PGDM 2019-21
Labour Legislations
DM 522
Trimester – V, End-Term Examination: December 2020

Time allowed: 2 hrs 30 min Max Marks: 50

Roll No: _____

Instruction: Students are required to write Roll No on every page of the question paper, writing anything except the Roll No will be treated as Unfair Means.

Sections	No. of Questions to attempt	Marks	Total Marks
A	Minimum 3 questions with internal choices and CILO (Course Intended Learning Outcome) covered	3*10	30
B	Compulsory Case Study with minimum of 2 questions	20	20
Total Marks			50

Section A

Note: Answer any three questions. Each question carries equal marks. (10x 3 = 30)

A1a. 'Archaic labour laws have been the biggest retardant for the Indian Economy'. Comment. 'The new labour codes will be a game changer in this VUCA era. It brings a pragmatic shift in the prevailing labour management ideologies'. Critically comment on this new change. (**CILO 1)**

Or

A1b. 'Article 19 1(a) and Article 43 of Indian Constitution, have been referred to strengthen the labour movements in India'. State the significance of the recently notified labour codes to meet the intent of the above statement. **(CILO 1)**

A2a. In the new wage code 2019, 'Wages' under section 2(y), explain the proviso 1 and proviso 2 in detail. Also describe the salient features on health, safety and welfare provisions as discussed in the new occupational safety, health and working conditions code 2020? (**CILO 2)**

Or

A2b. 'Retrenchment and lay-off' are the two weapons in the hands of employers, which they can use to press their viewpoints in the process of settlement with unions'. In the light of this statement, discuss the relevant provisions stated under the new Industrial Relations Code 2020. (**CILO 2)**

A3a. The definition of Inter-State Migrant worker is different in Inter-State Migrant Workmen Act, 1979 Act and new Social Security Code – will it create confusion? As an HR manager, what key measures would you suggest to deal with inter-state migrant workers in the light of COVID 19 norms in India? Also state the latest changes in the contract labour related provisions under the new code. (**CILO 1/2)**

Or

A3b Define an 'accident'. When is it said to arise out of and in the course of an employment? Mr Sajjan Singh, born on 25 Nov 1982, is working as an Assistant Machine Operator in a Cement factory. He is associated with this company since 2005. On Oct 24, 2020 he met with an accident, while on work, leading to an injury causing 60% loss of his earning capacity. His last drawn monthly wage was INR 16000 before the accident. Calculate his total compensation entitlement as per the new code. (**CILO 1/2)**

(Factor 31y:205.95, 32y:203.85, 33y:201.66, 34y:199.40, 35y:197.06, 36y:194.64, 37y:192.14, 38y:189.56, 39y:186.90, 40y:184.17)

Section B

Note: Analyze the situation and answer the following questions. (**CILO 3)**

(20 Marks)

New Labour Codes: An Unclear Proposition

Two independent committees were formed to review the recently passed four labour codes and submit a report. Each committee consisted of four members as experts. They reviewed all these codes and submitted their report with comments as stated below. Critically analyse these reports and answer the following questions.

First committees' comments on new labour codes

RECENTLY, the Lok Sabha & Rajya Sabha passed three Labour Codes which have, in one foul swoop, changed the face of labour legislation as we know it.

Last year, the Government had decided to compress 29 existing Labour Acts into four Codes

1. *The Industrial Relations Code* (replacing 3 Acts);
2. *The Occupational Safety, Health & Working Conditions Code* (replacing a colossal 13 Acts);
3. *The Social Security Code* (replacing 9 Acts) &
4. *The Wages Code* (replacing 4 Acts).

The Wages Code, 2019, was passed last year and published in the Gazette of India on August 8, 2019. While the Central Government is yet to notify it, the rules were framed a couple of weeks ago. The other 3 Codes were all passed together in the Lok Sabha & Rajya Sabha & are now awaiting Presidential assent.

The Industrial Relations Code replaces the real "mothers" of Indian industrial legislation – the Industrial Disputes Act, 1947, Trade Unions Act, 1926, & the Industrial Employment (Standing Orders) Act, 1946. These three Acts lay down the overall substantive rights of workers and trade unions in India. The Industrial Relations Code hits a severe blow to labour rights and transforms the basis of industrial jurisprudence.

