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WHY A CAP ON WORK-HOURS GETS CONGEALED INTO A CONSTITUTIONAL THRESHOLD

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ABSTRACT

The act of relaxing the limit on factory working-hours by a few Indian states in 2020 was akin to a constitutional flyby. Furthermore, there was no parallel increment in minimum wages. Both phenomena involve a dilution of statutes under Part IV of the Constitution of India. Both are, however, fortuitously barred by three unique constitutional prohibitions.

First of these is proposed to be a 'constitutional transference'. Upon fulfilment, certain positive obligations espoused under Part IV come under the aegis of negative obligations imposed on the State in Part III. Diminishing the former then impermissibly violates Part III. Both work hours and minimum wages are obligations of this mutable nature. Secondly and alternatively, the emerging principle of non-retrogression completely bars putting workers in inferior circumstances than they currently suffer.

In any case, there exists another two-pronged bar, wholly rooted in concurrent-federalism. Both, alternatively, disfavour the acts of Indian states in this

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instance. The 'exhaustive field' test prioritises a law from that unit of federation which evinces the intention to govern the concerned legislative subject. Whereas, the 'denial of rights' test disables the concurrent powers when one unit of the federation attempts to denature laws enacted by its complement.

Hence, the states' objective to increase working hours without the guarantee of a proportionate recompense, was most definitively under a constitutional interdict.

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I. INTRODUCTION

The Constitution of India [*hereinafter* "**the Constitution**"] had envisaged a central-state collaboration in regulating labour standards by placing it in the Concurrent List.[138] One such legislation is the Factories Act, 1948 [*hereinafter* "**the Act**"].[139] Several Indian states invoked powers conferred by Section 5[140] of the Act to undertake nothing less than a fundamental overhaul of workers' rights, in the name of recalibrating their working hours. The amendments involved suspension and modification of Sections 51, 54, 55, and 56 of the Act, respectively dealing with working hours per day, per week, its spread within a day, and the duration of daily intervals.[141] These were introduced in the backdrop of labour shortages as a consequence of inter-state labour migration and a cap on the number of people at a given place due to the pandemic, adversely affecting industry productivity.[142] To make up for the cumulative effect of the two factors, the industries were afforded an opportunity for extracting labour for a relatively prolonged period of time.[143] Ostensibly, this may appear to be constitutionally permissible, given the available legal competence and no perceivable bar on reducing working hours *per se*.

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138 INDIA CONST., Schedule VII, List III, *Concurrent List*.
139 The Factories Act, 1948, No. 63, Acts of Parliament, 1948.
140 See *Id.* § 5.
141 See *Id.* §§ 51, 54-56.
142 K.R. Shyam Sundar, *Factory Workers Can Now Legally Be Asked to Work 12-Hour Shifts: How Will this Change Things*, THE WIRE (April 27, 2020), https://thewire.in/labour/factory-workers-12-hour-shifts.
143 *Id.*

However, procedural competence and the absence of substantive legal bars are not the only means of testing an action's constitutionality. Both constitutional and common law come with certain safeguards, of which three are pertinent to this scenario. *Firstly*, this is explicitly precluded by the prevailing Indian jurisprudence around labour laws. *Secondly*, common law envisages another prohibition through the non-retrogression principle, for rights demanding a progressive realisation. *Thirdly*, prevailing jurisprudence on federalism disables legislative powers when one of its units departs from constitutional objectives.

This paper argues that these moves by the states could not have stood these standing legal tests.

Section II of this paper analyses these state notifications singularly within the paradigm of Parts III-IV of the Constitution, through four constituent parts. Section II(A) gives a brief description of the Supreme Court of India's [*hereinafter* "**the Supreme Court**"] reasoning in *Gujarat Mazdoor Sabha v. State of Gujarat* [*hereinafter* "***Gujarat Mazdoor Sabha***"].[144] Herein, the Supreme Court had agreeably struck down a notification for one of the states, albeit by way of an incomplete *ratio*.[145] The following Section II(B) shall reveal the significant gaps in both the *ratio* and its underlying premises insofar as the decision criminally disregards the role of 'wage rate' in labour rights. Section II(C) will build upon the foundation laid down in the preceding sub-section and will demonstrate that the

[144] Gujarat Mazdoor Sabha & Anr. v. State of Gujarat, 2020 10 SCC 459 ("***Gujarat Mazdoor Sabha***").
[145] *See* discussion *infra* Section ll.

notifications tacitly permitted a notional theft of minimum wages. It argues that the prescription of a minimum wages always takes into account the permissible cap on maximum work hours, and that an increment in the latter without a concomitant increment in the former allows for a *de facto* deduction in minimum wages. Section II(D) reveals how both the Parts function on a principle of mutual transference. That is, a fulfilled directive principle by the government becomes a secured fundamental right of the citizen. The phrasing of Article 23 of the Constitution is deliberately open ended so that it could attach itself to a fulfilled directive principle. The latter, then, comes under the heightened security that Part III comes with. The Section attempts to draw this link through the jurisprudence on minimum wages, a notional deduction of which is taking place in the case at hand.

Alternatively, Section III argues that the notifications in this case were precluded by the emerging 'non-retrogression' principle. Section III(A) describes the sources for this principle, as they exist in the form of legal texts. Section III(B) describes the theoretical underpinnings of the principle as it (exclusively) developed and applied in the U.S. Constitutional jurisprudence. It focuses on the crux of the principle, which is its running prohibition on the State to dilute or retract any previous act of it that had enhanced the citizens' constitutional rights. Eventually, Section III(C) asserts that Indian constitutional law in general and Indian constitutional-labour jurisprudence in particular is fertile ground for the principle's application. It argues that the Indian constitutional objective of 'attaining' the realisation of enumerated rights is meaningless if the government has

the power to later retract it. In avoiding such an absurd interpretation of constitutional law, the non-retrogression principle should be applied to strike down actions such as the concerned notifications.

Section IV is composed of the last alternative argument in this regard. It proposes that India's quasi-federation is a competitive marketplace for legislative ideas. A vertically-federal unit may only utilise the concurrent jurisdiction to enhance the prevailing laws. The negation/enhancement may be either quantitative or qualitative. Section IV(A) covers the quantitative test of 'occupying a field'. It argues that the Centre had appropriated the subject of working conditions[146] to itself by evolving multiple laws. Alternatively, Section IV(B) argues that the states were precluded in their actions by the qualitative 'denial of rights' test. This looks at whether the act of one federal unit obliterates the other unit's rights-based initiative, regardless of which one has the greater legal infrastructure. By both measures, the Section attempts to establish a federal-legal bar on the states in this case.

For the sake of fluency and convenience, states would imply both the state executives and the respective legislatures throughout the paper, unless explicitly mentioned otherwise. The same is to be assumed for the terms Union/Centre. The term 'amendments' shall be taken to reflect both, an executive's exercise of delegated powers and acts of legislatures.[147]

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[146] INDIA CONST., Schedule VII, List III, Item 24.
[147] INDIA CONST., art. 13, cl. 3.

II. CONSTITUTIONAL 'TRANSFERENCE' REVEALS THESE NOTIFICATIONS TO BE VIOLATING A FUNDAMENTAL RIGHT

At least eight Indian state executive branches went ahead to exercise the powers under Section 5 of the Act to increase the working hours on a daily and weekly basis.[148] Effectively, in most of the states, the new cap on daily work hours was 12 hours as opposed to the previous limit of 9 hours.[149] Furthermore, the new cap on the total daily spread-over of working hours were slated to be increased from the previous limit of 10.5 to 13 hours (average).[150] None of this was accompanied by any proportionate increment in the minimum wage floors. The notifications, then, effectively provided a platform to factories for a notional deduction in minimum wages. This goes against the constitutional intention of providing a framework wherein a worker shall not have to sacrifice her rights to earn a livelihood.[151]

This Section argues that the Constitution bars such notional deductions. It is proposed that the obligation to provide the same is captured by Part IV. However, once provided, it stands 'transferred' to Part III and any subtraction from it amounts to violating Part III in general, and Article 23 in particular.

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[148] Anya Bharat Ram, *Relaxation of labour laws across states*, PRS LEGISLATIVE RESEARCH (May 12, 2020), https://www.prsindia.org/theprsblog/relaxation-of-labour-laws-across-states. ("**Anya**")
[149] *Id.*
[150] *Id.*
[151] 2B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 100 (1966).

Indian states in their formulation of minimum wage-floors base it on a day-to-day parameter.[152] This is because this parameter is essentially tied with 'consumption units', components of which (such as daily calorific needs) are traditionally calculated for a day.[153] Forced labour comes about when there may be a notional wage deduction, such as when the same wages are not adjusted for inflation.[154] The same deduction comes about when the duration of a 'day' is increased, keeping wages *per* day stagnant.

