UNDERSTANDING THE LEGAL CONUNDRUM OF EMPLOYER'S RIGHT IN INDIA DURING COVID- 19 CRISIS

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Abstract

The COVID-19 pandemic has posed the labour market, the worst crisis since World War II. With the adoption of social distancing measures, 'lockdown' has become a norm. The four orders of lockdown, imposed by the state under the Disaster Management Act, 2005, has resulted in varying degrees of closure of businesses for a long period of time across sectors, leading to substantial losses. This has necessitated balancing the rights of employers and employees in this COVID-19 crisis. Consequently, an order dated March 29, 2020 was passed during continuance of first order of lockdown mandating payment of wages to all employees during the lockdown period. Despite the order dated March 29, 2020 ceasing to have effect with fourth order of lockdown dated May 17, 2020, the legality and legal consequences of the said order, invariably needs to analyse since it has created an impact on transactions during the said period. In this backdrop this paper attempts to comprehends the rights of the employers under the framework of the conventional agreement of personal service, ordinarily ungoverned under industrial law, *vis-à-vis* the prerogative of the employer to terminate employment and pay wages in the times of the COVID-19 crisis.

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I. Introduction

THE COVID-19 pandemic has invasively permeated through the fabric of the global economy, impacting public health at unprecedented scales, affecting the economy and labour markets. The International Labour Organisation (ILO), in its report,[1] has remarked that the on-going pandemic is the worst labour crisis since the Second World War. The COVID-19 pandemic is affecting the world's workforce of 3.3 billion, causing a dramatic decline in employment, both in terms of numbers of jobs and aggregate hours of work. With the adoption of social distancing and the policy of lockdown becoming the norm, the discretion to implement the lockdown, unfortunately, seems like a "choice" between the devil and the deep ocean. One of the significant concomitants of long periods of lockdown, is the threat posed to the labour markets in India. In India, the first order of lockdown was promulgated by the National Disaster Management Authority on March 24, 2020.[2] It was extended by second order dated April 14, 2020[3] and subsequently by a third order dated May 1, 2020,[4] that was in force from May 4, 2020. This was followed by the fourth order[5] of lockdown dated May 17, 2020. During this continuance of lockdown period, various guidelines were issued by the chairperson, National Executive Committee for effective implementation of lockdown and social distancing measures. Amidst rising concerns, one question which has crept into the minds of the

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1 International Labour Organisation, 3rd edn. on ILO Monitor: COVID-19 and the world of work Updated estimates and analysis, 2 (Apr. 29, 2020) *available at:* https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_743146.pdf (last visited on May 24, 2020).

2 Home Secretary, Government of India, "order bearing No. 1-29/2020-PP (Pt-II)" (Mar. 24,2020), *available at*: https://www.mha.gov.in/sites/default/files/MHAorder%20copy.pdf (last visited on May 24, 2020).

3 Home Secretary, Government of India, "order bearing No. 40-3/2020-DM-I(A)" (Apr.14, 2020), Member Secretary, NDMA, "order bearing No. 1-137/2018-Mit-II (FTS-10548)", (14 April 2020) and letter of Home Secretary to Chief Secretary and Administrators, "letter bearing No. D.O No 40-3/2020-DM-I(A).", (Apr. 14, 2020), all three *available at:* https://www.mha.gov.in/sites/default/files/MHA%20DO%20letter%20dt.14.4.2020%20to%20Chief%20Secretaries%20and%20Administrators%20for%20strict%20implementation%20of%20Lockdown%20order%20during%20extended%20period.pdf (last visited on May 24, 2020).

4 Home Secretary, Government of India, "order bearing No.40-3/2020-DM-I(A)", (May 01, 2020), and Union Home Secretary, "New guidelines on the measures to be taken by Ministries/Departments of Government of India, State/UT Governments and State/UT authorities for containment of COVID-19 in the country for the extended period of National lockdown for a further period of two weeks with effect from 4th May, 2020." (May 1, 2020), both *available at:* https://www.mha.gov.in/sites/default/files/MHA%20order%20Dt.%201.5.2020%20to%20extend%20Lockdown%20period%20for%202%20weeks%20w.e.f.%204.5.2020%20with%20new%20guidelines.pdf (last visited on May 26, 2020).

5 Union Home Secretary, Government of India, "order bearing No.40-3/2020-DM-I(A)", (May 17, 2020), and Union Home Secretary, "Guidelines on the measures to be taken by Ministries/ Departments of Government of India, State/ UT Governments and State/ UT Authorities for containment of COVID-19 in the country upto 31st May, 2020.", (May 17, 2020) both *available at:* https://www.mha.gov.in/sites/default/files/MHAorderextension_1752020_0.pdf (last visited on May 15, 2020).

employees across both blue-collar and white-collar jobs is the issue of job security and payment of wages. It thus becomes incumbent to analyse the legal implication arising out of the order of lockdown, particularly, the effect it has on the job-security employees.

II. The legal scenario of employment laws in India

In legal parlance, the contract of employment, between an employer/master and an employee/servant, in a *lis* concerning reinstatement of the dismissed employee is broadly divided into three heads:[6]

i. Master and servant relationship governed purely by a contract of employment
ii. Master and servant relationship arising out of Industrial Law
iii. Master and servant relationship under the employment of the state or other public or local authorities or bodies created under the statute

The focus of this paper is primarily restricted to the first head, as it encompasses the entirety of the workforce in the informal sector. Cognizance has been taken that any exercise to enumerate the rights of employers and employees entails study of individual contract of employment. This exercise in the Indian context is further fraught with limitations as a major section of the populace are not yet predisposed to reduce their terms of employment contract in writing.[7]

In regular times, the question of reinstatement after termination of an employee governed purely under a contract, does not arise in law. The Supreme Court in *Cecelia Francis Tellis*[8] held that the no declaratory judgement concerning the subsistence of employment could be rendered as any judgement of such nature that would tantamount to specific performance of a contract for personal services, which is impermissible under the law of specific performance. Khanna J and Fazl Ali J, in *Executive Committee of Vaish Degree College* v. *Lakshmi Narain*[9] had reiterated the above exposition of law by holding that ordinarily, the specific performance of a contract of personal service and declaratory relief concerning the status of an employee to be 'deemed to be in service' against the volition of the employer is impermissible. To this

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[6] *Sirsi Municipality* v. *Cecelia Francis Telli* (1973) 1 SCC 409 at para 15,16 and 17.
[7] National Statistical Office, Ministry of Statistics and Programme Implementation, "Annual Report Periodic Labour Force Survey (PLFS) (July 2017-2018)" (May 2019). The report indicates that about 71.1% of the regular wage or salaried workers in the informal sector are employed without a written contract. Amongst these workers, about 54.2% were not eligible for paid leave, and about 49.6% were not eligible for social security benefits.
[8] *Supra* note 6 at para 15, 18.
[9] (1976) 2 SCC 58 at para 18.

general rule, the court laid down three exceptions *viz*, the employee being a public servant and removed from service in contravention of article 311 of the Constitution of India, a worker being governed under industrial law and seeking reinstatement and where a statutory body removes an employee in violation of a mandatory provision of a statute. Bhagawati J.,[10] in his concurring opinion in the said case, afforded valuable reasoning to the general principle by holding that such contract of employment being akin to the illustration (b) of section 21 of the Specific Relief Act, 1877[11] would be impermissible. Interestingly Justice Bhagawati, recognised that the said illustration has been omitted in the Act of 1963[12], but assumed the general principle of law concerning the specific performance of the contract of personal service. He further expounded that the contracts of personal service have little relevance in "modern large-scale industry and statutory bodies," where professional management is of impersonal nature. Concerning the question of whether the exception expounded by the majority is exhaustive, Bhagawati J, emphatically stated that the *"three exceptions formulated in the statement of law laid down by this Court in the above decisions are not intended to be and cannot be exhaustive."*[13]

It is pertinent to mention here that, in a later judgement of the Supreme Court in *Lal Bahadur Gautam*[14], the court has observed that the decision in *Lakshmi Narain*[15] would be inapplicable and is based on a repealed statute. In *Lal Bahadur Gautam*[16] case court further observed that the earlier judgement of *Lakshmi Narain*[17] was adjudicating the status of the employment contract under the context of the Agra University Act, 1926, which, as observed by the court, was a repealed enactment. Nonetheless, the position of law, as explained by the court in *Lakshmi Narain*, without adverting to the conclusion, which was rendered in facts and circumstances peculiar to the case under the repealed law, would still hold the field. Reverting

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10 *Id.* at para 31, 32.

11 The Specific Relief Act, 1877 (India Act, 1877) s. 21(b), r/w Illustration to 'b'

> *"A contracts to render personal service to B;*
> *A contracts to employ B on personal service;*
> *A, an author, contracts with B, a publisher, to complete a literary work;*
> *B cannot enforce specific performance of these contracts"*

12 The Specific Relief Act, 1963 (Act 47 of 1963).

13 *Supra* note 9 at para 33.

14 (2019) 6 SCC 441 at para 8.

15 *Supra* note 9, in *Lakshmi Narain Case*, the principal of a local degree college, was dismissed by the Executive Committee. The Executive Committee of the college was registered under the Societies Registration Act, 1860 and the college was affiliated to the Agra University for mere 'convenience'. Hence, according to majority, since the Executive Committee was not statutory body, the exception could not be read into the facts of the case and the Court could not remedy the act of dismissal.

16 *Supra* note 14.

