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Judicial activism and worker rights: Upholding social justice during the pandemic in India

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Abstract

Judiciary is the custodian of rights of the citizens of a country. There is always the understanding of Separation of powers, the much-needed checks and balances and the overarching principle of Rule of Law that is ingrained into all kinds of democratic experiments. Judiciary has the specific role to interpret the law that reflects the interface of realization of principles into realities through administration of justice delivery system in India. When it comes to a socio-economic reality of 93% of workforce in a country being categorized under the informal and unorganized economy, the judicial activism that reflects the humane face of public policy assumes all the more significance. The Corona virus has not discriminated between the haves and have-nots but the impact and aftermath has been discriminatory to the vulnerable population. Marred with uncertainties in life, the workers had been toiling across the country due to mobility restrictions, lockdown measures and economic rescission. The efflux of migrants to home states and the connected sufferings of no food, no shelter and no wages coupled with non-accessibility to transportation means has been taken cognizance by the Apex Court while directing the state governments to bear the brunt of the sufferings underwent by the migrants. This scenario raises challenges on the availability, accessibility, adaptability and acceptability of the access to justice concerns of the working class. The situation of workers and their aspiration to pull on life reflects a grotesque of the sufferings borne by the workers during the lockdown period. The role played by the Apex Court becomes all the more significant and paves a way forward for interpretations in the future that touches upon the lives of the working class.

Keywords: Socio-economic reality, informal economy, unorganized economy, pandemic response, constitutional interpretation

1. Introduction

1.1. Setting the Tone

As a response to resurrect economy during the pandemic, one of the measures resorted to by the state governments were exempting the industrial units and factories from the applicability of labour laws and regulations. This moves by the employers and consequent notifications issued by different states in India like Madhya Pradesh, Assam, Gujarat, Uttar Pradesh etc., supporting and promoting the employers' perspective assumes significance in an economy wherein divergent views exist regarding the efficacy levels of labour laws. An employer's perspective had always been oriented towards splitting of production units to areas in search of cheap labour, deregulation of labour markets, scrapping of protectionist measures like more lenient health, environment and safety requirements, less rigid labour procedural compliances, lower environmental protection standards, more favorable tax laws that leads to maximization of profits^[1]. The divergent perspective of workers to secure their rights has led to trends like migration of human resources from rural areas to industrial areas in search of jobs providing for more wages, lack of solidarity among the human resources, feminization of labour, least social security measures, the presence of contractors and sub-contractors, more of casual workers, more of exploitations and less of the protections afforded. The idea of flexibility/deregulation/exemptions from applicability of regulations to reap profits for the employers turns disadvantageous to the workers as the same idea of flexibility/casualization is synonymous with vulnerability and insecurity. It is at this juncture when lockdown and pandemic has hovered the society, the Apex Court has upheld the rights of workers breathing in life to rights of the workers in the Indian social context. This judgment assumes

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significance when the allegations has come up that Social Justice is not being promoted or has rather been forgotten by the Apex Court.

1. Judicial activism during the pandemic-a justice model

Judicial activism in India reflected deep concerns over the issue of bonded labour and Apex Court had been pro-active in issuing directions to suit the context of social justice as envisaged under the Constitution of India. The understandings of human dignity and right to life and thereby extending the arms of judiciary to interpret the cause of the entrenched class are reflected through monumental cases in the Indian context. The liberalization of the concept of locus-standi to make accessibility to justice and court system easy ^[2], initiated the changing attitude of the courts in dealing with the depressed classes. In Gujarat Mazdoor Sabha & Anr v. State of Gujarat ^[3] a petition was filed under Article 32 of the Constitution

challenging the validity of notifications issued by State of Gujarat amidst lockdown. The point of contest aroused, when the State of Gujarat invoking the powers vested under Sec 5 of the Factories Act ^[4] had issued two consequent notifications issued by the Labour and Employment Department of the State of Gujarat during the lockdown starting from April 20th 2020 extending up to October 2020 exempting all the factories registered under the Act, across the state, from certain welfare provisions extended to the workers in factories, thus enabling a blanket ban. The aim of the notifications touted by the Government was to provide certain relaxations for industrial and commercial activities. The provisions relaxed by the state Government of Gujarat were Sections 51, 54, 55 and 56 of the Factories Act 1948. Through the notifications issued, there was a prohibition made applicable to female workers not allowing them to work between 7:00 PM to 6:00 AM. As well. The consequences of the above notification are summarily reflected through a table given below.