A. THE SUPREME COURT'S ROUTE OF INVALIDATING THE NOTIFICATION(S)

Before delving deeper into the relevant arguments, it is pertinent to note why the Respondent's, *i.e.*, the State of Gujarat's, notification was struck down in *Gujarat Mazdoor Sabha*. The two Petitioners included trade unions belonging to both the federal levels. In its written submissions, the Respondent admitted that the object of the notifications was not to gear up private production, but merely to push factories towards meeting their financial break-even points.[155]

Predominantly, the discussion in *Gujarat Mazdoor Sabha* revolved around the expanse of the phrase 'public emergency', which is a pre-

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[152] IndiaSpend Team, *New formula for minimum wage in India could double incomes – but only if implemented right*, SCROLL.IN (May 6, 2019), https://scroll.in/article/915456/new-formula-for-minimum-wage-in-india-could-double-incomes-but-only-if-implemented-right; *see also* The Minimum Wages Act, 1948, No. 11, Acts of Parliament, 1948, § 3.
[153] Anya, *supra* note 148.
[154] P.U.D.R. & Ors. v. Union of India & Ors., 1982 3 SCC 235, ¶ 14 ("***PUDR***").
[155] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶ 29.

condition for invoking the powers under Section 5.[156] The Supreme Court simply deployed the admitted position of the Respondent of helping the employers as a vehicle to invalidate its notification. It stated that this distinguished the case from *Pfizer Private Limited, Bombay v. Workmen*,[157] which would have otherwise favoured the Respondent. Therein, the aim of expanding the employer's entitlements was to gear up production that the country needed; it was not to reach a financial break-even. The Supreme Court further stated that unlike the state-imposed public emergency at hand, that case was a private dispute between parties.

The Supreme Court then stated that the present case was not even sufficient to invite the state-imposed emergency. It applied the concentric-circle test espoused in *Dr. Ram Manohar Lohia v. State of Bihar & Ors.*[158] to the Explanation in Section 5. It held the COVID-19 induced financial stress to be outside the smallest ring of 'state-security'.[159] This, therefore, removed the very foundation of a 'public emergency' use of the provision. This significant factor, alongside increased fatigue on the worker due to prolonged working hours,[160] violated Articles 21 and 23 of the Constitution, according to the Supreme Court.[161]

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[156] The Factories Act, 1948, No. 63, Acts of Parliament, 1948, § 5.
[157] Pfizer Private Limited, Bombay v. Workmen, AIR 1963 SC 1103.
[158] Dr. Ram Manohar Lohia v. State of Bihar & Ors., 1966 SCR (1) 709.
[159] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶ 30.
[160] *Id.*, ¶¶ 40, 41, 47; Y.A. Mamarde v. Authority, 1972 2 SCC 108.
[161] INDIA CONST., art. 21, 23.

B. THE DISCONTENTS OF GUJARAT MAZDOOR SABHA

With great deference, it is submitted that the Supreme Court failed to authoritatively denounce the legalisation of paying below minimum wages. It is pertinent to note that when the Respondent state herein was an exception amongst the notifying states insofar, it explicitly alluded to extra wages for the added work-hours. If INR 80 was the floor rate for 8 work hours, it would become INR 120 in the case of 12 work hours. The state, like others, had been specifying rates on a day-based parameter till this point.[162] That is, the workers were to be awarded wages for the extra hours worked, at the same wage per hour rate as earlier.

However, it is submitted that longer work hours demand an increment in wage rate, and not a compensation at the rate as existed previously. *A priori*, this inordinate proportionality between work hours and minimum wages is captured by available empirical literature.

Firstly, there is the factor of exponentially increased efforts during the later work hours of the entire duration. The period of work is not a continuum of the same circumstances, but an arc of gradually depleting efficiency in her devoted efforts towards work.[163] To provide the same level of labour productivity as earlier in the day, a worker needs to put in a

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[162] Ministry of Labour and Employment, Government of India, Response to Lok Sabha Unstarred Question No. 1118, (December 17, 2018), http://164.100.24.220/loksabhaquestions/annex/16/AU1118.pdf.

[163] Sabina Kołodziej & Mariusz Ligarski, *The Influence of Physical Fatigue on Work on a Production Line*, 20(3) ACTA TECHNOLOGICA AGRICULTURAE 63, 64-68 (2017).

relatively higher effort as the clock-out time approaches.[164] This is a consequence of tapering efficiency.[165] This is to be read with the Act permitting shift working,[166] which compounds the implications in a case such as this: night-shift workers fighting off of their natural circadian rhythm shall have prolonged their internal biological conflict.[167]

Secondly, it is proposed that the exacerbated post-work fatigue requires recompense at a higher rate. Longer working hours are mostly left to the will of the worker in the form of an electable overtime option. When longer hours are imposed as mandatory, the amount devoted to sleep and spent on leisure, decreases.[168]

The available literature suggests the efficiency-wage hypothesis works towards mitigating or precluding damage by both the above factors.[169] This hypothesis stipulates that the productivity of workers

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[164] Christopher M. Barnes, *The Ideal Work Schedule, as Determined by Circadian Rhythms*, HARVARD BUSINESS REVIEW (January 28, 2015), https://hbr.org/2015/01/the-ideal-work-schedule-as-determined-by-circadian-rhythms.

[165] India Today Web Desk, *Henry Ford started the 40-hour workweek but the reason will surprise you*, INDIA TODAY (July 27, 2017), https://www.indiatoday.in/education-today/gk-current-affairs/story/40-hour-workweek-henry-ford-1026067-2017-07-27.

[166] The Factories Act, 1948, No. 63, Acts of Parliament, 1948, § 2(r).

[167] Mia Son et al., *Effects of long working hours and the night shift on severe sleepiness among workers with 12-hour shift systems for 5 to 7 consecutive days in the automobile factories of Korea*, 17 JOURNAL OF SLEEP RESEARCH 385, 387-394 (2008).

[168] Sungjin Park et al., *The negative impact of long working hours on mental health in young Korean workers*, 15(8) PUBLIC LIBRARY OF OPEN SCIENCE ONE (2020); Kenji Iwasaki et al., *Effect of Working Hours on Biological Functions related to Cardiovascular System among Salesmen Machinery Manufacturing Company*, 37(1) INDUSTRIAL HEALTH 361, 364-366 (1999).

[169] Maarten D.C. Immink and Fernando E. Viteri, *Energy intake and productivity of Guatemalan sugarcane cutters: An empirical test of the efficiency wage hypothesis part II*, 9(2) JOURNAL OF DEVELOPMENT ECONOMICS 273, 275-278, 280-287 (1981).

proportionately increases with the wage increment.[170] This has been factored in by the Supreme Court for minimum wage disputes.[171]

Thirdly, there exists an undeniable link between calories consumed and minimum wages paid when it comes to the lowest economic quintile of the working class.[172] Minimum wages push the entire household of a worker towards the (biologically) required calorific consumption.[173] The sensitivity of this link between work-hours and calories consumed is extremely high.[174] When the work-hours decrease, such households' calorie consumption decreases inordinately.[175] That is as good as a wage deduction.

It is in this light that the Supreme Court's previous reading of the public policy as necessitating complete social, physical and mental health in contractual hires must be interpreted.[176] Aligned cumulatively, the three factors unfailingly denote hours to be the most significant unit for gauging spent labour. Most implicative in this regard is its mention as the lone metric by the two relevant statutes at certain places.[177]

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[170] *Id.*
[171] Express Newspapers v. Union of India, AIR 1958 SC 578.
[172] Mike Palazzolo & Adithya Pattabhiramaiah, *The Minimum Wage and Consumer Nutrition*, RESEARCH PAPER 2021 JOURNAL OF MARKETING RESEARCH, 20, 70-71, (February, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547832 ("**Palazzolo**"); Kathryn L. Clark, *Minimum wages and healthy diet*, 38(3) CONTEMPORARY ECONOMIC POLICY 546, 559 (2020); Lindsay Beck et al., *Low-income workers' perceptions of wages, food acquisition, and well-being*, 9(5) TRANSLATIONAL BEHAVIOURAL MEDICINE 942, 949-951 (2019).
[173] Palazzolo, *supra* note 172.
[174] *Id.* at 29-30.
[175] *Id.* at 70-71.
[176] C.E.S.C. Ltd. Etc. v. Subhash Chandra Bose & Ors., 1992 1 SCC 441 , ¶¶ 31-33.
[177] *See* The Factories Act, 1948, No. 63, Acts of Parliament, 1948, §§ 51, 53, 54, 55, 56, 57(b), 59; The Minimum Wages Act, 1948, No 11, Acts of Parliament, 1948, §§ 13, 14.

This aligns with the larger welfare objective to evolve from economics-driven quantum of wages to one based on 'entitlement'. This is so because if left to the former, the employer may be dictated by demand-supply factors to lower the wages disbursed to the weakest of working classes.[178] This makes it possible that essential commodities remain ample in supply, but the workers' access to those becomes minimal.[179] Added to this, the Indian constitutional law had desired a transformative journey graduating from minimum to fair wages, with living wages as the ultimate objective in floor limits of payments.[180] Executive orders by Indian states, it is submitted, were akin to placing the cart before the horse.