17 *Supra* note 9.

to the pertinent question raised by Bhagawati J. in *Lakshmi Narain*[18] concerning the question of applicability of the Specific Relief Act, 1963, the Supreme Court in *Maharashtra State Cooperative Housing Finance Corporation Ltd.* v. *Prabhakar Sitaram Bhadange*[19] has clarified that in the contract of personal service, where the employee is removed and ungoverned by the exceptions mentioned herein above, the relief of reinstatement, injunction, and declaration would be unenforceable, as the same would be barred under section 14 read with section 41 (e) of the Specific Relief Act, 1963.

The issues arising from the lack of a written contract as stated earlier can be analysed in the context of facts arising out in *M/S. Pearlite Liners Pvt. Ltd* v. *Manorama Sirsi.*[20] In the present case, the employee's service was not governed under any industrial law nor a written contract was entered between the parties, enumerating the service condition of the employee. The employee was terminated from her service, on the ground of insubordination and disobedience of the transfer order of the employer. On challenging the order of termination, the Supreme Court, after observing that the employee did not fall under any of the exceptions laid down in *Lakshmi Narain*,[21] had deemed it fit, to not interfere with the order of termination. This case resoundingly, demonstrates the inability of the court to insert a term in a contract of personal service. It also indicates that an order of mandatory injunction against the employer to hold an enquiry against dismissal and an order of reinstatement in a contract of personal service is impermissible.

The High Court of Karnataka has succinctly analysed the remedy of an employee and the legal position concerning rights and obligations of the employer in ordinary parlance for wrongful termination in *Goetze (India) Ltd.*[22] The court held that the master who wrongfully dismissed his servant is bound to pay damages to the employee/servant which would compensate him for the wrong done to him. Furthermore, in the context of the notice period, it was held that *"If the contract expressly provides that it is terminable upon, e.g., a month's notice, the damages will ordinarily be a month's wages*". The court had read into the settled principle of the law of mitigation in the context of dismissal of an employee. It held that the employee must use his *"due diligence endeavouring to obtain suitable employment with wages approximating that*

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[18] *Supra* note 9 at para 31.
[19] (2017) 5 SCC 623 at para 9.
[20] (2004) 3 SCC 172 at para 7 and 8.
[21] *Supra* note 9 finding of court in *M/S. Pearlite Liners Pvt. Ltd* v. *Manorama Sirsi,* (2004) 3 SCC 172 concerning inapplicability of exceptions to the employee at para 8 and 10.
[22] *Goetze (India)* v. *H.R Thimappa Gowda,* ILR (2016) Kar 1057 at para 26, 27, 28.

which he was getting in the service from which he was dismissed." and if the employee fails to "*do so, he cannot claim damages for any such loss which he ought reasonably to have avoided."*

It needs to be borne in mind that even in a government corporation, if the nature of employment is purely contractual, contradistinct from regularised employment,[23]the government corporation has a right to terminate employment summarily by issuing a notice or paying salary in-lieu of such notice. This position of law has been explained in *Gridco Ltd.* v. *Sadananda Doloi*,[24] wherein the court while analysing the issue of the reach of judicial review in service jurisprudence, held that the decision to terminate employment by the public authority, was in the nature of administrative action and is reviewable to the extent of the said decision being **"***unreasonableness, unfairness, perversity or irrationality*".[25]The subject of review would be limited to the decision-making process and not the final decision itself. The court, after holding that the employee has failed to place on record any material to impinge the process of decision, upheld the administrative action of the corporation to terminate the employment and observed, *"contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise*."[26]

Thus, any employee who is not governed by industrial law or is not a public servant is at a disadvantage since the remedies against dismissal are limited. The legal redressal concerning reinstatement after dismissal is unavailable to the employee, even if the termination of employment itself is held to be wrongful per se.

III. Analysis of employment laws during COVID -19

The fear, and uncertainties in employment have become more prevalent during the on-going COVID -19 crisis. Imposition of the first order of lockdown and subsequent extensions of the

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[23] In case of regularised employment in government, there is afforded a larger protection in terms of job security, wherein termination under convenience is impermissible. See *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600 which upheld decision in *Central Inland Water Transport Corpn*. v. *Brojo Nath Ganguly*, (1986) 3 SCC 156, in which the Court held that a regularised employee has fundamental right under art. 14,16 (1),19 (1) (g) and 21 of the Constitution of India, to continue to be in service of public employment until the age of superannuation and consequently struck down regulation empowering corporations to terminate employment summarily as being arbitrary and unconstitutional.

[24] (2011) 15 SCC 16 at para 38-42.

[25] *Id.* at para 40.

[26] *Id.* at para 42.

same has crippled the economy[27] and impacted adversely the majority of businesses.[28] During ordinary times, if an employee is discharged, he may seek alternative employment but in the prevailing situation, the labour market has become paralysed, and the employers are not willing to recruit new employees. In these circumstances, an employee who is discharged would be unable to get any gainful employment during the lockdown.

The government before the first order of lockdown, on March 20, 2020, had issued an advisory[29] requesting employers not to terminate any employment, particularly of contractual or casual labour. Another advisory[30] dated March 27, 2020, albeit not binding, was issued to mitigate the hardships caused to the workers of the unorganized sector.

Most importantly, a binding order[31] dated March 29, 2020 (subsequently, withdrawn),[32] issued by the National Executive Committee in exercise of its powers conferred under the Disaster Management Act, 2005 directed to state government/ Union Territories to take necessary action and to issue necessary orders to their respective authorities in the light of current COVID-19 Crisis. Consequently, the said authorities were specifically directed to make arrangements for temporary shelters,[33] to quarantine migrants.[34] Furthermore, all employees were mandated to be paid with full wages without any deduction during the period of lockdown,[35] and landlords were instructed not to demand rent for demised premises used by the migrants and workers for their accommodation.[36] Moreover, the order prescribed penal

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27 Editorial, "Economy in lockdown: On India's worst case scenario", *The Hindu*, Apr. 18, 2020, *available at:* https://www.thehindu.com/opinion/editorial/economy-in-lockdown-the-hindu-editorial-on-indias-worst-case-scenario-post-lockdown/article31383177.ece (last visited on May 28, 2020).

28 Mahesh Kulkarni, "Pandemic Impact: Coronavirus may swallow one in 10 jobs in India", *Deccan Herald,* Apr 28, 2020, *available at:* https://www.deccanherald.com/business/pandemic-impact-coronavirus-may-swallow-one-in-10-jobs-in-india-831211.html (last visited on May 29, 2020).

29 Secretary (Ministry of Labour & Employment), Advisory *vide* letter dated, "D.O bearing No.M-11011/08/2020-Media", March 20,2020, *available at*: https://labour.gov.in/sites/default/files/file%201.pdf (last visited on May 24, 2020).

30 Press information Bureau, "MHA issues advisory to all States/UTs to make adequate arrangements for migrant workers, students etc from outside the States to facilitate Social Distancing for COVID-19" Mar. 27, 2020, *available at*: https://www.mha.gov.in/sites/default/files/PressRelease%20MHAAdvisory_27032020.pdf (last visited on May 25, 2020).

31 Home Secretary, "order bearing No. 1-29/2020-PP (Pt-II)" Mar 29, 2020, *available at:* https://www.mha.gov.in/sites/default/files/PR_MHAOrderrestrictingmovement_29032020.pdf (last visited on May 5, 2020).

32 *Supra* note 5, the order dated Mar. 29, 2020 was withdrawn *vide* fourth order of lockdown.

33 *Supra* note 31 at para 3(i).

34 *Id.* at para 3(ii).

35 *Id.* at para 3(iii).

36 *Id.* at para 3(iv).

action against landlords for forceful eviction of labourers and students occupying the premises.[37]

In continuation to that, the Chief Labour Commissioner published an advisory[38] wherein all private and public enterprises were advised not to terminate their employees' jobs including casual and contract workers if the place of employment becomes non-operational due to the outbreak of COVID-19. It further prohibited the reduction of wages in case an employee is on quarantine leave.

It can be deduced from the March 29, 2020 order that the employee may not be terminated as there exists a continuing obligation to pay wages. It needs to be borne in mind that the term 'wages' has not been defined under the Disaster Management Act, 2005, and there is no mention of the term 'wage' in the entire act. Thus, the term must necessarily be interpreted in order to understand the implication of the order dated March 29, 2020.

'Wage', as defined under the Black's Law Dictionary, usually means[39] "*payment for labor or service based on time worked or quantity produced*", more specifically the definition of wages "*includes every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer*." Thus in ordinary parlance, the popular meaning ascribed to the term 'wage' refers to the form of compensation given to an employee in lieu of or as consideration of the work done. In the Indian legal context, the definition of 'wage' assumes different meanings in different contexts.

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37 *Id.* at para 3(v).

38 Chief Labour Commissioner, advisory *vide* "letter bearing No. D.O No. CLC(C)/Covid-19/ Instructions/LS-I" (Mar. 30, 2020).

39 Bryan A. Garner (ed.), *Black's Law Dictionary* 1716 (West, a Thomson Reuter business, ninth edition 2009).

Term 'Wages' is defined under at least 19 statutes.[40] Amongst these, five[41] statutes adopt the definition of wages as provided under the Payment of Wages Act, 1936, and one[42] statute adopts the definition of wages as provided under the Minimum Wages Act, 1948. Therefore, the definition of "wage" would vary according to the nature of employment, number of workers employed. These are few important criteria to necessarily attract the provisions of a particular statute, nature, and function of employer and employee. Since the various advisories issued by the government, specifically refers to the payment of wage to contractual/casual labourers, it would only be appropriate to refer to the definition of wages, as interpreted by the Supreme Court in the context of contract labourers.

