

# **SHALL THERE BE ANY PROVISION OF MEDICAL EMERGENCY IN THE CONSTITUTION?**

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On 11th March, the World Health Organization declared Covid-19 as a ‘pandemic’.<sup>1</sup> The deadly virus has infected millions of people around the world, overwhelming an already neglected health infrastructure. Covid-19 stands as an imminent threat to humanity a popular notion has evolved as to seek a constitutional reform in Part XVIII<sup>2</sup> (Emergency Proclamation) of the Indian Constitution to contain the panic situation in the country. The idea might sound effective but if we trace the origins of the provision, it has faced severe criticism from jurists and scholars. They have complained about its regressive colonial legacy.

To further adduce the provision, Constituent Assembly debates are the best source for its interpretation. The assembly was split into two factions. One insisted on a provision present in the Government of India Act, 1935 i.e., Section 92<sup>3</sup>, whereas the other faction insisted on not having any such provision in the Constitution as it may dilute the states’ political authority. Dr. Ambedkar insisted on inserting the provision to authorize the center to safeguard the provinces from external aggression and internal commotion. On the other hand, he also insisted that there should not be a wanton invasion by the center which is arbitrary and unauthorized by the law. Prof. K.T Shah was a staunch critique of such a regressive law as such a provision in the constitution would be a threat to the very foundation of constitutional democracy. H.V Kamath called insertion of such a provision as ‘Foundation of totalitarian State’ which was completely against the ethos of constitutional democracy as such a provision would jeopardize the rights and liberties of citizens.<sup>4</sup>

Even after strong criticism the idea that makes Indian constitution the lengthiest prevailed— that nothing should go unwritten. Indian democracy witnessed its grim days when Emergency was declared. It was not a ‘festival of discipline’ as intended by the government but ‘the

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<sup>1</sup> Dr. Tedros Adhanom, WHO director general’s opening remarks at media briefing on Covid-19, World Health Organization (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>2</sup> INDIA CONST. art 352, 356 and 360.

<sup>3</sup> The Government of India Act, 1935, Act of Parliament of the United Kingdom, 1935.

<sup>4</sup> Reference taken from Constituent Assembly Debate, Sudhir Krishnaswamy and Badrinarayanan (Aug. 04, 1949), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/9/1949-08-04](https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-04).

disciplining of the festival called democracy'.<sup>5</sup> After the lapse of twenty-one months an electoral battle was fought and the 44<sup>th</sup> Constitutional Amendment, 1978<sup>6</sup> tried to harmonize the defunct public administration. In 1987, Sarkaria Commission submitted its report<sup>7</sup> on 'Emergency provisions' (Chapter VI) whereby it recommended a cautious use of emergency provisions. It noted that only in extreme circumstances as a measure of last resort, when all available alternatives have been exhausted, that this provision should be evoked. The Commission stressed on resolving the crisis at state level before taking the recourse of emergency provisions. A similar proposition was reiterated in the case(s) of H.S. Jain v. Union of India<sup>8</sup> and S.R. Bommai v. Union of India<sup>9</sup> in light of exhausting all the alternative measures before resorting to the proclamation of emergency.

The constant challenge and despair in the history of invoking emergency and to use an alternative unitary government has made the jurists skeptic of its proclamation as it attracts blatant encroachment upon the civil liberties. The idea of insertion of 'Medical Emergency' clause is borrowed from countries which have such a provision in their constitution. In doing so, one fails to acknowledge that such countries have a unitary government, are comparatively smaller in size or are full-fledged federal governments whereas India is a unique case of a unitary government with essence of federal government. Interestingly, the Constituent Assembly debates reveal that state legislatures were not given because of two reasons— it would dilute the provision of the emergency and the upper hand of the Union; the fear of communists using the state administration to supersede Centre.