The Codes herald a whole new era of labour relations and mark a U-turn in the underlying concepts of industrial jurisprudence.

Collective bargaining and unequal bargaining partners

At the heart of labour law is the concept of *unequal bargaining partners,* that results from the class relationship between employers & employees. Hence, unlike other private contractual relations, the parties cannot be left to their own devices. A contract of employment therefore stands on an entirely different footing from other contracts. Justice Dinsha Pirosha Madon expressly recognised this principle in *Central Inland Water Transport Corporation v. Brojo Nath.*

"Trade unions play a central role through collective bargaining in the unequal relationship, where workers are at a constant risk of unemployment especially when employers are large corporations".

Courts have routinely struck down unfair, unreasonable and unconscionable terms of an employment contract. However, regardless of what is or isn't written, provisions of labour and industrial law are read into both oral and written contracts. This itself is a U-turn in contract law. In case of any conflict, the provisions of labour law, including *Industrial Employment Standing Orders Act, 1946* will prevail- as was held in *Bajaj Auto Ltd vs Bhojane Gopinath D. & Ors (2004 9 SCC 488).*

Trade unions play a central role through collective bargaining in the unequal relationship, where workers are at a constant risk of unemployment especially when employers are large corporations. Hence all labour laws are postulated on the premise that only contracts negotiated through *collective bargaining* are binding and that the law will prevail in spite of individual contracts.

Legal recognition of Fixed Term Contracts

A fixed-term contract means a contract entered into by the employer with each *individual employee* for a fixed period. Usually, the terms & conditions of service are determined unilaterally by the employer instead of being as per the prevailing settlement for all employees signed with the trade union in the establishment.

In 1977, Maharashtra implemented changes requiring all workers with 240 days of continuous service to be made permanent. But now a fixed term contract has statutory recognition.

The earlier labour law, through the *Industrial Employment (Standing Orders) Act, 1946,* recognised only five tenures of employment – permanent, temporary, casual, badli and probationer. "Fixed-term" was never a tenure of service and was only an exception to the payment of retrenchment compensation under the *Industrial Disputes Act, 1947*. *The Industrial Employment (Standing Orders) Amendment (Rules) 2018*, had already introduced a "fixed term

contract" as a tenure. Now, with the *Industrial Relations Code* it has been made a part of the Act itself.

It is common knowledge that workers, under threat of unemployment, are forced to enter into contracts for a "fixed term". In 1977, Maharashtra implemented changes requiring all workers with 240 days of continuous service to be made permanent. But now a fixed term contract has statutory recognition.

Individual settlements to replace collective bargaining

The *Industrial Relations Code* lays down that the employer cannot differentiate between fixed term and permanent employees. The working hours, wages, allowances and other benefits of a fixed-term employee cannot be less than that of a permanent worker doing the same or similar work. Further, a fixed term employee is eligible for all statutory benefits available to a permanent worker, even if his or her employment period does not extend to the qualifying period of employment required in the statute.

However, with the recognition of fixed-term contracts and individual settlements, the service conditions of even permanent workers will be fixed individually. The role of trade unions in fixing wages and service conditions through collective bargaining will evaporate in effect.
The definition of 'settlement' under the code now includes individual settlements, which goes against the very concept of collective bargaining. The ILO convention on tripartite consultation is binding.

"The definition of 'settlement' under the code now includes individual settlements, which goes against the very concept of collective bargaining".

Under the extant Industrial Disputes Act, 1947, a settlement is necessarily between a union or group of employees and employer, not between an individual employee and employer. In *Hindustan Lever v. Hindustan Lever Employees Union,* the Bombay High Court held "individual settlements" as inconsistent with not only the concept of collective bargaining, but to the very basis of the Industrial Disputes Act, 1947, itself.

Diluting Collective Bargaining Power of Unions

The Code places the power to negotiate with a statutorily recognised Union or a Negotiating Council. However, the recognised union or negotiating council will only have the right to negotiate with the employer on such matters "as may be prescribed".

