employees' State Insurance Act, 1948, on account of lack of supervisory control and "consistency of vigil".²⁴ Thus, the employment-centricity of the Code will act as an impediment to universal coverage of minimum wages law. Not only does this undermine the stated objective of the Code, but it also goes against the International Labour Organization's ('ILO') recommendations in Transition from the Informal to the Formal Economy Recommendation, 2015 (Recommendation No. 204), which call upon countries to progressively extend minimum wage protections to workers in the informal economy.²⁵ The inability to cater to such workers in precarious fields of employment would also render the Code marginal to the reality of the contemporary labour economy, which has seen a systematic increase in atypical work.²⁶

A perusal of the definition of 'employee' in Section 2(k) of the Code further shows that not every person in a relationship of employment is brought within its ambit. The operative part of the Section defines an employee as "any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward".²⁷ This means that a person must be employed to perform one of the types of work specified in the provision to be considered an employee. Consequently, many persons who remain in a relationship of employment may potentially be excluded from minimum wage protection. This is because, while the terms used to qualify the nature of work, like 'manual', 'unskilled', 'skilled', 'technical', 'operational', or 'clerical', may have broad meanings, they have been subjected to a comparatively narrow interpretation by the judiciary in recent cases under the Minimum Wages Act, 1948, the Industrial Wages Act, 1947, and the Payment of Gratuity Act, 1972 ('POGA').

²⁴ (2010) 11 SCC 537 (Supreme Court of India).

²⁵ 'R204 - Transition from the Informal to the Formal Economy Recommendation, 2015 (No 204)' (*International Labour Organization*, 12 June 2015), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204> accessed 23 June 2020.

²⁶ Kim Van Eyck, 'Flexibilizing Employment: An Overview' (2003) International Labour Office SEED Working Paper No 41 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/-ifp_seed/documents/publication/wcms_117689.pdf> accessed 23 June 2020.

²⁷ Code on Wages 2019, s 2(k).

For example, in *Haryana Unrecognised Schools' Association v State of Haryana*,²⁸ the Supreme Court held that school teachers do not come within the fold of “skilled, semi-skilled or unskilled, manual, operational, technical or clerical work” under the Minimum Wages Act.²⁹ In the same vein, the Supreme Court in *Ahmedabad Pvt Primary Teachers' Association v Administrative Officer*,³⁰ held that teachers “are not skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical employees” under the POGA. The Court, in this case, specifically held that teachers do not conform to the description of being employees who are ‘skilled’, ‘semi-skilled’, or ‘unskilled’.³¹ While the POGA was amended in 2009 in response to this case,³² the reasoning of this case was not addressed by the amendment. Indeed, even after the amendment, the judiciary has continued to rely on this reasoning in the context of other statutes.³³ Similarly, the Supreme Court has also held in *Bharat Bhawan Trust v Bharat Bhawan Artists' Association*³⁴ that theatre artistes would not be covered within the meaning of ‘skilled work’ for the purpose of the Industrial Disputes Act, 1947. This case had, in turn, relied on a Constitution Bench decision in *HR Adyanthaya v Sandoz (India) Ltd*,³⁵ where it had been held that the term ‘skilled work’ in the definition of ‘workmen’ in Section 2(s) of the Industrial Disputes Act, 1947 must be construed by using the rule of *ejusdem generis*.³⁶ Thus construed, the Court ruled that medical representatives could not be considered as ‘skilled workers’ and, by extension, as ‘workmen’ under that Act.

These cases illustrate the limited manner in which the types of work listed in Section 2(k) of the Code have been interpreted by the judiciary in the context of other statutes. These interpretations exclude numerous types of workers from statutory protection. In view of the fact that courts have been inclined

²⁸ (1996) 4 SCC 225 (Supreme Court of India).

²⁹ The Court followed its earlier decision in *A Sundarambal v Government of Goa* (1988) 4 SCC 42 (Supreme Court of India), wherein it had been held that ‘the main function of teachers cannot be construed as skilled or unskilled manual work or clerical work’.