Pre-Notification Effect	Post Notification Effect
Sec 51- Prohibition relating to adult worker- restricted to 48 hours in any week.	72 hours in any week
Sec 54-Limit on Daily hours of work for an adult worker, subject to what is provided u/Sec 51)– 9 hours in any day: Proviso enables that, subject to the previous approval of the Chief Inspector, the daily maximum specified in this section may be exceeded in order to facilitate the change of shifts.	No adult worker shall be allowed or required to work in a factory for more than 12 hours in any day

Security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.]

Sec 55- Limit of the periods of work of adult workers – 5 hours followed by interval for rest of at least half an hour. Exemptions are possible subject to the State Government or, subject to the control of the State Government, the Chief Inspector, may, by written order and for the reasons specified therein, but still a cap of total number of hours worked by a worker without an interval does not exceed 6.	The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour
Sec 56- Spread over shall not be more than ten and a half hours in any day. Proviso enables Chief Inspector for reasons to be specified in writing increase the spread over up to maximum of 12 hours	
Payment of overtime wages as envisaged under Sec 59-twice the ordinary rate of wages	Substituted by a rate proportionate to ordinary existing wages

The notifications according to the contention of the Government served the purpose of Public Emergency taking justification under Sec 5 of Factories Act to ensure the maintenance of minimum production levels in factories. The State Government of Gujarat contended that since the pandemic has disturbed the social order of the country and has led to extreme financial exigencies leading to an 'internal disturbance' in the State a temporary exemption of factories and establishments from the operation of labour laws such as the Factories Act to overcome the financial crisis and to protect factories and establishments was the need of the hour. Payment of wages for overtime work to be computed on existing wages, according to the respondents was not to be considered as an offensive measure.

These notifications were contested by a registered Trade Union under Trade Unions Act 1926 and by a federation of trade unions spread across the country as well contending that there was no situation warranting public emergency that necessitated the passing of the ordinances that had in effect resulted in whittling down the rights of the workers concerned. Public emergency as explained under Section 5 of Factories Act 1948 is envisaged as a "grave emergency" which threatens the security of India or of any part of the territory by war, external aggression, or internal disturbance. As opposed to this idea, the power under Section 5 provided to State Government when it was used and put into practice as a prerogative by the State, was opposed by the petitioners. According to the petitioner, pandemic induced

lock down measures and subsequent economic rescission ought not to be categorized under the situation called as public emergency and hence the move of the State was unnecessary, unwarranted, and unconstitutional in nature. Listing all the factories in the State and bringing a blanket ban as envisaged by the notifications was an unnecessary exercise and that was oriented towards an inclination to the employer's perspective was, yet another contention put forward by the petitioners. Wages payable for overtime work being computed at the rate of existing ordinary rate of wages violated the normal rule of overtime wages payable also violated the spirit of the Minimum Wages Act, 1948 and amounted to forced labour violating the workers' fundamental rights under Article 23, 21 and 14 of the Constitution of India. An alternative position was taken by the petitioners that the notifications ought to have been passed under Sec 65(2) Factories Act under the context of exception pressure to work situation, that enables State government to exempt the application of Sec 51,52,54, and 55 simultaneously acknowledging the welfare conditions stipulated under Sec 65 (3) ^[5] of the Act which could have taken care of the workers' rights to an extent, which never happened in this case since the powers invoked was under Sec 5, of the Act. The State Government contended that they never had the intention to take up the justification nor acknowledged the ground of 'exceptional pressure to work' situation as envisaged under Sec 65(3) of the Factories Act 1948.

The Apex Court had to consider the interpretation that was to be made possible to the terminology public emergency under Sec 5 of Factories Act, whether violations as contested by the petitioners has happened and whether the situation of pandemic warranted such a stringent measure on the part of the Government as against the workers. Apex Court was vociferous in upholding the legacy created by the Factories Act 1948 and acknowledged the history of labour legislations and the concomitant factors of colonialism and poverty and mass migration of workers that happened to the urban pockets leading up to the need of enacting of Factories Act 1948, which came up as an epitome of bulwark against exploitative employers during the period of industrialization keeping in tune with the vision of the drafting committee of the Constitution of India and that enactment reflected the gist of Welfare State Policy discussed under the Directive Principle of State Policy of the Constitution. The Factories

