Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 708 of 2020

Gujarat Mazdoor Sabha & Anr. **...Petitioners**

Versus

The State of Gujarat **...Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

Index	
A	The Notifications
B	Grounds of challenge
C	The power under Section 5 of the Factories Act, 1962
D	Precedent on ‘public emergency’ and ‘security of the state’
E	Interpreting ‘public emergency’ in Section 5
F	Scheme and objects of the Factories Act, 1962
G	Social and economic value of ‘overtime’
H	Constitutional vision of social and economic democracy
I	Summation

1 Invoking its powers under Section 5 of the Factories Act, 1948[1], the State of Gujarat has exempted factories from observing some of the obligations which employers have to fulfil towards the workmen employed by them. The government justifies the action on the ground that industrial employers are faced with financial stringency in the economic downturn resulting from the outbreak of COVID -19. A trade union with a state-wide presence and another with a national presence are before this court in a petition under Article 32 of the Constitution to challenge the validity of the state's notifications dated 17 April 2020 and 20 July 2020.

A The Notifications

2 A nationwide lockdown was declared by the Central Government from 24 March 2020 to prevent the spread of the COVID-19 pandemic. Economic activity came to a grinding halt. The lockdown was extended on several occasions, among them for the second time on 14 April 2020. On 17 April 2020, the Labour and Employment Department of the State of Gujarat issued a notification under Section 5 of the Factories Act to exempt all factories registered under the Act "from various provisions relating to weekly hours, daily hours, intervals for rest etc. for adult workers" under Sections 51, 54, 55 and 56. The stated aim of the notification was to provide "certain relaxations for industrial and commercial activities" from 20 April 2020 till 19 July 2020. The notification in its relevant part is extracted below:

> "…NOW, THEREFORE, in exercise of the powers conferred by Section 5 of the Factories Act, 1948 (LXIII of 1948), the

[1] "Factories Act"

> Government of Gujarat hereby directs that all the factories registered under the Factories Act, 1948 shall be exempted from various provisions relating to weekly hours, daily hours, intervals for rest etc. of adult workers under section 51, section 54, section 55 and section 56 with the following conditions from 20th April till 19th July 2020,-
>
> (1) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy Two hours in any week.
> (2) 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.
> (3) No Female workers shall be allowed or required to work in a factory between 7:00 PM to 6:00 AM.
> (4) Wages shall be in a proportion of the existing wages (e.g. If wages for eight hours are 80 Rupees, then proportionate wages for twelve hours will be 120 Rupees)."

On its lapse by the efflux of time, the State government issued another notification on 20 July 2020[2]. Similar in content, the new notification extended the exemption granted to factories from 20 July 2020 till 19 October 2020.

B Grounds of challenge

3 The first Petitioner is a trade union registered under the Trade Unions Act, 1926 and represents about ten thousand workers employed in factories and industrial establishments in the State of Gujarat. The second Petitioner is a federation of registered trade unions and represents a hundred thousand workmen in factories and establishments across India.

[2] Both the notifications dated 17 April 2020 and 20 July 2020 were issued by the Labour and Employment Department of the State of Gujarat

4 Leading the submissions of the petitioners, Mr Sanjay Singhvi, learned Senior Counsel, along with Ms Aparna Bhat, learned Counsel submits that:

(i) Section 5 of the Factories Act enables government to exempt any factory, or a class of factories, from its provisions only when a 'public emergency' exists;

(ii) The explanation to Section 5 defines the expression 'public emergency' as a "grave emergency" which threatens the security of India or of any part of the territory by war, external aggression or internal disturbance. Applying the interpretative principle of *noscitur a sociis*, the expression 'internal disturbance' will have a meaning which derives content from 'war' and 'external aggression' which endangers the security of India and would not include a pandemic or a lockdown;

(iii) Though both Section 5 and the provisions of Article 352 of the Constitution (prior to its amendment in 1978) contain a reference to the expression 'internal disturbance', there is a crucial difference. Art 352 was premised on the satisfaction of the President while the power under Section 5 can be exercised only upon the objective existence of the conditions prescribed;

(iv) Even if a threat to the security of India were to exist as an objective fact, the notifications must, to be valid, ameliorate the threat;

(v) Factories were open from 21 April 2020, which was the very next day after the first notification came into force. The purported justification of an economic chaos is a smokescreen to extract more work from the workers without paying them their overtime wages in onerous working

conditions;

(vi) Section 5 contemplates an exemption only to an individual factory or to a class of factories, and not a blanket exemption that extends to all factories;

(vii) Section 65(2), and not Section 5, of the Factories Act enables suspension of Sections 51, 52, 54 and 56 to a class of factories owing to 'exceptional pressure of work';

(viii) Even if Section 65(2) were to apply to account for the exceptional pressure of work, a host of conditions under Section 65(3) are attracted in order to ensure labour welfare including a limit on weekly overtime and intervals between work which the notifications fail to adopt;

(ix) The notifications do not specifically exempt the application of Section 59 of the Factories Act which mandates payment of double the wages for overtime. Yet they make overtime wages proportionate to the existing wages, which also violates the spirit of the Minimum Wages Act, 1948 and amounts to forced labour violating the workers' fundamental rights under Article 23, 21 and 14; and

(x) Three industrial accidents are reported to have occurred on 7 May 2020 at Vishakapatnam, Chattisgarh and Neyveli in hazardous industries which reopened after the lockdown with a skeletal workforce. The notifications in question will lead to similar disasters.