C. DISPROPORTIONALITY IN REAL TERMS: NOTIONAL THEFT OF MINIMUM WAGES

In terms of economic dignity, *Gujarat Mazdoor Sabha* jumped to the loss of previously available overtime wages, bypassing the elementary concern of minimum wages.[181] Also, it is pertinent that the Supreme Court did take note of the complete proportionality between government action necessitated by circumstances and its effect on the workers.[182] In tacitly using the fifth point of the five-limbed proportionality of 'State-action' test, last re-iterated in *K.S. Puttaswamy & Anr. v. Union of India & Anr.*,[183] the

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[178] Amartya Sen, COLLECTIVE CHOICE AND SOCIAL WELFARE 22-30 (2nd ed., 2017).
[179] *Id.*
[180] *See* discussion *infra* ¶¶ 9-10.
[181] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶¶ 34-43; *See* The Factories Act, 1948, No. 63, Acts of Parliament, 1948, § 59.
[182] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶¶ 10-11.6, 40.
[183] K.S. Puttaswamy & Anr. v. Union of India & Anr., 2017 10 SCC 1, ¶ 325.

Supreme Court held that the Respondent state acted disproportionately by interfering with the workers' rights without enhancing (economic) safeguards.[184] This inchoate line of reasoning misses out on proportionality in real terms, focussing only on overtime wages as the metric for 'humane working conditions'.

The loss of overtime wages ought to follow a primary consideration of loss in minimum wages, since Section 59 of the Act posits the latter to be its definitional component.[185]

As an illustration of indirect wage thefts/notional deductions, the American cases of *Arriaga v. Florida Pacific Farms*[186] and *De Luna-Guerrero v. North Carolina Grower's Association, Inc.*[187] are the most revelatory. Succinctly put, the issue before the concerned courts[188] was to determine whether the federally specified minimum wage floor was artificially breached. The employer-defendants were corporate bodies arguing that the transport costs incurred by the plaintiff-employees were neither necessary nor incidental to the work involved. The plaintiffs argued that the costs were indeed fundamental to performing the work and should statutorily be factored in while computing wage entitlements. Even though the

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[184] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶¶ 10, 42.
[185] The Factories Act, 1948, No. 63, Acts of Parliament, 1948 § 59.
[186] Arriaga v. Florida Pacific Farms L.L.C., 305 F.3d 1228 (11th Cir. 2002) (United States) ("***Arriaga***").
[187] De Luna-Guerrero v. North Carolina Grower's Association, Inc. 338 F. Supp. 2d 649 (E.D.N.C. 2004) (United States).
[188] United States Court of Appeals, Eleventh Circuit and Eastern District Court, North Carolina, respectively.

defendants paid the legal minimum wage on the face of it, they created a *de facto* deduction by denying these reimbursements. The courts in these cases determined the costs to be a necessary expense in performing official duties, and held:

"*…there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear.*"[189]

The focus, therefore, is the cumulative incidence of efforts put by the employee and its proportionality with the wages. It is the very basis of International Labour Organisation's [*hereinafter* "**ILO**"] Hours of Work (Industry) Convention, 1919 (No. 1), to which India has been an original signatory. This point is made more directly by the ILO's guidelines in their formulation of non-compliance of minimum-pay rules: there needn't be direct deductions for an impermissible departure from the laws, and can be done obliquely by requiring more overtime work for the same legal minimum or skewing the 'work to pay ratio' by other means.[190]

The beneficence of the outcome in *Gujarat Mazdoor Sabha*, therefore, deserves limited credit. Demonstrably, the executive orders across state borders were bad in violating the law, regardless of the pandemic. The parts of legal reasoning where the pandemic is brought

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[189] *Arriaga*, *supra* note 186, ¶ 1236.

[190] *Minimum Wage Policy Guide: Chapter 1: What is a Minimum Wage*, INTERNATIONAL LABOUR ORGANISATION https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439066/lang--en/index.htm.

about as the primary driver for the conclusion, do not capture the intent behind the Act and minimum wages.[191]

It is proposed that the states effectively permitted underpaying minimum wages and exacerbated market coercion instead of nullifying the same. The Supreme Court in *P.U.D.R. & Ors. v. Union of India & Ors.* has laid down the precise meaning of the term 'minimum' in the context of wages to assert that there exists certain proportionality between the 'labour provided' and 'its recompense'. It then defined compulsion for Article 23, holding socio-economic compulsion to be its object, as opposed to physical force of coercion *per se*.[192] As scholar Gautam Bhatia puts it, the Indian Constitution factored in economic arrangements themselves as probable violations of rights.[193] Accordingly, it put the mandate on the government to lessen this pre-existing asymmetry between workers and employers.[194]

However, it is proposed that the Constitution went a step further than being transformative in in its formulation of Article 23. It envisaged a dynamic transfer of intra-text obligations.

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[191] Thadeu Weber, *J. Rawls' idea of an "existential minimum"*, 54(127) KRITERION: PHILOSOPHY REVIEW 197, 200-210 (2013).
[192] *PUDR*, *supra* note 154, ¶¶ 12, 13.
[193] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 191 (2019).
[194] *Id.*

D. TRANSFERENCE: A TRANSMUTATION OF SOCIO-ECONOMIC 'DIRECTIVES' TO CEMENTED 'RIGHTS'

The fundamental rights were intended to lessen the sway of non-government actors over the socio-economic lives of the citizens as well.[195] The Constituent Assembly had intended to lessen the predatory control of market forces in determining the terms of this relationship, naturally skewed toward increased work hours and reduced wages.[196] This is why the Supreme Court has previously held that minimum wage calculations ought to directly correlate with the 'specified amount of work'.[197] However, the Drafting Committee did not want to dictate economics through justiciable rights.[198] Hence, they set it out as a 'moral precept': a positive freedom for the government as opposed to a stricture.[199] This shall be a part of the signage instructing how to strive towards an ideal.[200]

It is proposed that it was as markers of a more-equalised relationship that minimal wages and 'due' economic necessity went into Part IV.[201] Extended further, it was designed to reach an eventual

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[195] *Id*., at 205.
[196] Pramit Bhattacharya, *The economics of Ambedkar*, MINT (April 09, 2016) https://www.livemint.com/Sundayapp/lzpPlO5wsmQENPeXNWvwcK/The-economics-of-Ambedkar.html.
[197] Workmen of Bombay Port Trust v. Trustees of Port of Bombay, (1966) 2 SCR 632.
[198] SHIBANIKINKAR CHAUBE, CONSTITUENT ASSEMBLY OF INDIA: SPRINGBOARD OF REVOLUTION 170 (2nd ed. 2000).
[199] ROHIT DE, A PEOPLE'S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC 6 (2018).
[200] Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates, Vol. VII*, (November 19, 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19.
[201] *See infra* notes 65-67.

confluence with Part III. A dynamic link was deliberately left between Article 23(1)[202] on the one hand, and Articles 39(a) & (e),[203] 41[204] and 42[205] on the other.

To recapitulate the functioning of transference: the constitutional objective is to attain proportionality between quantum of work and the recompense it necessitates. This implies that the relevant provisions of Part IV, as and when fulfilled, will iron out the tilt in the employer-employee relationship. If these fulfilled rights are attempted to be retracted, it is akin to re-introducing the tilt. However, any government act that skews that relationship shall be hit by the equalising principle of Article 23. Hence, 'transference' works like an algebraic formulation, elevating certain fulfilled positive obligations to a heightened constitutional status.

A transference of this was illustrated when Article 39(d) was read as a part of Article 14.[206] Similarly, the jurisprudential trend since *Mukesh Advani v. State of M.P.*[207] has been to favour minimum wage as a constitutional mandate, and not merely a discretionary power under a directive.[208]

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[202] INDIA CONST., art. 23, cl 1.
[203] INDIA CONST., art. 39, cl a, art. 39, cl. e.
[204] INDIA CONST., art. 41.
[205] INDIA CONST., art. 42.
[206] Girish Kalyan Kendra Workers Union v. Union of India, AIR 1991 SC 1173, ¶ 6; Mohini Jain v. State of Karnataka, AIR 1992 SC 1858, ¶ 7.
[207] Mukesh Advani v. State of M.P., (1985) 3 SCC 162.
[208] Atul M. Setalvad, *The Supreme Court on Human Rights and Social Justice: Changing Perspectives*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 250 (B.N. Kirpal et al. 2nd edn. 2004) ("**Setalvad**").

