
COVID-19 AS A HEALTH EMERGENCY: LEGAL IMPLICATIONS THROUGH THE LENS OF DISASTER MANAGEMENT ACT, 2005

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ABSTRACT

In this era of globalization and technological advancement, the whole globe has come to a halt due to the outbreak of COVID-19. There have been many health emergencies in the past but the kind of outbreak the COVID 19 had has been immense and appalling. Further, it is also the first major health emergency in this era of globalization where we see mass movement around daily. The tendency of transmission through this virus has paralyzed the whole of mankind with aporia. With growing numbers of infected people around the globe, the major powers have been working extensively to overcome this scenario.

Health Emergencies are extraordinary events which are determined to constitute a public health risk. In India, though we have invoked the Disaster Management Act, 2005 to combat the current health emergency, however, in no way it was designed to cater the health emergencies and intricacies related to it. The bare perusal of the “disaster” under the Act of 2005 is wide and does not allude to the medical emergencies and other aspects related to it. In India, where a major chunk of people are living in poverty are finding this pandemic unbearably difficult for those without a social and economic cushion. Further, the inability of the legislation and governance has exacerbated the existing inequalities and vulnerabilities in the state.

The objective of this paper is to analyse the current scenario and whether the Disaster Management Act and other available legislation are enough to cater to health emergencies in the state. Furthermore, the authors shall also analyse the International legal framework in order to derive any relevant jurisprudence or model law to suffice the necessity of a health emergency such as the outbreak of Covid-19. In essence, The authors shall also discuss the role of the courts in India amidst this situation in various matters.

Keywords: Health Emergencies, COVID 19, Migrant workers etc.

I. INTRODUCTION

The whole world is going through distress and due to the outbreak of COVID-19 various spheres of life of the people have been affected. The COVID-19 which is commonly known as Novel Corona Virus is caused by the severe acute respiratory syndrome coronavirus-2. It has been declared as a public health emergency by the WHO owing to an increasing number of victims affected by the virus in late January 2020.¹ Health Emergency if we analyse has been defined in the International Health Regulations by the WHO as “an extraordinary event which is determined to constitute a public health risk to the other states through the international spread of disease and to potentially require a coordinated international response”. This definition implies a situation that is²:

- serious, sudden, unusual or unexpected;
- carries implications for public health beyond the affected State’s national border; and
- may require immediate international action.

It is pertinent to note that the current era of inexorably globalized world people travels, business transactions take place and rely on networks of exchange. However, due to the recent outbreak of COVID-19, we have seen various countries putting restrictions on travel and day to day life of people. Meanwhile, Corona Virus has been declared pandemic which means an epidemic occurring worldwide.³ India, in this case, has declared a complete lockdown to fight this outbreak and due to the rising number of COVID-19 affected patients. However, in-country where more than half of the world's more than 7.3 billion people do not have access to essential health services. Further, an estimated 800 million already financially vulnerable people spend at least 10% of their meagre household budgets on health care expenses either for themselves, their sick children or other family members has been facing a really hard time coping up with the restriction related to the health emergency.⁴ Moreover, the lack of support from the

¹ WHO Director-General, WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (January 30, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>

² WHO, Strengthening health security by implementing the International Health Regulations (2005), at 26, WHO/CDS/EPR/IHR/2007.1

³ Health Kelly, The classical definition of a pandemic is elusive (July 27, 2011), <http://www9.who.int/bulletin/volumes/89/7/11-088815/en/>

⁴ Mamiko Yoshizu, World Bank and WHO: Half the world lacks access to essential health services, 100 million still pushed into extreme poverty because of health expenses (Dec. 13, 2017), <https://www.who.int/news->

Government is ultimately forcing the destitute and vulnerable to draw on their life savings, sell their assets, or borrow the needed funds.