5 Opposing these submissions, Ms Deepanwita Priyanka, learned Counsel appearing on behalf of the State of Gujarat, has made an earnest effort to

persuade this Court to hold that the notifications are not *ultra vires* the Factories Act or unconstitutional. The submissions of Ms. Priyanka have been supported by Mr Tushar Mehta, Solicitor General of India. The submissions are summarized below:

(i) The State has issued the notifications by invoking its powers under Section 5 of the Factories Act, under which it may exempt any factory or class of factories from all or any provisions of the Act in a public emergency;

(ii) The COVID-19 pandemic is a 'public emergency' as defined in Section 5 of the Factories Act. It has disturbed the "social order of the country" and has threatened the even tempo of life in the State of Gujarat as well. As a result of the outbreak, emergency measures were required to be adopted to protect the existence and integrity of the State of Gujarat;

(iii) The COVID-19 pandemic has caused "extreme financial exigencies" in the State. The lockdown caused a slowdown in economic activities, leading to an 'internal disturbance' in the State within the meaning of Section 5. The State temporarily exempted 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;

(iv) The notifications do not violate Section 59 of the Factories Act as they impose the condition of payment of wages for overtime work in proportion to the existing wages;

(v) Section 5 of the Factories Act confers the power of exemption to the State Government to exempt any factory or class of factories from its provisions. The State Government has the prerogative to determine whether all or only a class or description of factories were to be exempted. Listing of all classes of factories would have been an unnecessary exercise;

(vi) The notifications have not been issued under Section 65(2) of the Factories Act, which can only be invoked to deal with an exceptional pressure of work;

(vii) The notifications have been issued under Section 5 of the Factories Act to ensure the maintenance of minimum production levels in factories. No targets for production have been fixed. Hence, there is no exceptional pressure of work within the meaning of Section 65(2). The purpose of the notifications is to deal with the COVID-19 pandemic and to ensure that the core functions of the economy continue to operate;

(viii) Under the notifications, workers are only allowed to work for three additional hours than the normal work day. Factories have also been directed to compensate the workers proportionately for the extra working hours. There is no exploitation of labour and factories are also able to sustain themselves; and

(ix) The notifications are not in violation of Articles 14, 21 and 23 of the Constitution.

C The power under Section 5 of the Factories Act, 1962

6 The issue for analysis is whether the notifications fall within the ambit of the power conferred by Section 5 of the Factories Act. The validity of the notifications depends on whether the COVID-19 pandemic and the nationwide lockdown qualify as a 'public emergency' as defined in Section 5. The statute provides both the language and the dictionary to interpret it.

7 Section 5 of the Factories Act provides that in a public emergency, the State Government can exempt any factory or class or description of factories from all or any of the provisions of the Act, except Section 67. Section 5 is extracted below:

> "5. 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.
>
> **Explanation.—For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance**."
>
> (**emphasis supplied**)

8 Section 5 specifies (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; (iv) the provisions from which an exemption can be allowed; (v) the period of time over which the

exemption may operate; and (vi) the manner in which the exemption has to be notified. An exemption can be granted “in any case of public emergency”. The existence of a public emergency is a pre-requisite to the exercise of the power. Whether there exists a public emergency is not left to the subjective satisfaction of the state government. The absence of the expression “subjective satisfaction” in Section 5 is crucial. The existence of a public emergency must hence be demonstrated as an objective fact, when its existence is questioned in a challenge to the exercise of the power. Left to itself, the expression ‘public emergency’ may have a wide and, as we say in law, an elastic meaning. But the statute as it stands does not leave the expression ‘public emergency’ undefined. The explanation to Section 5 was introduced by the Factories (Amendment) Act of 1976 - Amending Act 94 of 1976 - with effect from 26 October 1976. Interestingly, it was an amendment which was brought in during the internal emergency declared in June 1975 purportedly on account of “internal disturbances”. The effect of the explanation is to circumscribe the ambit of what constitutes a public emergency. The explanation constricts the expression in two ways: first, by confining it to specific causes; and second, by requiring that a consequence must have emanated from those causes before the power can be exercised. Under Section 5 a situation can qualify as a ‘public emergency’, only if the following elements are satisfied: (i) there must exist a “grave emergency”; (ii) the security of India or of any part of its territory must be “threatened” by such an emergency; and (iii) the cause of the threat must be war, external aggression or internal disturbance. The existence of the situation must be demonstrated as an objective fact. The co-relationship between the cause and effect must exist.

Implicitly therefore, the statutory provision incorporates the principle of proportionality.

9 The principle of proportionality has been recognized in a slew of cases by this Court, most notably in the seven-judge bench decision in **K S Puttaswamy** vs. **Union of India**.[3] The principle of proportionality envisages an analysis of the following conditions in order to determine the validity of state action that could impinge on fundamental rights:

(i) A law interfering with fundamental rights must be in pursuance of a legitimate state aim;

(ii) The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved;

(iii) The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim;

(iv) Restrictions must not only serve legitimate purposes; they must also be necessary to protect them; and

(v) The State should provide sufficient safeguards against the abuse of such interference.

However before adverting to an analysis on the proportionality of the Respondent's action in issuing the notifications, it would be important to determine, at the threshold, whether the notifications have been validly issued, in

[3] (2017) 10 SCC 1, para 325

conformity with the scope of power envisaged under Section 5 of the Factories Act.

D Precedent on 'public emergency' and 'security of the state'

10 The originating causes of a 'public emergency' in Section 5 of the Factories Act are similar to those which Article 352 of the Constitution embodied, prior to its amendment by the Constitution (Forty-fourth Amendment) Act, 1978. Articles 352 to 360 of the Constitution contain emergency provisions. Article 352 of the Constitution, prior to its amendment, read as follows:

> "352. Proclamation of Emergency: (1) If the President is satisfied that **a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect**."
>
> (**emphasis supplied**)

11 The powers under Article 352 have been invoked thrice by the President to declare an emergency. An emergency was declared for the first time in 1962 due to the Chinese aggression on Indian territory. The emergency was revoked in 1968. In 1971, when hostilities broke out with Pakistan, an emergency was proclaimed by the President on the ground that the security of India was threatened by external aggression. While this proclamation was in force, another proclamation was issued by the President on 25 June 1975 declaring that a "grave emergency exists whereby the security of India is threatened by 'internal disturbance'." Both these proclamations were revoked in March 1977. The Forty-fourth amendment to the Constitution sought to limit recourse to emergency

powers under Article 352 to prevent their abuse. Pursuant to this amendment, the expression "internal disturbance" was replaced with "armed rebellion". Thus, a proclamation of emergency now cannot be issued on a mere internal disturbance and must reach the threshold of an armed rebellion threatening the security of India. The Parliamentary amendments to Article 352 are the product of experience: experiences gained from the excesses of the emergency, experiences about the violation of human rights and above all, experiential learning that the amalgam of uncontrolled power and unbridled discretion provide fertile conditions for the destruction of liberty. The sobering lessons learnt from our not-too-distant history should warn us against endowing a statute with similar terms of a content which is susceptible of grave misuse.