³⁰ (2004) 1 SCC 755 (Supreme Court of India).

³¹ *ibid* 764-765.

³² Payment of Gratuity (Amendment) Act 2009. The implications of the amendment on coverage of teachers under the POGA was acknowledged by the Supreme Court in *Birla Institute of Technology v State of Jharkhand* (2019) 15 SCC 587 (Supreme Court of India).

³³ For example, the Allahabad High Court in *Shrikrishna v Surendra Singh* 2014 SCC OnLine All 15225 : 2014 Indlaw All 1221 relied on the interpretation of the Supreme Court in *Ahmedabad (P) Primary Teachers' Association v Administrative Officer* (2004) 1 SCC 755 while adjudicating on the meaning of ‘unskilled’ labour under the Motor Vehicles Act 1988. See also *Sarajuddin v Jai Narain Vyas University, Jodhpur* 2013 SCC OnLine Raj 1808 : 2013 Indlaw Raj 2586 where the Rajasthan High Court invoked the case while adjudicating on the University Rules on gratuity. See also *Sanjay Memorial Institute of Technology v Appellate Authority* 2018 SCC OnLine Ori 441 : 2018 Indlaw Ori 535 (Orissa High Court) for continued reference to *Ahmedabad (P) Primary Teachers' Association v Administrative Officer* (2004) 1 SCC 755 (Supreme Court of India).

³⁴ (2001) 7 SCC 630 (Supreme Court of India).

³⁵ (1994) 5 SCC 737 (Supreme Court of India).

³⁶ *ibid* 755.

to follow judicial precedent from analogous labour statutes while interpreting these terms,³⁷ there is a distinct possibility that a similar meaning would also be accorded to terms like ‘manual’, ‘unskilled’, ‘skilled’, ‘technical’, ‘operational’, and ‘clerical’ in the definition of ‘employee’ in Section 2(k) of the Code. Consequently, many white-collared employees like teachers, theatre artistes, and medical professionals would fall outside the purview of the Code. Such an exclusion would thoroughly undermine the goal of universalization of minimum wages.

It is also submitted that such exclusion also runs afoul of the dicta of the Supreme Court, which views minimum wages as a constitutional entitlement for every worker. The Supreme Court had held in *Sanjit Roy v State of Rajasthan*³⁸ that every person who provides labour or service to another is entitled to the minimum wage and “if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23”.³⁹ Therefore, the imposition of qualifications in the definition of ‘employee’ is constitutionally suspect. If minimum wage is indeed a matter of constitutional right of every person who works for wages, then it should apply to every worker, regardless of the nature of their work. The qualifications contemplated in Section 2(k) of the Code undermine that constitutional guarantee.

B. ‘Worker’ and ‘Employee’ – A Lack of Definitional Consistency

The impact of the exclusion embedded in the definition of ‘employees’ in Section 2(k) of the Code is compounded by the ambiguity caused by the use of different statutory terms to refer to workers to whom the Code shall apply. It is noteworthy that some of the rights under the Code are available to ‘workers’ while many rights are available to ‘employees’. For example, Section 5, which prohibits an employer from paying less than the notified minimum rate of wages, uses the term ‘employee’. In contrast, Section 6(6) and Section 7(1) of the Code use the term ‘worker’ while providing for fixation of the minimum wage rate. Similarly, Section 9, which empowers the Central Government to fix the floor wage, uses the term ‘worker’.

The difference in usage of terms is reinforced by differences in the statutory definitions of these terms. Section 2(z) of the Code defines a ‘worker’ as any person “employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward” and includes working journalists and sales promotion employees.⁴⁰ By one count,

³⁷ *Sarva Shramik Sangh v Indian Smelting & Refining Co Ltd* (2003) 10 SCC 455 : AIR 2004 SC 269 (Supreme Court of India); *Ahmedabad (P) Primary Teachers’ Association v Administrative Officer* (2004) 1 SCC 755 (Supreme Court of India).

³⁸ (1983) 1 SCC 525 (Supreme Court of India).

³⁹ *ibid* 533.

