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Constitutional Rights of Labour During Covid 19 Pandemic: A Study of India and Indonesia

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ABSTRACT
The Covid 19 pandemic, and the legal sanction for lockdowns and curfews in 2020, had a profound impact on workers even as economic downturn, reduction of labour demand, unemployment, severe financial distress, forced migration or confinement, assailed the labour sector. The informal, contractual, migratory, daily wage, and blue-collar workers across the world were especially vulnerable and most deleteriously affected, by the pandemic. A review of the legislative, legal, and judicial responses to labour rights during the pandemic, in different States provides crucial insights into how the variegated national Constitutional philosophies regarding labour and associated rights, were originally conceived, and are presently perceived, negotiated, and implemented resulting in divergent outcomes in praxis. This article based on secondary sources, critically analyses the jurisprudence underlying the legislative, legal and judicial reflexivity to labour rights during the pandemic lockdown in 2020 and 2021 in India and Indonesia, which are the two hegemonic developing economies of Asia in their respective regions, to identify the lacunae and susceptibilities in constitutional conception and its legal articulation which may be amenable to reforms for making law more socially responsive for a more egalitarian and humane society.
Keywords: *Covid 19 Pandemic, Labour Rights, Constitutional Law, India, Indonesia.*

1. INTRODUCTION

The Covid 19 pandemic, apart from its heavy toll of human life, has significantly affected the economies of most States and brought about a global recession. The economic crises, engendered by the near total stagnation during the prolonged lockdowns and subsequent sectoral adjustments and reallocations in response to the pandemic induced slowdowns triggered massive layoffs. The crises of resultant unemployment have exacerbated the endemic economic divide especially in developing States of the global south, and exponentially amplified the vulnerability of labour to exploitation, sociopolitical exclusion, marginalization, and pernicious poverty. While the criticality of the pandemic lockdowns to save lives is acknowledged, an undeniable dilution of labour social security laws, erosion of standards of constitutionally guaranteed labour rights, and a propensity for normalization of affronts to dignity of the worker, particularly the migrant labourers of the informal sector is undeniably apparent across the world.

This article analyses the universalism of Constitutional philosophy underlying the *grund norm* provisions, and thereafter examines the contemporary jurisprudence to comprehend the reflexivity of the legislature, laws, and judiciary towards protection of constitutional labour rights contra the pervasive and coercive prophylactic administrative measures necessary to check the spread of infection through during the Covid 19 Pandemic in India (Common Law Legal System) and Indonesia (Civil Law Legal System). The two regionally hegemonic, developing States with discrete legal systems were consciously chosen for analysis to demonstrate the similitude and functional convergence of the constitutional jurisprudential discourses, while endeavouring to identify mutually complementary legal insights. This article seeks to address the following research questions:

1) What are the philosophical foundations for the Constitutionalisation of labour rights in classical jurisprudence?
2) Based on a factual analysis of the legal policies related to labour in India and Indonesia during Covid 19, whether any departure from the jurisprudence of Constitutional labour rights can be discerned?
3) How can the reflexivity of the legislative, legal, and judicial institutions towards Constitutional labour rights contribute to legal reforms?

2. RESEARCH METHODS

This research article is based exclusively on seconday sources, such as data, reports, published literature, news, statutes, legal and academic resources. All data references have been cited. The examination of the Constitutional implications of laws related to labour has been done through sociological jurisprudential lens which comprehends law as a normative system for betterment of human society. Similarly, the legal reflexivity has been comprehended through judicial normative approach by statute analysis of Civil Codes (Indonesia) and Judicial decisions in case laws (India). The comparative legal analysis of labour laws of two different States with different legal systems has been done to obtain complementarity to address lacunae which may otherwise pass undetected.