This was explicitly stated in *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*,[209] specifically for migrant workers within the country.[210] The decision went further by equating right to work[211] with another provision in Part III: the right to life.[212] It held that all powers bestowed on the government, such as those under Article 256,[213] shall be utilised to facilitate the cementing of this right.[214] The Supreme Court further explicated the same assertion in *All India Imam Organization v. Union of India*.[215] Therein, it was held that the perceived financial difficulties of an institution cannot possibly form a basis for determining applicability of the fundamental rights of a citizen.[216] The decision in the case was strictly limited to payment of minimum wages, and not its proportionality with work. However, the notable feature of it was that it equated a directive principle to a fundamental right.[217]

This transference of obligation from Part IV to Part III was most uniquely summarised in *D.T.C. v. D.T.C. Mazdoor Congress*.[218] The power relations between an employer and employee will always be tilted towards the former, it stated.[219] The Supreme Court ingenuously stated that

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[209] Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors., (1985) 3 SCC 545 ("***Olga Tellis***").
[210] *Id.*, ¶¶ 32, 33.
[211] INDIA CONST., art. 41.
[212] INDIA CONST., art. 21.
[213] INDIA CONST., art. 256.
[214] *Olga Tellis*, *supra* note 209, ¶¶ 32, 33.
[215] All India Imam Organization v. Union of India, (1993) 3 SCC 584.
[216] *Id.*, ¶ 6.
[217] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, ¶ 105 ("***Minerva Mills***").
[218] D.T.C. v. D.T.C. Mazdoor Congress, (1991) Supp(1) SCC 600 ("***DTC***").
[219] *Id.*, ¶ 232.

adequacy of payments, in light of the performative nature of the work involved, becomes crucial for the right to livelihood.[220] Income becomes a foundation for many fundamental rights.[221] This necessarily implies adequacy of payment as a constitutional guarantee falling under Part III. The said obligation includes conceiving a levelling mechanism in employment relationships.[222]

In another instance, 'job security' in its widest sense was held to comprise of concretely anchored living wages, to secure a fundamental right.[223] This sought-for transference was held as indispensable even during the most exigent of financial circumstances.[224]

This reasoning delegitimises the underlying ground for Section 5 notifications, which was the financial stress induced by an unforeseen exigency. Even assuming this to be a valid argument, the prevailing law preemptively rebuts it.[225] It contrarily suggests that work of greater utility and value under difficult circumstances, necessitating minimum wages *a fortiori*.[226] In line with this, precedent further bars a negative revision of minimum wages on account of the financial stringency of the institution as a whole.[227]

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[220] *Id.*
[221] *Id.*
[222] Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42, ¶¶ 24, 25.
[223] Sanjit Roy v. State of Rajasthan, (1983) 1 SCC 525, ¶ 3 ("**Sanjit Roy**").
[224] *Id.*, ¶ 4.
[225] *Id.*
[226] *Id.*; *see also* State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392.
[227] The Workmen represented by Secretary v. The Management of Reptakos Brett and Co. Ltd., (1992) 1 SCC 290, ¶ 28 ("***Reptakos Brett***").

Demonstrably, the jurisprudence has consistently held the obligation on minimum wages is subject to 'transference'. That is, the minimum-wage requirement may have its roots in Part IV, but that is only a baseline allocation. Proposedly, once the State initiates beneficial legislation/positive action based on the obligations in this Part of the Constitution, those become cemented bases for future actions. The benefits granted in the said direction can only be built upon, and not negated in any manner. It is submitted that the implications of the said beneficial legislations/positive actions by the State acting under Part IV become cemented 'rights'. Applying the said proposition, previously granted minimum wages for a certain period of work hours are proposed to be protected by the negative rights as against the State. Once guaranteed in any form, their retraction will have to be tested against Article 23. At the very least, the Constitution requires that minimum wages be given the most expansive interpretation, eventually moving towards living wages as the bare minimum.[228]

It is submitted that the obligation of minimum wages is also covered by transference of a different kind: directive principles to the basic structure. This is asserted as is because, *inter alia*, the strictures ensuring efficiency in work are considered to be the essence of the 'right to work' as espoused by Article 39(a).[229] More specifically in the context of minimum wages, this right and all its subsets were considered to be the very essence

[228] Express Newspapers v. Union of India, AIR 1958 SC 578.
[229] Daily Rated Casual Labour v. Union of India (1988) 1 SCC 122 at 123-124.

of the Preambular 'socialism'.[230] Striving towards socialism by enacting a comprehensive labour law framework,[231] in turn, was held to be a part of the Constitution's basic structure.[232] Hence, the proportionality between working hours and minimum wages is an extension of a very elementary feature of the Constitution. Furthermore, the basic structure view is more applicable for directive principles that have multi-provisional implications: they may function like a figurative 'cheque' to be cashed, if they have the effect of furthering the objective of a fundamental right.[233]

Logically extended, upon fulfilment and integration with a fundamental right, all the instruments wielding that effect are effectively on a figurative solid ground. Thereupon and thereafter only, further construction is permitted. The reasoning espoused by this Section is only buttressed by the fact that the amendatory Factories Act and the Minimum Wages Act, 1948 were passed by the Constituent Assembly itself, following a year of discussions on the draft of Article 23.[234] The fulfilled positive obligation of 'minimum wage-rate' comes to acquire elevated constitutional

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[230] *Reptakos Brett*, *supra* note 227.

[231] National Engineering Industries Ltd. v. Shri Kishan Bhageria, (1988) Supp SCC 82 ¶ 14, ("***Bhageria***").

[232] Samatha v. State of Andhra Pradesh, (1997) 8 *SCC* 191, ¶¶ 79, 99; *see also Minerva Mills*, *supra* note 217, ¶ 112.

[233] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 39, 40, 82, 179 (2009).

[234] *Discussion on Clause 11-Traffic in Human Beings*, CONSTITUENT ASSEMBLY DEBATES, VOL. III, (May 01, 1947), https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-05-01; Government of India Act, 1935, First Schedule, § 18; Raghu Vinayak Sinha et al., *A brief legal history of the Minimum Wages Act (1948) and its implementation in India*, 33 SADF FOCUS 1, 1-3 (2017).

sanctity. The only powers of the states under Section 5 of the Act should be to enhance the law, not negate it.

III. 'RETROGRESSION' FROM A CONSTITUTIONALLY DESIRED POSITION IS IMPERMISSIBLE

There seems to be another feature that becomes salient in case such as this. By fixing minimum wage rates and working hours, a society freezes its achieved progress in the form of legislation. This progressive element alone, apart from the joint textual aims of the preamble, directive principles and fundamental rights, is a law unto itself. The mere phraseology of Article 23 *per se* carries a connotation of 'irreversibility' in secured human rights for the workers.

A. THE SKELETAL FRAMEWORK: ORIGINS OF THE NON-RETROGRESSION PRINCIPLE

Before the amending notifications, the workers enjoyed a guarantee in form of a floor-limit on working hours, both within a day as well as a week, along with a shorter cumulative spread-over per day. However, when the states bring about a substantial change in these, there occurs a dilution of rights *per se*. This is regardless of the *de facto* deductions or the nuanced application of the basic structure doctrine, as discussed previously. This Section argues the emerging constitutional principle of non-retrogression bars the states from bringing about even a slight detriment in the existing rights-based framework.

The roots of this principle may be traced back to an interesting feature in the Universal Declaration of Human Rights [*hereinafter*

"**UDHR**"],[235] a declaration contributed to by India. It attempted to cement the progressive realisation of human rights achieved by way of legislation in a democratic setup.[236] In its Article 30,[237] the UDHR states that no government should act in a way to destroy the rights set as its purposive ideal. Article 2(1)[238] of the International Covenant on Economic, Social and Cultural Rights [*hereinafter* "**ICESCR**"] is similarly phrased.[239] These, hence, not only act as sources of substantive social rights, but also espouse a unidirectional growth thereof.[240] The underlying premise is that once the rights are created or augmented by progressive legislation or interpretation, a government cannot retrograde to a position that was less advantageous to its constituents. The flow of changes to the rights-based framework has to be strictly unidirectional, complementing the pre-existing enjoyment of rights.

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[235] G.A. Res 217 (III) A, The Universal Declaration of Human Rights (December 10, 1948), art. 30; Miloon Kothari, *Remembering India's Contributions to the Universal Declaration of Human Rights*, THE WIRE (December 20, 2018), https://thewire.in/rights/indias-important-contributions-to-the-universal-declaration-of-human-rights ("**Kothari**").

[236] Katherine Young, *Waiting for Rights: Progressive Realization and Lost Time*, BOSTON COLLEGE LAW SCHOOL FACULTY PAPERS 1, 6-12 (2019) ("**Young**").

[237] G.A. Res 217 (III) A, The Universal Declaration of Human Rights (December 10, 1948), art. 30.

[238] G.A. Res 2200 (XXI), The International Covenant on Civil and Political Rights (March 23, 1976), art. 2.

[239] Young, *supra* note 236, at 8-10.

[240] Laura Kirvesniemi, *Prohibition of Retrogression: Effectiveness of Social Rights in the Finnish System of Constitutional Review* 19-33 (August, 2015) (Unpublished M. A. thesis, University of Helsinki), https://helda.helsinki.fi/bitstream/handle/10138/157497/Master's%20thesis%20Laura%20Kirvesniemi%20final.pdf?sequence=2 (March 29, 2021); UN, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, ¶ 4, HR/PUB/06/12 (June, 2006).

