

## “A Critique of India’s Legal Responses to COVID-19”

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A nation’s strength is determined by their response to their biggest challenges and how they overcome them. Coronavirus pandemic is testing the resolve of nations all over the globe. In India, while the number of Coronavirus disease cases has crossed 8 Lakhs, the battle against the virus is being fought on medical, ad ministerial, legal and humanitarian fronts. However, on the legal front, the response seems to be inadequate.

### **Need for a single national framework:**

India has taken recourse to various pieces of legislations and sections of criminal law to deal with dangers of the pandemic, but they all have been proved weak and ill-equipped with their provisions to deal with a pandemic of this scale. What we need is one comprehensive framework of law to deal with such crisis which arms the authorities with enough powers to take necessary action while balancing the rights of people. It should provide us with a roadmap for the upcoming challenges and safeguard us from future dangers by ensuring smooth functioning of the administrative machinery.

Coronavirus disease was classified as a ‘disaster’ under section 2(d) of the Disaster Management Act 2005. The definition of a disaster under the section is given as a “catastrophe, mishap, calamity or grave occurrence arising out of natural or man-made causes.....” but it doesn’t include an epidemic or an infectious disease. Regardless of this a nationwide lockdown was implemented on 23<sup>rd</sup> March under section 10(2)(1) of the Act which states that the National Executive Committee may “lay down guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster”. The lockdown resulted in suspension of all economic activities and transportation except for essential services and restriction in movement of people. Disaster Management Act talks about control and restriction of movement in affected areas, but nowhere does it specify suspension of economic activities, movement and right to employment.

<sup>1</sup>Another legislation being enforced is the Epidemic Diseases Act 1897, a colonial era law which was passed in the wake of the Bombay bubonic plague.

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<sup>1</sup>Manish Tewari, India’s fight against health emergencies: In search of a legal architecture, Observer Research Foundation (March 31, 2020), <https://www.orfonline.org/research/indias-fight-against-health-emergencies-in-search-of-a-legal-architecture-63884/>

Section 2(1) of the Act gives states wide powers to take any such measures or empower any person to take any such measures deemed necessary to prevent outbreak and spread of the disease.

The vaguely worded legislation doesn't elaborate on what kind of measures could be taken for prevention and is silent on the need to balance the rights of citizens and authority of the state to curtail their freedom.

The law talks about inspection of ships and people travelling in railways but keeps air travel out of its scope. According to Section 3 of the EDA, any person found in violation of the Act is deemed to have committed an offence under Section 188 Indian Penal Code (IPC): Disobedience to order duly promulgated by public servant. Offence under this section attracts punishment by imprisonment for 1 month and fine of 200 rupees which can be extended to 6 months and 1,000 rupees only when such disobedience causes danger to human life.

Under Section 188 IPC a court cannot take cognizance of the offence unless the public servant or his superior files a complaint in writing and therefore the police cannot initiate an action by registering FIR. The said provision is weak to tackle various challenges thrown towards administration.

<sup>2</sup>In Maharashtra letters have been sent to as many as 75,000 doctors in Mumbai with a private practice, requiring them to sign up for at least two weeks duty at one of the state-run hospitals. Those who defy the order risk prosecution under Epidemic Diseases Act and losing their license because of which there has been a lot of criticism of the outdated law.

Other Indian public health legislations with the objective to prevent and control epidemic diseases include –

- The Livestock Importation Act which regulates the import of livestock and its products which are likely to be affected by infectious diseases. It empowers the state governments to make rules for detention, inspection, disinfection or destruction of imported livestock.
- The Indian Ports Act which under Section 6 empowers the government to make rules for prevention of danger to public health and stopping spread of contagious diseases from vessels arriving at or sailing from any such port.
- The Drugs and Cosmetics Act under section 26B empowers the Central Government to regulate, restrict, or manufacture drugs in the public's interest to meet the requirements of an emergency arising due to epidemic or natural calamities.

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<sup>2</sup>Upmanyu Trivedi and Dhvani Pandya, Maharashtra: Mumbai invokes an 1897 law to draft doctors in its coronavirus fight, Deccan Herald (May 08, 2020 10:53 pm), <https://www.deccanherald.com/national/west/maharashtra-mumbai-invokes-an-1897-law-to-draft-doctors-in-its-coronavirus-fight-835280.html>

Airport Authority of India empowered by its statute has been issuing new flight guidelines and standard operating procedures regarding social distancing, sanitisation of baggage, PPEs for airport staff etc.