India has invoked two laws that are Disaster Management Act, 2005 and the Epidemic Act, 1897, to combat the ongoing COVID 19, however, none has an inclusive definition of the “health emergencies” nor “pandemic”. Further, analysing the current scenario in the state the author feels that there are deficiencies in the public health system in India in light of the current COVID 19 outbreak as the Disaster Management Act, 2005⁵ lacks the legal preparedness and intricacies required during a health emergency. The aforementioned argument is clear by the bare perusal of the definition of “Disaster” under 2(d) of the Act of 2005⁶ which does not allude to medical emergencies and other intricacies especially related to the vulnerable in the state. Moreover, the latter i.e, the Epidemic Act⁷ which comprises merely five sections can be argued insufficient to deal with the pandemic in the present era of globalisation. Further, this Act was amended in the year 1937, wherein the power was transferred to the state government, whereas the central government was given very limited powers relating to inspection of vessels on ports. Also, the existence and usage of this law in the current scenario raises very pertinent questions such as - whether the existing legal framework in India, which governs the measures being taken by the central and state governments for control of the spread of infectious diseases, is adequate? If not, what changes are required and whether the government is making sufficient efforts to bring about such changes?

The Disaster Management Act 2005 is used extensively by the Government to issue binding directions and guidelines to state governments. Also, there are certain states which have their own laws such as the Madhya Pradesh Public Health Act, 1949 which have provisions regarding notification of infectious diseases, isolation of affected persons, temporary usage of premises during outbreaks etc. But it is pertinent to note that not all the states in the Union have such laws nonetheless considering all the facts even in the absence of any specific law or definition related to Health Emergency in the country, the central Government is quite successful in tackling the outbreak related to COVID 19. However, it is evident that the prevailing legislation at the central and state lacks uniformity with no comprehensive measures

room/detail/13-12-2017-world-bank-and-who-half-the-world-lacks-access-to-essential-health-services-100-million-still-pushed-into-extreme-poverty-because-of-health-expenses

⁵ Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005 (India).

⁶ Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005, s. 2(d).

⁷ Epidemic Diseases Act, 1897, No 3, Acts of Parliament, 1897.

with regard to dealing with the prevention and mitigation of a pandemic with a degree such as COVID 19. There have been instances in the past where successive governments have tried to bring laws related to Public Health which covers Health Emergencies one such recent instance is that of Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill, 2017. However, the aforementioned bill is yet to pass by the Parliament.

II. LEGAL FRAMEWORK VIS-À-VIS HEALTH EMERGENCIES

In India, the protection of human life is enshrined under Article 21⁸ which also includes the circumstances during health emergencies. Further, the Constitution envisages the establishment of a welfare state at the federal level as at the state level. It is the primary duty of the Government to safeguard the interests of people especially during the times when he/she is in need of medical care.⁹ Moreover, during health emergencies, it is a time of despair and if we analyse the current scenario the outbreak has caused fear and anxiety leading to prejudices against people and communities, social isolation and stigma.¹⁰ The aforementioned behaviour may culminate into increased hostility, chaos and unnecessary social disruptions. Cases have been reported of people affected with COVID-19 as well as healthcare workers, sanitary workers and police, who are in the frontline for management of the outbreak, facing discrimination on account of heightened fear and misinformation about infection during this state of emergency.¹¹ Though the state has not per se declared a health emergency in the state as per their order, however, it national lockdown can be promulgated as a one due to the ongoing health emergency.

Further, under the Constitution there are provisions regarding the proclamation of emergency can be found under Article 352¹² of the Constitution. However, it does not include or explicitly talks of health emergency which can be seen by a bare perusal of the definition that states "emergency can be declared on the grounds of war, external disturbance and internal disturbance". The term internal disturbance was a flexible term broad enough to include disturbances caused due to an epidemic which was later replaced with "armed rebellion" by the 44th amendment to the Constitution, except Article 355¹³. Moreover, if we look at Article

⁸ INDIA CONST. art. 21

⁹ Paschim Banga Khet Mazdoor Smity v. State of West Bengal, (1996) 4 SCC 37

¹⁰ Suo Motu, W.P No. 7492 of 2020, 2020 SCC OnLine Mad 938

¹¹ Devesh K Pandey, Coronavirus | Don't discriminate against COVID-19 patients, health workers: Health Ministry, The Hindu (April 08, 2020, 07:57 PM), <https://www.thehindu.com/news/national/coronavirus-dont-discriminate-against-covid-19-patients-health-workers-health-ministry/article31291391.ece>

¹² INDIA CONST. art. 352

¹³ INDIA CONST. art. 355

355 it casts a duty on the Centre to protect all states against external aggression and internal disturbance, and ensure that the governance of states is carried on in accordance with the Constitution and it will also direct the state governments how to use its executive power, and the Parliament to make laws on matters from the State List. It is pertinent to note that the Constitution, under provisions for an emergency, provides the central government with some overriding powers and the use of that power or "invasion" by the centre of the Provincial field.