Act had been projected as a poster boy for socialist and welfare labour legislation positioning the rights of workers intact, taking cognizance of their health, safety and welfare measures. The Act clearly, mandates the obligations of the employers in the context of manufacturing processes and envisioned conducive working conditions, adequate and sufficient rests and leave facilities, overtime wages as well as timely payment of wages to its workers. Having reflected upon the intent of the Act and its history, the Supreme Court clarified that the Factories Act specifically provided for: -(i) when an exemption can be granted; (ii) who can exercise the power to grant an exemption; (iii) who can be exempted; (iv) the conditions subject to which an exemption can be granted; (v) the provisions from which an exemption can be allowed; (vi) the period of time over which the exemption may operate; and (vii) the manner in which the exemption has to be notified." The existence of a 'public emergency', it was categorically pointed by the Court that it was not to be left to the subjective satisfaction of the state governments but can only be construed in situations where a 'war', 'external aggression' or 'internal disturbance' causes a grave emergency that threatens the security of the State and therefore, the powers provided under Section 5 of the Factories Act can only be exercised (i) on the existence of such 'public emergency' and (ii) the existence of a rational nexus between the notifications and the exemption so provided existed.

Supreme Court referred to the proportionality test propounded under J.K.S. Puttaswamy Judgment^[6] to determine the validity of impingement of fundamental rights by State action to understand what constitutes an 'internal disturbance', the Apex Court discussed various precedents in which its meaning and ambit had been discussed. The term 'internal disturbance' provided under Article 355^[7] of the Constitution, was interpreted by the Court as that can be exercised only when there is a failure in the functioning of the constitutional order of the State as provided under Article 356^[8] of the Constitution. The Supreme Court held that even though the pandemic had caused great economic hardships, such hardships were not in any way threatening the security of India or any parts of its territories and thus, the COVID-19 pandemic does not qualify as a 'public emergency' within the meaning of Section 5 of the Factories Act as no 'internal disturbance' which threatens the security of the State could be made out. Apex Court after going through many precedents and referring to essence of

Sarkaria Commission categorically opined that unless the threshold of an economic hardship is so extreme that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law. Recourse can be taken to them only when the conditions requisite for a valid exercise of statutory power exists under Section 5 of Factories Act 1948 and Court out rightly rejected the contention of respondents that such emergency ever existed.

The highlight part of the judgment was the elaborate discussion that has gone behind interpreting the essence of Conscience of the Constitution i.e., Fundamental rights, Part III and Directive Principles of State Policy Part IV. The enlightened idea that political democracy and rights cannot be achieved unless economic democracy and rights are taken care of was emphasized during the discussion. The ideal argument of transformative constitutional vision to achieve Justice- Social Economic and Political as provided in the Preamble of the Constitution. to the workers of the land was projected by the J.D.Y Chandrachud while elaborating on the philosophical terrain of the Constitution of India. Labour welfare was reiterated by the Court as an essential part and parcel of that vision. Court positioned its justification on the legacy of sea change paradigm shift that had happened from the concept of employer employee relationship/contract as a one of private contract to the contract of status. It referred to the reflections of Supreme Court in Bhikusa Yamasa Kshatriya (P) Ltd. v. Union of India^[9] and emphasized on the paternalistic approach that the Welfare State ought to enact in situations of exploitation of workers at the hands of exploitative and unscrupulous employers.

Apex Court condemned the practice of paying ordinary rate of wages proportionate to existing wages for a worker who has toiled and rendered labour in the form of overtime to the employer. Reliance was placed on *Y A Mamarde v. Authority*^[10] under the Minimum Wages Act and interpreted the concept of overtime pay at double the rate of the ordinary wage, as a minimum endeavour of just compensation for the significant additional labour that is utilized by a worker, after having toiled in the ordinary course of the day. An interesting and timely interpretation of idea behind paying double the rate for overtime work was enunciated by referring to the judgment in *I.T.C. Ltd. v. Regional Provident Fund Commissioner*^[11]. The need for due payment to worker doing overtime work was emphasized as below,

Two types of remuneration are fixed for work being done during the additional hours and overtime hours. While remuneration for additional hours, i.e., beyond the normal hours, is fixed at one and a half times, the remuneration for overtime, i.e., beyond the statutory hours is fixed at double the normal hour rate. It clearly shows that remuneration for additional hours is not considered as an overtime allowance and two rates of payment are fixed, one for the additional hours which come within the normal statutory working hours and the other for the overtime hours which are beyond the normal statutory working hours.