12 The expression 'internal disturbance' finds place in Article 355 of the Constitution, as well. Article 355 of the Constitution provides:

> "355. 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 State is carried on in accordance with the provisions of this Constitution."

Article 355 does not contemplate the proclamation of an emergency or interference in the functioning of elected state governments. It casts a duty on the Union Government to ensure the protection of the states against external aggression and internal disturbance and to ensure their functioning in accordance with the Constitution.

13 Article 356 of the Constitution provides for the failure of constitutional machinery in a state in a situation where the functioning of the State Government cannot be carried out in accordance with the Constitution. Article 356 reads as follows:

> "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 any body 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 any body or authority in the State:.."

14 The interpretation of Articles 352, 355 and 356 was discussed by a seven-judge bench of this Court in **S R Bommai** vs. **Union of India**[4]. Justice Sawant, writing for himself and Justice Kuldip Singh, observed that:

> "… Article 355 … is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Articles 356 and 357. **What is however, necessary to remember in this connection is that while Article 355 refers to three situations, viz., (i) external aggression, (ii) internal disturbance, and (iii) non-carrying on of the Government of the States, in accordance with the provisions of the Constitution, Article 356 refers only to one situation, viz., the third one. As against this, Article**

[4] [1994] 2 S.C.R 644

> **352 which provides for Proclamation of emergency speaks of only one situation, viz., where the security of India or any part of the territory thereof, is threatened either by war or external aggression or armed rebellion. The expression "internal disturbance" is certainly of larger connotation than "armed rebellion" and includes situations arising out of "armed rebellion" as well. In other words, while a Proclamation of emergency can be made for internal disturbance only if it is created by armed rebellion, neither such Proclamation can be made for internal disturbance caused by any other situation nor a Proclamation can be issued under Article 356 unless the internal disturbance gives rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. A mere internal disturbance short of armed rebellion cannot justify a Proclamation of emergency under Article 352 nor such disturbance can justify issuance of Proclamation under Article 356(1), unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution.** […]
>
> The common thread running through all these Articles in Part XVIII relating to emergency provisions is that **the said provisions can be invoked only when there is an emergency and the emergency is of the nature described therein and not of any other kind.** The Proclamation of emergency under Articles 352, 356 and 360 is further dependent on the satisfaction of the President with regard to the existence of the relevant conditions precedent. The duty cast on the Union under Article 355 also arises in the twin conditions stated therein.
>
> (**emphasis supplied**)

15 In **Extra-Judicial Execution Victim Families Association** vs. **Union of India**[5], this Court considered whether the situation in Manipur was of public order, internal disturbance or an armed rebellion. Analysing the impact of the Forty-fourth amendment which substituted the expression “armed rebellion” for “internal disturbance’, the Court held that:

[5] (2016) 14 SCC 578 2

> "66. The impact of the above substitution of words was the subject-matter of consideration by a Constitution Bench of this Court in *Naga People's Movement of Human Rights v. Union of India*. **It was held therein that though an internal disturbance is a cause for concern, it does not threaten the security of the country or a part thereof unlike an armed rebellion which could pose a threat to the security of the country or a part thereof. Since the impact of a Proclamation of Emergency under Article 352 of the Constitution is rather serious, its invocation is limited to situations of a threat to the security of the country or a part thereof either through a war or an external aggression or an armed rebellion, but not an internal disturbance**. […]
>
> 170. The conclusion therefore is that in the event of a war, external aggression or an armed rebellion that threatens the security of the country or a part thereof, it is the duty of the Union Government to protect the States and depending on the gravity of the situation, the President might also issue a Proclamation of Emergency. That apart, the Union Government also has a duty to protect the States from an internal disturbance. However the President cannot, in the event of the latter situation, issue a Proclamation of Emergency except by using the drastic power under Article 356 of the Constitution which has in-built checks and balances."
>
> (**emphasis supplied**)

16 The expression 'internal disturbance' must be interpreted in the context in which it is used. Under Article 352, an internal disturbance must be of the order of an armed rebellion threatening the security of India to proclaim an emergency. Similarly, in order to sustain a valid exercise of power under Article 356 on the ground of an internal disturbance, it must be of such a nature as to disrupt the functioning of the constitutional order of the State; in other words, it must be of such a nature that the government of a state cannot be carried on in accordance with the Constitution.

17 On the definition of 'internal disturbance' in the context of Article 355 of the Constitution, the Report of the **Sarkaria Commission on Centre-State Relations (January 1988)** noted that:

> "6.3.04 It is difficult to define precisely the concept of 'internal disturbance'. Similar provisions, however, occur in the Constitutions of other countries. Article 16 of the Federal Constitution of Switzerland uses the expression "internal disorder". The Constitutions of the United States of America and Australia use the expression 'domestic violence'. The framers of the Indian Constitution have, in place of this term, used the expression 'internal disturbance'. Obviously, they have done so as they intended to cover not only domestic violence, but something more. The scope of the term 'internal disturbance' is wider than 'domestic violence'. **It conveys the sense of 'domestic chaos', which takes the colour of a security threat from its associate expression, 'external aggression'. Such a chaos could be due to various causes.** Large-scale public disorder which throws out of gear the even tempo of administration and endangers the security of the State, is ordinarily, one such cause. Such an internal disturbance is normally man-made. **But it can be Nature-made, also. Natural calamities of unprecedented magnitude, such as flood, cyclone, earth-quake, epidemic, etc. may paralyse the government of the State and put its security in jeopardy.**
>
> […]
>
> 6.3.13 It is important to distinguish 'internal disturbance' from ordinary problems relating to law and order. Maintenance of public order, excepting where it requires the use of the armed forces of the Union, is a responsibility of the States (Entry 1, List II). That being the case, 'internal disturbance' within the contemplation of Article 355 cannot be equated with mere breaches of public peace. In terms of gravity and magnitude, it is intended to connote a far more serious situation. **The difference between a situation of public disorder and 'internal disturbance' is not only one of degree but also of kind. While the latter is an aggravated form of public disorder which endangers the security of the State, the former involves relatively minor breaches of the peace of purely local significance. When does a situation of public disorder aggravate into an "internal disturbance' justifying Union intervention, is a matter that has been left by the Constitution to the judgement and good sense of the Union Government**.