⁴⁰ Code on Wages 2019, s 2(z).

this definition appears broader since it specifically includes working journalists and sales promotion employees. By another count, however, it is narrower as it does not include managerial and administrative workers. It is submitted that this lack of consistency in usage and definition is likely to cause considerable confusion with regard to the scope of persons covered by the provisions on minimum wages, particularly with respect to working journalists, sales promotion employees, managerial workers, and administrative workers, who evidently fall under only one of the two definitions.

The Ministry of Labour and Employment, in its submission to the Parliamentary Standing Committee, had stated that the drafters had used these two different terms for distinct scenarios. It claimed that “the word ‘employee’ has been used where the right for minimum wages, payment of wages and payment of bonus is concerned” and “the word ‘workers’ is used in the definition of industrial dispute”, implying that disputes “cannot be raised by persons in supervisory, managerial and administrative capacity”.⁴¹ However, this claim is belied by the fact that both these terms have been used in the very same chapter pertaining to minimum wages. The use of different terms, with separate statutory definitions, for the same chapter, is a recipe for confusion and will undermine the practical application of the Code. In fact, the Parliamentary Standing Committee had itself noted that “the Code lacks consistency in use of both terms” and “the confusion may lead to employers misinterpreting these terms and perhaps also discriminate between the workers and employees”.⁴² However, there has been no pursuant amendment to the Code and the confusion still persists. This lack of consistency, and the consequent confusion, may turn out to be an Achilles’ heel of this Code, especially with respect to payment of minimum wages to working journalists, sales employees, and managerial and administrative workers.

C. Defining ‘Employer’ and the Ambiguity Over Coverage of Domestic Work

The goal of universalization of minimum wages is also undermined by the uncertainty over the status of coverage of domestic workers by the Code. The erstwhile Minimum Wages Act, 1948 had been extended to domestic workers in more than half a dozen states through their inclusion in scheduled employment and a notification fixing minimum wage rates for such work.⁴³ While there were several challenges in the actual enforcement of the law, there was little doubt that state governments could notify minimum wage rates for

⁴¹ Standing Committee on Labour, ‘Report on the Code on Wages Bill 2017, Forty Third Report’ (Ministry of Labour and Employment 2018) 15 <http://164.100.47.193/lssccommittee/Labour/16_Labour_43.pdf> accessed 23 June 2020.

⁴² *ibid* 18.

⁴³ Neetha N, ‘Minimum Wages for Domestic Work: Mirroring Devalued Housework’ (2013) 48(43) *Economic & Political Weekly* 77.

domestic workers.⁴⁴ The provisions in the Code are, however, far more ambiguous. Section 5 of the Code states that “no employer shall pay to any employee wages less than the minimum rate of wages”. While this clause is very broad, the definition of ‘employer’ in Section 2(l), read with the definition of ‘establishment’ in Section 2(m), may result in the exclusion of domestic workers. A conjoint reading of these provisions suggests that a worker must be employed in an establishment before they can claim the right to minimum wages under the Code. The term ‘establishment’ has been defined under Section 2(m) as “any place where any industry, trade, business, manufacture or occupation is carried on”.⁴⁵

It is doubtful whether households and homes would fall within the scope of the terms listed in the definition of ‘establishment’. Terms like ‘trade’, ‘business’, ‘manufacture’, and ‘occupation’ have also been used in the definition of ‘industry’ in Section 2(j) of the Industrial Disputes Act, 1947. It is noteworthy that in the context of this Act, the Supreme Court has held that “services rendered by a domestic servant” would fall outside the definition of ‘industry’.⁴⁶ The inference that a household would not fall within the scope of the term ‘establishment’ is strengthened by the Supreme Court’s decision in *Bangalore Turf Club Limited v Regional Director, Employees State Insurance Corporation*,⁴⁷ in the context of the Employees’ State Insurance Act, 1948. In this case, the Supreme Court had held that an ‘establishment’ is a place “where an activity is systematically and habitually undertaken for production or distribution of goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking”.⁴⁸ This standard is similar to the principles outlined by a seven-judge bench of the Court in *Bangalore Water Supply and Sewerage Board v A Rajappa*⁴⁹ in the context of the definition of ‘industry’ in the Industrial Disputes Act. Given that the Supreme Court has held in later cases that domestic work does not meet this standard, it is unclear whether domestic work in a household would meet the onerous requirement in the definition of ‘establishment’. Therefore, the question of whether domestic workers would be covered by the provisions on minimum wages under the Code does not furnish an unequivocal answer. Indeed, the definition of ‘employer’, read with the definition of ‘establishment’, generates considerable confusion on this issue. The ambiguity over coverage of domestic workers would substantially impair the coverage of the Code. It also goes against the principles enshrined in the ILO Domestic Workers