In *Hindustan Steelworks Construction Ltd.* v. *Commr. of Labour,*[43] the court observed that the term 'wages' for the purpose of section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, means *"contractual wages which are payable under the terms of employment as between the contractor who is the employer and the contract labourers who are his employees*." Notwithstanding the above definition, in cases where none of these statutory definitions is applicable, the parties may be at liberty to include a definition of salary or wages through a contract to include or exclude any component of compensation capable of being expressed in monetary terms as consideration for the work done under the contract of employment. However, the said definition will be subject to other financial statutes for payment of taxes, like the Income Tax Act, 1961.[44] Apropos to the present context of mandating payment of wages, the newly enacted code on wages, 2019, which though not yet in force may be invoked here, as it gives a comprehensive definition of the term "wages".

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[40] The Building and Other Constructions Workers' (Regulation of Employment and Conditions of Service) Act, 1996, s. 2(n), The Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981, s. 2(k) The Contract Labour (Regulation and Abolition) Act, 1970, s. 2(h), The Employees' Compensation Act, 1923, s. 2(m), The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, s. 2(b) defines "basic wages", The Employees' State Insurance Act, 1948, s. 2(22), The Equal Remuneration Act, 1976, s. 2(g) defines 'remuneration', The Industrial Disputes Act, 1947, s. 2(rr), The Industrial Employment (Standing Orders) Act, 1946, s. 2(i), The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, s. 2(i), The Maternity Benefit Act, 1961, s. 2(n), The Minimum Wages Act, 1948, s. 2(h), The Motor Transport Workers Act, 1961, s. 2(l), The Payment of Bonus Act, 1965, s. 2(21) defines the term 'salary or wage', The Payment of Gratuity Act, 1972, s. 2(s), The Payment of Wages Act, 1936, s. 2(vi), The Personal injuries (Compensation Insurance) Act, 1963, s. 2(j), The Plantation Labour Act, 1951, s. 2(i), The Working Journalists and Other Newspapers Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, s. 2(eee).

[41] The Building and Other Constructions Workers' (Regulation of Employment and Conditions of Service) Act, 1996, s. 2(n), The Contract Labour (Regulation and Abolition) Act, 1970, s. 2(h), The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, s. 2(i), The Motor Transport Workers Act, 1961, s. 2(l), The Payment of Bonus Act, 1965, s. 2(21).

[42] The Plantation Labour Act, 1951, s. 2(i).

[43] *Hindustan Steelworks Construction Ltd.* v. *Commr. of Labour* (1996) 10 SCC 599.

[44] The Income Tax Act, 1961 (Act 43 of 1961), s. 17.

The Wage Code, 2019, under section 69, repeals four enactments, including the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976. Consequently, the Wage Code, 2019, under section 2(y) defines wages comprehensively to mean remuneration, by way of salaries, or otherwise paid in terms of employment. The definition includes basic pay, dearness allowance, and retaining allowance and excludes explicitly sums payable as a consequence of termination, including gratuity on termination of employment and retrenchment compensation. Since the definition of the term wage excludes any sums payable on the termination of the contract, and the order mandating employers to pay wages, naturally, the question of termination of an employee does not arise as he is still required to pay wages to the employee 'under employment.' Furthermore, states like Maharashtra, for instance, have passed circular in unambiguous terms, mandating employers not to terminate employment.[45]

Another concomitant of this interpretation concerning termination, when advanced is that even where employees' services are terminated in accordance with their contract of employment, say for instance, by 'payment of a month's salary in lieu of notice,' such termination is ineffective per se as it would be contrary to 'law'. The exception as stated in *Lakshmi Narain*[46] being non-exhaustive may aid employees in obtaining a declaration concerning the invalidity of termination of employment, even when it is purely governed under the contract of personal service and may afford the remedy of reinstatement or at the very least, the termination of employment, may in itself be a cause of action for 'wrongful dismissal' and an action for damages as expounded in *Goetze (India).*[47] It goes without saying that this interpretation concerning remedies against termination of employment can be advanced in aid of an employee, only if it can be decisively concluded that the order dated March 29, 2020 is legal and valid.

With the passage of time, there has been some relaxation of the lockdown measures as compared to the initial steps contemplated under the first order of lockdown.[48] The third order,[49] for instance, classified regions into three zones and had permitted some amount of economic activities and manufacturing of essential goods in the three zones, subject to

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45 Circular issued by Under Secretary, Government of Maharashtra (Finance Department), "bearing No. Sank/2020/PK-62/KS PS-S" (April 01, 2020).

46 *Supra* note 9.

47 *Executive Committee of Vaish Degree College* v. *Lakshmi Narain* (1976) 2 SCC 58, at para 18.

48 *Supra* note 2.

49 *Supra* note 4.

restrictions. The fourth order[50] of lockdown dated May 17, 2020 vests obligation on the state government to classify regions into containment zones, in which activities would be regulated. To a large extent, commercial activities have been permitted to operate after the fourth order of lockdown dated May 17, 2020[51] while adopting all precautionary measures. Furthermore, the fourth-order declares that all orders, passed under section 10(2) (l) of the Disaster Management Act, 2005, cease to be in effect from May 18, 2020. Thus, in effect, even the order dated March 29, 2020 ceases to be in operation.

The effect of this revocation in light of the fourth order dated May 17, 2020 needs to be analysed by contemplating two scenarios. First being the obligation of the employer to pay wages for the period of the lockdown in addition to the continuing obligations on account of the relaxation of lockdown measures, not being the period covered by the order dated march 29,2020.

Under this scenario, the obligation of the employer to pay wages would further be subcategorized into employers who have been permitted to operate their commercial establishments and employers whose place of establishments lies within the vicinity of the containment zones.[52] In the first sub-category, the service condition prescribed by their agreement or applicable industrial standard law would operate. In such an event, if an employee refuses to work, despite being called upon to work, there is no obligation on the employer to pay wages as held by the High Court of Bombay.[53] In the second sub-categorization, where the activities of establishments are prohibited on account of general prohibition or for being proximate to the designated containment zones, in the absence of the purported protection afforded under order dated March 29, 2020, there seems to be no obligation per se for the employer to pay total wages, as the employer in such circumstances may amend with consent

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50*Supra* note 5.

51 Home Secretary to Chief Secretaries and Administrators regarding violation in MHA guidelines and ensure proper implementation of guidelines, "vide letter bearing No. D.O No.40-10/2020-DM-1(A)", (May 21, 2020) *available at*: https://www.mha.gov.in/sites/default/files/MHADOLrDt2152020.pdf (last visited on May 24, 2020).

52 Third order of lockdown, *supra* note 4 and fourth order of lockdown, *supra* note 5, wherein certain activities are prohibited across all zones and all activities except delivery of essential goods and services. Are prohibited in containment zones and zones designated as red zones.

53 *Align Components Pvt. Ltd.,* v. *Union of India*, writ petition stamp no.10569 of 2020. "In the event such workers voluntarily remain absent, the Management would be at liberty to deduct their wages for their absence subject to the procedure laid down in Law while initiating such action. This would apply even to areas where there may not have been a lock down". This expounding of law by the High Court of Bombay would be applicable even if the order dated Mar. 29, 2020 was still in effect and the employee was permitted to operate his establishment to the extent permitted to him under the law for the time being in force and the employee refuses to work, despite being called upon to work.

of the employee the service condition and reduce the quantum of wages payable. Furthermore, in absence of the legal consequences flowing from the order dated March 29, 2020, the employer, subject to applicable industrial law[54] and contractual obligation has no other 'external' impediment, to resort to laying-off or termination of the contract of employment.

The second scenario, which needs to be seen is the liability of the employer, both penal and civil in case of non-payment of wages for the period of time when the order dated March 29, 2020 was in effect. The non-payment of wages during this period would be a sufficient cause of action for the employees to recover from their employer the entire wages, which would for all intents and purposes be legally recoverable debt, payable by the employer to the employee. Furthermore, another interesting yet bizarre consequence springs up, if the interpretation of the order dated March 29, 2020 concerning non-termination of employment is advanced. If the employment is terminated during the period of subsistence of the order dated March 29, 2020, the termination would be rendered illegal as being contrary to law, thus enabling the employee to prefer legal action to either obtain reinstatement or claim damages. On the other hand, if the employment is terminated after May 18, 2020, in accordance with the contract and despite the exact resemblance to the method of termination of an employee during continuance of order dated March 29, 2020, the employee terminated after May 18, 2020 has no right accruable and cannot obtain any declaratory judgment or order of reinstatement, unlike his former compatriot.

Thus, in this background it becomes imperative to analyse the legality of the order, dated March 29, 2020, despite the order itself ceasing to be in effect. The legal analysis is a desideratum as the order not only creates civil liability but also attracts penal liability for purported violation under the Indian Penal Code, 1860[55] and the Disaster Management Act, 2005.[56]

IV. The validity of the order dated March 29, 2020 passed by the National Executive Committee

On a bare reading of the order dated March 29, 2020,[57] there arises a potent question as to whom the order would apply and if the order is restricted to only a certain class of employers

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54 The Industrial Dispute Act, 1947 (Act 14 of 1947), chapter V-A, ss. 25-A -25-J and chapter V-B, ss. 25-k-25-s. s 25-C, subject to s. 25-E would enable the employee to get fifty percent of his wages during the period of layoff. See further *Rashtriya Mill Mazdoor Sangh* v. *Apollo Mills Ltd.*, (1960) 3 SCR 231, para 10, 22 and 23.