> […]
>
> 6.4.11 The following are some instances of physical break-down:
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> […]
>
> (ii) **Where a natural calamity such as an earthquake, cyclone, epidemic, flood, etc. of unprecedented magnitude and severity, completely paralyses the administration and endangers the security of the State and the State Government is unwilling or unable to exercise its governmental power to relieve it**.
>
> […]
>
> 6.5.01 […] Some examples are given below of situations in which it may be improper, if not illegal, to invoke the provisions of Article 356:
>
> […]
>
> **(ix) This power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State**."
>
> (**emphasis supplied**)

The Sarkaria Commission recognized that a range of situations may qualify to be internal disturbances. The instances of 'internal disturbance' given by the Sarkaria Commission were in the context of Article 355 and Article 356, where the breakdown of the constitutional machinery of the State is in question. In any event, the Sarkaria Commission clarified that mere financial exigencies of a State do not qualify as an internal disturbance.

18 In **Anuradha Bhasin** vs. **Union of India**[6]**, ("Anuradha Bhasin")** a three judge Bench of this Court considered the definition of the expression 'public

[6] (2020) 3 SCC 637

emergency' in Section 5(2) of the Telegraph Act, 1885.[7] A textual comparison shows that the definition of 'public emergency' in Section 5(2) of the Telegraph Act, 1885 is broader than under the Factories Act. Section 5(2) of the Telegraph Act, 1885 covers situations pertaining to "sovereignty and integrity of India", "friendly relations with foreign states", "public order" and "preventing incitement to the commission of an offence" which do not find place in the statutorily defined ambit of a 'public emergency' in Section 5 of the Factories Act. Be that as it may, para 101 of the decision in **Anuradha Bhasin** contains an observation that- "..*"public emergency" is required to be of serious nature, and needs to be determined on a case-to-case basis*."[8]

19 The power under Section 5 of the Factories Act can be exercised in a "public emergency". The explanation states that to constitute a public emergency, there must be a grave emergency. The emergency must be of such a nature as to threaten the security of India or a part of its territory. The threat to the security of India or a part of the territory must be caused by war, external aggression or an internal disturbance. The expression 'internal disturbance' cannot be divorced from its context, or be read in a manner divorced from the other two expressions

[7] "5. Power for Government to take possession of licensed telegraphs and to order interception of messages.—(1) * * *
(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:
Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

[8] No other aspect of *Anuradha Bhasin* v. *Union of India*, (2020) 3 SCC 637 has been the subject matter of the debate in the present case

which precede it. They are indicative of the gravity of the cause which threatens the security of India or a part of its territory. An internal disturbance must be of a similar gravity. Further, it is necessary to evaluate whether a situation of internal disturbance threatens the security of India, or a part of its territory to qualify as a 'public emergency'. In the absence of any one or more of the constituent elements, the conditions requisite for the exercise of statutory power will not exist.

20 What is meant by the phrase "security of India"? In **Romesh Thapar** vs. **State of Madras**[9], a Bench, comprising six judges of this Court observed that the concept of 'security of State' is narrower than that of 'public order'. Justice Patanjali Sastry, speaking for the court held that:

> "7. The Government of India Act, 1935, nowhere used the expression "security of the State" though it made provision under Section 57 for dealing with crimes of violence intended to overthrow the Government. While the administration of law and order including the maintenance of public order was placed in charge of a Minister elected by the people, the Governor was entrusted with the responsibility of combating the operations of persons who "endangered the peace or tranquillity of the Province" by committing or attempting to commit "crimes of violence intended to overthrow the Government". **Similarly, Article 352 of the Constitution empowers the President to make a proclamation of emergency when he is satisfied that the "security of India or any part of the territory thereof is threatened by war or by external aggression or by internal disturbance". These provisions recognise that disturbance of public peace or**

[9] (1950) 1 SCR 594 [The first amendment to the Constitution in 1951 expanded the area of permissible regulation of the fundamental right under Article 19(1)a, by amending Article 19(2)]

tranquillity may assume such grave proportions as to threaten the security of the State.

8. As Stephen in his *Criminal Law of England* observes: "Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other and are not capable of being marked off by perfectly defined boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it". Though all these offences thus involve disturbances of public tranquillity and are in theory offences against public order, the difference between them being only a difference of degree, yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by the Indian Penal Code. **Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Article 19(1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgement of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly "sub-clause (b)" and the right of association "sub-clause (c)" may be restricted under clauses (3) and (4) of Article 19 in the interests of "public order", which in those clauses includes the security of the State.** The differentiation is also noticeable in Entry 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the "security of a State" and "maintenance of public order" as distinct subjects of legislation. **The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind**."

(**emphasis supplied**)

21 The difference between law and order, public order and security of the State was demarcated by this Court in **Ram Manohar Lohia** vs. **State of Bihar**[10]. In a celebrated passage, Justice M Hidayatullah observed:

> "55. […] It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". **One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State**. […]" (**emphasis supplied**)

E Interpreting 'public emergency' in Section 5 of the Factories Act, 1962

22 Section 5 of the Factories Act provides for the power of exemption from certain provisions of the Act due to the occurrence of a public emergency. The explanation speaks of a grave emergency where the security of India is threatened by war, external aggression or internal disturbance. The power conferred by the provision by its very nature, must be used only where there is a grave emergency implicating an actual threat to the security of the state. The purpose of exercising emergency powers is to avert the threat posed by war, external aggression or internal disturbance and such powers must not be used for any other purpose.

[10] AIR 1966 SC 740

23 The question before the Court in this petition is whether the COVID-19 pandemic and the ensuing lockdown imposed by the Central Government to contain the spread of the pandemic, have created a public emergency as defined by the explanation to Section 5 of the Factories Act.