⁴⁴ Nimushakavi Vasanthi, ‘Addressing Paid Domestic Work: A Public Policy Concern’ (2011) 46(43) Economic & Political Weekly 85.

⁴⁵ Code on Wages 2019, s 2(m).

⁴⁶ *Som Vihar Apartment Owners’ Housing Maintenance Ltd v Workmen* (2002) 9 SCC 652 (Supreme Court of India); *Manjur v Shyam Kunj Occupants’ Society* Civil Appeal No. 7502 of 2002, order dated 4-2-2004 (SC) (Supreme Court of India).

⁴⁷ (2014) 9 SCC 657 (Supreme Court of India).

⁴⁸ *ibid* 680.

⁴⁹ (1978) 2 SCC 213 (Supreme Court of India).

Convention, 2011, which calls upon states “to ensure that domestic workers enjoy minimum wage coverage”.⁵⁰

This part of the paper has highlighted the lacunae and the contradictions embedded in the definitions of key terms like ‘employees’ and ‘employers’ in the Code and their ramifications on the objective of extending the right to minimum wages to all wage-earners. In this context, it is suggested that the Code should instead use a definition of ‘employees’ akin to the amended definition of this term in the POGA. This definition extends to every person “who is employed for wages” in “any kind of work” that is connected “with the work of an establishment”.⁵¹ Indeed, this would have aligned the Code’s provisions with the recommendations of the Standing Committee, which had opined that “since minimum wage is a matter of right for every working person, a common and comprehensive definition” must be incorporated in the Code.⁵² Further, the confusion and uncertainty over the coverage of domestic workers could have been obviated with a clause similar to Section 2(g)(iv) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which stipulates that in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of a domestic worker shall be considered the employer.⁵³ This would have also ensured that there is no regression in the erstwhile protection of domestic workers under the Minimum Wages Act.

III. EXCLUSION OF NREGA FROM MINIMUM WAGES LAW

One of the most egregious aspects of this Code is the exclusion of the work under the National Rural Employment Guarantee Programme (‘NREGA’) from the ambit of minimum wages law. Section 66 of the Code states that nothing in the Code “shall be deemed to affect the provisions of the Mahatma Gandhi National Rural Employment Guarantee Act 2005”. This provision must be juxtaposed with Section 6 of the latter statute, which allows the Central Government to specify wage rates irrespective of the provisions of the Minimum Wages Act, 1948.⁵⁴ Section 66 of the Code also explicitly excludes NREGA from the ambit of minimum wages law.

⁵⁰ Convention Concerning Decent Work for Domestic Workers, art 11.

⁵¹ Payment of Gratuity Act 1972, s 2(e).

⁵² Standing Committee on Labour (n 41) 18.

⁵³ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(g):

(g) “employer” means [...] (iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.

⁵⁴ Mahatma Gandhi National Rural Employment Guarantee Act 2005, s 6.

