

COVID-19: SOCIO LEGAL IMPLICATIONS

Since time immemorial, the world has faced the wrath of deadly infectious diseases including but not limited to the Plague of Justinian, the Bubonic Plague and the Black Death. The world is once again in conflict with a pestilent virus.

COVID-19 surfaced the eyes of the world on 31st December 2019 when China confirmed the spread of the disease to the World Health Organization (WHO). The outbreak originated in Wuhan City of China and subsequently spread to the rest of the world. WHO declared the outbreak of coronavirus as Pandemic on 11th March 2020. Since then, the pandemic has posed a series of intriguing questions ranging from medical provisions and preparedness around the world to unfettered powers presumed by the governments to control the spread of the coronavirus. This essay will analyse the impact of a pandemic on the Fundamental Rights in relation to India and the reasons for failure to implement any draft or model for national health even after 73 years of independence. This essay will synchronize suggestions on how law and health can work concurrently.

IMPACT OF COVID-19 ON FUNDAMENTAL RIGHTS

Before undertaking the question of how pandemic has violated the Fundamental Rights, we need to answer a preliminary question, whether the Fundamental Rights are available in times of National Health Emergency.

Michael O’Flaherty, Director of the European Union (EU) Agency for Fundamental Rights says “We clearly need strong public health responses to protect life during the pandemic. But we can protect our health and respect human rights. It is not a zero sum game. The more we respect human rights, the better will be our public health strategies. Our health strategies must also ensure that any limitations to people’s fundamental rights should only last as long as necessary.” He affirms it is imperative to protect human rights and public health in fighting COVID-19.¹ *Michelle Bachelet* in the UN High Commissioner for Human Rights and *Filippo Grandi* in the UN High Commissioner for Refugees have also cited same concerns and have

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Manuscript of European Union Agency for Fundamental Rights, 2020 accessed on 22nd April 2020 at 4:30 p.m. at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf, published by Luxembourg.

requested countries to protect human dignity and human rights while combatting with the pandemic because basic rights are inalienable.

The analysis of provisions in international covenant and guidelines issued by *EU or Venice Commission Report of 2020* all reveal that the basic Human Rights cannot be curtailed under any circumstance because they form the very essence of our existence, democracy and the rule of law. On 16th March 2020, UN Human Rights experts said “emergency declarations based on the COVID-19 should not function as a cover for repressive action under the guise of protecting health.”²

Now, let’s steer the process of thought towards the Indian perspective. According to the supreme law of India, the Fundamental Rights cannot be abridged by any state law passed contrary to Part III in part or whole and any law made in contravention of this, shall be void.³ Nevertheless, the Constitution also makes a provision that when an emergency is declared⁴, the freedoms provided under Article 19 are suspended⁵ and so is the enforcement of fundamental rights except rights under Article 20 and 21.⁶ For any of the aforementioned articles to be applicable in the current situation, we need to examine the provisions. The words used in the provision are war, external aggression and internal disturbance⁷. To consider the pandemic as internal disturbance, we need to interpret the intention of the

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<https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> was accessed on 22nd April 2020 at 5:30 p.m.

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Article 13(2) of COI.

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Article 352 of COI.

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Article 358 of the COI.

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Article 359 of the COI.

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44th Amendment to the COI substituted the word armed rebellion to internal disturbances.

drafters of the Constitution of India (COI). The constituent assembly was conscious that the law is dynamic and cannot be written in a straitjacket manner, so when *Sarkaria Commission* was constituted they scrutinized the legislative intent while interpreting and resolved that the word “internal disturbance” was broad and not simply restricted to internal violence. The report also observed that the word “physical break down” in the state emergency provision can embrace the ambit of natural calamity, disaster or epidemic.

It is reasonable to conclude in the light of the argument raised that the executive has the power to curtail the Fundamental Rights to certain extent in the pandemic however, constitution and law are not just the tools for peace time. This government hasn't yet endeavoured on this path. Nonetheless, if it does, the principle of necessity doesn't override the basic human and fundamental rights which is axiomatic in the judgement delivered by the Kerala High Court on 1st April 2020.

In the case of *Kerala High Court Advocates' Association v. The State of Kerala and Ors.*⁸ the court held that the fundamental right of a citizen to move freely throughout the territory of India under Article 19(1)(d) and the fundamental right to life and personal liberty under Article 21, will be infringed in case a resident of Kerala is denied entry into Karnataka for availing medical treatment or is deprived of essential articles of food that are being transported into Kerala.

Thus, we can reach to the conclusion that basic human rights cannot be abridged in a pandemic. The preliminary question as the trunk of the tree forms branches of secondary questions. So, let's navigate further into those questions by evaluating the basic rights.

1. RIGHT TO HEALTH AND TREATMENT

1.1. Health is defined by WHO as the state of complete mental, physical and social well-being in which disease and infirmity are absent.⁹ The first and the foremost question which the current pandemic of Covid-19 raises is if health is recognized as a

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https://www.livelaw.in/pdf_upload/pdf_upload-372019.pdf accessed on 23rd April at 11:30 a.m.