Unlike United States, India has a single constitution where Art 245 sets limits to the power of Parliament and Legislatures of the state; Art 246 distinguishes the subject matters of the law enacted by the Parliament and the State Legislature wherein 'Health' is classified under the State List i.e., Schedule VII List II Entry 16. Lately, the 14<sup>th</sup> Finance Commission Report<sup>10</sup> recommended devolution of a greater share of revenue to the states in order to boost the health sector of India.

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<sup>5</sup> Arun Jaitley, A tale of three Emergencies: Real reason always different, Indian Express, Nov 5 2007.

<sup>6</sup> India Const. art. 352 & 356, amended by The Constitution (Forty-Fourth Amendment) Act, 1978.

<sup>7</sup> Report of the Sarkaria Commission, 1987, Chapter 6, 179-180.

<sup>8</sup> H.S. Jain v Union of India, 1996 SCC OnLine All 739.

<sup>9</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>10</sup> Y.V. Reddy, Report of the 14<sup>th</sup> Finance Commission, 2015.

Right to health and medical care is a fundamental right protected under Article 21 to be read with Article(s) 39(e), 41 and 43 as enshrined in the Indian Constitution. The 'Right to life' under Article 21 has a wider scope. As recognized in the Consumer Education and Research Centre v. Union of India<sup>11</sup>, the expression 'life' assured under Article 21 does not connote mere animal existence or continued drudgery throughout life. Instead, the said expression has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. Thus, recognizing health as a fundamental right creates an obligation on the legislature to provide for an effective and robust legal framework against such a disaster.

There are two prime statutes that currently regulates the Medical Emergencies, namely, the Epidemic Diseases Act<sup>12</sup> and the Disaster Management Act<sup>13</sup>. Former is archaic with a limited approach, making it ineffective and weak. For instance, the Act has an inclination towards quarantine measures while ignoring other possible methods of outbreak prevention and control. The primary target of the Act is travel by ship and waterways while ignoring air travel. It also ignores the possibility of mass exodus of daily wage workers on account of lack of work opportunities driven by hunger and disturbed emotional and mental state, which was non-existent in those days. The latter statute being much more recent recognizes an institutional framework at national and state level with its respective committees, carrying out specific functions in order to observe center-state cooperation to contain a disaster. However, the audit<sup>14</sup> conducted by CAG post-Uttarakhand disaster in 2013, reflects the deficiencies present in the Disaster Management Act including deficient supervision and quality control mechanisms of various departments and nodal agencies in view of poor compliance to instructions issued during inspection by the authorities along with non-issuance of financial sanction by the State Government despite funds being released by the center. In view of the shortcomings highlighted by the audit report, CAG provided many suggestions to the state governments like strengthening the financial management for preventing the diversion and blockage of funds, ensuring timely release of funds for the various projects; strengthening the mechanism for properly assessing and identifying damages and submitting viable proposals on time for enabling the State to avail and utilize funds as per approved outlay; strengthening the State

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<sup>11</sup> Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

<sup>12</sup> The Epidemic Diseases Act, 1897, No. 3, Acts of Parliament, 1897 (India).

<sup>13</sup> The Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005 (India).

<sup>14</sup> Report of the Performance Audit on Reconstruction of Infrastructure Post 2013 Disaster in Uttarakhand, Government of Uttarakhand, No.2, 2018 (India).

Disaster Management Authority (SDMA) so that it is equipped to fulfil the responsibilities as stipulated in the Disaster Management Act, 2005 and State Disaster Management Plan.<sup>15</sup> The SDMA should lay ideally down stringent timelines for adoption and initiation of measures required to be undertaken by the line departments for prevention and mitigation of disasters.<sup>16</sup> The SDMA may also consider entrusting the responsibility for monitoring compliance to these timelines to the State Executive Committee or may consider creating a separate empowered Committee for the purpose.<sup>17</sup>