Regardless of an economic crisis, a cut-back in expenditure that takes away an 'existential minimal' amounts to being constitutionally regressive.[241] When Indian states reduce working hours under a law enacted by the Parliament, they retrograde to a lesser beneficial position for the workers. That is, a position where a fundamental right's implementation was in the form of a less enabling entitlement.

B. FLESHED UP WITH CONSTITUTIONAL COLOUR: THE CONCEPT'S DEVELOPMENT IN THE UNITED STATES

To understand the concept of non-retrogression in guaranteed rights, a backdrop of the concept's judicial usage is necessary. It was devised as a constitutional exception to the 'reserved power of states' in the United States of America's [*hereinafter* "**U.S.**"] federal set-up.[242] For a change, the supposedly weaker U.S. federal government may trump state law(s) for a particular subject if it legislates more beneficially towards human rights.[243] From thereon, that law may only be overwhelmed if a better state legislation comes along. Any extraneous crises that may occur shall only make any such legal dilutions even more directly assailable by this principle.[244] The authorities, as will be demonstrated below, suggest that the beneficial law may have come about any under any local/central constitutional power;

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[241] Matheus Medeiros Maiaa & Rafael Soares Duarte, *Analysis of the (Im)Possibility of Social Retrogression in the Brazilian Constitutional Order*, 5(11) SOCIOLOGY STUDY 875, 876-882 (2015).
[242] John C. Jeffries & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86(6) CALI. L. REV. 1211, 1214 (1998) ("**Jeffries**").
[243] *Id.*, at 1234.
[244] Robert S. Berman, *Constitutional Law: Due Process: Non-Retrogressive Reapportionment Plan Upheld (Beer v. United States)*, 60(1) MARQUETTE L. REV. 173, 180, 183 (1976).

however, its retraction/dilution can always be tested for retrogressing from U.S. constitutional objective.

Although never explicitly linked with the UDHR, the principle is claimed to be first founded by the U.S. decision in *Reitman v. Mulkey* [*hereinafter* "***Reitman***"].[245] Like most of its successor decisions[246] which fleshed the concept up, the case dealt with an amendment to the California Constitution which did away with beneficial legislation. The issue was whether the state of California was well within its rights to amend the state Constitution in a manner that skewed the progress achieved as per U.S. Constitution's Fourteenth Amendment [*hereinafter* "**equality clause**"]. The Supreme Court of the United States [*hereinafter* "**SCOTUS**"] concluded that the U.S. Constitution cannot be said to govern the aspect of the Californian Constitution which affects housing.[247] However, and at the same time, it isn't permissible for the state to deteriorate a better law that had the effect of restricting horizontal discrimination in housing policies.[248] The legal reasoning for the conclusion was this: the political power (as a consequence of the laws) previously granted to a certain group of (marginalised) citizens constitutes only a baseline allocation.[249] The impermissible direction of

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[245] Reitman v. Mulkey, 387 U.S. 369 (1967) (United States) ("**Reitman**").
[246] Shaw v. Reno, 509 U.S. 630 (1993) (United States); Holder v. Hall, 512 U.S. 874 (1994) (United States); Miller v. Johnson, 515 U.S. 900 (1995) (United States).
[247] *Reitman*, *supra* note 245, at 388.
[248] *Id.*, at 373-381.
[249] *Id.*, at 394.

change would be when a subtraction from this allocation takes place, by an act of the executive or the legislature.[250]

The principle was re-affirmed by the SCOTUS in *Hunter v. Erickson*.[251] The issue here was whether a city of a state can amend its city charter to achieve the same effect as in *Reitman*. As in *Reitman*, the issue here was whether the equality clause of the Fourteenth Amendment to the U.S. Constitution applied to the given case. Again, the U.S. Constitution's clause was read as prohibiting an act that retrogrades from (such) a right enhancing law for being *per se* discriminatory.[252] To pre-empt this retrogression, the equality clause is not barred by any reserved legislative/executive powers that a state may otherwise have.[253] The decision's major premise posited that any tinkering of beneficial law, meant for those on the social margins, would be retrograde.[254]

The most pertinent enunciation for an expansive scope in its application came in *South Carolina v. Katzenbach*.[255] The issue here was again whether the SCOTUS can apply the equality code so as to govern a decision made by the state, ostensibly under its domain of reserved powers. Herein, the issue was stringent voting eligibility criteria for states with a certain voter turnout. One of the states refused to comply with this federal imposition,

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[250] *Id.*
[251] Hunter v. Erickson 393 U.S. 385 (United States).
[252] *Id.*, at 397.
[253] *Id.*
[254] Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) (United States) ("**Seattle School District**").
[255] South Carolina v. Katzenbach, 383 U.S. 301 (1966) (United States).

and this act of protest was upheld by the SCOTUS. The SCOTUS explained that the object of the concept is, to tilt the weight of time and inertia in favour of the socially weaker class, by freezing the pre-existing beneficial framework.[256] It is this reasoning that applies to minimum wage workers with previously fewer working hours.

It is also pertinent to mention that in addition to the cases cited above, there exists an instance in *Denver Area Educational Telecommunications Consortium v. F.C.C.*[257] wherein a morphed application of the principle takes place. Herein, a statute enacted by the federal government for reserving some part of private broadcasting space for federal use was under challenge by cable operators.[258] The relevant laws involved were the First Amendment of the U.S. Constitution [*hereinafter* "**freedom of expression clause**"], along with limits on the power of the federal government under Article 1, Section 8, Clause 3 (*i.e.*, the commerce clause) and Cable Television Consumer Protection and Competition Act, 1992. The SCOTUS, initially, stated that such a provision had the effect of restricting the freedom (of expression) available to private cable operators.[259] This was seen as a retrogression from the private operators' freedom to express, as encapsulated in their power to editorialise.[260] This was taken more in consonance with fulfilling the freedom of expression clause. However,

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[256] *Id.*, at 328.
[257] Denver Area Educational Telecommunications Consortium v. F.C.C., 518 U.S. 727 (1996) (United States).
[258] *Id.*, at 770.
[259] *Id.*
[260] *Id.*, at 761, 773.

because the concerned statute was historically preceded by federal frameworks which never bestowed full autonomy on the operators, the SCOTUS stated that there was no retrogression.[261] The principle would only apply if the previously available position was deviated from. Hence, in this case, the Court did judge the impact of the statute on larger constitutional objectives, but on a chronological comparison of the constitutional subjects' statuses.[262] This case, therefore, disregards the fulfilment of constitutional objectives and only looked at the existence of any 'demotion in circumstances'.

The principle, taken from a strict constitutional effect perspective, or even from a chronological comparison of the subject's status point of view, applies squarely to the case at hand in nullifying the 2020 notifications. In the case of Section 5 of the Act, a state government may legally be permitted to bring about changes in the law. However, the same would be deemed ineffective because of it diminishing an enhanced rights-based position envisaged by the Constitution. That is, the notifications are retrogressing to a position where the class with lesser or no means becomes more susceptible for higher labour-value extraction. Alternatively, the prior proportionality between working hours and minimum wages bars a retrogression from the same. This is not accompanied by any proportional increment in the employer's obligations, and hence, is a demotion in

[261] *Id.*, at 760-761.
[262] Jeffries, *supra* note 242, at 1232.

circumstances. Non-retrogression bars such a retreat to what is otherwise permissible, but a less desirable, position.[263]

C. IMPORT TO INDIA AND ITS PROBABLE DEFEASANCE OF THE 2020 NOTIFICATIONS

In India, the tacit embodiment of this principle has been in existence. Cases dealing with standards in labour law dictate that the government may only expand them, 'legislation to legislation'.[264] The same is aligned with cases that espouse the disparate impact test. The concept was created by the U.S. for its labour law jurisprudence,[265] and accepted by India in its larger scheme of non-discriminatory provisions.[266] Essentially, it argues that any change in legal circumstances may not perceivably violate the Constitution.[267] However, given the vulnerabilities of certain sections in the society, a violation may occur in their covert yet inferior treatment.[268] It may be asserted that in a figurative sense, the non-retrogression principle acts as a broader version of this concept. While it discerns and strikes down any retrogression in circumstances, the disparate impact has to check its

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263 *Seattle School District*, *supra* note 254, at 485.
264 *Bhageria*, *supra* note 231, ¶ 14.
265 Michael Selmi, *Was the disparate impact theory a mistake?*, 53(3) UCLA L. REV. 701, 708-714 (2006).
266 Dhruva Gandhi, *Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14*, 13(4) NUJS L. REV. 1, 4 (2020); Shreyas A.R., *On the Dangers of Reading Disparate Impact into Manifest Arbitrariness – a Response to Dhruva Gandhi*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (September 12, 2020), https://indconlawphil.wordpress.com/2020/09/12/guest-post-on-the-dangers-of-reading-disparate-impact-into-manifest-arbitrariness-a-response-to-dhruva-gandhi/.
267 Tarunabh Khaitan, *Indirect Discrimination* 4 (Melbourne Legal Studies Research Paper Series No. 854, 2017).
268 *Id.*

impact on specific groups. It is submitted that the non-retrogression principle is recognised insofar as it overlaps with the latter.