Moreover, if the establishment has only one trade union then that shall be recognised or else the Union with 51% membership will be. If no Trade Union meets the 51% membership threshold, then the employer must constitute a negotiating council with representatives from all registered Trade Unions that receive support of at least 20% of the total workers. The code does not mention the process of verification of membership and if it is to be "as may be prescribed".

"With over 50% of the workers being illiterate, a tiny proportion being unionised and with law books being in English language, such a provision is only a way of defeating the legitimate rights of workers".

Trade unions and employees in public utility services were required to give a 14 day notice before going on strike under the Industrial Dispute Act. Now all unions and employees in all undertakings must serve this prior notice. While this appears to be an innocuous provision, it is not.

As per the other provisions in the code, that have carried over from the Act, the Labour Commissioner must admit the dispute into conciliation upon receiving the notice of strike and no strike can commence once it is admitted into conciliation. The new provisions are thus in effect prohibiting strikes in all establishments.

New Limitation of 2 years to Raise a Dispute

The Industrial Dispute Act, 1947 puts no limitation on raising a dispute, although case law provides that the appropriate Government can refuse to refer the matter to a Tribunal or Court if the matter is "stale" and the same is to be decided in the facts of each case. The new Code prescribes a limitation of 2 years for the Conciliation Officer for taking an industrial dispute matter into conciliation.
This is unreal.

In many cases, poor workers are not even able to unionise so as to know their rights. With over 50% of the workers being illiterate, a tiny proportion being unionised and with law books being in English language, such a provision is only a way of defeating the legitimate rights of workers. Workers may not raise a certain dispute in certain circumstances, like not being made permanent or not getting minimum wages, through either ignorance of the law or fear of termination if they do raise it.

They may want to raise the dispute once they attain permanency or minimum wages.

"They may discharge or dismiss any worker for any misconduct connected with the dispute. It is left to the workers to challenge it in Court and bear the circumstances till the outcome of the Court".

Preventing this would be unfair and unjust. In many cases of sham and bogus contracts or of enforced casualness, workers have only organised and attained their rights after several years or even decades.

The new Code has also very significantly diluted Section 33 (1) of the Industrial Dispute Act. It gave total protection against any unilateral change by the employer while the proceedings are pending. It now gives further concession to employers to make changes in any matter connected with the dispute, while the dispute is still pending. They may discharge or dismiss any worker for any misconduct connected with the dispute. It is left to the workers to challenge it in Court and bear the circumstances till the outcome of the Court.
This will render the protection against action taken to punish workers for litigating for their rights totally toothless.

Grievance Redressal Committee & Individual Workers.

In industrial establishments employing more than 20 workmen, an individual worker can raise an "individual grievance" in matters other than those relating to termination of services. But the worker cannot directly approach the Conciliation Officer and must first go through an in-house "Grievance Redressal Committee".

This Committee will consist of equal numbers of employers & employees. It must have adequate representation of women workers. The moot question here is also how the representatives of workers are to be chosen and the same is yet to be specified by the rules to be framed under the act.

The Committee “may” give its decision within 30 days. No provision has been made to enforce the decision of this Committee, which has not even been made binding on the employer. “Individual grievance” has not been defined.

This goes against the very concept of collective bargaining which the law has so far stood by. Moreover, the act does not mention anything about establishing internal committees to hear complaints of sexual harassment.

The new Industrial Relations Code turns collective bargaining and labour rights principles on its head and reverts to the position of classic contract law.

Second committees’ comments on new labour codes

Trade unions saw red when the Lok Sabha and Rajya Sabha passed by voice vote the Industrial Relations Code, 2020, the Occupational Safety, Health and Working Conditions Code, 2020, and the Code on Social Security, 2020 is understandable. The passage of these crucial bills, welcomed by corporate India, but severely impacting workers, was preceded by only three hours of discussion. At the end of it, 350 pages of legislation loaded in favour of business and seen as anti-labour was given the nod by both Houses on a day when the Opposition had boycotted Parliament to protest the Farm Bills.

Among the three legislations, the Industrial Relations Code, 2020 needs to be subjected to closer analysis since it changes the existing equations vis-à-vis workers as well as the establishment they work for.