The court categorically upheld the rights of the workers while acknowledging the efficacy level of Factories Act 1948 and held that

Clothed with exceptional powers under Section 5, the state cannot permit workers to be exploited in a manner that

renders the hard-won protections of the Factories Act, 1948 illusory and the constitutional promise of social and economic democracy into paper-tigers. It is ironical that this result should ensue at a time when the state must ensure their welfare.

J. Chandrachud, referred to the seminal work of Granville Austin and literature brought in by Prof. Upendra Baxi while he was reviewing the work of Granville Austin, to emphasize upon the essence of what the Governments should be working upon to make directive principles of state policy a reality. Fundamental Rights are often considered as operational in nature and while Directive Principles of State Policy is aspirational in nature. The Court took cognizance of the understandings of supplementary and complementarity connection brought out between Part III and Part IV through various precedents between Part III and Part IV ending up with the *Minerva Mills Case*. The clarification on justifiability and non-justifiability difference between Rights and Principles under Part IV was acknowledged and alongside the need to operationalize the principles into reality was solidified by the Court.

Interestingly Court reflected upon a vivid explanation to the terminology *strive* under Article 38 of the Constitution. This explanation rendered by the Apex Court takes the judgment to a classic level as to how to construe the terminology *strive* that is made use of under Article 38 of the Constitution of India. A student of Constitutional Law and any stakeholder within the system ought to know and profess this idea incorporated into the Constitution of India. Dr Ambedkar, in defending the retention of the word '*strive*' in the Constituent Assembly debates emphatically noted:

The word '*strive*' which occurs in the Draft Constitution, in judgment, is very important. We have used it because our intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always *strive* in the fulfilment of these Directives. That is why we have used the word '*strive*'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go." (Emphasis added)

The Court ventured to lay down the idea of constitutional vision and the need to understand the ushering in of a new world order by interpreting the actual essence of Directive Principles of State Policy in the Constitution of India. The Court was sympathetic towards the plight of the migrant workers during the pandemic and reiterated the sentiments of the vulnerable and marginalized reflecting a humanitarian approach during the times of crisis.

The wholehearted and humanitarian face of the Court got projected when the notification of the Labour Department was quashed and the Apex Court invoking the inherent power of the Court under Article 142^[12] of the Constitution, directed payment of overtime wages, in accordance with the provisions of the Factories Act to all the workers who have continued working in the conditions provided since the issuance of the impugned notifications.

3. Concluding remarks

This judgment and the ethos expressed therein comes as a

sigh of relief to the working population of the country. It is heavily ordained upon a society wherein lesser the economic power lesser the visibility, ideology exists. Sir Henry Maine had opined that all progressive societies are moving from status to contract. But the contradictory has happened with developments in industrial Relations scenario wherein the change is from contract (inequitable) to status (equitable). This change from contract to status is because of the manifest inequality in the position of parties to the contract of employment. In order to create a proper balance in the employer-employee relationship and to maintain peaceful and cordial industrial atmosphere so that the process of production continues unhampered, the State has intervened actively in the sphere of industrial and labour relations. When State loses track of this noble ideology and the legacy of industrial jurisprudence in the country, judgments of this kind make a clarion call to relook and reconsider the way forward in balancing the rights of the marginalized with the elite class.

It is interesting to recollect here in this context the explanation given to forced labour as per the judgment in *PUDR v Union of India*^[13]. Explaining the scope of the expression '*traffic in human beings and beggar and other similar forms of forced labour* under Article 23, the court categorically observed:

What article 23 prohibits is '*forced labour*', that is, Labour or service which a person is forced to provide... and '*forced labour*' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger, and poverty, want and destitution... The word '*force*' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice or alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. (Emphasis added)

Applying this principle into a situation of COVID 19 could very well be taken up as a good justification that could have been invoked by the petitioners, but which was not taken expressly neither by the petitioners nor in the judgment. Leaving no choice to the downtrodden masses and compelling them to take up occupations harmful and destructive in nature to meet both ends of life is the socio-economic cultural reality that exists in India. The Court's opinion that Berefts of social security, they have no fallback options resonate as highly reassuring, instilling confidence in Rule of Law and reaffirming the values of equality, dignity and worth inherent in a human being generally and the working class specifically. The change in the philosophy of the State from *laissez-faire* to a Welfare State brought State intervention into the field of industrial relations and the development of industrial jurisprudence have eroded most of the principles relating to the sanctity of the employment contract. Now the employer employee relations are governed more by status than by the contract of employment.