3. RESULT AND DISCUSSION

Constitutional Law is the *grundnorm* enunciation of national aspirations, expression of the idealist vision, and derives from the social, political, civilizational, and historical contexts of the State and as Hobbesian social contract between the State and citizen, guarantees certain fundamental legal rights. The classic Lockean conception of Constitutionalisation of certain guaranteed fundamental rights is through the binding legal limitations on the Government not to violate these justiciable rights, which are directly enforceable by Courts of Law at the behest of the affected citizen or even *suo moto*. The Judiciary is the protector of Constitutionalism and the rights of the citizens against the State. Law is an authoritative tool for social engineering devised to be instrumentalsed to achieve social goals[1]. Law is evolutionary and open to symbiotic interpretation based on social, technological, economic, and political developments in democracies to remain relevant. Even Constitutional jurisprudence emerging from legal statutes and judicial determinations is neither sequestered nor independent of social realities, but evolving normatively whose indeterminate meaning, is constantly reinterpreted by jurists in reflexive jurisprudential response to limitations of the law to address emergent social need conflicting interests[2]. Therefore, despite the legal Constitutionalisation of (labour and associated) rights as fundamental, its actual implementation is delegated to the political executive in practice, which is susceptible to the sociopolitical cogitation in democratic States can undermine the rights of the weak (labour), by favouring dominant political, economic, and social forces. Protection of fundamental constitutional rights of socioeconomically weaker sections of society requires vigilant juridical engagement beyond mere statutory codification, or even Constitutionalisation[3].

The Constitutionalisation of labour rights in most democratic States is an indicator of the significance of labour law and jurisprudence to economic development, State stability, legitimacy of its authority, and security as labour exploitation can be a decisive source of social conflict and political secessionism. The State is usually assigned the role of arbiter and protector of the rights of the labour without prejudice to the interests of the capitalist. For post colonial States like India and Indonesia, emerging from the economically emaciating yoke of European colonization which had aggravated socioeconomic disparities in society, the Constitutional recognition and protection of labour rights as inviolable was of seminal importance to ensure socioeconomic justice through redistribution and reallocation of wealth and resources, ensuring equitable and inclusive development and simultaneous development of the nascent economy.

The Constitution of Indonesia, 1945 in Article 33 envisions the principles of economic democracy as a common familial endeavour of capital, labour and the State, and directs that the economic development must be balanced with national unity. This Contitutional mandate when read together with Article 27 (2) relating to the fundamental right to work and livelihood, Article 28E guaranteeing freedom of choice of employment and migration within the Unitary Republic of Indonesia for residence reflects the legal structural framework for labour rights in Indonesia. Similarly, the Constitution of India in Article 43 directs the State to ensure that workers have a “living wage” (not merely minimum wage) and ensure working conditions for a decent standard of life, through maximum hours of employment, mandatory leisure, and opportunities for convivial cultural engagement. Article 43 A directs the State to ensure workers participation in the management of undertakings in which they are employed. Both the States have enacted various laws to implement these Constitutional guaranteed fundamental labour rights. While formally the national statutes on labour rights of both India and Indonesia seem to be sufficient for effectively protecting the labour rights, the plight of the workers, particularly the migrant labour in the informal sector, in the face of complex challenges of the pandemic was a shocking expose of the systemic failure of structural implementation of labour rights protection regimes[4].

The outbreak of Covid 19 impelled a complete lockdown in India from midnight 25 March 2020 under

the stringent Disaster Management Act 2005 with barely a few hours notice. The lockdown forced the closing of workplaces, resulting in massive layoffs of labourers, especially of the unorganized informal sector. The Indian Government passed a notification on 29 March 2020 directing employers to pay "living wages" to all employees, and ordering "rent clemency" by all landlords in whose premises the workers were tenants, but in the face of dissent by the powerful lobby of capitalists and landlords withdrew the notification on 18 May 2020. The Public Distribution System was woefully ineffectual in the delivery of rations and the labour was stranded in the monsoon without any food, income, or shelter[5].

The apathy and incompetence of the executive policy makers towards the labourers was further revealed when special "shramik" (worker) trains operated by the Indian Railways required payment of full fare through online portals, production of a certificate of medical fitness from a government hospital at own expense and police pass to be obtained from local police station. Access to internet and electronic devices, indigency to undertake medical tests or buy tickets and bureaucratic police procedures excluded most of the poor labourers. The absence of public transport prompted a massive exodus of desperate labour on foot for hundreds of kilometres to their homes just for survival[6]. Statist administrative strategies for containment of the virulent contagion through mandatory lockdowns of most activities (including most commercial operations) except essential services, stringent curfews and quarantines enforced coercively through law enforcement agencies and armed forces arguably succeeded in mitigating the public health emergency but the same involuted into violence against the workers violating the lockdown. Moreover, public anxiety stigmatised the labourers who were perceived as spreading the infection and stifled civil society assistance[7]. Conservative estimates reveal that more than 128 million labourers lost their livelihood in India during the lockdown[8].