55 The Indian Penal Code, 1860 (Act 45 of 1860), s. 186: Obstructing public servants in discharge of public functions, s. 188: Disobedience to order duly promulgated by public servant, s. 269: Negligent act likely to spread infection of disease dangerous to life, s. 270: Malignant acts likely to spread infection of disease dangerous to life and s. 271 Disobedience to quarantine rule of Indian Penal Code may be attracted.

56 The Disaster Management Act, 2005 (Act 53 of 2005), ss. 51 – 54.

57 *Supra* note 31.

hiring migrant labourers, or if it applies to employers of every class. To answer this poignant question, when Para iii[58] of the order dated March 29, 2020, is read in isolation and in a vacuum, devoid of the preamble and other paragraphs of the order, it would be suggestible that the order would apply to all employers. But if on the application of the settled rule[59] of interpretation, to ascertain the legislative intent and make text intelligible, the *"provision in its context"*[60] is to be legitimately and properly read in the backdrop of the enactment as a whole.[61] The order dated March 29, 2020, when read as a whole, would itself indicate that it was purportedly promulgated on account of the movement of a large number of migrants in violation of the lockdown. Accordingly, an irresistible conclusion can be drawn that the order in its application would be limited to employers employing migrant labourers alone and that only migrant labourers are required to be paid total wages. This would naturally exclude a large proportion of employers that would be excluded from fulfilling their purported obligation to pay full wages, arising out of the order dated March 29, 2020.

The order dated March 29, 2020, in itself does not create any obligation/liability against an individual. It merely enables the authorities mentioned, to implement the general direction of the order. Thus, if any state government or state authority has not promulgated any further orders, in furtherance of the order dated March 29, 2020, the order of the National Executive Authority, in itself, would have no effect to attract any obligation or even liability for that matter. For instance, the Karnataka Government *vide* circular dated April 13, 2020, had mandated employers not to terminate employment and had directed employers for the payment of wages.[62] The government subsequently, vide circular dated April 15, 2020,[63] withdrew the earlier circular dated April 13, 2020. Therefore in the state of Karnataka, no liability can *per se* be fastened upon employers solely arising out of the order dated March 29, 2020.

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58 The para mandates "all the employers … shall make payment of wages..at due date without deduction".

59 *Poppatlal Shah* v. *State of Madras*, 1953 SCR 677, BK Mukherjea J. at para 7 held that "*It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself.*" Further held, *"The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself".*

60 Justice A K Patnaik (ed.), *Principles of Statutory interpretation* 35 (LexisNexis, India, 14th edn. reprint 2016).

61 F.A.R Benion, *Understanding common law legislation drafting and interpretation*, 54 (Oxford University Press, New Delhi, first Indian edn., 2004).

62 Secretary, Labour department, Government of Karnataka, Circular "bearing No. KE 170 Sweemar 2018 (Part 7)", (Apr. 13, 2020).

63 *Ibid.*

In this background it is necessary to analyse the order dated March 29, 2020 to develop a comprehensive understanding concerning the legal rights of employers against employees during this time of crisis.

The test for upholding the validity of subordinate legislation has been succinctly explained by the Supreme Court in *Bombay Dyeing and Mfg. Co. Ltd.* (3)[64] wherein the court held that *"subordinate legislation must, apart from being intra vires the Constitution, should also not be ultra vires the parent act under which it has been".* The court further held that subordinate legislation must not only be reasonable but it must be in accordance with the legislative policy to give effect to the objects mentioned of the parent act, which the parent act seeks to achieve. Furthermore, to ascertain the legislative policy of the parent legislation, to test the vires of subordinate legislation, the well settled rule as laid down by the Supreme Court in *Harishankar Bagla*[65] concerning the method of ascertaining legislative intent must be seen. The court held that "*the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy.*"[66] Further, the Supreme Court, while striking down RBI circular dated February 12, 2018, issued under the Banking Regulation Act, 1949 in *Dharani Sugars and Chemicals Ltd.* v. *Union of India*[67] has held that "*When it comes to lack of any guidelines by which the power given to RBI is to be exercised, it is clear from a catena of judgments that such guidance can be obtained not only from the Statement of Objects and Reasons and the Preamble to the Act but also from its provisions*."

R.F Nariman J, in *Cellular Operators Assn. of India,*[68] reiterated the settled proposition of law concerning judicial review of subordinate legislation as laid down in *T.N.* v. *P. Krishnamurthy*[69] and observed that:[70]

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[64] *Bombay Dyeing & Mfg. Co. Ltd. (3)* v. *Bombay Environmental Action Group* (2006) 3 SCC 434, para 104.

[65] *Harishankar Bagla* v. *State of M.P.*, (1955) 1 SCR 380, para 9.

[66] *Id.* Supreme Court of India while testing the vires of Cotton Textiles (Control of Movement) order, 1948 promulgated under the Essential Supplies (Temporary Powers) Act, 1946 has reaffirmed the principles of law laid down by the majority Judges in *Delhi Laws Act* case (1951 SCR 747). Interestingly, Justice Meher Chand Mahachand who authored the majority judgement in *Harishankar Bagla* also authored concurring opinion in *Delhi Laws Act* Case.

[67] (2019) 5 SCC 480 at para 28.

[68] (2016) 7 SCC 703.

[69] *State of T.N.* v. *P. Krishnamurthy* (2006) 4 SCC 517.

[70] *Supra* note 73 at para 34.

There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of *the land, that is, any enactment.*

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

To test the validity of the order dated March 29, 2020[71] passed by the National Executive Committee under section 10(2) (l) of the Disaster Management Act, 2005, a detailed examination of the Disaster Management Act *vis-a-vis* tests (a),(d),(f) as laid down in *Cellular Operators Assn. of India,*[72] is required.

An Analysis of the legislative scheme of the Disaster Management Act, 2005

The enactment in the present form owes its origin primarily to the recommendations of the high powered committee (HPC) on disaster management.[73] The committee was formed with J. C. Pant as its chairman. The initial Mandate[74] of the HPC was limited to "preparation of management plans for natural disasters only." Subsequently, the terms of reference were expanded, because of which, the study of the human-made disaster was included. Furthermore, the HPC was required to undertake a detailed inquiry, recommendations, and review of existing arrangements of preparedness for disaster. The HPC was also required to recommend institutional measures and was charged with the preparation of a model plan for effective disaster management at three tiers, *viz*., national, state, and at the district levels.

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[71] *Supra* note 31.

[72] *Harishankar Bagla* v. *State of M.P*. (1955) 1 SCR 380.

[73] Department of Agriculture and Cooperation, Ministry of Agriculture, Government of India along with the National Disaster Response Plan, "The Report Of High Powered Committee On Disaster Management" (Oct, 2001), *available at*: https://nidm.gov.in/PDF/pubs/HPC_Report.pdf, (last visited on May 28, 2020).

[74] *Id.* at 62.

In October 2001, the HPC submitted its final report consisting of ten chapters, under which, importantly, Part I of Chapter Seven considers the legal and constitutional framework, and Chapter Ten consists of recommendations. In the context of the constitutional and legal framework, it had observed[75] that the "subject of disaster management does not find mention in any of the three lists in the 7th schedule of the Constitution." It was further observed that despite the requirement of the efforts of the state government being at the forefront in the face of disaster, there is a lack of constitutional mechanism in the Constitution to enact legislation under schedule VII, list II of Constitution of India.[76] Consequently, it recommended,[77] "that a conscious view needs to be taken to make an appropriate mention of the subject of disaster management in one of the lists." Furthermore, even the National Commission to Review, the working of the Constitution (NCRWC) under the chairmanship of Justice M.N Venkatachaliah, had recommended[78] that disaster management, be it natural or human-made, ought to be included in the concurrent list of the Constitution since combating of disaster requires coordination between centre and states.

The third report of the Second Administrative reforms under the chairmanship of Sri. M. Veerappa Moily vide its report dated September 19, 2006, titled "crisis management from despair to hope,"[79] has observed[80] that the Parliament in its wisdom has legislated the enactment of the Disaster Management Act, 2005, by invoking entry 23 of list III of schedule VII of the Constitution of India, *i.e.,* under the entry of 'social security and social insurance, employment, and unemployment.' The third report of the second administrative reforms had also observed that entry 23 of the concurrent list does not effectively cover all aspects and facets of crisis management; consequently, it recommended[81] that a new entry, "management of disasters and emergencies, natural or man-made," be included in list III the seventh schedule of the Constitution by amending the Constitution. The parliament, in its wisdom, despite the recommendations, has not amended the Constitution but has enacted the statute under entry 23

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[75] *Id.* at 107-108.

[76] *Id.* at 108, observed that *"The only two entries in the State List that are remotely related to the subject of disaster management are entry 14, which deals with agriculture, including protection against pests and plant diseases, and entry 17, which deals with water, including water supply, drainage and embankments."*

[77] *Id.* at 158.

[78] Justice M.N Venkatachaliah, "National Commission to review the working of the Constitution," Vol. I, Chapter 8, "Union-State Relations", Para 8.2.13 and Vol. 1, chapter 10, "summary of recommendations", para 151 (Mar, 2002).

[79] Second Administrative Reforms Commission (ARC), third report "Crisis Management From Despair to Hope" (Sep. 2003), *available at:* https://darpg.gov.in/sites/default/files/crisis_management3.pdf (last visited on March 15, 2020).

[80] *Id.* at 34.

[81] *Id.* at 35, para 4.1.5 and p. 114, para 1.

of list III itself. Thus, an analysis of the parent act under this entry must be undertaken to test the validity of the orders passed during the COVID -19 crisis by the state and Central Government.