24 The global pandemic caused by COVID-19 is an unprecedented situation with which countries all over the world are grappling. In India, the Central Government imposed a nationwide lockdown on 24 March 2020 for an initial period of 21 days to take effective measures to contain the spread of COVID-19, including, maintenance of essential supplies and services and healthcare facilities. The lockdown was subsequently extended until 31 May 2020. During the lockdown, economic activity in the country was brought to a standstill. There was a widespread migration of labour from the cities, where all avenues for work had closed. There was an unprecedented human migration, countless of the marginalized on foot, to rural areas in search of the bare necessities to sustain life. There has been a loss of incomes and livelihood. The brunt of the pandemic and of the lockdown has been borne by the working class and by the poorest of the poor. Bereft of social security, they have no fall back options. The respondent has in exercise of its powers under Section 5 of the Factories Act issued the impugned notifications purportedly to provide a fillip to industrial and commercial activities.

25 Before this Court, the Petitioners have submitted that the present situation does not threaten the security of India or a part of its territory. According to them the Respondent has failed to demonstrate the existence of such a threat. The

exercise of powers under Section 5 of the Factories Act is challenged as *ultra vires* the Factories Act.

26 In response, the Respondent, on one occasion in their written submissions, has argued that the COVID-19 pandemic was *leading* to financial chaos and the situation was on "the brink of internal disturbance". In other places, the Respondent has urged that the economic slowdown caused by the pandemic constitutes a public emergency, warranting the need to issue the impugned notifications curtailing the applicability of certain provisions of the Factories Act. In their submissions, the Respondent has placed reliance on instances of internal disturbance cited by the Sarkaria Commission (as quoted above), which include a natural calamity such as an epidemic, which paralyses the administration and the security of the State. In the context of the Factories Act, the Respondent has relied on the decision of this court in **Pfizer Private Limited, Bombay** vs. **Workmen**[11] ("**Pfizer**") to urge that during times of a national emergency, all necessary efforts must be made to enhance the industrial production of the nation.

27 We do not find any merit in the submissions of the respondents. In **Pfizer**, the dispute between the employer and workmen concerned the imposition of onerous working conditions by the factory owner. The case was a private dispute and did not concern the exercise of emergency powers by the State under the Factories Act. The Court merely noted that the dispute had arisen during the time of a national emergency imposed by the President in 1962 and there was a need

[11] AIR 1963 SC 1103

to gear up the industrial production to meet the needs of the nation. In the present situation, the Respondent has in its written submissions admitted that the purpose of the notifications is not to cope with an overwhelming pressure of work, but only to meet the minimum targets.

28 Even if we were to accept the Respondent's argument at its highest, that the pandemic has resulted in an internal disturbance, we find that the economic slowdown created by the COVID-19 pandemic does not qualify as an internal disturbance **threatening the security of the state**. The pandemic has put a severe burden on existing, particularly public health, infrastructure and has led to a sharp decline in economic activities. The Union Government has taken recourse to the provisions of the Disaster Management Act, 2005.[12] However, it has not affected the security of India, or of a part of its territory in a manner that disturbs the peace and integrity of the country. The economic hardships caused by COVID–19 certainly pose unprecedented challenges to governance. However, such challenges are to be resolved by the State Governments within the domain of their functioning under the law, in coordination with the Central Government. 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 exist under Section 5. That is absent in the present case.

[12] Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) dated 24 March 2020

F Scheme and Objects of the Factories Act, 1962

29 The Respondent's purpose in invoking the emergency powers under the Factories Act is to counter the effects of the economic slowdown caused by the lockdown. In analyzing the scope and intent of Section 5 of the Factories Act and the specific exemptions of Section 51, 54, 55 and 56 envisaged by the impugned notifications, it is necessary to examine the purpose of the Factories Act, in the backdrop of the constitutional scheme of the Indian welfare State. The Factories Act was enacted almost contemporaneous with the framing of the Constitution. The Factories Act is a product of history; of a long struggle of worker unions to secure the right to human dignity in workplaces that ensure their safety and well-being. The first Factories Act was introduced in 1881 and was amended in 1891, 1911, 1934 and 1941. Justice Umesh C Banerjee, as a part of a two-judge bench of this Court, in **S M Datta** vs. **State of Gujarat**[13] succinctly traced these amendments in the context of the industrial revolution and British imperialism in India. The Court noted:

> "14. …the establishment of cotton mills in Bombay in 1851 and the jute mill at Rishra in Bengal marked the beginning of factory system in India and it is only thereafter that the factories grew steadily both in Bombay and in Bengal but the conditions prevailing in these factories were inhuman, both as regards working hours, welfare measures and wages. Availability of labour was plenty and as such became rather cheap and in order to eradicate the same, a Commission was appointed in 1875 to investigate the conditions of labour in factories and on the basis of its recommendations, the first Factories Bill, 1880 was introduced in the legislature, subsequently however, the Bill was adopted as an Act. No sooner however, the Act was passed, agitation started afresh in Bombay and other places and on the basis of the report of a Committee, the Indian Factories (Amendment) Act of 1891

[13] (2001) 7 SCC 659

> was passed. The provisions of the amended Act were also inadequate and a somewhat revised Bill was subsequently introduced in 1909 and the same was passed as a statute in 1911. Though the Factories Act, 1911 was amended from time to time but it could not meet the required growing activities in the country, especially after the Second World War by reason whereof, the Factories Act, 1948 was engrafted in the statute-book where emphasis had been on the welfare of the workers. Factory Inspectors have been placed with very heavy responsibility on them and provisions have been made in the statute empowering the State Governments to make and frame rules for the purposes of meeting the local exigencies of situation."

30 The Factories Act, as it currently stands, was enacted to guarantee occupational health and safety. It ensures the material and physical well-being of workers by fastening responsibilities and liabilities on 'occupiers' of factories. As a legislative recognition of the inequality in the material bargaining power between workers and their employers, the Act is meant to serve as a bulwark against harsh and oppressive working conditions. The Act, primarily applies to establishments employing more than 10 persons. It has been purposively and expansively applied to workers, who may not strictly fall within the purview of the definition, and yet embody similar roles within the establishments. These permissible interpretations have been aligned with the intention of the legislature which has a vital concern in preventing exploitation of labour.