The impact of the phasic lockdown under authority of Article 12 of the Constitution of Indonesia, 1945 through Executive Regulation numbers 9 and 21 of 2020, on labour in Indonesia was not as dire as in India, perhaps because of better planning and execution, as well as the geography of the archipelago restricting the spread of Covid 19. But at the same time the rate of employment of labour crashed by 69 percent by February 2020 raising the number of unemployed people to 137.91 million in Indonesia[9] which indicates a precarity of economic stability in the future.

The subsequent misconceived legislative response to address the inevitable slowdown of the national economy in India and Indonesia raises several crucial questions related to the devience of economic policy from the directives of their Constitutions, about the structure of theier national economies, their socioeconomic inclusiveness, and most crucially regarding the constitutionally recognised rights of workers. The democratically elected representatives of India and Indonesia seem to have misperceived labour rights as an impediment rather than a component of national economic development as retrogressive labour legislations largely impinging on labour rights were promulgated. This is even more pernicious since the statutes were hastily drafted without the usual consultative process involving all the stake holders, or even wider debate with the political and civil society due to the prevailing public health emergency, at the height of the virulent pandemic when quarantine regulations in both India and Indonesia severely curtailed the collective bargaining power of the labour through their Unions. It is pertinent to note that Article 19 of the Constitution of India and Article 28 and Article 28E (3) of the Constitution of Indonesia, 1945 explicitly recognize the right of workers to Unionise as a fundamental constitutional right with legislative Act 21 of 2000 on Trade Unions in Indonesia and the Trade Union Act, 1926 of India, protecting and regulating this Constitutional right of labour. While this right to form lawful association and freely express lawful opinion has, technically not been abrogated in India or in Indonesia, the public health emergency has in practice prevented labour from associating to express their opinion.

In Indonesia the constitutional mandate of Article 33 for balanced economic development in the interest of the Unity of Indonesia, read with Article 27 (2) emphasizing the right to work and livelihood, and Article 28, and Article 28 E (3) relating to the Constitutional assurance of rights to freedom of association and freedom of expression, were incorporated in the form of various safeguards of the essential rights of labour to wages, employment security, and against arbitrary layoffs, in the comprehensive Indonesian Labour Code on manpower (Law 13 of 2003). This Indonesian Labour Code was superseded by the Act 11 of 2020 on Job Creation (Omnibus Law) promulgated by residential assent on on 03 November 2020, ostensibly to protect the economy from the vagaries of the pandemic induced recession. While the Indonesian legislators seem to have been motivated by genuine and incontrovertible concern for the need of securing the imploding Indonesian economy through infusion of investment, supplemented

by creation of liberalised business environment to attract and retain capital for economic growth when drafting the Omnibus Bill, and while the Omnibus law has some provisions which are long overdue for protecting labour ,the lack of transperancy and disregard for consultations with the Trade Unions has led to widespread protests aginst what is seen as capitulation of the Government to the hegemonic Oligarchic lobbies with curtailment of labour rights in a tradeoff that overwhelmingly favours the capitalists of Indonesia at the expense of labour rights[10]. Legally, the provisions of the Omnibus Law raise concerns regarding the protection of labour as a nonderogable and justiciable Constitutional right as it dilutes the constitutional protections for labour (under Article 28H (2) Article 34 (2) for special provision for empowerment of weaker sections of society), against unilateral lay off, assurances of minimum wages, fixed work hours, vacations, healthcare, maternity leaves, and severance pays. The withdrawl of the Government of Indonesia as the regulator of Industrial relations and relegation of labour to a private contract governed by Article 1320 of the Civil Code denotes a demotion of labour rights to contractual law from Constitutional right.