IPC sections apart from Section 188, equipped to handle offences endangering public health are - Section 269: Negligent act likely to spread infection of disease dangerous to life which provides for imprisonment which may extend to 6 months or fine or both and Section 270: Malignant act likely to spread the infection of disease dangerous to life which prescribes for punishment with imprisonment which may extend to 2 years or with fine or both.

Recently F.I.R. was registered against famed singer Kanika Kapoor under IPC sections 269 and 270 and 188 on the complaint of the Lucknow Chief Medical Officer. Section 144 of Criminal Procedure Code (CrPC) was imposed in Mumbai, Delhi and other parts of the country. It gives power to an executive magistrate to restrict an individual or persons residing in a particular place or to the public in general while visiting a particular place or area through a written order.

<sup>3</sup>We have seen reports of National Security Act 1980 being used to prosecute people misbehaving with frontline health workers. NSA, as the name suggests is used against those who pose a threat to national security. Section 13 of the act provides for preventive detention of an individual without a charge for up to 12 months. The Act has a large history of being misused. It is a well-established fact that the preventive detention law cannot be used as a punishment for past offences, but to prevent the person from committing a certain offence in the future.

<sup>4</sup>Another story came to light of Uttarakhand DGP warning Tablighi Jamaat members of Attempt to Murder charges under Section 307 IPC to be levied against them in case it was found that they hid from authorities.

Getting conviction on the said charge in court is a whole other story. The charges are likely to be dropped because of lack of *Mens Rea* (guilty state of mind).

The principle has been well laid down in *State of Maharashtra v. M.H.George*, 1965 AIR SC 722, that unless a statute, either clearly or by necessary implication rules out *Mens Rea* as the constituent part of crime, an accused should not be found guilty unless he has a guilty mind.

There is clear lack of a standard procedure or any kind of set guidelines when it comes to punishing people for offences endangering others during these times of pandemic. A person committing an offence in one state might be charged with just Section 188 while one

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<sup>3</sup> Rituparn Uniyal, Invocation of National Security Act, 1980 (NSA) amid Coronavirus Pandemic, LatestLaws.com (5 April 2020), <https://www.latestlaws.com/articles/invocation-of-national-security-act-1980-nsa-amid-coronavirus-pandemic-by-rituparn-uniyal/>

<sup>4</sup> Lalmani Verma, Uttarakhand DGP warns Tablighi members, The Indian Express (6 April 2020, 12:02:56 pm), <https://indianexpress.com/article/india/coronavirus-uttarakhand-dgp-warns-tablighi-members-dgp-6348933/>

committing same offence in different state may be charged under a law for threatening national security.

<sup>5</sup>President Ram Nath Kovind signed Epidemic Diseases (Amendment) Ordinance 2020 which made any attack on healthcare personnel as cognizable and non-bailable. Imprisonment for term of three months to five years was provided followed by a fine of Rs.50, 000 to Rs.2, 00,000. After that, somehow few states felt the need to bring in their own Ordinances. Uttar Pradesh made assault or misbehaviour with health and sanitation workers and police personnel to be punished with imprisonment of 6 months to 7 years and fine ranging from Rs.50, 000 to Rs.5, 00,000.

Rajasthan and Karnataka also brought their own version of ordinance. The range of imprisonment and fine is troubling. It violates the principle laid down by the Supreme Court in *Vikram Singh & Anr v. Union of India & Ors*, 2015, which stated that punishment must be proportionate to the nature and gravity of the offences for which the same are prescribed.

The government is making a good effort to ensure timely dissemination of information regarding the pandemic and all its policies. But currently there are more than 830 notifications pertaining to COVID-19 issued by state governments and more than 430 notifications issued by central government which has caused a lot of confusion among the citizens.

### **What we can learn from International Legal Responses to COVID-19:**

#### **<sup>6</sup>UK Coronavirus Act 2020:**

UK has enacted a detailed legislation dealing with the Coronavirus pandemic. The provisions of the act are time-limited for 2 years.

The act provides for emergency registration of nurses and other health care professionals as well as temporary registration of social workers.

It enables the government to restrict or prohibit public gatherings, control or suspend public transport, order businesses such as shops and restaurants to close.

The Act gives power to government to enrol medical students and retired healthcare professionals in the health services.

Schedule 15 of the act deals with information relating to the food supply chain. An appropriate authority will provide information regarding any risk of disruption to food supply chains to Secretary of State, other functionaries of the government and ministerial departments such as department of agriculture.