During the Constitution Assembly Debates, interestingly, an amorphous proto-version of this constitutional concept was cited. In arguing against the uniformity of laws in certain subjects, A. Thanu Pillai interposed that some states had made more progress in the human rights framework than others and possibly the nascent Centre.[269] If an imposition of the latter's framework takes place over the former, it shall lead to an unjust 'retrogression'.[270] Put succinctly, he was suggesting that the new Constitution let all legislatures compete for better human rights laws, freezing the better ones as unassailable standards.

However, there exists no wholesale adoption of the principle by the Indian Constitution. Notably, India is a signatory to both UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[271] Fortuitously, the arc of constitutional jurisprudence does reveal a willingness and a probable adoption of the argument made by Pillai. Most illustratively, the Supreme Court in *Bandhua Mukti Morcha v. Union of India & Ors.*[272] conceptualised a dynamic concretisation of right-enhancing

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[269] Speech of Shri A. Thanu Pillai, *Constituent Assembly Debates, Vol. XI*, (November 24, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-24.

[270] *Id.*

[271] Treaty Section, United Nations, *United Nations Treaty Collection: Chapter IV*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en; *See* Kothari, *supra* note 235.

[272] Bandhua Mukti Morcha v. Union of India & Ors., (1984) 3 SCC 161 ("**Bandhua Mukti Morcha**").

laws. It states that a constitutional violation may occur simply due to the non-implementation of laws that secure the dignity of workmen.[273] The reason proffered by the Supreme Court for this assertion was retrogression and the resultant nullification of constitutional intent:

"…*they would become more exposed to exploitation and slide back once again into serfdom even in the absence of any coercion.*"[274] [emphasis supplied]

The judgement is denoting that anything apart from a progressive interpretation and implementation of laws shall be defeating a rights-based objective.[275] It logically follows that a serious attempt at giving pre-existing labour standards a dynamic and irrevocable constitutional salience.

The only explicit recognition of the principle occurred in *Navtej Singh Johar & Ors. v. Union of India*.[276] In stating that progressive realisation of rights has non-retrogression as its corollary, a government cannot retrograde to a position that conduces a lesser enjoyment of the same rights. The government has indeed covered some distance forward down the road to fulfilling a directive principle in cementing a minimal for working hours.[277] The principle also prevents the State from decelerating its pace at

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[273] *Id.*, ¶ 26; P.P. Rao, *The Supreme Court and the Employee*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 385 (B.N. Kirpal et al. 2nd ed. 2004).

[274] *Bandhua Mukti Morcha*, *supra* note 272, at 208.

[275] Setalvad, *supra* note 208, at 251.

[276] Navtej Singh Johar & Ors. V. Union of India, (2018) 10 SCC 1.

[277] *See* Paul Wolfson, *A review of the consequences of the Indian minimum wage on Indian wages and employment*, Working Paper ILO ASIA- PACIFIC WORKING PAPER SERIES, 7-10, 14 (May, 2019), http://oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_717971.pdf.

which it proceeds towards this constitutional goal. The Supreme Court has also stated that an act that consolidates the rights under Part III and furthers the directive principles adheres to the "*foundational Constitutional principle of non-retrogression*".[278] Invoking the Act to mutilate an achieved threshold such as the one discussed above, is nothing but constitutionally regressive in the Indian context.

IV. CONCURRENCE IN DELIBERATIVE POWERS HAS ITS LIMITS APART FROM REPUGNANCY

Legal scholar H.M. Seervai had fleetingly mentioned a novel ground for repugnancy in the context of concurrent list subjects: in case a state amendment makes the application of certain provisions of the central act effectively harsher relative to similarly situated citizens in other states, it shall be violating Article 14.[279] Even without the equality aspect, this formulation raises a larger argument. A state cannot fiddle with the Union's legislative framework, arbitrarily, against the interest of its residents.

The Indian Constitution's source of federal-concurrent legislative jurisdiction happens to be its Australian counterpart.[280] In case of an inconsistency, both the jurisdictions prioritise the Central law on the subject.[281] However, the Australian jurisprudence surrounding concurrent list disputes had devised two tests for discerning the existence of this

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[278] *Id*., at 125, 146.
[279] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 468 (4th ed., 2004).
[280] INDIAN LAW INSTITUTE, CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE 217 (1975).
[281] 1 M.P. Jain, INDIAN CONSTITUTIONAL LAW, 94 (6th ed 2011).

inconsistency. These happen to be: i) 'cover the field' test; and ii) 'interference or denial of rights' test. Both have their source in the Australian Constitution's Section 109, which is the equivalent of Article 254(1) of the Indian Constitution.

In essence, the 'cover the field' test deals with a quantitative analysis of comparing the Union and provincial frameworks regarding a legislative subject. The federal unit that appears to be more meticulous in governing the legislative field shall prevail, nullifying minor amendments by the other. This has witnessed wide acceptance in the Indian jurisprudence. Whereas, the 'interference or denial of rights' test has not acquired similar currency. According to this second test, concurrent jurisdiction gets disabled as and when it's attempted for wresting away an existing right. There need not exist a repugnancy *stricto sensu*. The bar is on the otherwise imperceptible implication of some concurrent laws: nullifying each other's right-based benefits.

The following sub-sections argue against the impugned notifications, both equally invalidating the same. The Act, as an act of Parliament of India, came with desirable stipulations for working hours, only enabling the states to enhance them. Similarly, both the Centre and the states may have the power to direct minimum wages, but it is the former that carries more weight.

A. THE 'EXHAUSTIVE FIELD' TEST DECLARES THE UNALTERED UNION LAWS AS STARTING LINES

Succinctly put, this concept shall reveal how the Indian Union has exclusively appropriated deliberation in working conditions and minimum wages for itself.[282] However, the argument for its application herein shall have to be prefaced with its historical roots in Australian labour law.

i. The Concept's Natural Congruity with Labour Rights

The foundation, notably, is situated in the Australian minimum-wage jurisprudence. In the relevant period, Australia had a federal law[283] for addressing labour law disputes, which has been a concurrent subject under the Australian Constitution.[284] Such disputes had to be compulsorily resolved by a vestigial organ of the Central government.[285] It settles the case by way of an 'arbitral award'.[286]

Notably, the zone of concurrence in this subject was deemed hazy in a series of cases before the High Court of Australia [*hereinafter* "**the High Court**"]. It began when it came across a case titled *Australian Boot Trade Employees' Federation v. Whybrow & Co.*[287]

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[282] *See* discussion *infra* at 20-22.
[283] Commonwealth Conciliation and Arbitration Act, 1904 (Australia) (repealed 1989).
[284] Ron McCallum, *The Australian Constitution and the Shaping of Our Federal and State Labour Laws*, 10(2) (2005) DEAKIN L. REV. 460 (2005) ("**McCallum**").
[285] *Id.*
[286] *Id.*
[287] *Australian Boot Trade Employees' Federation v. Whybrow & Co.* (1), (1910) 10 CLR 266 (Austl.) ("***Whybrow***").

Therein, the primary issue was whether such an award stipulating a higher minimum wage-floor would trump the lower state floor-limit. In other words, this would be encroaching the reserved powers of the states, the exact opposite of the Indian position.[288] The High Court chose to shape a pre-existing amorphous concept, namely, the 'simultaneous-obedience' prism.[289] It stated that adherence to the Central law on minimum wages would necessarily entail default compliance with the lower minimum stipulated by the states. Applying this, it concluded the Central condition to be supplementary and not inconsistent.[290] However, this approach kept the state level floor limit alive. Isaacs J., in a separate concurring opinion stated that the higher floor limit set-up by the majority should now be the new law for the state. He adumbrated what later became the 'cover the field' test, by analysing the award as a federal law contradicting state legislation.[291] According to his reasoning, the federal law intended to govern the specifics of labour law disputes. This intent could supposedly be revealed by, either: the greater number of laws or a much-enhanced interpretation of the same law.[292] In this case, by comparing the specificity in legal frameworks at both federal levels, he concluded that it was largely the Centre's intention to minimise labour disputes.[293] A higher minimum in wages implied fewer

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[288] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 821 (Jasti Chelameswar J. & Dama Seshadri Naidu J. eds., 8th ed., 2018).
[289] *Whybrow*, *supra* note 287, at 299.
[290] *Id.* at 330.
[291] McCallum, *supra* note 284.
[292] *Whybrow*, *supra* note 287, at 310-312.
[293] *Id.*, at 332.

labour disputes, and hence, the federal floor limit was deemed a better approximate to the federal intention.[294]

He had first thought of it in *Clyde Engineering Co. Ltd. v. Cowburn* [*hereinafter* "***Cowburn***"],[295] another case dealing with minimum wages. Stated more clearly, it held this intention could be evinced by greater number of laws by either of the vertical-federal units. Once this quantitative edge is established, the other unit may only exercise its concurrent power so as to enhance the other's intent. Another case stated that such an award in minimum wages evinces explicit intention to completely expropriate the state's concurrent power.[296] This view doesn't seem to have found any purchase in the Australian jurisprudence.