In a similar vein, the legal protections to labour which are mandated by the Constitution of India were embodied in forty four Statutory Acts, which were abrogated by the Indian Parliament without a wider consultative process with the Trade unions, and admist the strictly quarantined lockdown, and replaced with the Code on Wages, 2019, the Industrial Relations Code, 2020, the Working Conditions Code, 2020 and the Social Security Code, 2020. These Labour Codes of India are heavily tilted in favour of the capitalists and severely restrict the collective bargaining by Trade Unions and have increased restrictions on labour, such as a minimum of fourteen days notice before resorting to strikes while increasing the threshold of layoff without recourse to the Government. The much touted “change in work culture” to “work from home” which was politically cited as the impetus behind the Codification seems illusory. The elitist orientation of these arguments become clear when we consider that informal sector labourers lack the education, means and luxury to avail access to “work from home”. These Labour Codes of India pertain largely to the miniscule formal labour sector and excludes the informal sector workers (such as agricultural labourers, domestic workers, daily wage workers and other labour engaged individually such as employees of street vendors), who comprises more than ninety percent of Indian labour workforce.

The permissiveness to hire and fire labour, without consequence places the struggling informal labourer in severe insecurity. The timing of the promulgation of these Codes during the height of the pandemic in India has largely curtailed labour protests. The practical implications of the Indian Labour Codes, which were justified as being essential to preserving investments and employment and bringing the national economy on track, on labour in India becomes very apparent when the Government of India’s largest province increased the working hours for labour from eight hours per day to twelve hours at the same payscale. Other States have exempted several sectors of industries such as textiles, cement, iron and steel and heavy engineering from the mandatory labour inspections for compliance with statutory protections of labour rights for periods exceeding two years.

Constitutionally recognized rights have a higher status than statutory rights. In both India and Indonesia, the arbitrary impositions, and curtailments of protection for labour mitigate against the original intent of their respective Constitutions which was to nurture labour as a productive force for equitable development of the State. For example, Articles 28 A, 28 C, 28G, 28H (3) and 34 (2) of the Constitution of Indonesia, 1945 explicitly assure a fundamental right to life where all basic needs and human dignity are secured from fear and threat through social security. Similarly, Article 21 of the Constitution of India presages the very same dignified life of the individual as a Constitutional guarantee. The provisions of the new Labour Codes in both States seem to lack the provisions to ensure this dignified life for labourers. Moreover, there are multiple complex intersectionalities that impinge upon other explicit Constitutionally guaranteed rights in India and Indonesia that the provisions of the “surreptitiously imposed” pandemic era labour codes can have in developing States like India and Indonesia. For example, Article 31 of the Constitution of Indonesia, 1945 and Article 21A of the Constitution of India recognize the right to education and impose upon the State the duty to ensure that every child has access to free and compulsory education. The economic insecurity of the labourer that the liberalized provisions of the labour codes introduce will directly impact the access to education for children of indigent and migratory labourers, perpetuating the cycle of poverty. It is clearly concieveable that labourers pushed into poverty will face falling standards of living, food insecurity, reduction of access to sanitation and shelters. All the mandated protocols for controlling the pandemic such as social distancing, sanitisers, masks etc. become redundant when the labourer is struggling for existence.

The violent security centric dealing with such vulnerable labour can give rise to social unrest, impede development, aggravate conflicts and community disruptions, and create civil unrest, severely delegitimizing the authority of the State. The reality of these assessments is already apparent in both India and Indonesia where the Executive has had only limited success in providing succour to the impoverished labourer despite Article 34 of the Constitution of Indonesia, 1945 and Article 16 of the Constitution of India imposing a duty on the State to take care of the impoverished persons.