Further, a few years back there was a report by the Sarkaria Commission on the provisions of the Constitution had stated with reference to emergency provisions that can be conceived these provisions as more than a mere grant of overriding powers to the Union over the States. Moreover, the Report retaliated that the term "internal disturbances" has a broad scope and it can be nature-made also. As we all know that natural calamities of unprecedented magnitude such as floods, cyclones, earthquakes and epidemics may paralyse the government of a state and put its security in jeopardy. Therefore, according to the Constitution, a health emergency being invoked by the centre, though not covered by Article 352 which deals with the proclamation of emergency on the grounds of war, external aggression and armed rebellion, could be covered under internal disturbance. However, an amendment is a dire need of time owing to the current scenario which includes many intricacies.

Further, as pointed out earlier the primary legislation which has been used to combat the ongoing pandemic is Disaster Management Act, 2005 through which COVID-19 has notified a disaster and as a "critical medical condition or pandemic situation". The provision of the aforementioned Act has allowed the government to use the National Disaster Response Fund¹⁴ to contain the rise in COVID-19 cases and to make policies at the national, state and district levels. However, in a country with more than a billion people does not have a recent statute to govern protection and regulation against the spread of a pandemic like COVID 19 is alarming. Recently a PIL¹⁵ moved by two doctors who invoked Section 11 of the Disaster Management Act, 2005¹⁶ seeking a direction to the Government in order to formulate a National Plan as prescribed. The petitioners also emphasized on "One Nation, One Plan" as an imperative ensure success and effective implementation of Disaster Management Act, 2005 whilst highlighting that the implementation of the Covid-19 Regulations has been piecemeal, sporadic, slow and not uniform. As both the PILs were clubbed, the petitioners, in this case, we're also granted

¹⁴ Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005, s. 46

¹⁵ *Jerryl Banait v. Union of India*, 2020 SCC OnLine SC 357

¹⁶ Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005 (India).

with the same interim reliefs.

It is appalling that the tool through which the government is inspecting and imposing penalties in the current scenario is a pre-Independence era law i.e., Epidemic Diseases Act which also was only recently amended making it more stringent and effective to curb the rising cases of COVID 19 across the country. With all the aforementioned discussions and analysis the author would like to point several questions related to the legislation in force and will the Constitution allow the government to take more serious measures if the situation worsens? Can the centre declare a health emergency in India explicitly? Though India has a plethora of laws and guidelines, there is still a need to strengthen its legal framework to deal with such an emergency, including coordination and implementation issues. This is especially so considering that the main legal weapon the government possesses today to deal with COVID-19 is the Epidemic Diseases Act¹⁷, a law of colonial vintage, and the Disaster Management Act of 2005 which does not incorporate the specific approach required to deal with an emergency of such severe proportions. In such a scenario the role of our apex courts is very important which shall be covered in the next part of the paper.

III. ROLE OF COURTS AMIDST THE OUTBREAK OF COVID-19: ACTIVE OR PASSIVE?

In any country, the Judiciary plays the important role in interpreting and applying the law of the land and interpreting controversies between its subjects.¹⁸ With the world's lengthiest constitution¹⁹ and largest set of codified laws, the Indian courts have always been burdened with heaps of cases on any ordinary working day. However, the unprecedented outbreak of Covid-19 has put everything to halt while significantly affecting the day to day court's functioning as well. In any given situation, the last hope rests with the judiciary, and thus, it is impossible to imagine an outright discontinuance of court's functioning, even though it is a pandemic-like situation due to the outbreak of Covid-19. In fact, the active functioning of courts become much more important in a situation of health emergency.

3.1 An interplay between courts and health sector vis-à-vis the legal implications

With courts partially functioning on a virtual platform²⁰, it has been hearing "urgent" and "very

¹⁷ Epidemic Diseases Act, 1897, No 3, Acts of Parliament, 1897.

¹⁸ M.P. Jain, Indian Constitutional Law 191 (Lexis Nexis, 7th edn., 2016).

¹⁹ *Ibid* at 11.

²⁰ Editorial, Supreme Court to hear urgent cases via video, The Hindu (26 March 2020) <https://www.thehindu.com/news/national/supreme-court-to-hear-urgent-cases-via-video/article31176298.ece>

urgent matters” as far as possible.²¹ The outbreak of Covid-19 has undoubtedly created a health emergency situation in the country and across the globe. Therefore, here is a brief analysis on how the courts including the Supreme Court have been functioning and their contribution to bring stability to the holistic situation so created in various sectors of the society.