Despite the inherent deficiency in the Constitutional scheme for the enactment of a comprehensive code for disaster management, the Constitutional scheme for enacting a legislation to contain epidemics has been envisaged, in as much as there are entries under schedule VII in all the three lists of the Constitution of India, permitting containment of epidemics. The List-I of schedule VII under entry 28 enumerates "quarantine," and entry 81 "inter-state migration and quarantine." The list-II, entry 6, contains "public health and sanitation." List-III; entry 29 contemplates "prevention of the extension from one state to another of infectious, or contagious diseases or pests affecting men, animals or plants." Thus the power granted to make laws under each of the lists enumerated herein above envisages broad power to contain the epidemic, but does not envision a comprehensive structure requiring casting of any positive obligation on private individuals during an outbreak, like payment of wages, *etc*. Notwithstanding, the constitutional scheme for containment of epidemic, the centre and state government have promulgated orders under the Disaster Management Act, 2005. Thus, it is *sine qua non* to analyse if epidemics will be covered under the Disaster Management Act, 2005.

Epidemic Crisis is covered under the Disaster Management Act, 2005

Before embarking upon the issue of the validity of orders, it is fundamental to analyse if the crisis of COVID-19 could be suitably addressed under the regime of the Disaster Management Act, 2005. Under the statute, the term "disaster" is defined under section 2(d)[82] and contemplates both natural and man-induced disasters. The former, *i.e.,* 'natural disaster' is further sub-classified under the National Disaster Management Plan, 2016 into five groups, *viz.,* geophysical, hydrological, meteorological, climatological, and biological. Apropos to the discussion herein, the classification of the biological disaster refers to a "process or phenomenon of organic origin or conveyed by biological vectors, including exposure to

[82] The Disaster Management Act, 2005 (Act 53 of 2005), s. 2(d) defines Disaster to mean *"a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area."*

pathogenic microorganisms, toxins, and bioactive substances."[83] Such a process may be the cause of loss of life, illness or affect health, reduce the value of the property, result in loss of livelihood, and affect the health and wellbeing of people. The biological disaster would impact the economy and/or the environment. Furthermore, the Disaster Management Plan itself describes biological disaster to include epidemics, caused due to "viral, bacterial, parasitic, fungal, or prion, infections, insect infestations, and animal stampedes" [84] agents.

To clarify the doubt, whether the Disaster Management Act, 2005, would be applicable in cases of epidemics or not, it is required to see the response of the National Disaster Management Authority. The National Disaster Management Authority has laid down detailed guidelines titled, "management of biological disasters," in July 2008,[85] concerning preparedness management and mitigation of biological disasters, including epidemics. To clinch the issue of application of the statue to the COVID-19 crisis, reference may be drawn to the third report of the second administrative reforms, wherein, it is observed: [86]

> the manner in which the Disaster Management Act, 2005 defines the term 'disaster' leaves no doubt that an epidemic of extraordinary severity spreading rapidly is covered by it. The Act also overrides the provision of any other law (section 72). As such, it is clear that management of epidemics-related crisis would also fall within the jurisdiction of the National Disaster Management Authority and that apart from the legislation being contemplated by the Ministry of Health and Family Welfare, it will be imperative that the planning and preparatory exercises envisaged in the Disaster Management Act, 2005 are also undertaken.

Thus, it may be concluded that the COVID-19 crisis would be adequately covered under the Disaster Management Act, 2005. The quintessential question is does the statute permit the

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[83] National Disaster Management Authority, Ministry of Home Affairs, Government of India, "National Disaster Management Plan (NDMP)" p.no 8 Para 1.9.1 (National Disaster Management Authority Government of India, New Delhi, May 2016), *available* at: https://ndma.gov.in/images/policyplan/dmplan/National%20Disaster%20Management%20Plan%20May%202016.pdf (last visited on May 28, 2020).

[84] *Id. at* 10.

[85] National Disaster Management Authority, Ministry of Home Affairs, Government of India, "National Disaster Management Guidelines Management of Biological Disasters" (National Disaster Management Authority Government of India, New Delhi, July 2008), *available at:* https://ndma.gov.in/images/guidelines/biological_disasters.pdf (last visited on March 19, 2020).

[86] *Supra* note at 79 at 110, para 10.1.9.

delegatee to make law, mandating private individuals to compulsory pay wages as provided under the order dated 29.09.2020.

Vires of order dated March 29, 2020

To decide upon the legality of the order, an analysis of the scheme of the enabling act is required. The policy of the legislation, so to speak, must be deciphered from the statement of object and reasons provided with the bill and the provisions of the act. The 2005 act, at its core, was enacted to "provide for the effective management of disasters and for matters connected therewith or incidental thereto."[87] A perusal of the statement of object and reason appended with the disaster management bill would indicate that an enactment was required to make provisions for setting up of an institutional mechanism, establish disaster management authorities at three levels, make provisions for statutory funds for disaster management and most importantly to facilitate in formulating effective steps to mitigate, prepare and coordinate between different agencies and authority at the time of disaster.

Since a disaster of cataclysmic scale requires to be combated at different levels of governance, the Act itself recognises authorities at all three levels, *viz.,* the central, state and district level. At the central level, the act contemplates the establishment of the National Authority[88] under section 3 and the National Executive Committee[89] under section 8. The powers of the National Authority are mentioned under section 6, and the powers of the National Executive Committee have been enumerated under section 10. Furthermore, the National Authority under section 12 is required to comply with guidelines for minimum standards of relief. At the federal level, the Act contemplates the establishment of State Disaster Management Authority[90] under section 14 and State Executive Committee[91] under section 20. The powers of the State Disaster Management Authority and State Executive Committee are indicated under sections 18 and 22 of the Act, respectively. Similarly, at the district level, section 25 contemplates the

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[87] The Disaster Management Act, 2005 (Act 53 of 2005), the long title is referred to as the core purpose of the enactment of the Disaster Management Act, 2005, as it is settled law and reiterated in *Union of India* v. *Elphinstone Spg. and Wvg. Co. Ltd.* (2001) 4 SCC 139, para 7, that long title is as internal aid of construction and that "long title along with the Preamble or even in its absence is a good guide regarding the object, scope or purpose of the Act." But, see *Manohar Lal* v. *State of Punjab*, (1961) 2 SCR 343, Para 4, where it is held long title and preamble despite being a good guide to ascertain the legislative intent, "cannot, obviously, control the express operative provisions of the Act".

[88] The Disaster Management Act, 2005 (Act 53 of 2005), s. 2(j) and 3(1) define and establish National Authority respectively.

[89] *Id.* at s. 2(k) and 8(1) defines and establishes the National Executive Authority.

[90] *Id.* at s. 2(q) and 14(1) defines and establishes State Authority.

[91] *Id.* at s. 2(r) and 20(1) defines and establishes the State Executive Committee.

establishment of the District Disaster Management Committee,[92]and its powers and functions are indicated under section 34 of the Act.

Since the order dated March 29, 2020 directs[93] the state authority and state Government[94] to take certain measures, it becomes incumbent at this juncture to analyse the power of the state authority and state government under the Disaster Management Act. Section 18 of the Act circumscribes the power of state authority, section 38 stipulates measures required to be taken by the state government, and section 39 specifies responsibilities of the Department of State Government. On a conspectus of section 18, 38 and 39, it becomes abundantly clear that the state authority and the state government has the power and is under obligation to formulate a state disaster management policy. Furthermore, the State Authority must coordinate in the implementation of the state plan, recommend provision for funds and under section 23 of the act approve the state plan.

The state government under sub-clause (a) to (k) of subsection 2 of section 38 does not have any power to implement the order dated March 29, 2020. However, it may be argued that the state government under sub-clause (l) of sub section 2 of section 38 may have powers as it is required to take measures on "such other matters as it deems necessary or expedient for the purpose of securing the effective implementation of provisions of this Act. Furthermore, the responsibilities of Departments of the State Government under section 39 (a) to (h) does not extend to implement the measures as required under the order dated March 29, 2020. Nonetheless, it may be argued that under section 39(i), the Departments State Government may have the responsibility to take such other actions as may be necessary for disaster management.

Having laid the contours of the functioning of the authorities at three tiers under the Disaster Management Act and having explained the powers of the National Executive Commission, state authority, state government, and Department of State Governments, a two-pronged attack on the vires of order dated March 29, 2020 is forthcoming.

Firstly, it is inconceivable that the Act permits the National Executive Committee to pass orders on the subject, which is not contemplated under the Act. Primarily the Act contemplates the responsibility of the government to alleviate the effects of the disaster. This aspect of the matter is forthcoming from the perusal of chapter IX of the Act, which contains a provision for the

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[92] *Id.* at s. 2(f) and 25(1) defines and establishes District Authority.

[93] *Supra* note 31, para 3.

[94] *Id.* at s. 2(s).

constitution of national disaster response fund under section 46, creation of a national disaster mitigation fund under section 47, and establishment of funds by State Government under section 48. Furthermore, liability is foisted upon the State Executive Committee under section 24(d) and district authority under section 34(e) to provide shelter, food, drinking water, essential provisions, healthcare, and services. The Ministries or Department of Government of India under section 36(g) is responsible for making available its resources to the National Executive Committee or a state executive committee for the purpose of responding promptly and effectively to any threatening disaster situation or disaster.