The applicability of the Minimum Wages Act, 1948 to public works programmes, especially in the context of NREGA, has been a bone of contention for a long time. The Central Government has time and again sought to delink the wages under NREGA from minimum wages laws. Indeed, a recent study found that the wages paid under NREGA were less than the statutory minimum wages in all states and union territories but one.⁵⁵ This exemplifies the systematic neglect of the observations of the Supreme Court that non-payment of minimum wages amounts to forced labour.⁵⁶ The Court has also explicitly held that such obligation to pay minimum wages extends to public works programmes as well. In *Sanjit Roy v State of Rajasthan*,⁵⁷ the Supreme Court held that minimum wages have to be paid for a drought relief programme and observed:

Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him he can complain of violation of his fundamental right under Article 23. . . . The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The State cannot, under the guise of helping these affected persons, extract work of utility and value from them without paying them the minimum wage. Whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person on pain of violation of Article 23.⁵⁸

The applicability of minimum wages law to public works programmes as a tenet of Article 23 was also reiterated in the context of NREGA by the Karnataka High Court in *Karnataka Prantya Raita Sangha v Union of India*.⁵⁹

⁵⁵ 'MNREGA Wage Hike Less Than Minimum in 33 States' (*Down To Earth*, 3 April 2019) <<https://www.downtoearth.org.in/news/agriculture/mnrega-wage-hike-less-than-minimum-wage-in-33-states-63791>> accessed 23 June 2020.

⁵⁶ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235 (Supreme Court of India).

⁵⁷ *Sanjit Roy v State of Rajasthan* (1983) 1 SCC 525 (Supreme Court of India).

⁵⁸ *ibid* 534.

⁵⁹ 2011 SCC OnLine Kar 4509 (High Court of Karnataka). On appeal, the Supreme Court had noted that the Ministry of Rural Development had issued a notification that had increased the wages under NREGA. Therefore, the Supreme Court declined to decide the issues raised in the special petition. See *Union of India v Karnataka Prantya Raita Sangha* 2014 SCC OnLine SC 1793 (Supreme Court of India).

Admittedly, some doubts over the obligation to pay minimum wages under NREGA arise because of the observations of the Madras High Court in the recent case of *R Gandhi v Union of India*. The Madras High Court held that the nature of work intended to be assigned under NREGA “was separate to be [sic] and distinct from those listed under the Schedule to the Minimum Wages Act” and as a result, “any comparison between works assigned under the two legislations seems specious and legally untenable”.⁶⁰ It is submitted that the Madras High Court’s reliance on the distinction between scheduled employment under the Minimum Wages Act and work envisaged under NREGA may not be relevant for analysis under the present Code due to the elimination of the dichotomy between scheduled and non-scheduled employments under the Code. Further, the High Court also did not take into account the categorical assertion of the Supreme Court in *Sanjit Roy* that “every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him he can complain of violation of his fundamental right under Article 23”.⁶¹

In spite of the unequivocal assertion by the Supreme Court that “whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person on pain of violation of Article 23”, the Code has delinked the minimum wages law from NREGA. Such divorce of NREGA from the legal norms on minimum wages arguably violates the prohibition on forced labour as outlined in Article 23 and is consequently unconstitutional. Much like how the Supreme Court had declared the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 unconstitutional on account of violation of Article 23 and Article 14,⁶² there is a strong case to assail the constitutional validity of Section 66 of the Code.

IV. FAILURE TO ADDRESS STRUCTURAL BARRIERS

Apart from the definitional limitations, the goal of universalization of minimum wages is also likely to be impeded by the Code’s failure to address the structural barriers in the implementation of the minimum wages law. The High Power Expert Groups on Determining the Minimum Wages in India had noted that low wages and wide disparities in wages have continued to prevail across states even for various scheduled employments.⁶³ TS Papola and KP Kannan had found that “an overwhelming majority of casual workers” were not being

⁶⁰ *R Gandhi v Union of India* 2020 SCC OnLine Mad 618 (Madras High Court).

⁶¹ *Sanjit Roy v State of Rajasthan* (1983) 1 SCC 525, 536-538 (Supreme Court of India).

⁶² *ibid.*

⁶³ Ministry of Labour and Employment, ‘Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage’ (Government of India January 2019) <https://labour.gov.in/sites/default/files/Committee_on_Determination_of_Methodology.pdf> accessed 23 June 2020.

paid the recommended National Minimum Wage rate.⁶⁴ The systemic non-implementation of the minimum wages law has been as much a product of the structural features of the labour economy as it is of the limitations in statutory definitions.