The new Code redefines the Industrial Employment (Standing Orders) Act, 1946, which has been one of the most important legislations for employees and is applicable to industrial establishments that employ 100 or more workers. Apart from defining the tenure of workers, this Act laid down the basic Rules and Regulations of employment such as misconduct, permissible punishments, right to be defended by a trade unionist or co-worker, the right to and rate of subsistence allowance.

However, the Code considerably reduces the scope of protection against arbitrary retrenchment, closure, and lay-off. The employer needs to seek government permission only when employing more than 300 workers, unlike the earlier benchmark of 100 workers. This

means that over 90 per cent of workers of this country will be defenceless, further advancing the interests of the hire and fire regime.

"This is utterly unfair and will allow employers to rid themselves of workers and has immediate significance in the light of the COVID-19 downsizing".

To add to this, the employer is now permitted to issue standing orders even on matters other than those in the schedule prescribed. Also, prior to the enactment of the Code it was required of managements to display standing orders in a language understood by majority of workers. That condition is no longer applicable.

Section 25H of the Industrial Disputes Act requires the employer to first give an opportunity to a retrenched worker to be re-employed before employing another person to replace him/her. Now the employer need only offer the retrenched worker re-employment if a new worker is recruited within one year of the retrenchment. This is utterly unfair and will allow employers to rid themselves of workers and has immediate significance in the light of the COVID-19 downsizing.

Definition of "industry"

The exclusion of certain activities from the definition of "industry" in the Code is crucial. Only those activities/undertakings which are included will now come under the provisions of the Industrial Disputes Act, 1947 and almost all other labour legislation, including the three new labour Codes.

The definition of "industry" has time and again come under the scrutiny of the Supreme Court as reflected by the judgements in the case of Safdarjung Hospital (1971 SCR (1) 177), Madras Gymkhana Club (AIR 1968 SC 554) etc. leading finally to the judgement of a seven judge bench in the case of Bangalore Water-Supply & Sewerage Board vs. R. Rajappa & Others (1978 SCR (3) 207. This judgement included hospitals and philanthropic, charitable and religious institutions within the definition of "industry" so long as they passed the other criteria laid down.

The new Code simply excludes all institutions owned or managed by organisations substantially engaged in any "charitable, social or philanthropic service", or any activity which is merely "spiritual or religious in nature", as well as any sovereign functions of the Government (State or Central).

Not only is a large section earlier covered by industrial law now removed from its ambit, but the vagueness of the term "social activity" will lead to all sorts of institutions claiming exemption from labour laws.

As far as "sovereign function" goes, the Indian Constitution is unique in so far it specifically allows the state to make laws to carry on any trade, business, industry or service under Article 19 (6) (ii). As such, when the State is specifically allowed to carry on an industry, it would not be fair to deprive the employees of that industry the protection of labour laws.

Definition of 'Employer', 'Employee' and 'Worker'

The changes in the definition of "employer", "employee" and "worker" in the three Codes taken together are confusing, self-contradictory and untenable. Although "employer" includes "contractor", "contractor" is not clearly defined. If we proceed on the basis that "contractor" is the same as defined in the Code on Social Security, then the consequences are even more dangerous. The definition of "contractor" there has been changed from what is accepted today

to mean “a person who supplies contract labour for any work of an establishment as mere human resource.”

“As a consequence of changes in the definitions of ‘employee’, ‘employer’ and ‘worker’, the contract worker becomes the worker of both the principal employer and the contractor”.

The new definitions seek to legitimise all forms of contract labour and sham and bogus contracts. The concept of “employer” will be divorced from the concept of “master and servant” which is the basis of much of labour jurisprudence. Again, this change contradicts the basis of labour law, which is to protect workers. It allows these contractors to front as employers, while the workers actually work for another concern/employer.

As a consequence of changes in the definitions of “employee”, “employer” and “worker”, the contract worker becomes the worker of both the principal employer and the contractor. Hence who is the “employer” is ill-defined. It will not be possible for such workers to pinpoint the responsibility of “employer” on any one person. Even the definition of “employer” is internally self-contradictory. The employer may be the person who employs or the person who has ultimate control of the affairs — which may not be the same juristic person.