Primarily, it would be pertinent to scrutinize the contribution of courts in the health sector with regard to the directions pertaining to hospitals, health workers, kits, and medicines. Secondly, on a doctrinal aspect, a critical appraisal of legislations, viz., Disaster Management Act, 2005, Epidemic Disease Act, 1897, and various other laws to deal with the ongoing pandemic shall be covered further. Thirdly, other aspects like financial and medical aid to the poor and various other sectors, rent control, bail applications, etc.

3.2 Health sector

With the health sector being the most vulnerable and the most critical stakeholders of the society during the outbreak of Covid-19, it is always expedient for the Government to primarily raise funds for creating more facilities and infrastructure. It was reported at various instances that there existed a lack of Personal Protection Equipment (PPEs), and masks for the health workers,²² the Government ordered 15 million kits from China²³. A few cases and petitions which were filed before the Supreme Court and various other courts of this country have been discussed in brief.

3.2.1 Directions for making the availability of PPEs, masks and other medical facilities

With respect to the kits, masks and Protective Gears, a PIL was filed in the Supreme Court highlighting the Government’s inefficiency and inexperience to tackle the calamity. The following were prayed before the Hon’ble Court²⁴; firstly, making available protective equipment in Metros and in Tier 2 and 3 cities to health workers; secondly, increasing facilities for testing and screening; and thirdly, framing guidelines for testing through private agencies,

²¹ Aditi Singh, Delhi High Court decides to not restrict virtual hearings to 'very urgent matters'; pending matters may also be taken up when urgency arises, Bar and Bench, (18 April 2020) <https://www.barandbench.com/news/delhi-high-court-decides-to-not-restrict-virtual-hearings-to-very-urgent-matters>

²² Payel Majumdar Upreti, PPE shortage throws doctor out of gear, The Hindu Business Line, (10 April 2020) <https://www.thehindubusinessline.com/blink/cover/ppe-shortage-throws-doctors-out-of-gear/article31307053.ece>

²³ Ananth Krishnan, India to get 15 million PPE kits from China, The Hindu (14 April 2020)

²⁴ Dr. Jerryl Banait v. Union of India, Writ Petition (Civil) Diary No.10795/2020

including pricing and modalities for testing. The Bench comprising of Justice Ashok Bhushan and Justice Ravindra Bhat were satisfied that the Petitioner had made out a prima facie case and was thus entitled to an interim relief. The Court made four directions to the respondents as an interim order as follows:

- a) The respondents were directed to ensure availability of appropriate PPEs, including sterile medical/Nitrile gloves, starch apparels, medical masks, goggles, face shield, respirators (i.e. N-95 Respirator Mask or Triple Layer Medical Mask or equivalent), shoe covers, head covers and coveralls/gowns to all Health Workers including Doctors, Nurses, Ward Boys, other medical and paramedical professionals actively attending to, and treating patients suffering from COVID-19 in India, in Metro cities, Tier-2 and Tier-3 cities.
- b) The Government of India, respective States/Union Territories and respective Police authorities are directed to provide the necessary Police security to the Doctors and medical staff in Hospitals and places where patients who have been diagnosed COVID-19 or patients suspected of COVID-19 or those quarantined are housed. Necessary Police security be also extended to Doctors and other medical staff who visit places to conduct screening of people to find out symptoms of disease.
- c) The State shall also take necessary action against those persons who obstruct and commit any offence in respect to performance of duties by Doctors, medical staff and other Government Officials deputed to contain COVID-19.
- d) The Government shall explore all alternatives including enabling and augmenting domestic production of protective clothing and gear to medical professional. This includes the exploring of alternative modes of production of such clothing (masks, suits, caps, gloves etc.) and permitting movement of raw materials. Further, the Government may also restrict export of such materials to augment inventory and domestic stock.