Among such structural barriers is the lack of bargaining power of workmen to “refuse work when the wages offered are below the minimum wage”.⁶⁵ Endemic poverty aside, such lack of bargaining power is exacerbated by precarity of work and absence of effective organization among workers. Indeed, the ILO has noted that empowering workers through collective action and workers’ organization has enabled better implementation of minimum wage laws.⁶⁶ Pertinently, the Minimum Wage Fixing Convention, 1970 itself alludes to collective bargaining.⁶⁷ Consequently, universalization of minimum wages cannot be divorced from the question of more robust protection for the collective bargaining rights of trade unions. In view of this, the goal of universalization of minimum wages has to be juxtaposed against the systematic assault on the rights of trade unions in the aftermath of COVID-19⁶⁸ and the proposed dilution of the rights of trade unions in the Code on Industrial Relations Bill, 2019.⁶⁹ Beyond the lack of collective bargaining, the ILO has also acknowledged the role of precarious work as a key driver for the preponderance of low wages.⁷⁰ Thus, the legal guarantee of minimum wages cannot be translated into meaningful protection, without proactive steps against precarious work. Unfortunately, the direction of change in Indian labour relations is likely to enhance greater insecurity and precarity for workers due to the legalization of

⁶⁴ TS Papola and KP Kannan, ‘Towards an India Wage Report’ (International Labour Organization October 2017) 110 <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_597270.pdf> accessed 23 June 2020.

⁶⁵ *ibid* 120.

⁶⁶ ‘Minimum Wage Policy Guide: A Summary’ (International Labour Organization 2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_570376.pdf> accessed 23 June 2020.

⁶⁷ Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries, art 2(2).

⁶⁸ Pratap Bhanu Mehta, ‘Ordinances by States to Change Labour Laws are a Travesty’ *The Indian Express* (12 May 2020) <<https://indianexpress.com/article/opinion/columns/industrial-relations-code-india-labour-law-amendment-pratap-bhanu-mehta-6405265/>> accessed 23 June 2020; Payaswini Upadhyay, ‘The Unprecedented Changes to India’s Labour Laws = Social Chaos?’ (*Bloomberg Quint*, 12 May 2020) <<https://www.bloombergquint.com/law-and-policy/the-unprecedented-changes-to-indias-labour-laws-social-chaos>> accessed 23 June 2020.

⁶⁹ Shreehari Paliath, ‘Why Trade Unions are Pushing Back Against India’s Proposed Industrial Relations Code’ (*Scroll.in*, 7 January 2020) <<https://scroll.in/article/949030/why-trade-unions-are-pushing-back-against-indias-proposed-industrial-relations-code>> accessed 23 June 2020; Akhil Kumar, ‘Trade Unions Protest Against Changes in Labour Laws, Allege Pro-Employer Bias’ (*The Wire*, 2 August 2019) <<https://thewire.in/labour/trade-union-protest-change-labour-laws>> accessed 23 June 2020.

⁷⁰ ‘From Precarious Work to Decent Work: Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment’ (International Labour Organization 2012) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---atrav/documents/meetingdocument/wcms_179787.pdf> accessed 23 June 2020.

fixed-term contracts in the Industrial Employment (Standing Order) Rules⁷¹ and the Industrial Relations Code Bill, 2019.⁷²

The question of income security and universalization of minimum wages is also inextricably linked with social security and protection for workers. Indeed, the recommendations of the National Commission for Enterprises in the Unorganised Sector highlighted the need for a National Minimum Wage as well as a National Minimum Social Security.⁷³ Therefore, any discussion on the possibility of universal coverage of minimum wages must also necessarily look at universal social security for all workers.