Concerning the application of the Act against an individual per se, from the scheme of Act, it is forthcoming that the state executive committee under section 24(a) and (b) and district authority under section 34 (b) and (c) is empowered at the most to control and restrict the movement of an individual, either through vehicular means or in-person to ingress and egress from any vulnerable or affected area. Thus, the order of lockdown itself may be legally justifiable, but by no stretch of imagination can it be contemplated that upon lockdown, individual and private enterprise would be foisted with the liability to make payments to employees and imposition of measures like prevention of collection of premium for demised premises. The National Authority, in fact while laying down guidelines is mandated[95] to include "ex gratia assistance on account of loss of life as also assistance on account of damage to houses and for restoration of means of livelihood". The state at the time of promulgating the order dated March 29, 2020, had not envisaged under the first guidelines published alongwith the first order of lockdown,[96] any *ex-gratia* assistance on account of loss of livelihood. On the other hand, the state is fastening liability on private employers to pay wages, to compensate for the loss of livelihood, which is the responsibility of the state.

Secondly, upon examination of the scheme of the Act, it is apparent that the authorities mentioned in the order dated March 29, 2020, have no power to implement such an order. Any efforts to achieve the same would be ultra-vires to the parent legislation as the delegate cannot assume more power than what has been delegated to him under the parent act. The residuary clause indicated earlier, that permitting such measures to be taken by the authorities cannot be allowed to subsume drastic powers. Such clauses are required to be interpreted, keeping in mind the general powers each authority has, the object indicated, and the measure that is sought to be achieved by such authorities. On a more in-depth examination of the Act, it is forthcoming

[95] *Id.* at s. 12(iii).
[96] *Supra* note 2.

that even where powers of requisition of "resources, provisions, vehicles for rescue operations, or other purposes" under the Act is contemplated,[97] the Act itself provides for compensation for such requisition under the section. Thus, no interpretation of the residuary clause is permitted,[98] which in effect would nullify or stupor the legislative intent behind the Act, as the Act contemplates for compensation to a person whose property is being deprived.

Thus, the order dated March 29, 2020 seemingly fails to qualify the test (a) and (d) as laid down in *Cellular Operators Assn. of India.*[99] *i.e.,* lack of legislative competence to make the subordinate legislation. The delegate has failed to conform to the statute under which it is made or has exceeded the limits of authority conferred by the enabling Act.

The order dated 29.09.2020 suffers from manifest arbitrariness

The Supreme Court in *Cellular Operators Assn. of India* v. *TRAI*[100] has observed that "*it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation."* The court further held that one of the tests to challenge the constitutional validity of subordinate legislation is that it must not be manifestly arbitrary. R.F Nariman J. in *Cellular Operators Assn.* has determined the test of manifest arbitrariness by relying upon *Khoday Distilleries Ltd.* v. *State of Karnataka*[101] wherein it is held that a delegated legislation is liable to be struck down as being manifestly arbitrary if it "*could not be reasonably expected to emanate from an authority delegated with the law-making power."* The court in *Cellular Operators Assn* further relied upon the case of *Sharma Transport* v. *State of A.P.,*[102] wherein it was held that if the legislation is shown to be unreasonable, it would be deemed to be arbitrary. The expression 'arbitrary' has been explained by the court in *Sharma Transport* to mean an act or provision which is made "in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone".

The Supreme Court in *Cellular Operators Assn.* case was deciding the legality of Telecom Consumers Protection (Ninth Amendment) Regulations, 2015. Under the impugned regulation,

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[97] The Disaster Management Act, 2005, s. 65.

[98] *Parakh Foods Ltd.* v. *State of A.P.* (2008) 4 SCC 584, para 9 and 10, wherein the court applied the principle of *ejusdem generis* to restrict the interpretation of rule 37-D of the Prevention of Food Adulteration Rule, 1955.

[99] *Harishankar Bagla* v. *State of M.P.*, (1955) 1 SCR 380, para 9.

[100] *Id. at* para 42.

[101] (1996) 10 SCC 304 at para 13.

[102] (2002) 2 SCC 188, Para 25.

the telecom service provider was made liable to credit money to the account of customers for 'call drops.' The impugned regulation further required the service provider to furnish details of the amount credited to the account of the consumer initiating the call vide unstructured supplementary service data (USSD) or short message service (SMS). In the event of the customer being a postpaid user, the amount credited was required to be reflected in the next Bill. The apex court struck down the impugned regulation as being manifestly arbitrary. It held[103] that the regulation is based on the fact that the service provider would be at fault and that the said fault would be attributable solely and wholly (100%) on the service providers, without differentiating call drops resulting due to fault of customers themselves. It was further observed that even when calls dropped at the instance solely attributable to the consumer, he would nonetheless receive the benefit for the call drop, and this made the regulation fraught with absence of intelligent care and deliberation. By extension of the logic in the above case, the employer cannot by any stretch of imagination be held to be responsible for the outbreak of pandemic and is not responsible for lockdown, ergo; fastening liability solely on the employer, despite "no-fault" is arbitrary.

The Test of Arbitrariness has reached its crescendo in *Shayara Bano* v. *Union of India,*[104] wherein the Supreme Court by a majority opinion of R.F Nariman, UU Lalit JJ and concurring opinion of Kurian Joseph J reemphasized the test laid down in previous cases[105] and while overruling the State *of A.P.* v. *McDowell and Co.*[106] categorically held:[107]

> The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under article 14.

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103 *Supra* note 99 at para 49.

104 (2017) 9 SCC 1.

105 *Ajay Hasia* v. *Khalid Mujib Sehravardi* (1981) 1 SCC 722, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* (1985) 1 SCC 641, *Khoday Distilleries Ltd.* v. *State of Karnataka*, (1996) 10 SCC 304, *Sharma Transport* v. *State of A.P.* (2002) 2 SCC 188 and *Cellular Operators Assn. of India* v. *TRAI* (2016) 7 SCC 703.

106 (1996) 3 SCC 709.

107 *Supra* note 99 at para 101.

The order dated September 29, 2020 is capricious, irrational, and is issued without any adequately determinable principle. The order does not make any distinction or consider the different scales of operability of employers. The order does not take into account the requirement of capital for industries located at different regions and does not make any differentiation between industries/establishments situated at different regions or places. All employers irrespective of their ability to pay wages, including start-ups and MSMEs are placed in the same category without any intelligible differentiation. The order does not afford an option to cut or deduct wages proportion to the financial capacity of the employer. More importantly, the order fails to take into consideration that despite "no-fault" of the employer, his business may be failing due to the lockdown at these tumultuous times. By fastening liability to pay wages coupled with a looming threat of attracting penal consequence for violating the same seems capricious and arbitrary. Thus, the order falls squarely under test (f) of *Cellular Operators Assn. of India*[108], *i.e.,* the subordinate legislation suffers from manifest arbitrariness/unreasonableness.

The order dated March 29, 2020 is disproportionate and violative of article 14, 19 (1) (g), and 300A of the Constitution of India

The order dated March 29, 2020, supposedly being subordinate legislation, to survive must besides being intra vires should also be non-arbitrary. Any person challenging its constitutionality, must demonstrate that the order violates any fundamental rights or any other constitutional rights. The inquiry then will be directed towards examining if the order mandating employer for payment of wages is in violation of test (b) and (c), as laid down in *Cellular Operators Assn. of India,*[109] *i.e.,* the order must be examined against the touchstone of fundamental rights under Part III of the Constitution of India and any other provision of the Constitution.

In legal parlance, when legislation or administrative action, is being impinged on the grounds of constitutionality, it must necessarily satisfy the condition of proportionality, *viz*:[110]

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[108] *Supra* note 99.

[109] *Ibid.*

[110] Test of Proportionality, enumerated herein is laid down in *K.S. Puttaswamy* v. *Union of India* (2019) 1 SCC 1, by summarising the principles laid down in *Modern Dental College & Research Centre* v. *State of M.P.* (2016) 7 SCC 353 at Para 157. Also see the dissenting opinion of Dr. Chandrachud, J. at Para 13242-1324.5, J. A.K Sikri, "*Proportionality as a Tool for Advancing Rule of Law"* 3 Supreme Court Cases J-1 (2019), and decision of Supreme Court in *Internet and Mobile Association of India* v. *Reserve Bank of India,* 2020 SCC Online SC 275, in which court was considering the Reserve Bank of India's statement dated Apr. 05, 2018 and circular dated

a. A measure restricting a right must have a legitimate goal (legitimate goal stage).

b. It must be a suitable means of furthering this goal (suitability or rational connection stage).

c. There must not be any less restrictive but equally effective alternative (necessity stage).

d. The measure must not have a disproportionate impact on the right-holder (balancing stage).

The Supreme Court in *Anuradha Bhasin* v. *Union of India,*[111] after analysing the position of law in *Modern Dental College & Research Centre*[112] and *K.S. Puttaswamy (Retired)* v. *Union of India*[113] has summarised the requirement of the application of the doctrine of proportionality for restriction of fundamental rights. The court held:

> In the first stage itself, the possible goal of such a measure intended at imposing restrictions must be determined. It ought to be noted that such a goal must be legitimate. However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications on the fundamental rights of the affected parties, the same should be supported by sufficient material and should be amenable to judicial review.

It is plausible to contend relying upon *Anuradha Bhasin*[114] itself to purportedly justify the violation of fundamental rights, wherein it is further held that the doctrine of proportionality requires consideration of restriction upon parameters including "territorial extent, stage of emergency and nature of urgency, duration of such restrictive measures and nature of such restriction." This observation of the Apex court, nonetheless, does not, in any manner, justify

Apr. 06, 2018, in which banned trading in virtual currency and since RBI had failed to demonstrate any deleterious effect and having not considered other measures, the circular was struck down as disproportionate.

[111] 2020 SCC Online SC 25, para 77.

[112] (2016) 7 SCC 353.