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<https://www.who.int/about/who-we-are/constitution> was accessed on 22nd April at 3:00 p.m.

Fundamental Right or not? The answer, however simple it appears on the surface goes deeper in the roots. The international organizations like UDHR in article 25 encapsulate right to health in its model. It is also evident by perusal of Article 12¹⁰ of International Covenant on Economic, Social and Cultural Rights, Article 12(1)¹¹ of Protocol on Economic, Social, Cultural Rights and Article 17¹² of Beijing Conference of 1995 that all these conventions converge at one common fact that right to health is a human right.

1.2. On the other side of the coin, the Indian Constitution in Part IV through Articles 38, 39(e), 39(f), 42 and 47 acknowledges that right to health though not a Fundamental Right is still in the ambit of constitution and imposes an obligation on the state to ensure timely availability of medicines and healthcare facilities to every section of the society. A pandemic should not be an aide-mémoire that an efficient and effective health care system is the need of the hour. It requires persistent advancement even without a time bomb like Covid-19 ticking in our heads.

1.3. Right to health is multifold.

Firstly, the pandemic of Covid-19 unfurls the fact that the executive has disregarded health bills introduced in the past and have certainly not reached a consensus in matters of national importance like health. The bills lapse in the parliament and remain in memory like old books covered in dust at the corner of a library. The bill to introduce Article 21b¹³ in the constitution so as to declare Right to Health as

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The ICESCR in article 12 establishes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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It says that Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

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It says that the explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.

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It says that the State shall provide a mechanism for protection of the health of all Indian citizens which includes prevention, treatment and control of diseases as well as access to free of cost or affordable medical treatment, diagnosis and essential medicines in such manner as the State may,

Fundamental Right can be retraced to the year 2012 where it was first introduced in Rajya Sabha, the same was again introduced in 2017 and 2018. The Draft National Health Policy has been stranded over the years and the recent attempts to implement it are the Model for 2015 and 2017. The HIV/AIDS epidemic did not stir the motion for the same and hence, we reappear in a similar yet devastating life lesson like students who failed their earlier examination.

- 1.4. Secondly, the pandemic reveals the progressive thinking of the courts as they recognized right to health as Fundamental Right long before. The judgments like *CERC v. Union of India*¹⁴ while construing the term “Life” under Article 21 of COI inferred that it includes right to health in it. In the judicial pronouncement of *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*¹⁵ the honorable Supreme Court held in unambiguous words that right to life under Article 21 includes in it the right of a person to receive medical aid. It also held that it is the duty of the state to make health accessible to all sections of the society. The honorable courts over the years have emphasized that right to health is a prerequisite for right to live with human dignity. Thus, the requirement to legislate on health and healthcare sector. Also, in this respect doctrine of separation of powers is not the obstacle on the path of development instead a tool to harmonise the functioning of the three organs. The unheeded pronouncements and guidelines issued need to be taken into consideration by the government.
- 1.5. Covid-19 once again highlights the importance of right to health as a Fundamental Right (FR) in India. Right to health if declared as a Fundamental Right would encompass wide aspects ranging from right to sufficient supply of water, food and nutrition to right to know and access information about better health opportunities. Also, the courts could interpret and enforce the right under Articles 32 and 226 of COI in such a situation. It will be able to impose obligations and issue binding regulations on the state and non-state actors as well as determine and affix the duties

by law, determine.

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(1995) 3 SCC 42. M.C. Mehta v. UOI, (1996) 6 SCC 9.

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(1996) 4 SCC 37.

on the citizens of India. It will ensure transparency and accountability in the health sector.

Not just this, with the declaration of right to health as FR, there shall be a defined structure for fund allotment to the healthcare system and the government will consider and pay heed to the statement that the financial difficulties cannot come in the way of making medical facilities available to the people laid down by the Supreme Court in the landmark judgment of *Navtej Singh Johar*¹⁶.

Thus, by implementing the much awaited National Health Policy, not only the legal aspect but also the sociological and psychological aspect of the health sector will be addressed.

- 1.6. Thirdly, Covid-19 fan the flames in the direction of Domestic Violence. The country which until 2005 did not have a defined law for domestic violence is standing on the fire attempting to extinguish it. The pandemic led the governments of countries across the globe to take extreme measures like complete lockdown. Soon, after the lockdown, there has been surge in the domestic violence cases. According to *Rekha Sharma*, chief of National Commission for Women, the atrocities and gender based violence has materially augmented since the lockdown was announced. In UK as well there has been a 700% increase in calls to its helpline in a day, while a separate helpline for perpetrators of domestic abuse seeking help to change their behaviour received 25% more calls after the start of the Covid-19 lockdown.¹⁷ The escalation in the number of cases for domestic violence caught the eye of United Nations and Secretary General *António Guterres* responded by urging “the governments across countries to put women’s safety first as they tackle the pandemic.” The psychologists have been analysing the relation between home isolation and increase in the number of cases for a while now.