Isaac J's view, albeit approved in obiter instances otherwise,[297] was truly consolidated in *Blackley v. Devondale Cream (Vic) Pty. Ltd.*[298] The High Court held that Section 109 of the Australian Constitution found direct application in such a case.[299] It stated that this wasn't about simultaneous obedience of supplementary laws, but about a collision of standards on wage-minimums.[300] Upon a purely quantitative analysis of legal provisions,

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[294] *Id.*
[295] Clyde Engineering Co. Ltd. v. Cowburn, (1926) 37 CLR 466 (Austl.) ("***Cowburn***").
[296] Woodstock Central Dairy Co. Ltd. v. Commonwealth, (1912) 15 CLR 241 (High Court of Australia).
[297] *Cowburn*, *supra* note 295.
[298] Blackley v. Devondale Cream (Vic) Pty. Ltd., (1968) 117 CLR 253 (High Court of Australia) ("***Blackley***").
[299] *Id.*, at 259-263.
[300] *Id.*, at 258-259.

the federal law seemed to impose a greater obligation on the employer, which is in line with the larger object of labour law.[301]

The High Court in *Ex parte McLean*[302] finally went to consolidate the higher floor rate of its own choosing across the states, and not just to those present as parties. It stated that state laws may continue to exist. But if the Centre chooses to become more comprehensive or specific in a certain aspect of that legislative field, it acquires a dominant status for that aspect.[303] In other words, a legislative field such as 'working conditions' implies many elementary areas: gratuity payments, minimum wages, working hours, etc. Both states and the Centre may legislate concurrently, but exclusivity to govern each shall depend on the comprehensiveness of laws for each.

Succinctly put, this is how the test seems to operate: a comparative view of both the central and state-level legal frameworks takes place. The one with the quantitatively superior framework is perceived to govern a certain area within the marked legislative field, or the whole of it. The other unit, then, may only utilise concurrent powers in enhancing the former's stipulations in this area/field, and not negating it.

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[301] *Id.*, at 259.
[302] Ex parte McLean, (1930) 43 CLR 472 (High Court of Australia) ("***McLean***").
[303] *Id.*, at 483.

ii. Application to the Indian Concurrent Scheme of Labour Law

It is submitted that this principle has its basis in the same logical arc as espoused by Seervai. This is insofar it seems to hold a Union law as the prevalent one, in spite of being competently contradicted by a state. The more extensive a federal unit's legal framework on the subject, the more beneficial for the state's residents. Indian Union presently sees 41 labour laws enacted by it,[304] with both the laws on Minimum Wages Act, 1948, with the Industrial Disputes Act, 1947 and the Factories Act, 1948 delegating only minimal amendatory powers to states.[305] In this context, it appears that the Union has exhibited greater intent to govern disputes related to minimum wages and working conditions.[306]

Hence, if the exhaustive field test is applied, it is bound to hold the Union law's specified minimum as the prevailing one. India has explicitly adopted the test from the Australian jurisprudence. It has found widespread application under Article 254(1) of the Constitution.[307] So much so that the

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[304] Ministy of Labour and Employment, Government of India, *List of Central Labour Laws Under Ministry of Labour and Employment*, https://labour.gov.in/sites/default/files/Central%20Labour%20Acts.pdf.

[305] P.B. Mukharji, *Delegated Legislation*, 1(4) JOURNAL OF THE INDIAN LAW INSTITUTE 465, 470-473, 476-477; State of Assam v. Horizon Union, (1967) 1 SCR 484 ("***Horizon Union***").

[306] *See also* Bloomberg, *India's heavy-handed labour laws are a result of states being a little too united*, FINANCIAL EXPRESS (June 11, 2020), https://www.financialexpress.com/economy/indias-heavy-handed-labour-laws-are-a-result-of-states-being-a-little-too-united/1988243/.

[307] Vijay Kumar Sharma v. State of Karnataka, (1990) 2 SCC 562 ("***Vijay Kumar Sharma***"); Ravula Subba Rao v. C.I.T., (1956) SCR 577; M. Karunanidhi v. Union of India, (1979) 3 SCC 431; State of Uttarakhand v. Kumaon Stone Crusher (2018) 14 SCC

Supreme Court has extended it to even Article 246, which means it is not confined to List III disputes exclusively.[308] To apply this, the Supreme Court unequivocally states that an intention to dominate a deliberative field may take any form.[309]

There may be possible objections to applying exhaustive field test in the factual circumstances of the 2020 notifications. *Firstly*, the Parliament expressly delegated powers to the state executive for modifying the relevant provisions of the Act.[310] *Secondly*, the Parliament has assigned the task of setting up wage floors to the states under the Minimum Wages Act.[311] Alternatively or cumulatively, it may be argued that the intention was not to govern this field exclusively.

However, the very basic premise of this test is that the intention applies to a certain aspect of the concurrent subject.[312] In this case, that would be the aspect of work hours, or the work-hour to minimum-wage ratio. Furthermore, a framework need not be exhaustive *strictu sensu*. According to a Constitutional Bench ruling, it only needs to be relatively

537; Offshore Holdings (P) Ltd v. Bangalore Development Authority, (2011) 3 SCC 139; Bharat Ram Gupta v. State of Uttar Pradesh, (1978) SCC OnLine All 888 (Allahabad High Court, India); G.P. Stewart, Collector of Sylhet v. Brojendra Kishore Roy Choudhury, (1939) SCC OnLine Cal 116 (India); Shabeer Shajahan v. State of Kerala & Ors., (2020) SCC OnLine Ker 2315 (Kerala High Court, India).

[308] State of Kerala v. Mar Appraem Kuri Co. Ltd., 2012 7 SCC 106 ("***Mar Appraem Kuri***"); I.T.C. Ltd. v. State of Karnataka, 1985 Supp SCC 476.

[309] Ch. Tika Ramji v. State of U.P., 1956 SCR 393, ¶¶ 28-30.

[310] *See* Factories Act, 1948, No. 63, Acts of Parliament, 1948, §§ 2(cb)(ii), 5, 84.

[311] *See* Minimum Wages Act, No. 11, Acts of Parliament, 1948, 1948, §§ 2(b)(ii), 3.

[312] *Cowburn*, *supra* note 295, at 490, 505; *McLean*, *supra* note 302.

more so than the state-level legal lattice.[313] Furthermore, in applying this test, the Supreme Court seems to have recognised that Parliamentary intent to govern labour law may have exceptions, and the same does not negate the otherwise implied intention to dominate.[314]

Hence, the express delegation of powers to modify certain provisions of the Act is no bar to the application of the test. This is explicitly demonstrated by the decision in *State of Assam v. Horizon Union*.[315] The concerned Central law (*i.e.*, Industrial Disputes Act)[316] both pre-existing and its amended version around the time, contemplated state appointment of members for the tribunals. The bar was the admittance of district court judges with a certain amount of experience. The state amendment subverted this requirement in an amendment to the Central law. The express intention of the delegation of this power in the Central law was held not to overshadow the exhaustiveness of the code.[317] The state was held to be empowered in only adding to the baseline given by the Central law, not in negating it. For the enterprise of this paper, there occur two baselines: ceiling on working hours and a (proportional) floor of minimum wages.

It is submitted that the notifications in question may only stand when these nationally specified baselines are not breached. A cap on working hours in the unaltered Central law is only a starting point and that

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313 *Mar Appraem Kuri*, *supra* note 308, ¶ 57.
314 *Vijay Kumar Sharma*, *supra* note 307, ¶¶ 69, 70, 75, 88.
315 *Horizon Union*, *supra* note 305.
316 *See* INDIA CONST., Schedule VII, List III, *Concurrent List*.
317 *Horizon Union*, *supra* note 305.

states, through Section 5, may only lower them. Similarly, the prevailing minimum wage figures notified[318] by the Centre may only be improved upon.

B. THE 'DENIAL OF RIGHTS' TEST DISABLES THE STATES' RETRACTIVE POWERS

It is to be noted that in *Cowburn*,[319] the same court came up with a non-retrogression variant of the 'exhaustive-field test'. The 'enhanced interpretation' prong was infused with another meaning. Before exploring the same, the case deserves a greater introduction.

i. The Eerily Similar Circumstances for which the Test was Devised

The case had striking similarities with the factual circumstances of this paper's enterprise. The federal dispute resolution body, therein, gave an award mandating minimum wages for a workweek of 48 hours. The State of New South Wales, by way of legislation, targeted this award by modifying the floor to 44 hours. The latter may appear more beneficial at the surface for a moment, however, the State law was attempting to ingratiate the employers through this move. Overtime pay was still available only when the previous limit of 48 hours was crossed by the employees. A part of the Bench had applied the exhaustive-field test to invalidate the state law.[320]

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[318] Ministry of Labour & Employment, Minimum Wages order dated 06.10.2017, No. 1/13(1)/20 17-LS-II (Notified on September 06, 2017) https://clc.gov.in/clc/node/568.
[319] *Cowburn*, *supra* note 295.
[320] *Id.*, at 472, 489-491.