Public protests against the Omnibus Law, the humanitarian crises reslting from the rescindment of labour rights, criticism by legal scholars, and the continued spiralling fall of the economy has incited some remedial measures by the Government of Indonesia to ameliorate the existential crisis faced by the workers. The Government of Indonesia has issued circulars directing the protection of the employment and wages of workers infected by Covid 19 (M3HK04/ III of 2020), allowing labour to avail religious holidays on wages (M4HI01/ V of 2020) and ensuring pecuniary protection through wages or compensation for the workman in the event of injury due to occupational hazard (M8HK04/ V of 2020). In India, the Government has been recalcitrant in implementing measures to ensure labour rights, and recourse to judiciary and judicial review as the safeguard of Constitution by restraining the executive and the legislature, has been necessary to stabilise the precarious situation by recourse to Constitutionalism and thereby the recognition of rights of labour. The legal practitioners, jurists and the Indian judiciary have shown empathy and reflexivity to the violation of guaranteed fundamental rights and stepped in to protect Constitutional rights of the labour with several writ petitions and cases being filed by lawyers in the Higher Judicial Courts of India.

Judicial Independence and guardianship of Constitutionalism through judicial review of legislative acts, and jurisprudential checks on executive fiat has emerged as a crucial tool for protection of labour rights. The Supreme Court of India in the case *Gujarat Mazdoor Sabha v State of Gujarat(2020)* referred to the *stare decisis* in the case *Bhikusa Yamasa Kshatriya v Union of India (1972)* that the role of the State in preventing exploitation of labour and protection of Constitutional rights is an essential and non derogable Sovereign function for ensuring social and economic democracy, ruled that the constitutional rights of the worker can not be subordinated to the incapacity of the State or the mercy of his employer, and struck down all the laws made by provincial governments which had on grounds of public health emergency exempted employers from inspection for compliance with labour laws. In the case *Anuradha Bhasin v Union of India (2020)* the Supreme Court held that the pandemic was not an "emergency" as contemplated in Article 352 of the Constitution of India since it did not threaten the security of the State, was not related to external aggression or internal disturbances resulting in breakdown of governance. The lockdown and its implementation showed that the State of India still exercised sovereign authority and hence the partial suspension of fundamental rights during emergency as provided for in the Constitution was not met. The Court ruled that since Covid 19 is not an emergency, its *stare decisis* in the case *Pfizer Pvt Ltd, Bombay v Workmen* (1963) upholding the employers increase of the working time of labourers without overtime pay, when required by the State to enhance industrial production of essential products needed in the interest of nation, was inapplicable. All laws, ordinances and orders enhancing work without pay were held violative of Article 23 of the Constitution of India (which absolutely prohibits forced labour and slavery) and declared *void ab initio* with directions to the Government to ensure immediate payment of wages for overtime work rendered by workmen. The Apex Court during the hearing in the *Bandhua Mukti Morcha v Union of India (2021)* case took cognizance of the humanitarian crises of labour in India and issued an interim order to the federal Government *In re: Problems and Miseries of Migrant labourers* on 29 June 2021. The order directed the immediate implementation of daily distribution of dry rations at highly subsidized rates or free to migrant labourers in which ever provice they maybe. It struck down the penal provisions applied by the Indian Railways to passengers who could not afford tickets on the special trains for workmen repatriation.

4. CONCLUSION

The Constitutionalisation of labour rights in most democratic States is an indicator of the significance of labour law and jurisprudence to economic development, State stability, legitimacy of its authority, and security as labour exploitation can be a decisive source of social conflict and political secessionism.

The democratically elected representatives of India and Indonesia seem to have misperceived labour rights as an impediment rather than a component of national economic development as retrogressive labour legislations largely impinging on labour rights were promulgated. This is even more pernicious since the

statutes were hastily drafted without the usual consultative process involving all the stake holders, or even wider debate with the political and civil society due to the prevailing public health emergency, at the height of the virulent pandemic when quarantine regulations in both India and Indonesia severely curtailed the collective bargaining power of the labour through their Unions.

Labour is the economic spine of the State and civil society activism and sustained analytical engagement by jurists have succeded in ensuring executive recognition of labour rights in Indonesia. Judicial reflexivity to the crises of workers in India and shows that rule of law and separation of powers of governance enhances institutional abilities to address attenuated constitutionally guaranteed rights of citizens. However, these remedial measures are limited in their scope. Unless the labour laws of India and Indonesia are amended according to a non discriminatory, sensitive, transparent, and participatory process, with active supervision and involvement of the State, the erosion of Constitutional rights of labour will continue. If India and Indonesia are to become developed Asiatic States they must initiate legal reforms to ensure egalitarian and effective labour laws.

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