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<sup>5</sup> The Epidemic Disease (Amendment) Ordinance, 2020, PRS Legislative Research (April 22, 2020), <https://www.prsindia.org/billtrack/epidemic-diseases-amendment-ordinance-2020>

<sup>6</sup> Coronavirus Act 2020, legislation.gov.uk, <http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

Parts 1, 2 and 3 of Schedule 16 are related to provisions of temporary closure of educational institutions.

Schedule 23 and 24 gives temporary modification to Criminal Justice Act, Evidence Act and various other legislations to make for availability of live links in criminal proceedings and hearings.

The act states that payment by employers of statutory sick pay in respect of incapacity of work related to Coronavirus to be funded by Her Majesty's Revenue and Customs, thus safeguarding the interests of workers.

### **<sup>7</sup>Singapore Infectious Diseases Regulations 2020:**

Singapore's Ministry of Health came out with their regulations on 26<sup>th</sup> March. They define an 'at risk individual' as one who entered Singapore during control period, comes in contact with an infected person, one who underwent a Coronavirus test and awaiting results or appears to be exposed to risk of infection. The Regulations clearly spell out what the various Singapore government agencies have been advising businesses and workers to do.

Instructions for Businesses include the following:

Employers must implement Telecommuting. They must provide the necessary facilities for as well as instruct their employees/contractors/subcontractors to work from their own residence in Singapore during the control period, unless it is not reasonably practicable to do so.

Where employees/contractors/subcontractors are required to work at the office or other such workplaces, employers must implement the following safe distancing measures:

- a. Workers should be placed in two or more groups to avoid or minimise physical interaction between workers in different groups;
- b. Workers should not all arrive at and leave the workplace at the same time;
- c. Any worker who exhibits any symptoms or is physically unwell must report immediately to the employer; and
- d. The employer must ensure that there is a distance of at least one metre between any two individuals in the workplace.

The one-metre distance is applicable for seating arrangements at workstations, in meeting rooms, and in a queue or area.

Employers must cancel or postpone organised activities involving face-to-face interactions, except for the following:

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<sup>7</sup>Chian Voen Wong, Cecil C. Leong, Christopher Tan, COVID-19: Singapore's Ministry of Health Promulgates Infectious Diseases (Workplace Measures to Prevent Spread of COVID-19) Regulations 2020, NATIONAL LAW REVIEW, <https://www.natlawreview.com/article/covid-19-singapore-s-ministry-health-promulgates-infectious-diseases-workplace>

- a. If the activity is critical to the operations of the organization;
- b. Professional or vocational training or tests or certification events for professional or vocational purposes; or
- c. Educational activity for workers by an educational institution.

### **<sup>8</sup>Swiss Federal Council Ordinance on measures to combat the Coronavirus:**

The Ordinance talks about provision of essential medical goods. If the provision of essential medical goods cannot be guaranteed, the Federal Council may require manufacturers to produce essential medical goods or to prioritize production of these essential goods. It provides a list of all essential medical goods and medical substances like Hydroxychloroquine.

Employers in the main and ancillary construction industry and in other industries are required to comply with the recommendations relating to hygiene and social distancing. The number of people present at the work site has to be limited.

Different zones are required to regularly report on availability of hospital beds for treating COVID-19 cases. Availability of medical and nursing staff in the hospitals has to be reported as well.

Classroom teaching in schools at secondary and tertiary level and other educational institutions is prohibited and gatherings of more than 30 persons in public areas, in particular public places, on footpaths or in parks are prohibited.

If due to the result of the Epidemic situation, there is a special risk to the health of the population of any region, the Federal Council in response to a reasonable request authorise the region concerned to restrict or suspend the activities of certain sectors of the economy for limited time. Essential sectors of economy may be exempt.

In workplaces where close contact cannot always be avoided, appropriate protective measures shall be taken in accordance with the STOP principle (substitution, technical measures, organisational measures, personal protective equipment).

The Ordinance also consists of provisions relating to family reunification, export controls, and border trade.

If any person who wilfully fails to comply with any measures is liable to a custodial sentence not exceeding 3 years or to a monetary penalty.