The other part devised the 'interference with rights' or 'the denial of rights' test.

It posits that when a vertically-federal unit takes away or diminishes a statutorily conferred entitlement, it will be held as an invalid exercise of the concurrent jurisdiction.[321] In this case, the otherwise minimum wage entitlement was nullified if the employee worked a minute less than 48 hours. This would 'alter, detract or impair'[322] the beneficial effect of Central law for those working for 44 hours, and was invalid *ab initio*.[323]

The Court, therefore, struck at the very heart of an asymmetrical wage to hour ratio using this logic. In doing so, it also pointed out the flaw in applying the exhaustive field test in the specific circumstances of that case. Hence, this test is consequentialist insofar as it looks at government actions on a case by case basis. Complementary units in a federation shall only add, and not denature, the rights given by each.

Pertinently, a similar yet incomplete argument was indeed raised before the Supreme Court in *Gujarat Mazdoor Sabha*, but in the context of lost overtime-wages. Section 59 doubles the ordinary wages for work-hours exceeding the statutory cap.[324] By pushing the cap further upwards, there occurs an artificial theft in overtime wages, much like the *de facto* deduction in minimum wages discussed in the beginning.[325] The Supreme Court in its

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[321] *Id.*, at 478, 479, 502.
[322] Victoria v. Commonwealth (1937) 58 CLR 618 (Austl.) ("***Victoria***").
[323] *Cowburn*, *supra* note 295, at 471.
[324] The Factories Act, 1948, No. 63, Acts of Parliament, 1948, § 59.
[325] *Gujarat Mazdoor Sabha*, *supra* note 144, ¶¶ 38-48.

operative part simply directed the Respondent to 'comply with Section 59, without having it to modify the definitional 'minimum wages' to begin with.[326]

Returning to *Cowburn*, the nascent principle and its consequentialist approach for rights were adopted in a few succeeding cases,[327] mostly for circumventing the difficult task of discerning 'implied intent' for the exhaustive field test. The operative words for the argument herein are the terms 'detracted', 'altered',[328] and 'varied'.[329] This brings about a new form of inconsistency: the effect of state modification, as opposed to a quantitative comparison of central and state frameworks, is looked at.[330] This test has had various human rights-related applications in Australian labour-law: Central law permitting female employment while the state law prohibited it through legislation,[331] or where a federal award (law) enabled trade unions to raise funds legislatively prohibited by a state,[332] most illustratively.

Herein, it is argued that a modification of working hours introduces a skewed work hour to wage ratio, which was the object of the Minimum

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[326] *Id.*, ¶ 50.
[327] Stock Motor Pfoughs Ltd. v. Forsyth, (1932) 48 C.L.R. 128 (Austl.) ("***Stock Motor Pfoughs Ltd.***").
[328] *Cowburn*, *supra* note 295; *Victoria*, *supra* note 322.
[329] *Stock Motor Pfoughs Ltd.*, *supra* note 327, at 196.
[330] Allan Murray Jones, *The Tests for Inconsistency under section 109 of the Constitution*, 10(1) FEDERAL L. REV. 25, 34 (1979).
[331] Colvin v. Bradley Bros. Pty. Ltd. (1943) 68 CLR 151 (Austl.).
[332] Williams v. Hursey, (1959) 103 CLR 30 (Austl.).

Wages Act, the Bonded Labour Act, Articles 23, 39(d), 41 and 42 of the Constitution.

ii. Constitutional Implications on the 2020 Notifications

The Supreme Court's recognition of the 'denial of rights' test is both inexplicit and relatively restricted compared with the one alluded to in the preceding sub-section.[333] However, it does not affect anticipating the judiciary's approving disposition towards the same. A close parallel of the principle is found in *Saverbhai Amaidas v. State of Bombay*,[334] where the state law was concluded to be hit by Article 254(1). The inconsistency being the difference in (degree of) penalty for the same offence, the Supreme Court used a federalised logic of Pillai's contention: it applied Article 254(2) to tacitly repeal the state law, which imposed a higher punishment than the Centre.[335] The Supreme Court discerned an implied repugnancy in a concurrent subject, and applied the constitutional rule of Centre's prevalence.[336]

Similarly, the Supreme Court has inexplicitly applied the denial of rights test in the Indian labour law jurisprudence. For instance, in upholding the Bombay Industrial Relations Act, 1946, the Supreme Court discussed and acknowledged the exhaustive coverage of the subject by the Central law(s).[337] However, since the state law went beyond 'disputes' and also

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[333] *Id.*, at 607; *Mclean*, *supra* note 302, at 483, 609; O'Sullivan v. Noarlunga Meat Ltd., (1956) 95 CLR 177 (Austl.).
[334] Saverbhai Amaidas v. State of Bombay, (1955) 1 SCR 799.
[335] *Id.*, ¶¶ 6-8; Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407, ¶ 60.
[336] Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45, ¶¶ 67, 68.
[337] Ahmedabad Mill Owner's Assn. v. I.G. Thakore, (1967) 2 SCR 437.

provided a novel form of dispute resolution, it had a slicing-edge over the Central law.[338] Applying the obverse of the 'interference with rights' test discussed above, the Supreme Court upheld it to be a valid state exception to the Union laws' completeness.

This test had taken serious shape, if not total recognition, in 1988. In *National Engineering Industries Ltd. v. Shri Kishan Bhageria*, a state legislation was held to be repugnant to the Industrial Disputes Act insofar as it 'curtailed the rights of the workman' by introducing a limitation period.[339] In 2002, a state amendment to the central Industrial Disputes Act was held to be invalid for providing an expanded interpretation of the term 'retrenchment', effectively limiting the right to invoke the Act's protective machinery.[340]

The Indian version, demonstrably, does not necessarily envisage a complete negation of entitlements but only their diminution. The primary requirement seems to be that this entitlement should pre-exist, enacted by either unit of the federation.

It is proposed that the notifications are repugnant by this unrecognised principle. The Central law was enacted embedded with a certain set of stipulation on working hours. The impugned notifications conduce its diminution. Furthermore, the Minimum Wages Act came with its own set of stipulations,[341] that have a certain proportionality with the

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[338] *Id.*
[339] *Bhageria*, *supra* note 231.
[340] U.P. State Sugar Corpn. Ltd. v. Om Prakash Upadhyay, (2002) 10 SCC 89, ¶¶ 4-6.
[341] *See* The Factories Act, 1948, No. 63, Acts of Parliament, 1948, §§ 51, 52, 54, 56.

hours specified of the former. Reducing work hours is invalid *per se*. A notional wage floor violation is a right-depriving state repugnancy in the federal-concurrent scheme. The denial of rights test applies to both when either's essentiality is reduced.

V. CONCLUSION

The minimum wage rates are predicated upon work hour limits. Work hour limits, like minimum wage workers, enjoy a constitutional protection that no forced subservience may smother.

The cap on working hours and its dynamic proportionality with minimum wages fall precisely in this protected category. This happens for four reasons.

There exists a rule of transference between Parts IV and III of the Constitution of India. There exist several obligations in the former that have their aspirational roots in the latter. Minimum wages are the supposed essence of eliminating undue influence in a relationship such as that of an employer-employee. Hence, a directive suggesting those is taking a fundamental right to its logical conclusion. A government act attempting to retract or violate a legislation is effectively tinkering with a fundamental right.

At the same time, a welfare legislation necessarily enhances human rights. All its prevailing provisions are presumed to be doing the same. Hence, when any one of them is altered so that the previous version of it was more right-enhancing, it is considered constitutionally retrograde.

Lastly, concurrence in legislative jurisdiction implies a marketplace for better legislative ideas in specified fields. In a federation, one unit may appropriate a field or an aspect of it to itself if it deals with it more comprehensively. Working conditions in List III, Schedule VII, seem to enjoy wider Central regulation in the Indian scheme. On the other hand, the incipient denial of rights test considers any right mutilating action of the states to be stillborn. The latter, also a concurrent list concept, shall operate if the concerned right was statutorily provided for earlier. The specified workhours and a proportional set of minimum wages in central laws, are such baseline entitlements.

The entire scheme of the Constitution and the concomitant jurisprudence, therefore, seems to have gauged the prescience in Pillai's words. Invalidating the invocation of Section 5 to dismantle the previous safeguards is constitutionally inevitable. However, the same ought to be the result of considering deprivation of real minimum wages and not by facile considerations such as whether Section 5 found applicability. Any such notification *per se* debilitates the normative ideal emanating from Articles 21, 23, 39, 41, 42 and 254(2) of the Constitution.