31 The notifications in question, besides specifically exempting all factories from the applicability of Sections 51, 54, 55 and 56, effectively override Section 59 of the Factories Act. The above provisions form a part of Chapter VI which prescribes the 'Working Hours of Adults'. The Chapter, broadly concerned with worker productivity and fair remuneration, prescribes working hours, mandatory

days of rest, intervals between stretches of work and adequate compensation for overtime. The notifications, putatively, are a response to the COVID-19 pandemic and exempt *all* factories from the provisions of Sections 51, 54, 55 and 56 which are extracted below:

> "**51. Weekly hours** — No adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week.
>
> **54. Daily hours** —Subject to the provisions of Section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day:
>
> Provided that, subject to the previous approval of the Chief Inspector, the daily maximum hours specified in this section may be exceeded in order to facilitate the change of shifts.
>
> **55. Intervals for rest**- (1) The periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour.
>
> (2) 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, exempt any factory from the provisions of sub-section (1) so however that the total number of hours worked by a worker without an interval does not exceed six.
>
> **56. Spreadover**—The periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest under Section 55, they shall not spreadover more than ten and a half hours in any day:
>
> Provided that the Chief Inspector may, for reasons to be specified in writing, increase the spreadover up to twelve hours."

32 The two notifications, while providing for an exemption from the above provisions, prescribe the following conditions of work:

> "(1) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy-two hours in any week.
>
> (2) The period 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 for rest of at least half an hour.
>
> (3) No Female workers shall be allowed or required to work in a factory between 7:00 PM to 6:00AM.
>
> (4) Wages shall be in a proportion of the existing wages (e.g. if wages for eight hours are 80 Rupees, the proportionate wages for twelve hours will be 120 Rupees)."

33 The notifications make significant departures from the mandate of the Factories Act. They (i) increase the daily limit of working hours from 9 hours to 12 hours; (ii) increase the weekly work limit from 48 hours to 72 years, which translates into 12 hour work-days on 6 days of the week; (iii) negate the spread over of time at work including rest hours, which is typically fixed at 10.5 hours; (iv) enable an interval of rest every 6 hours, as opposed to 5 hours; and (iv) mandate the payment of overtime wages at a rate proportionate to the ordinary rate of wages, instead of overtime wages at the rate of double the ordinary rate of wages as provided under Section 59.

34 While enacting the Factories Act, Parliament was cognizant of the occasional surge of the demand for, or requirement of, the manufacture of certain goods which would demand accelerated production. The law – makers were aware of the exigencies of the war effort of the colonial regime in World War II,

with its attendant shortages, bottlenecks and, in India, famine as well. Section 64(2) of the Factories Act envisages exemption from certain provisions relating to working hours in Chapter VI, for instances such as urgent repairs, supplying articles of prime necessity or technical work, which necessarily must be carried on continuously. Section 65(2) enables classes of factories to be exempt from similar provisions in order to enable them to cope with an exceptional pressure of work. However, these exemptions are circumscribed by Section 64(4) and 65(3) respectively, at limits that are significantly less onerous than those prescribed by the notifications in question. Despite these concessions, these provisions do not enable an exemption of Section 59 which prescribes mandatory payment of overtime wages to the workers at double the ordinary rate of their wages.

35 During the course of the hearings, the Respondent has submitted that the exemption under the impugned notifications must be understood in the context of the "extreme financial exigencies arising due to the spread of COVID-19 pandemic" and have been deployed as "a holistic approach to maintain the production, adequately compensate workers and take sufficient measures to safeguard the said factories and establishments in carrying out essential activities".

36 We are unable to find force in the arguments of the learned counsel for the Respondent. The impugned notifications do not serve any purpose, apart from reducing the overhead costs of *all* factories in the State, without regard to the nature of their manufactured products. It would be fathomable, and within the

realm of reasonable possibility during a pandemic, if the factories producing medical equipment such as life-saving drugs, personal protective equipment or sanitisers, would be exempted by way of Section 65(2), while justly compensating the workers for supplying their valuable labour in a time of urgent need. However, a blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalize on the pandemic to force an already worn-down class of society, into the chains of servitude.

G Social and Economic Value of 'Overtime'

37 The Indian Constitution is born from a transformative vision which aims to achieve social and economic democracy. Labour welfare is an integral element of that vision. That, indeed, is the philosophy which undergirds the Directive Principles. Speaking for a Constitution Bench of this Court, in **Bhikusa Yamasa Kshatriya (P) Ltd.** vs. **Union of India**[14], Justice J C Shah observed:

> "9. […] **Employment in a manufacturing process was at one time regarded as a matter of contract between the employer and the employee and the State was not concerned to impose any duties upon the employer**. **It is however now recognised that the State has a vital concern in preventing exploitation of labour and in insisting upon proper safeguards for the health and safety of the workers.** The Factories Act undoubtedly imposes numerous restrictions upon the employers to secure to the workers adequate safeguards for their health and physical well-being. But imposition of such restrictions is not and cannot be regarded in the context of the modern outlook on industrial relations, as unreasonable. Extension of the benefits of the Factories Act to premises and workers not falling strictly within the purview of the Act, is intended to serve the same purpose. By authorising imposition of

[14] AIR 1963 SC 1591

> restrictions for the benefit of workers who in the view of the State stand in need of some or all the protections afforded by the Factories Act, but who are not governed by the Act, the legislature is merely seeking to effectu[a]te the object of the Act i.e. it authorises extension of the benefit of the Act to persons to whom the Act, to fully effectuate the object, should have been, but has on account of administrative or other difficulties not been extended. Provisions made for the benefit of "deemed workers" cannot therefore be regarded as not unreasonable within the meaning of Article 19(1)(g) of the Constitution. (**emphasis supplied**)

38 The need for protecting labour welfare on one hand and combating a public health crisis occasioned by the pandemic on the other may require careful balances. But these balances must accord with the rule of law. A statutory provision which conditions the grant of an exemption on stipulated conditions must be scrupulously observed. It cannot be interpreted to provide a free reign for the State to eliminate provisions promoting dignity and equity in the workplace in the face of novel challenges to the state administration, unless they bear an immediate nexus to ensuring the security of the State against the gravest of threats.