[113] (2019) 1 SCC 1.

[114] *Supra* note 99, at para 79.

the infraction of an individual's right as the mandate to pay wages, seems not only ultra vires but also excessive.

Fundamental rights are "general rights of citizens or those negative obligations of the state not to encroach on individual liberty"[115] The restriction or limitation of these are such that *"no person could be denied such right until the Constitution itself prescribes such limitations*."[116] An example of one such valid restriction at the times of the COVID-19 crisis being restraint upon an individual to move freely without sufficient cause. Unlike the violation of a right in the traditional sense, the order mandating payment of wages casts a positive obligation upon an employer, even without any sanction of law. Thus, departing from the traditional limitation in the strict sense, whereupon the State restricts itself from interfering with the rights of an individual, the State, by exerting coercive power, is purporting to snatch property of an individual, without compensation which is violative of the very fabric of Part III of the Constitution and article 300A of the Constitution.

The Doctrine of proportionality, in particular, mandates that any administrative measure must not be drastic than it is necessary to attain the desired result. The proportionality principle, as stated by the aphorism of Lord Diplock's that *"you must not use a steam-hammer to crack a nut, if a nutcracker would do*"[117] is apt for the situation at hand. Since the object of the Government is to contain the epidemic, the measure of lockdown would suffice. Once lockdown is in place, as stated earlier, it would be the responsibility of the authorities under the Disaster Management Act, 2005, to ensure the supply of essentials and provide such goods or service as necessary to mitigate the effects of disaster.

The order dated March, 29 2020 is highly disproportionate and unreasonable to achieve the desired result of the lockdown issued by virtue of four orders, *i.e.,* social distancing. Once commercial establishments have been temporarily closed by virtue of operation of law, interference by state without any effect of law, under the guise of regulation, into the affairs of private individuals concerning private relationship, by mandating imposition of terms into service condition is excessive and is liable to be struck down. Consequently, it is devoid of

115 Granville Austin, *The Indian Constitution Cornerstone of a Nation*, 64 (Oxford University Press, twenty-seventh impression 2016).

116 *Supra* note at 99, in para 23 court recognised that the only exception to the aforesaid formulation is Article 21A of the Constitution of India, which is a positive right that requires an active effort by the concerned government to ensure that the right to education is provided to all children up to the age of 16 years.

117 (1983) WLR 151 at 155.

having any effect on transactions effected between continuance of the period between 29 March 2020 and May 18, 2020.

The principle of proportionality assumes significant importance in the context of the statutory scheme of the Disaster Management Act, 2005, *vis-à-vis* provision for allocation of funds for mitigation of disaster. On a conjoint reading of section 6(g), 35(c), and 36(e) of the Act, the National Authority, Central Government and Ministries or Departments of Government of India are responsible for establishing funds for the purpose of mitigation. Central government in particular is responsible to constitute the National Disaster Response Fund under section 46 and National Disaster Mitigation Fund under section 47 of the Act. Similarly, section 18(f), 38(d), and 39(c) contemplate allocation of funds by state authorities, state government, and department of state government for mitigation of disaster. More particularly, the State Government under section 48 is responsible for the establishment of funds, including funds for mitigation of disaster. In the context of the establishment of mitigation funds, the Supreme Court in *Swaraj Abhiyan - (I)* v. *Union of India*,[118] had observed that *"We are also quite surprised that the National Disaster Mitigation Fund has not yet been set up even after 10 years of the enforcement of the NDM Act. Risk assessment and risk management also appear to have little or no priority as far as the Union of India and the State Governments are concerned."* The apathy of the government was frowned upon by the apex court. At this juncture, at the time of crisis, the dereliction of statutory duty by the central and state government cannot be the basis for fastening liability, without any force of law upon the private individual, and doing so would be extraordinarily disproportionate and would be unjust.

Thus, it may be safely concluded that the order dated March 29, 2020 seemingly fails to qualify the tests (b) and (c) of *Cellular Operators Assn. of India,*[119] *i.e.,* the order violates fundamental rights guaranteed under the Constitution of India, *viz.,* article 14,19(1) (g) and article 300 A of the Constitution of India. Since there is no discernible law forming the basis for the deprivation of fundamental rights and there being no reasonable and rational necessity for the same, the order is liable to be struck down as illegal and unconstitutional.

V. The State as an employer and its conduct towards its employee during Covid-19: A guiding light to ascertain the rights of private employers

[118] 2016 SCC OnLine SC 485, para 38.
[119] *Supra* note at 99.

On concluding in the previous section, that the order dated March 29, 2020 seems to be ultra vires the parent legislation and the Constitution, the question of rights of employers to pay wages *dehors* the order dated March 29, 2020, both during and after the period of the order remains to be explored. The order purportedly bound all private establishments and employers in the 54 days of its existence. Thus, it would not be out of place to look at the conduct of the 'model employer' to ascertain the mode and manner in which it has treated its employees. This will aid in gauging the mechanism required for balancing the rights between the employer and employee.

The state has been referred to as a 'model employer' and is expected to treat its employees with higher standard fairness.[120] Justice Krishna Iyer, regarding the State and public sector, has opined that *"the public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt.*"[121]

Consequently, two instances of the state as an employer at the union and federal level are referred to in the furtherance of this analysis, *viz*, the order of the Central Government dated April 23, 2020,[122] deciding to freeze dearness allowances and the ordinance[123] of the Kerala Government in deferring the payment of salary.

VI. Freezing of dearness allowance- Office memorandum dated April 23, 2020

Dearness allowances are paid to employees, primarily on account of the rise in the cost of living. It is an attempt to compensate for the loss in real wages on account of the price rise.[124] It is not in dispute that at the time of revision of dearness allowances, one of the factors accounted for is the additional financial burden that would be borne by the industry.[125] It is also open to 'other authorities' acting as employers within the purview of article 12 of the

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120 *State of Jharkhand* v. *Harihar Yadav* (2014) 2 SCC 114, para 57.

121 *Som Prakash Rekhi* v. *Union of India* (1981) 1 SCC 449, para 70

122 Office Memorandum issued by Addnl. Secretary to the Govt. of India, Dept. of Expenditure, Ministry of Finance,. "bearing no. 1/1/2020-E-II(B)" (Apr 23, 2020).

123 Kerala Disaster and Public Health Emergency (special provision) 2020, Ordinance No. 30 of 2020. The Ordinance was promulgated with an object to *"make special provision for the deferment of any payment in part, due and payable to any person, institution and any pay, in part, to any employee in the event of disaster and public health emergency in the State and for the matters connected therewith or incidental thereto."* The ordinance contains 9 sections.

124 *Workmen* v. *Indian Oxygen Ltd.* (1985) 3 SCC 177, see further Suresh Srivatsa "Payment of Dearness allowances to Industrial workers in India: The Judicial approach", 15 *Journal of Indian Law Institute* 444 (1974).

125 *Bengal Chemical & Pharmaceutical Works Ltd.* v. *Workmen,* (1969) 2 SCR 113 at para 21.

Constitution to set a cut-off date for payment of revised dearness allowances, keeping in view its financial constraints.[126]

Nonetheless, the state being an ideal employer, it would be a legitimate expectation of its employees to be paid with the enhanced rate of dearness allowances, especially during difficult times during the pandemic. Notwithstanding this, the Central Government has taken a decision vide an office memorandum dated April 23, 2020, to freeze payment of additional instalments of dearness allowances payable to Central Government employees, including Central Government pensioners due from January 1, 2020, and that no arrears for the period January 1, 2020, till June 30, 2021, would be paid. However, it is stated that the dearness allowance at the existing rates will be paid, and the rates for the future period will be restored prospectively and subsumed in the future payment due from July 2021.

On challenging the legality of the said office memorandum dated April 23, 2020, the Delhi High Court of Delhi *vide* its judgement dated June 1, 2020,[127] has held that the Office Memorandum had, in effect, frozen the dearness allowance and not withdrawn the dearness allowances payable to Central Government employees and pensioners. It was further held that this act of the Central Government was well within its domain as per sub-section (1) of section 3 of All India Services (Dearness Allowance) Rules, 1972. Consequently, the court dismissed the writ petition challenging the office memorandum.

This approach of the Central Government in not refusing to make payments, but freezing payments at an enhanced rate at this time, indicates that even during the continuance of the

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126 *T.N. Electricity Board* v. *TNEB-Thozhilalar Aykkiya Sangam* (2019) 15 SCC 235 at para 27.

127 *Hitesh Bhardwaj* v. *Ministry of Finance, Union of India* W.P (C) 3308/2020. See also *Nijaguni and Karnataka High Employees' Welfare Association* v. *The State of Karnataka, Rep by its Principal Secretary*, ILR 2005 Kar 2638, wherein, the State of Karnataka *vide* two government orders adjusted the grant of DA of 3% and 4% of basic pay towards calamity relief fund, without consent of employees. The impugned Orders were stuck down and the court held, "In the event of deduction other than statutory, the employer cannot deduct out of wages/salary without the written consent of the employee. That is the reason why the Payment of Wages Act has been enacted, the action of the State Government in appropriating the enhanced Dearness Allowance of 3% of basic pay granted for the period from 1.1.2003 to 31.5.2003 as contribution from the employees to Calamity Relief Fund without their consent is not justifiable in law." Concerning, the release of Dearness allowance, *vis-à-vis* the weak financial position of the State, it was held, "It is common knowledge that whenever the State's financial position is weak and the enhanced Dearness Allowance is released, the arrears of Dearness Allowance is ordered to be kept either in National Savings Certificate or credit the same to Provident Fund Account of the employees. Thus, Immediate cash payment was deferred for a few years."
The case of *Hitesh Bhardwaj* can be distinguished from *Nijaguni and Karnataka High Employees' Welfare Association*, as in the latter the enhanced dearness allowance was granted and then expropriated without written consent, whereas in the former the Central Government had merely frozen the payment of enhanced rate and not paid the enhanced rate at all.

order dated March 29,2020, the employer had the prerogative to make suitable orders concerning payment of dearness allowances in accordance with its service rules, keeping in tune with the poor financial condition caused due to the pandemic crisis.