3.2.2 Petition for the formulation of National Plan under Section 11 of Disaster Management Act, 2005

The Jerryl Banait matter was taken up along with another PIL moved by two doctors²⁵ who invoked Section 11 of the Disaster Management Act, 2005 seeking a direction to the Government in order to formulate a National Plan as prescribed. The petitioners also

²⁵ Dr. Sneha Jain and Ors. v. Union of India and Ors., W.P. (Civil) Diary No(s). 10830/2020.

emphasized on “One Nation, One Plan” as an imperative ensure success and an effective implementation of Disaster Management Act, 2005 whilst highlighting that the implementation of the Covid-19 Regulations has been piecemeal, sporadic, slow and not uniform. As both the PILs were clubbed, the petitioners in this case were also granted with the same interim reliefs.

3.2.3 Directions for free Covid-19 testing

In a very significant petition moved to the Supreme Court entitled *Shashank Deo Sudhi v. Union of India and Ors.*²⁶, the Court passed an interim order on 8th April 2020 directing the respondents to carry out free tests relating to Covid-19. According to the order, the free tests were supposed to be carried out in approved Government and private laboratories, while further is said that all tests pertaining to Covid-19 must be conducted in NABL accredited labs or any other agency approved by Indian Council of Medical Research (ICMR) or by World Health Organisation (WHO).

However, the interim order dated 8th April 2020 in *Shashank Deo Sudhi* was modified and it was directed that free testing of Covid-19 can only be availed by persons covered under Aushman Bharat- Pradhan Mantri Jan Aarogya Yojna (AB-PMJAY).²⁷ Thus, persons belonging to Economically Weaker Sections (EWS) shall be entitled to free tests as per the modified order to the exclusion of tests to be carried out in private labs. On a critical note, the modified interim order appears to have no nexus which the object sought to be achieved, amidst the pandemic. The order appears to be arbitrary on the simple reason that the government’s liability to incur the expenses for tests for the same test is based on a classification when the present circumstances has caused to economic distress to all classes of citizens at different levels.

3.2.4 Right to health as Fundamental Right and how the free testing interim order dated 8th April could have been preserved constitutionally.

The Supreme Court in plethora of cases has held that every citizen has a right to lead a dignified life and right to health is an integral part of Article 21 of the Constitution.²⁸ It is the duty of the government to provide adequate medical aid to its citizens.²⁹ The Supreme Court could have

²⁶ *Shashank Deo Sudhi v. Union of India and Ors.*, Writ Petition (Civil) Diary No(s). 10816/2020

²⁷ National Health Agency, *Ayushman Bharat-Pradhan Mantri Jan Arogya Yojna*, Ministry of Health and Family Welfare, Government of India, (November 2018).

²⁸ *Devika Biswas v. Union of India and Ors.*, (2016) 10 SCC 726.

²⁹ *Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal*, (1996) 4 SCC 37

preserved the constitutional spirit of the first interim order, whilst making an appropriate modification to the exclusion of the supposedly 'privileged' or the 'creamy layer' or the 'upper class' of the society who were economically sound to pay for the Covid-19 tests in the private labs.

Furthermore, whilst upholding the constitutional spirit, instead of outrightly excluding the private laboratory from the umbrella of free testing, it could have directed the government to frame a policy or scheme for the re-imburement of the costs incurred by anyone who incurs expenses in a private laboratory, till the pandemic situation existed. Given the health emergency, notwithstanding the fact that 'creamy layer' or the 'upper class' are capable enough to incur the expenses in private laboratories, this pandemic circumscribes the majority population under economic distress. Thus, where people belong to circumstantially same condition, it would have been expedient for the court to exercise the aforesaid interim alternatives in order to uphold the mandate set out in *Anwar Ali Sarkar*³⁰ and *Chiranjit Lal Chawdhary*³¹ by the Supreme Court, inter alia, "all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed". However, the issue with respect to re-imburement has been kept to be decided at a later stage. In a nutshell, the intention of the Supreme Court, prima facie commendable, albeit, it is not expected from the court's to pass an order which does not uphold the constitutional spirit at any stage.

3.3 Supreme Court empowered under the Disaster Management Act, 2005 to review Government actions

The PIL in *Shashank Deo Sudhi*³² succeeded before the Supreme Court and a few interim reliefs were also granted to the Petitioner. However, it is pertinent to note that Section 71³³ empowers the Supreme Court and the High Courts to review government actions pertaining to the subjects falling under the Disaster Management Act, 2005 (DM Act), but the interim order does not mention of any legal provision of DM Act as well as the Epidemic Disease Act, 1897. The court is yet to decide on the issue whether it can pass such orders against the private entities as well amidst such circumstances where it is expected that the State's should have such powers to extract from the private entities whatever is required.