### **What Indian Model COVID Legislation should be like?**

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<sup>8</sup>818.101.24 Ordinance of 13 March 2020 on Measures to Combat the Coronavirus (COVID-19) (COVID-19 Ordinance 2), The federal Council, <https://www.admin.ch/opc/en/classified-compilation/20200744/index.html>

On similar lines, the Indian Coronavirus/Infectious Diseases Legislation should prepare a framework to fight the battle against the virus, giving the government tools to fight the virus while also balancing the rights of citizens. A

mechanism should be put in place for risk assessment at national and state level. There should be proper grades of assessment like Low Risk, Medium-High Risk and Emergency. Screening at airports to be started at Low Risk assessment, cancellation of Visas during Medium to High Risk assessment while complete shutdown in flight operations during Emergency.

Similarly, states will have to suspend economic activities, schools, public gatherings in zones where there is High Risk of disease contraction and complete lockdown during Emergency. State-level Public Health Boards envisaged in National Health Bill 2009 should be established to monitor the state developments.

Compulsory state-wise registration of nurses and medical personnel should happen to a central database.

It will help in situations of shortage of medical personnel in some states in which they can request loaning of such medical personnel from states who have the capacity to provide them.

<sup>9</sup>Recently, Maharashtra's medical education department sent a plea to the Kerala government for specialist doctors and nurses.

Concerned departments will need to take cognizance of any disruption in the food supply chain across the country. <sup>10</sup>India let 65 Lakh tonnes of food grain go to waste in last four months as the poor went hungry.

There should be proper assessment and reporting of the hospital beds available in states and their capacity to deal with COVID-19 cases. Requirements for Essential Medical Goods and Substances should be laid down as the Swiss Federal Council did and their home production to be started at war footing.

Scientific research on containing the spread of the disease should be promoted and incentives to be given.<sup>11</sup>In the latest study by Beijing Centre for Disease Prevention and Control, on community mask use, it was stated that COVID-19 has mostly spread within families and those in close contact with the sick. Wearing mask at home before the sick person developed symptoms would help in reducing symptoms by 79%.

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<sup>9</sup> Kalpana Pathak, Maharashtra requests Kerala for 50 doctors, 100 nurses to fight Covid-19, livemint (May 24, 2020 09:59 pm), <https://www.livemint.com/news/india/maharashtra-requests-kerala-for-50-doctors-100-nurses-to-fight-covid-19-11590336704713.html>

<sup>10</sup> Vikas Rawal, Manish Kumar, Ankur Verma & Jesim Pais, India let 65 lakh tonnes of food grains go to waste in four months even as the poor went hungry, Scroll.in (June 03, 2020 6:30 am), <https://scroll.in/article/963535/india-let-65-lakh-tonnes-of-grain-go-to-waste-in-four-months-even-as-the-poor-went-hungry>

<sup>11</sup> Kashmira Gander, Wearing a Face Mask at Home Could Reduce Risk of Transmission by 80 Percent, Newsweek (May 28, 2020 6:30 pm), <https://www.newsweek.com/coronavirus-face-masks-home-transmission-1507001>

Suspension of travel is to be done in a phased manner, depending on risk assessment to avoid the current migrant crisis situation in the future. Employers shall consider treating employees' absence from work as paid hospitalisation leave and should give employees option to apply for leave/no pay leave or use paid leave in advance.

Rights of frontline health workers need to be protected under new law. Uniform punishment in criminal law is to be given across states keeping in mind doctrine of proportionality.

### **COVID-19 and Migrant Labour Crisis:**

<sup>12</sup>India's rank in Global Health Security Index 2019 was 57 out of 195 countries. The Index addressed the capability of countries to combat infectious disease outbreaks which can lead to epidemics or pandemics.

India ranks below many Asian countries in terms of scores given for preparedness. A few months forward, and the entire country is witnessing the greatest exodus since partition due to Coronavirus.

<sup>13</sup>According to World Bank, the nationwide lockdown in India has impacted nearly 40 million internal migrants. While the lockdown was necessary, it could have been better executed. Suspension of transportation could have been implemented early on, in a phased manner while also developing policies regarding welfare of the stranded migrant labourers.

While a comprehensive law regarding infectious diseases should contain provisions for the protection of migrant labourers, India already has enough ammunition in terms of legal provisions, which, if had been implemented properly, could have helped in the current crisis.

Section 12 of Disaster Management Act 2005 gives guidelines for minimum standards of relief to be provided to persons affected by disaster, which shall include minimum requirements to be provided in relief camps in relation to shelter, food, medical cover, drinking water and sanitation.

The Prime Minister of India in his address to the nation urged companies to not fire workers although under Section 25M of the Industrial Disputes Act 1947 they can lay off workers in the event of a calamity, on the condition of payment of 50% of wages as compensation limited to first 45 days of lay-off. But there is lack of clarity as to what workers will get compensation since the act excludes many of them.