VII. The Kerala Disaster and Public Health Emergency (Special Provisions) Ordinance, 2020 (Ordinance No. 30 of 2020)

The Kerala Government on April 23, 2020, initially passed an order[128] deferring payment of a portion of salaries of all its government employees. The High Court of Kerala stayed this government order vide an interim order dated April 28, 2020,[129] primarily on the ground that deferment of salary amounted to a deprivation of property, and deprivation of property by executive order, sans valid law, would prima facie be impermissible.

Subsequently, the Kerala Government, to validate the substance of the government order dated April 23, 2020, promulgated an ordinance,[130] purportedly exercising power under entry 6[131] and 41[132] of List II and Entry 20,[133] 23[134] and 29[135] of List III of Constitution of India. The ordinance *vide* section 4 and 5 contemplated that the government by a notification could defer payment of salaries to employees of the government, and employees of any institution, owned, controlled or aided by the government. The state government, on April 30, 2020, exercising its power conferred *vide* ordinance, passed an order[136] to defer the pay and allowances in part, to the extent of 20 percent of the total monthly pay and allowances. The said government order dated April 30, 2020, was challenged before the High Court of Kerala, which *vide* its interim

128 Addln. Chief Secretary (finance), Government of Kerala, vide order bearing No. "GO(Rt)No. 2859/2020/Fin" (23 Apr 2020). The gist of Government order is explained by the Kerala High Court vide order dated Apr 28, 2020, in *Kerala Vydyuthi Mazdoor Sangam (BMS)* v. *State of Kerala*, W.P(C) TMP No. 182 of 2020, at Para 3, "all Government employees who are in receipt of a gross salary of above Rs. 20,000/- shall be subjected to a deferment of a small portion of their salary. The said deferment is on the salary payable for the period April 2020 till August 2020. The quantum of salary proposed to be deferred under Ext. P1 is the salary equivalent to 6 days for each of the aforesaid months."

129 *Kerala Vydyuthi Mazdoor Sangam (BMS)* v. *State of Kerala*, W.P(C) TMP No. 182 of 2020.

130 *Supra* note 123.

131 Public health and sanitation; hospitals and dispensaries.

132 State public services; State Public Service Commission.

133 Economic and social planning.

134 Social security and social insurance; employment and unemployment.

135 Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

136 Additional Chief Secretary (finance), Government of Kerala, vide order bearing No. "G.O. (P) No. 53/2020/Fin." (30 Apr. 2020), para 1.

order dated May 05, 2020[137], refused to stay the ordinance and the government order dated April 30, 2020.

The events transpiring concerning the freezing of dearness allowances, deferring of payment of wages, and even wage cuts[138] by the 'model employer' indicates that any employer, as a matter of principle, must have the prerogative to be permitted to strike a balance between the capacity of the employer to pay and the need of the employee to be paid with fair wages. It is this opportunity of readjusting the terms of services, more particularly concerning payment of wages, which needs to be extended to private employers as well, especially at times of emergency like a pandemic.

VIII. Interim order of the Supreme Court in deciding the legality of March 29, 2020 order

The issue concerning the mandatory payment of wages under the order dated March 29, 2020, along with the looming threat of coercive action against employers, has reached the doors of the Supreme Court.[139] Despite the order dated March 29, 2020, ceasing to have effect vide the fourth-order of lockdown from May 18, 2020,[140] the Apex court is considering the batch of petitions, since the petitioners have challenged the vires of the order and also the vires of section 10(2)(l) of the Disaster Management Act, 2005.[141] The Supreme Court, after hearing the batch of petitions, in the interim order dated June 12, 2020, has observed that: [142]

> It cannot be disputed that both Industry and Labourers need each other. No Industry or establishment can survive without employees/labourers and vice versa. We are thus of the opinion that efforts should be made to sort out the differences and disputes between

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137 *Kerala N.G.O Association* v. *State of Kerala,* W.P (C) TMP No. 279 of 2020 (05 May, 2020) at para 20. The court observed that the defect was rectified and the present order under challenge was validly enacted under a 'law', *viz.,* the ordinance.

138 See further, the plea against salary cut of police personnel dismissed as withdrawn by the Supreme Court of India vide order dated May 5, 2020 in *Bhanupratap Barge* v. *Union of India*, WP(C) Diary No. 11016/2020. For details of plea, see, Shruti Mahajan, "Cannot entertain policy matters under Article 32 jurisdiction, SC disposes of plea challenging salary cuts of cops during COVID-19." *Bar and Bench*, May 5, 2020, *available at:* https://www.barandbench.com/news/litigation/application-in-supreme-court-seeks-extension-of-atma-nirbhar-scheme-for-provision-of-rations-to-migrant-workers-for-at-least-12-months (last visited on July 16, 2020).

139 There are about 12 Petitions currently being heard by the Supreme Court of India. See further, live law network, "SC Says No Coercive Action Against Employers In Two Pleas Challenging MHA order On Full Payment Of Wages; No Interim order In Connected Cases." Live Law, (May 15, 2020), *available at*: https://www.livelaw.in/top-stories/mha-order-on-full-wages-payment-amid-covid-lockdown-sc-no-coercive-action-156822 (last visited on May 24,2020).

140 *Supra* note 5.

141 *Ficus Pax Private Ltd*. v. *Union of India,* 2020 SCC OnLine SC 503 (12 Jun, 2020).

142 *Id.* at para 37.

the workers and the employers regarding payment of wages of above 50 days and if any settlement or negotiation can be entered into between them without regard to the order dated 29.03.2020, the said steps may restore congenial work atmosphere.

Consequently, the Apex Court, with great judicial dexterity, has, in its interim order, by balancing the conflicting rights between the employers and employees, has granted leave to the employers of private establishments to enter into negotiations and settlements with its employees regarding payment of wages. In the event, the employer and employees were unable to settle the dispute by themselves, a request could be made to the concerned labour authorities for the latter to aid the former parties in arriving at a settlement. These conciliatory efforts were ordered by the court to be arrived at *dehors* the order dated March 29, 2020, and without prejudice to the rights of the parties.

The interim order of the apex court is certainly a step in the right direction as it has given a window of opportunity for settlement[143] to be arrived at between the employers and employees, who have both indubitably suffered due to the COVID-19 global pandemic.

IX. Conclusion

The possibility of the attraction of penal action to implement an unlawful, unconstitutional, and ultra vires order is an alarming situation that looms above the fabric of legitimate rights of persons like the 'swords of Damocles.' The employer at most has a moral obligation to pay wages and not terminate employment. However, as discussed earlier, they cannot have any legal obligation as contemplated under the Order dated March 29, 2020. The abdication and dereliction of duty by the government cannot be the basis for creating liability more fully penal liability against private individuals with a purported intent to safeguard the rights of labourers and employees.

The real solution seems to lie in the formulation of a comprehensive policy by the government, coupled with active dialogue and collaboration between the employer and employee. The

143 The employers may take into consideration factors, such as its financial capacity, comparative wages paid in similar region-cum industry and account and for financial need of the employees, to arrive at a settlement to vary the terms of employment concerning payment of wages in consonance with the Payment of Wages Act, 1936. It must be noted that the settlement must be real and not be merely illusionary, for instance payment of wages below 'minimum wages', as the same would be illegal, unjust and void in law. See further the case of *U. Unichoyi* v. *State of Kerala,* (1962) 1 SCR 946, at para 13, wherein it is held that capacity to pay is an irrelevant consideration for fixation of minimum wages.

government must encourage and incentivize an amicable solution to be arrived at between the employer and employee at the time of labour crisis. The example of *Côte d'Ivoire,* a West African country, as explained by the ILO in its report[144] concerning the solution to the labour crisis set against the backdrop of political conflict, may be examined for this purpose. Workers in Côte d'Ivoire were temporarily laid off with the hope of being reinstated once the impasse of crisis passes. In these tumultuous times, the constructive collaboration between employers and workers *via* Commission Indépendante Permanente de Concertation (CPIC)[145] has formulated a mechanism under which the employer was required to pay at least one-third of the salary during the period of technical unemployment. Furthermore, to ensure minimal lay-offs, the employers and employees worked together to find a workable rotation system of employment.

Similarly, at the time of crisis, instead of being at loggerheads with one another, it is essential to establish and foster trust by forging solidarity between employer and employee to reach an amicable workable solution such that the employee is not left to fend for himself at the time of crisis and the employer is not overburdened to the extent of killing the business itself which is the very means and machinery of employment generation. Legally, the order dated March 29, 2020 must be struck down or at least in the alternative may be read down to be construed as an administrative instruction, incapable of being enforced for any purported violation.

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144 International Labour Organisation, *Managing Conflicts and Disasters: Exploring Collaboration between Employers' and Workers' Organizations Conflict, post-conflict, and fragile settings*, PRODOC, ILO 14 (2020), *available at*: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_741421.pdf (last visited on May 25, 2020).

145 *Id*. at 14 the CIPC is a bipartite forum consisting of representatives of the workers' and employers' organizations created in 1995.