Thus, the person employing may be a body corporate such as a company whereas the occupier of the factory may be a particular manager. This will lead to confusion as to who is to be held responsible for implementation of the provisions of the Code, and what if someone acts in opposition? For instance, what if the body corporate wants to retrench but the occupier does not follow the procedure? It is unclear as to who is to be held to account.

Two positive points at first blush are the inclusion within the meaning of “workers” of working journalists as defined in clause (f) of Section 2 of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 and sales promotion employees as defined in Clause (d) of Section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976. However, both these Acts stand repealed by the Occupational Safety, Health & Working Conditions Code, 2020. The earlier Acts had specific provisions for these employees – including a Wage Board for journalists and newspaper employees. Now that has been scrapped.

Definition of “Wage”

The change in the definition of “wage” excludes a large proportion of the emoluments paid to a workman under the old definition under Section 2(rr) of the Industrial Disputes Act, 1947.

Not included in wages now are the following:

1. house rent allowance
2. the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government
3. any conveyance allowance or the value of any travelling concession
4. any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment
5. remuneration payable under any award or settlement between the parties or order of a court or Tribunal
6. any overtime allowance and

7. any commission payable to the employee.

"All the changes in the redefining of wages will have the effect of reducing such rights as retrenchment compensation, subsistence allowance and wage arrears as well as retiral benefits of workers on a winding up of the company".

The Code which is a difficult document to comprehend has included this condition: "Provided that if any such payments (listed above) exceed one half or such other percent as may be notified by the Central Government, of the total remuneration treated as "wages", then the amount which exceeds such one-half, or the percent so notified, shall be calculated as "wages".

It goes on to add that if the employee is paid part of the wage in kind, then only 15 per cent of such wage is to be reckoned as paid in kind. There is no justification for this and is untenable. It is not clear as to 15 per cent of what amount is to be calculated.

All the changes in the redefining of wages will have the effect of reducing such rights as retrenchment compensation, subsistence allowance and wage arrears as well as retiral benefits of workers on a winding up of the company.

Exceptions to Notice of Change

An important right under the Industrial Disputes Act, 1947, is in Section 9A which requires an employer to give 21 days' prior notice of any proposed change in service conditions listed in the Schedule. Though this has been reproduced in the Code, an exception is now given if such change is affected "in accordance with the orders of the appropriate Government". This will have particular significance for PSUs. For example, Air India and its subsidiaries recently slashed the overall take-home pay of its employees – by up to 50 per cent of allowances, and have taken the defence that they have been directed to do so by the Ministry of Civil Aviation.

It is heralding a return to laissez faire and the classic law of contract and undone the rights of workers and trade unions won over the last half a century or more.

An earlier 25 per cent cut by Air India was ruled illegal by the Bombay High Court in 2014 which rejected the contention that this had been done under the direction of the Ministry and held that such directions can never prevail over statutory provisions. (Air India Employees Union v/s. Air India Ltd. 2014 I CLR 856).

A new exception now introduced is the need for a notice of change "in case of the emergent situation which requires a change of shift or shifts working, otherwise than in accordance with standing orders, in consultation with Grievance Redressal Committee". This is rather unclear. Unless it is in accordance with the decision of the Grievance Redressal Committee, "consultation" is reduced to a mere show.

It is thus clear that the Industrial Relations Code has turned the very basis and premise of Indian industrial jurisprudence and legislation on its head. It is heralding a return to laissez faire and the classic law of contract and undone the rights of workers and trade unions won over the last half a century or more.

Questions:

1. The definition of "settlement" under the code now includes individual settlements, which goes against the very concept of collective bargaining. Comment. ***(5 Marks)***

2. *"The new law renders workers virtually defenseless against arbitrary retrenchment and lay-offs". Critically analyse the relevant provisions and comment.* ***(5 Marks)***
3. *Critically review the two reports by the expert committees and state whether the new codes are in line with the desired ethical fabric of industrial democracy in India.* ***(10 Marks)***

*****