39 The provisions embodied in Chapter VI of the Factories Act reflect hard-won victories of masses of workers to ensure working conditions that uphold their dignity. In **Y A Mamarde** vs. **Authority under the Minimum Wages Act**,[15] ("**Mamarde**") this court in the context of a contemporary legislation, the Minimum Wages Act, 1948, interpreted the concept of overtime pay at double the rate of the ordinary wage, as a minimum endeavour of just compensation for the

[15] (1972) 2 SCC 108

significant additional labour that is utilized by a worker, after having toiled in the ordinary course of the day. The Court, through a three judge Bench, held:

> "13. Let us first deal with this question. The Act [Minimum Wages Act] which was enacted in 1948 has its roots in the recommendation adopted by the International Labour Conference in 1928. The object of the Act as stated in the preamble is to provide for fixing minimum rates of wages in certain employments and this seems to us to be clearly directed against exploitation of the ignorant, less organised and less privileged members of the society by the capitalist class. This anxiety on the part of the society for improving the general economic condition of some of its less favoured members appears to be in supersession of the old principle of absolute freedom of contract and the doctrine of laissez faire and in recognition of the new principles of social welfare and common good. Prior to our Constitution this principle was advocated by the movement for liberal employment in civilised countries and the Act which is a pre-Constitution measure was the offspring of that movement. Under our present Constitution the State is now expressly directed to endeavour to secure to all workers (whether agricultural, industrial or otherwise) not only bare physical subsistence but a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure. This Directive Principle of State Policy being conducive to the general interest of the public and, therefore, to the healthy progress of the nation as a whole, merely lays down the foundation for appropriate social structure in which the labour will find its place of dignity, legitimately due to it in lieu of its contribution to the progress of national economic prosperity. […]. We are, therefore, clearly of the view that Rule 25 contemplates for **overtime work double the rate of wages which the worker actually receives**, including the casual requisites and other advantages mentioned in the explanation. **This rate, in our opinion, is intended to be the minimum rate for wages for overtime work**. **The extra strain on the health of the worker for doing overtime work may well have weighed with the rule-making authority to assure to the worker as minimum wages double the ordinary wage received by him so as to enable him to maintain proper standard of health and stamina. Nothing rational or convincing was said at the bar while fixing the minimum wages for overtime work at double the rate of wages actually received by the workmen should be considered to be outside the purpose and object of the Act. Keeping in view the overall purpose and object of the Act and viewing it harmoniously with the general scheme of**

> **industrial legislation in the country in the background of the Directive Principles contained in our Constitution the minimum rates of wages for overtime work need not as a matter of law be confined to double the minimum wages fixed but may justly be fixed at double the wages ordinarily received by the workmen as a fact.** […]
>
> (**emphasis supplied**)

40 The rationale behind fixing of double the rate of wages for overtime in **Mamarde** was separately noted by the Punjab and Haryana High Court, in interpreting overtime for the purpose of the Factories Act, in **I.T.C. Ltd**. vs. **Regional Provident Fund Commissioner**[16], where the Court held:

> "27. It cannot be lost sight of that in the present case interpretation of a social and labour legislation is involved. The social and labour legislations were enacted in order to safeguard the rights and interests of the working class and these are the result of a prolonged struggle of the working class. It is a matter of common knowledge that at the advent of the industrialisation in the country, there were no such social legislations as the Minimum Wages Act, Industrial Disputes Act, the payment of Wages Act and the Workmen Compensation Act etc. Then no working hours were fixed, no minimum wages were fixed; there were no safeguards against the retrenchment of the workmen, their wrongful dismissals, termination of service, wrongful reduction in rank etc. It was only after the workers organised themselves into trade unions that these enactments were made by the Legislature. Before these enactments, the workers were totally at the mercy of the employer. They used to work long hours right from morning till evening and even during night sometime and no basic or minimum wages were fixed. **In order to end this type of exploitation, these social legislations were made and even the benefits of these social legislations are sometimes denied by the employers and in these days of high prices the workers are not able to make their both ends meet.** In a civilized society, every person is entitled to the basic needs of life such as lodging, boarding and clothing to keep his body and soul together. It is in this background that the expression 'basic wages' is to be interpreted as defined in the Act. **The last settlement itself shows that two types of**

[16] ILR (1988) 1 P&H 73

> **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**."
>
> (**emphasis supplied**)

41 The principle of paying for overtime work at double the rate of wage is a bulwark against the severe inequity that may otherwise pervade a relationship between workers and the management. The Rajasthan High Court, in **Hindustan Machine Tools Ltd.** vs. **Labour Court**[17] emphatically noted that the workers cannot contract out of receiving double the rate for overtime as a way of industrial settlement. The Court held:

> "6. […] An interpretation which restricts or curtails benefits admissible to workers under the Factories Act has to be avoided. Since the provisions contained in the Factories Act, particularly those contained in Chap. VI, are intended to protect the workmen against exploitation on account of his uneven position *qua* the employer, employer cannot be permitted directly or indirectly to infringe upon the rights of the workers. Likewise, the employee cannot be permitted to volunte[e]r to work beyond the prescribed hours. **If the employer was given permission to contract out of the provisions of 1948 Act, the whole object with which these provisions have been enacted will be frustrated.**
>
> […]
>
> 9. […] **The employer has clearly taken advantage of its superior bargaining position vis-a-vis the workmen by making them to work for more than 50 hours of overtime work.** It cannot now claim that despite the fact that workmen

[17] (1994) 1 LLN 256

> have rendered service for more than 50 hours of overtime wages should be denied to them because the workmen became a party to the violation of that embargo. Having taken advantage by violating the provisions of law, the employer cannot now plead that the workmen should be denied benefit of their extra work."
>
> (**emphasis supplied**)

H Constitutional vision of social and economic democracy

42 The Constitution is a charter which solemnized the transfer of power. But the constitutional vision of *swarajya* transcends the devolution of political power. The Fundamental Rights and Directive Principles of State Policy present a coherent vision of a welfare state that envisages justice- *social, economic and political*. Granville Austin, in his seminal work on the Indian Constitution, has collectively described them as "*the conscience of the Constitution which connects India's future, present, and past by giving strength to the pursuit of social revolution in India*".[18] The colonial experience, and the poverty it sanctified as an incident of state policy, were the driving force in the Constituent Assembly's goal to achieve economic equality and independence.[19] Although the Directive Principles were not intended to be capable of being independently enforced before the courts to invalidate a legislation, they inform state policies; act as a guidepost for legislation and provide sign posts for travelers engaged on the path of understanding the complexities which the Constitution unravels. Eminent legal scholar Upendra Baxi, while reviewing Granville Austin's work on the Indian Constitution had analysed the dichotomy of justiciability and non-justiciability of