³⁰ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

³¹ *Chiranjit Lal Chawdhary v. Union of India and Ors.*, 1951 AIR 41.

³² *Shashank Deo Sudhi v. Union of India and Ors.*, Writ Petition (Civil) Diary No(s). 10816/2020

³³ Disaster Management Act, 2005 (Act No. 53 of 2005)

In this situation, no advisory, directions, or regulations were released by the Government with respect to the costs of testing, except for the ICMR's advisory dated 17th March 2020 which was further notified by the Ministry of Health and Family Welfare in accordance with Section 10(2)(1)(i) of DM Act.³⁴ While it would not be appropriate to nitpick every small infirmity in the orders of the courts as long as they serve in the larger interest of the country, it would be of utmost importance for the courts to keep in mind that such orders shall be subject to stare decisis in the future. It appears that the interim order in Shashank Deo Sudhi was modified with a view to remove an extreme philanthropist element and to 'balance-out' the resources and finances between the government and private entities. In arguendo, it would have been perfectly fine, even if the first interim order wasn't modified.

3.4 Better Security for health workers, doctors and persons affected by Covid-19

3.4.1 Order for safeguarding the eviction of medical professional tenants

In a positive move, the relief however, came from the Delhi Government in an order stating that strict penal actions shall be taken against the landlords or house owners forcing the eviction of doctors, paramedical staff, and other health professionals.³⁵ It is always a positive sign when the relief primarily comes from the government and not the courts.

3.4.2 Data Privacy of Covid-19 affected patients

In this health emergency, certain other reliefs pertaining to data privacy of persons affected by Covid-19 came as a blessing. In *Girish Bharadwaj v. State of Karnataka and Ors.*³⁶ the Karnataka High Court rejected a plea seeking public display of the information of the persons who have contracted Covid-19 by attending Nizamuddin event. The court expressed its inability to issue any directions for the release of such data on the ground that it is a matter of policy and the state should see if such information can be made public or not.

Another beguile step, and allegedly violating data privacy of the Covid-19 patients, was taken by the Kerela Government wherein it transferred personal data of persons in quarantine to an

³⁴ Guidelines for Covid-19 testing in private laboratories in India, Ministry of Health and Family Welfare, Government of India, (21st March 2020), available at <https://www.mohfw.gov.in/pdf/NotificationofICMguidelinesforCOVID19testinginprivatelaboratoriesIndia.pdf>

³⁵ Health and Family Department, Government of National Capital Territory of Delhi, No.F.51/DGHS/PH-IV/COVID-19/2020/prsecyhfw/3316-30

³⁶ *Girish Bharadwaj v. State of Karnataka and Ors.*, Writ Petition No. 6678 of 2020 (GM-RES) PIL.

American based company, Sprinkl. ³⁷ In a PIL entitled Balugopalakrishnan v. State of Kerala and Ors. ³⁸ moved before the Kerala High Court, the court sought a response from the state on data privacy concerns. The court observed that medical data is certainly sensitive, and further added that the court did not want a Covid epidemic to be substituted by a data epidemic.

IV. RIGHTS AVAILABLE TO INDIA AND ITS OBLIGATIONS UNDER INTERNATIONAL LAW

4.1 Compliance with the WHO Guidelines

The PIL in Jerryl Banait ³⁹ case was also moved with a view to direct the Government to effectively comply with the WHO Guidelines for maintaining essential health services during the outbreak. The Supreme Court in plethora of cases ⁴⁰ has held that in view of Article 51 of the Constitution the Courts must interpret the language of the Constitution, if not intractable, which after all an intractable law, in the light of United Nations Charter and the solemn declaration prescribed to India. ⁴¹ The lockdown in the country has comparatively been way better than many other countries. However, India has fallen significantly flat whenever the question of having maximum tests arises. In this pursuit, the infrastructure in health sector was found to be inadequate. The petitioner in this case was successful in obtaining interim measures from the Supreme Court.