Other structural barriers that must be addressed in order to ensure universal income security include the limited institutional capacity of the state enforcement machinery. The labour inspection machinery in India is generally under-resourced and overburdened, with the task of monitoring the implementation of multiple legislations at the same time.⁷⁴ The scope for enforcement has been further weakened by the inspection system envisaged under the Code. Section 51(3) of the Code envisages randomized selection for inspection, which goes against the ILO's emphasis on the need for targeted inspection "based on an analysis of the levels and patterns of compliance from labour statistics".⁷⁵

Most significantly, as the India Wage Report, 2018 noted, "the potential for minimum wages to reach low-paid workers depends on the level at which the minimum wage is fixed".⁷⁶ Even though the Code has very commendably introduced a statutory national floor minimum wage, a suggestion first mooted by the National Commission on Rural Labour in 1991,⁷⁷ it does not lay down any definite norm or criteria for fixing the minimum wages. In this context, the Code's failure to incorporate the guiding principles adopted by the Indian Labour Conference in 1957, and endorsed and developed by the Supreme Court in *Standard Vacuum Refining Co of India v Workmen*⁷⁸ and *Workmen v Reptakos Brett & Co Ltd*,⁷⁹ is a glaring lacuna. This lacuna is also in contravention of General Comment No. 23 of the Committee on Economic, Social, and Cultural Rights, which recommends that the minimum wage should not

⁷¹ Ministry of Labour and Employment, 'Notification to Amend the Industrial Employment (Standing Orders) Central Rules, 1946' (The Gazette of India 2018) <<https://labour.gov.in/sites/default/files/FTE%20Final%20Notification.pdf>> accessed 23 June 2020.

⁷² The Industrial Relations Code Bill 2019.

⁷³ National Commission for Enterprises in the Unorganised Sector, 'Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector' (Government of India 2007) <https://msme.gov.in/sites/default/files/Condition_of_workers_sep_2007.pdf> accessed 23 June 2020.

⁷⁴ *ibid* 166-67.

⁷⁵ Code on Wages 2019, s 51.

⁷⁶ International Labour Organization (n 8) 86.

⁷⁷ Ministry of Labour and Employment (n 63).

⁷⁸ AIR 1961 SC 895 : (1961) 1 LLJ 227 (Supreme Court of India).

⁷⁹ (1992) 1 SCC 290 : AIR 1992 SC 504 (Supreme Court of India).

only be recognized in legislation, but also be “fixed with reference to the requirements of a decent living, and applied consistently”.⁸⁰

The failure to address these systemic impediments in the path of realization of minimum wages is bound to undermine the aim of universalization of minimum wages. It is submitted that the attempt to expand the coverage of minimum wage law is unlikely to succeed in isolation. Unless the Code is accompanied by an appropriate structural transformation that can remedy some of the structural barriers affecting the law’s implementation, its promise of universalization would be belied in the days to come.

V. CONCLUSION

This paper has tried to establish that despite its very laudable objective of universalizing minimum wages, the provisions dealing with minimum wages in the Code suffer from several infirmities that will ensure continued exclusion of large swaths of workers from the protection of minimum wage laws. While the Code undoubtedly takes a very substantive step forward by eliminating the dichotomy between scheduled employment and non-scheduled employment, it fails to extend the protection of minimum wage norms to all wage workers in India. The myriad lacunae in the Code, including the absence of a common definition of ‘worker’ and ‘employee’, qualitative restrictions on the types of work covered under these definitions, exclusion of NREGA, and ambiguity over the status of domestic workers, will ensure that universalization of minimum wages in its true sense will remain a pipedream. Additionally, the Code’s failure to confront the systemic impediments to the implementation of minimum wage law will act as a major hindrance in the path to universalization of minimum wages. Income security laws cannot operate in a vacuum, without adequate changes to wage policy, broader labour laws, and institutional framework that can promote decent work for all. In its failure to create an entitlement to minimum wages for every wage worker and surmount the structural hurdles in the payment of minimum wages, the Code not only belies its own promise of extending minimum wages to all workers, but also renders meaningless the constitutional mandate on payment of minimum wages under Article 23.

⁸⁰ Committee on Economic, Social and Cultural Rights, ‘General Comment No 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (United Nations Economic and Social Council 2016) <<https://www.refworld.org/docid/5550a0b14.html>> accessed 21 May 2020.