Marianne Hester, a Bristol University sociologist who studies abusive relationships says that domestic violence goes up whenever families spend more time together.

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W. P. (CrL.) No. 76 of 2016 D. No. 14961/2016.

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<https://www.theguardian.com/society/2020/apr/12/domestic-violence-surges-seven-hundred-per-cent-uk-coronavirus> was accessed on 25th April 2020 at 5:10 p.m.

The psychological aspect of domestic violence falls under the mental health ambit of Right to health.¹⁸ Since, right to life includes in it the right to live with dignity and right to health, it indirectly falls under the umbrella of Article 21 of the COI. Thus, it was a foreseen consequence of the measure of home isolation and the governments should have addressed the issue in advance like the release of Manuscript of European Union Agency for Fundamental Rights, 2020 which deliberated on domestic violence in the guidelines as one of the aspects of the pandemic. Later on, the countries started creating helpline numbers to prevent the abuse. But, in a country like India which stigmatises broken families, the battle seems unjustified. The country in which patriarchy flows in the blood of people, recovering from the pandemic of domestic violence is going to be as challenging as the pandemic of Covid-19.

2. RIGHT TO FOOD

- 2.1. Article 39(a) of COI states that for the governance of the country, it is fundamental for the State to direct its policies towards securing that all its citizens have the right to an adequate means of livelihood, while Article 47 invokes the duty of the State to raise the level of nutrition and standard of living of its people as a primary responsibility. In India right to food has been given the status of fundamental right through judicial activism. While defining the term “Life” under Article 21, the courts have recognized that the basic necessities that form life include food¹⁹. In the judgement of *Kapila Hingorani v. State of Bihar*²⁰, it was held by the SC that economic incapacity cannot be a ground for justifying the violation of the FR to food. But, this principle is not into consideration in the current pandemic.
- 2.2. The response of government to impose lockdown had discriminatory impact on people of India. Where one strata of population was stocking on essentials others were struggling to meet their basic requirements. One such instance is the case of the

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Supra Note 9.

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Kisshan Pattnayak v. State of Orissa, AIR 1989 SC 677.

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migrant workers²¹ who have been struggling to make both ends meet. The public distribution system in India is ineffective currently due to the inherent flaw that is identification of poor. The measures to provide basic necessities should have been taken after the previous struggle of India with epidemics. The inadequacy of policies is manifest in acts like National Food Security Act, 2013 which doesn't make one provision to resolve the issues pertaining to an epidemic. It is high time we make policies and involve in them the ambit of possibilities to which we are oblivious yet. The inevitability of the epidemics in the progressing world is the only certainty that it is essential to make broad spectrum of laws to be prepared in future.

3. DEFICIENCY IN CURRENT FRAMEWORK

3.1. The Epidemic Diseases Act, 1897 enacted as a response to the epidemic of bubonic Plague spread in Bombay is still in force after 123 years without any amendment. The only legislation which governs the current pandemic is in itself flawed as it doesn't provide the framework for distribution of vaccines, drugs and other essentials to all the sections of society without any discrimination. The act is silent on another essential aspect that is rights and duties available to citizens during the epidemic. In India when the act was passed there was no written constitution but now we have a supreme law governing us. Thus, it necessitates the need to consider the Draft National Health Policy and some international models like Public Health Agency of Canada Act of 2006 or the National Health Security Act, 2007 of Australia to make further amends and draft a legislation which cater to current and future catastrophe.

4. UNFETTERED POWERS PRESUMED BY THE GOVERNMENT

4.1. As the pandemic of Covid-19 goes out of depth the governments around the world are using exceptional measures under the colour of their offices. To exemplify let's take a glance at few illustrations where the leaders have assumed absolute powers in matters of public importance. In Hungary, the approved Bill on Protection against the Coronavirus provides that the PM *Viktor Orbán* power to rule by decree for an indefinite period of time.²² In addition to this another superpower, Russia issues a ruling that allows to renew the presidential term for President *Vladimir Putin*. In

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<https://scroll.in/latest/958101/steps-to-fight-covid-19-shouldnt-worsen-existing-inequalities-says-un-on-migrant-workers- plight> accessed on 26th April 2020.

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Serbia, the president *Aleksandar Vučić* circumvented the national assembly to declare a state of emergency to gain sweeping powers to limit human and minority rights.

- 4.2. The pandemics characteristically afford an opportunity to the executive to misuse their powers as they warrant no review. This threat ranges from unwanted intrusion in one's personal life to superseding the constitutional mandates. Board of the EU-Russia Civil Society Forum in response has requested the governments to protect the basic institutions of democracy and procedures safeguarding the rule of law in an attempt to overcome the pandemic.

It can be concluded that a holistic public health and an improvised epidemic law needs to be enacted which not only answers the aforementioned questions impeccably but also deliberates on prisoners rights and rights of minorities including refugee, women and migrants.