A transformative vision of the Indian Constitution is a welcoming aspect of this judgment as the bench emphasized the need for protecting labour welfare on one hand and combating a public health crisis occasioned by the pandemic

on the other with careful balancing, with due regard for the rule of law. Article 51(c) of the Constitution of India requires the governments to foster respect for international law and treaty obligations. India has ratified various conventions relating to forced labour of 1930 and 1957 as well. It is thus made evident that labour laws are an essential substratum of constitutional values that ensures that workers are no more to be treated as slaves and are to be duly recognized as rights holders. A need of the hour cited by the Court from the works of Prof. Upendra Baxi to move on from the planet of platitudes to analytic paradise reveals the dearth of constitutional scholarship on the understanding of how Part III and Part IV works in tandem and synergy, which leads to the realization of Directive Principles of State Policy could be considered as one of the majors take away from this judgment. The ideal of transformation from the so-called regulatory Police State to that of Welfare State gets highlighted through this.

The judgment goes in tune with the ethos expressed by the Court while accepting Public Interest Litigations on the grievance of the oppressed classes ^[14] generally, and the ethos reflected by Olga Tellis Case ^[15]. A great philosophy ingrained in the Industrial Relations is reiterated through this benchmark judgment i.e., a worker's right to life cannot be deemed contingent on the mercy of their employer or State.

A fresh life gets infused into the Factories Act, 1948 which had always been known for all the wrong reasons like, that the Act is too much imposing regulations on safety, health and welfare measures making the industrial relations scenario congested and non-flexible for employers is being re-written through this epoch-making judgment. That is where the ideal of Gandhi that partnership in production between the workers and employers gets exemplified. This case represents a model judgment upholding the synergy of social and economic democracy indigenous to the Indian socio-cultural and economic context which needs to be emulated and serves as a beacon, amidst the pandemic.

Labour is prior to, and independent of, capital. Capital is only the fruit of labour, and could never have existed if labour had not first existed. Labour is the superior of capital, and deserves much the higher consideration.

Abraham Lincoln's First annual message to Congress, December 3, 1861

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2. See, People Union for Democratic Rights v. Union of India, 1982 AIR 1473, Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, Neeraja Chaudhary v. State of M.P, AIR 1984 SC 1099 prominent cases in which the apex court liberalized the rule of Locus Standi.
3. Gujarat Mazdoor Sabha & Anr v. State of Gujarat, Writ Petition (Civil) No. 708 of 2020.
4. S. 5, The Factories Act, 1948. Power to exempt during public emergency. —In any case of public emergency, the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act [except section 67] for such period and subject to such conditions as it may think fit: Provided that no such notification shall be made for a period exceeding three months at a time. 2[Explanation. — For the purposes of this section “public emergency” means a grave emergency whereby the
5. See S. 65(3), The Factories Act, 1948. Any exemption granted under sub-section (2) shall be subject to the following conditions, namely: —(i) the total number of hours of work in any day shall not exceed twelve;(ii) the spreadover, inclusive of intervals for rest, shall not exceed thirteen hours in any one day (iii) the total number of hours of work in any week, including overtime, shall not exceed sixty;(iv) no worker shall be allowed to work overtime, for more than seven days at a stretch and the total number of hours of overtime work in any quarter shall not exceed seventy-five.
6. K S Puttaswamy v. Union of India 3 (2017) 10 SCC 1, para 325.
7. Art. 355, The Constitution of India. Duty of the Union to protect States against external aggression and internal disturbance: It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every
8. State is carried on in accordance with the provisions of this Constitution
9. Ibid, Art.356. Provisions in case of failure of constitutional machinery in States: (1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State.
10. Bhikasu Yamasa Kshatriya & Anr v. Union of India & Anr., AIR 1963 SC 1591.
11. Y.A. Mamarde v Authority under the minimum wages act, (1972) 2 SCC 108.
12. I.T.C. Ltd. v. Regional Provident Fund Commissioner, 6 ILR (1988) 1 P&H 73.
13. Art. 142, The Constitution of India, Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power

to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

14. Peoples Union for Democratic Rights v. Union of India (1982) 2 LLJ 454 (SC).
15. People's Union for Democratic Rights v Union of India, (1982) 2 LLJ 454 (SC); M.C. Mehta v Union of India, AIR 1987 SC 965; Bandhua Mukti Morcha v Union of India, AIR 1984 SC 802; Neeraja Choudhary v State of MP, AIR 1984 SC 1099.
16. Olga Tellis v. Bombay Municipal Corporation & Anr., 1986 AIR 180.