[18] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966) at page 63
[19] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966) at pages 74-77

Fundamental Rights and Directive Principles. He had noted- "..*In no other area of constitutional scholarship, the need to ascend from the planet of platitudes to an analytic paradise is more compelling than in the study of directive principles*[20]…*The fact that this distinction [in justiciability] is now a constitutional reality should not be allowed to obscure the more important fact that the directive principles and fundamental rights are both originally rooted in a vision of a new India. And though many writers on constitutional law have been led to draw a radical and sharp distinction between rights and principles, it is heartening that judicial decision-making has not failed to maintain the awareness of their basic unity*".[21] The Factories Act is an integral element of the vision of state policy which seeks to uphold Articles 38,[22] 39,[23] 42,[24] and 43[25] of the Constitution. It does so by attempting to neutralize the excesses in the skewed power dynamics between the managements of factories and their workmen by ensuring decent

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[20] Upendra Baxi, "The Little Done, The Vast Undone"- Some Reflections on Reading Granville Austin's "The Indian Constitution", *Journal of the Indian Law Institute* (1967) Vol.9 No.3, at page 360

[21] *ibid* at pages 366-367

[22] Article 38- "(1)- "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations"

[23] Article 39- "The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

[24] Article 42- "The State shall make provision for securing just and humane conditions of work and for maternity relief."

[25] Article 43- "The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."

working conditions, dignity at work and a living wage. Ideas of 'freedom' and 'liberty' in the Fundamental Rights recognized by the Constitution are but hollow aspirations if the aspiration for a dignified life can be thwarted by the immensity of economic coercion.

43 The expression 'worker' as defined in the Factories Act, is broad enough to include persons who are indirectly employed as contract labour and contribute to the manufacturing process at the establishment.[26] The COVID-19 pandemic in India, was accompanied with an immense migrant worker crisis, where several workers (including workers employed or contracted with factories) were forced to abandon their cities of work due to the halt in production which cut-off their meagre source of income. The notifications in question legitimize the subjection of workers to onerous working conditions at a time when their feeble bargaining power stands whittled by the pandemic. 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.

44 In an economy where the State is not the dominant employer of workers, the COVID-19 pandemic opens up unforeseen challenges in securing true equality and dignity to them. Workers in the organized and unorganized sectors of the economy face basic questions about survival and security. The

[26] National Thermal Power Co-operation v. Karri Pothuraju, (2003) 7 SCC 384; Barat Fritz Werner Ltd. v. State of Karnataka, (2001) 4 SCC 498

unprecedented nature of these challenges is matched only by the unanticipated nature of the pandemic. The challenges will need to be addressed with ingenuity and commitment. The framers of the Constitution did not envisage one model of economic democracy. Dr B R Ambedkar, as the architect of the Constitution, incorporated a vision which endows the succeeding generations of elected governments with the discretion to design responses in tune with the changing nature of social and economic structures.[27] In the Constituent Assembly on 19 November 1948, he stated[28]:

> "..While we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy …The question is: Have we got any fixed idea as to how we should bring about economic democracy ? There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy. Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act."

However, flexibility for succeeding generations to develop their models of economic democracy would not in the vision of the Framers allow a disregard of

[27] Dr B R Ambedkar, *Constituent Assembly Debates*, Volume 7 on November 19, 1948
[28] ibid

socio-economic welfare. Dr Ambedkar, in defending the retention of the word 'strive' in Article 38 of the Directive Principles 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 supplied**)

The Constitution allows for economic experiments. Judicial review is justifiably held off in matters of policy, particularly economic policy. But the Directive Principles of State Policy cannot be reduced to oblivion by a sleight of interpretation. To a worker who has faced the brunt of the pandemic and is currently laboring in a workplace without the luxury of physical distancing, economic dignity based on the rights available under the statute is the least that this Court can ensure them. Justice Patanjali Sastry immortalized that phrase of this court as the *sentinel on the qui vive* in our jurisprudence by recognizing it in **State of Madras** vs. **V G Row**[29]. The phrase may have become weather-beaten in articles, seminars and now, in the profusion of webinars, amidst the changing times. Familiar as the phrase sounds, judges must constantly remind themselves of its value through their tenures, if the call of the constitutional conscience is to retain meaning. The 'right to life' guaranteed to every person under Article 21,

[29] AIR 1952 SC 196

which includes a worker, would be devoid of an equal opportunity at social and economic freedom, in the absence of just and humane conditions of work. A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour that are secured by Articles 21 and 23 of the Constitution.

I Summation

45 This Court is cognizant that the Respondent aimed to ameliorate the financial exigencies that were caused due to the pandemic and the subsequent lockdown. However, financial losses cannot be offset on the weary shoulders of the laboring worker, who provides the backbone of the economy. Section 5 of the Factories Act could not have been invoked to issue a blanket notification that exempted all factories from complying with humane working conditions and adequate compensation for overtime, as a response to a pandemic that did not result in an 'internal disturbance' of a nature that posed a 'grave emergency' whereby the security of India is threatened. In any event, no factory/ classes of factories could have been exempted from compliance with provisions of the Factories Act, unless an 'internal disturbance' causes a grave emergency that threatens the security of the state, so as to constitute a 'public emergency' within the meaning of Section 5 of the Factories Act. We accordingly allow the writ petition and quash Notification No. GHR/ 2020/56/FAC/142020/346/M3 dated 17 April 2020 and Notification No. GHR/2020/92/FAC/142020/346/M3 dated 20 July

2020 issued by the Labour and Employment Department of the Respondent State.

46 As a consequence of this judgment, and in the interest of doing complete justice under Article 142 of the Constitution, we direct that overtime wages shall be paid, in accordance with the provisions of Section 59 of the Factories Act to all eligible workers who have been working since the issuance of the notifications.

47 Pending application(s), if any, are disposed of.

…….....J.
[Dr. Dhananjaya Y Chandrachud]

…….....J.
[Indu Malhotra]

…….....J.
[K M Joseph]

New Delhi;
October 01 , 2020.