<sup>14</sup>Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 is an important legislation to govern inter-state migrant workers to prevent their

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<sup>12</sup> Global Health Security Index, Index, <https://www.ghsindex.org/>

<sup>13</sup> PTI, HEALTH – Lockdown In India has impacted 40 Million Internal Migrants says World Bank, THE WIRE (23 April 2020), <https://thewire.in/health/lockdown-in-india-has-impacted-40-million-internal-migrants-says-world-bank>

<sup>14</sup>Application of NHRC, In Re: Problems and Miseries of Migrant Labourers, I.A. No. 51637/2020 in Suo Motu W.P.(C) No. 6/2020

exploitation. It grants migrant workers displacement allowance, journey allowance etc. But it is clear from the current plight of migrant workers that the Act was never implemented in its true spirit.

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 have also not been implemented. Coronavirus pandemic should not turn into a humanitarian crisis. The government needs to take immediate action on the long term and short-term measures suggested by National Human Rights Commission (NHRC) in its Application seeking to intervene in the case of Suo Motu cognizance taken by the Supreme Court with regard to the condition of migrant labourers.

### **Covid-19 and Right to Privacy:**

On 24 August 2017, a nine-judge bench of the Supreme Court of India handed down its decision in the important constitutional case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. The court ruled unanimously that privacy is a Fundamental Right protected under Article 21 of the Indian Constitution.

During the fight against COVID-19, the lines separating the responsibility of State to protect its citizens and the right of citizens for privacy, has been blurred. Maharashtra and Karnataka have been using indelible ink to stamp people under home quarantine.

<sup>15</sup>Karnataka went a step ahead and published list of individuals in home quarantine with their addresses which is a huge privacy violation. This was reportedly done as a deterrent to individuals breaking their quarantine.

Many countries have been using technology as a defence from COVID-19. The most widely used is Digital Contact Tracing. It is a method of contact tracing relying on tracking systems, most often based on mobile devices, to determine contact between an infected patient and a user. Aarogya Setu is India's contact tracing app.

India has made it mandatory for government and private sector employees to download it. The app uses phone's Bluetooth and location data to find out if the user has been near a person with COVID-19. According to privacy experts, any app that tracks who you have been in contact with and your location at all times is a clear violation of privacy.<sup>16</sup> Former Supreme Court judge, Justice B.N. Srikrishna said the drive to make people use the app was "utterly illegal".

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<sup>15</sup> Aroon Deep, Karnataka govt publishes address of people in COVID-19 quarantine, Medianama (March 26, 2020), <https://www.medianama.com/2020/03/223-privacy-karnataka-addresses-coronavirus-quarantine/>

<sup>16</sup> Apurva Vishwanath, Mandating use of Aarogya Setu app illegal says Justice B N Srikrishna, The Indian Express (May 13, 2020 11:37:10 am), <https://indianexpress.com/article/india/aarogya-setu-app-mandate-illegal-justice-b-n-srikrishna-6405535/>

<sup>17</sup>Singapore's app, 'TraceTogether' can be used only by its health ministry to access data. It assures citizens that the data is to be strictly used for disease control and will not be shared with law enforcement agencies for enforcing lockdowns. Aarogya Setu lacks such safeguards.

<sup>18</sup>Perhaps India would have been better equipped to tackle such situations if it promptly acted on the draft of the Personal Data Protection Bill, drafted by the committee headed by Supreme Court judge, Justice B.N. Srikrishna (retired), and not try to dilute its safeguards. The Standing Committee report on the diluted version of the bill is still pending. A detailed legislation on data protection is necessary to guide the policies of the government and safeguard the interests of the citizens.

To conclude, Laws must reflect the changes in society. India needs to stay ahead of the challenges that it is facing and those which it might face in future. For that to happen, the country needs to constantly update its laws with time. A good legislation provides clarity, not ambiguity and should help steer the nation through a crisis. India, being the largest democracy and a welfare State should lead other nations in this process.

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<sup>17</sup> Andrew Clarence, Why India's Covid-19 contact tracing app is controversial, BBC NEWS (14 May 2020), <https://www.bbc.com/news/world-asia-india-52659520>

<sup>18</sup> Sonam Saigal, Data Protection Bill not in line with the draft: Justice Srikrishna, The Hindu (December 18, 2019 8:39pm), <https://www.thehindu.com/news/national/data-protection-bill-not-in-line-with-draft/article30307560.ece>