4.3 Right to Health and Health Emergency as understood under International Law

While the outbreak of Covid-19 is indisputably a health emergency, however, the phrase 'health emergency' has not been defined explicitly under any international legal framework. The general provision under International Covenant on Civil and Political Rights (ICCPR) exists. Article 4(1) ⁴² allows the State parties to take measures derogating the provisions of ICCPR except Articles 6, 7, 8, 11, 15, 16 and 18. Therefore, the state parties to ICCPR are bound to take all measures to meet any exigencies as the right to life doesn't get suspended at

³⁷ Vishnu Verma, Explained: What is the Sprinkl row Kerala govt's Covid-19 response is embroiled in?, The Hindu, 21st April, 2020 available at <https://indianexpress.com/article/explained/what-is-the-sprinkl-row-kerala-govts-covid-19-response-6371205/>

³⁸ Balugopalakrishnan v. State of Kerala and Ors., Writ Petition (Civil) Temporary No. 84 of 2020.

³⁹ Dr. Jerryl Banait v. Union of India, Writ Petition (Civil) Diary No.10795/2020

⁴⁰ Visakha v. State of Rajasthan, AIR 1997 SC 3011

⁴¹ Kesavananda Bharathi v. State of Kerala, (1973) Supp. SCR 1

⁴² Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, UNGA Res 39/46.

any stage.⁴³

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) implicitly states that the state parties must recognize the right of everyone to the enjoyment of highest attainable physical or mental health. To put the discussion in perspective, it is pertinent to note that a collective reading of Article 4(1) of ICCPR and Article 12 of ICESCR, the state parties are under an obligation to provide highest attainable health standards even in a situation of health emergency.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights recognizes health emergency within the ambit of “public emergency” as enshrined under article 4(1) of ICCPR. In essence, the definition of health emergency can be derived from the aforesaid provisions and covenants.

V. CONCLUSION

The degree in which COVID 19 has affected is dreadful across the globe and with advanced technologies, even the first world countries are also failing to curb this obstacle. In light of India's situation though the situation is relatively better than most the countries, however, it has also revealed the loopholes in the country's legislation vis-à-vis Health Emergencies. Though legislation like the Disaster Management Act caters the temporary, however, their primary objective is not to tackle disease outbreaks. The Epidemic Diseases Act, on the other hand, is a colonial-era law, which means it was enacted at a time when the concept of fundamental rights, as laid down in the Constitution, did not exist. The law is vaguely-worded, allowing the government to take temporary measures as it "shall deem necessary" to contain an outbreak. The Courts in these times of distress are surely safeguarding the interests of the people, especially to that of the medical professionals. In *Girish Bharadwaj v. State of Karnataka and Ors.*,⁴⁴ the Karnataka High Court rejected a plea seeking a public display of the information of the persons who have contracted Covid-19 by attending Nizamuddin event. The court expressed its inability to issue any directions for the release of such data on the ground that it is a matter of policy and the state should see if such information can be made public or not.

One of the important aspect during any health emergencies is privacy which is also enshrined

⁴³ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, UNGA Res 39/46, Article 6.

⁴⁴ *Girish Bharadwaj v. State of Karnataka and Ors.*, 2020 SCC OnLine Kar 399

in Part III of our Constitution, however, due to the measures taken by the state to quarantine people and allegedly violating data privacy of the COVID-19 patients, was taken by the Kerala Government wherein it transferred personal data of persons to an American based company, Sprinklr.⁴⁵ However, due to the last-minute intervention, the people of the aggrieved has been sufficed and the court sought a response from the state on data privacy concerns.⁴⁶ Further, with regard to the executive machinery it is clear due to the absence of specific legislation or amendments in the existing legislation there is a glaring gap between the preparedness and implementation vis-à-vis Health Emergencies. Further, though the Disaster Management Act, 2005 empowers the Government to direct in light of pandemic, however, there is explicitly no control or supervision by any authorities. The author would like to quote Lord Atkin "amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace".⁴⁷ India at this present stage has a clear opportunity to amend the existing legislation as according to the standards of WHO's report titled International Public Health Hazards: Indian Legislative Provisions to strengthen its machinery to function in a fluid manner during pandemics or any health emergencies.

⁴⁵ Vishnu Verma, Explained: What is the Sprinklr row Kerala govt's Covid-19 response is embroiled in?, *The Hindu* (April 21, 2020), <https://indianexpress.com/article/explained/what-is-the-sprinklr-row-kerala-govts-covid-19-response-6371205/>

⁴⁶ *Balugopalakrishnan v. State of Kerela and Ors.*, Writ Petition (Civil) Temporary No. 84 of 2020.

⁴⁷ *Liversidge v. Anderson*, (1942) AC 206.