Making India resilient to biological disasters, the 2008 guideline<sup>18</sup> lays down a Sendai Framework Monitor which ordains global standardized Disaster Risk Reduction (DRR). The guideline recommends international cooperation to prevent, protect, control and provide a public health response to the international spread of the disease by following certain just principles of regulation and its implementation should be guided by the UN Charter and the Constitution of the WHO. National Policy on Disaster Management, 2009<sup>19</sup> provides for a legal/financial framework by creation of institutions which shall play an active role during the outbreak. At the national level, Ministry of Health & Family Welfare along with the National Crisis Management Committee and National Executive Committee shall coordinate along with National Center for Diseases. At the state level, health infrastructure shall be developed to contain and attend such an outbreak. Its spread should be shared with Integrated Disease Surveillance System which will be expanded to all districts and shall be integrated with all laboratories i.e., DRDO, ICMR and state government laboratories<sup>20</sup>. At district level, the DM (District Magistrate) shall coordinate the entire plan along with the State Disaster Management Authority.

The guidelines were pertinent and futuristic which was in contrast to the international standard of guideline for investigation, containment & treatment/immunization. Followed by the guidelines of 2008, baby steps were taken in 2017. Acknowledging the fact that the Epidemic Diseases Act, 1897 is inefficient at tackling an outbreak. There arose a need after a number of outbreaks, bird flu and swine flu (zoonotic outbreak) to legislate an enactment attuned both to

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<sup>15</sup> *Id. at 14.*

<sup>16</sup> *Supra* Note 14 at 3.

<sup>17</sup> *Id. at 16.*

<sup>18</sup> National Disaster Management Guidelines-Management of Biological Disasters, 2008, NDMA, Government of India ISBN 978-81-906483-6-3 (India).

<sup>19</sup> National Policy on Disaster Management, 2009, MHA, Government of India ID: 133377 (India).

<sup>20</sup> *Id at 19.*

the changing circumstances and microbial mutations. In 2017 Public Health (Prevention, control and management of Epidemics, Bio-terrorism and Disaster) Bill 2017 was tabled.<sup>21</sup> It proposed to repeal the inefficient enactment of the past with penal sanctions which would have increased the punishment and fine under Section 269 and Section 270 against negligence or malignant act of a person contributing to the transmission of the disease. However, a penal provision would have ravaged civil liberties of the citizens during an outbreak as the Bill proposed to empower the medical officer to inspect any premise and administer vaccine without consent. Suspension of civil liberties was observed under the guise of another obsolete statute, namely, the Madras Public Health Act, 1939. The said Act allowed for measles-rubella vaccination campaigns at schools without parental consent. The 2017 Public Health Bill was much more stable but could not come into existence because it arrogated too much power to the Centre. Much like the 1897 Act, the 2017 Bill had no blueprint for a coordinative framework between Centre and States.

In 2019, the National Disaster Management Plan<sup>22</sup> was drawn following an updated replica of 2008 Guidelines with Sendai Framework (2015-2030) prepared by National Disaster Management Authority which was the first national plan ever prepared in the country with the vision to make the country, both disaster ready and resilient. The plan also highlighted the financial arrangements to manage residual risks, by mainstreaming the DRR which required the states and the respective ministries to adopt adequate provisions as an integral part of the main budget, unlike the recommendations of 15<sup>th</sup> finance commission, to insert the subject 'health' in the concurrent list which has foreclosed any possibility of center-state cooperation.<sup>23</sup>

Emergency proclamation has earned a bad reputation throughout the world. Its proclamation has a history where human rights and vital ethos of democracy are often jeopardized. Emergency has proven itself to be the iron hand of the executive to suppress the vital essence of democracy. The pro-Emergency supporters argue that Emergency is time driven which has to be renewed after a period of time but the Patriot Act which was enacted shortly after 9/11 terrorist attack due to be expired on 31<sup>st</sup> December 2005 is still in operation. Victor Obran, the current President of Hungary is considering an Emergency Bill which would extend his tenure to a time period yet to be ascertained. European Convention on Human Rights restricts the

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<sup>21</sup> Public Health (Prevention, control and management of Epidemics, Bio-terrorism and Disaster) Bill 2017 (India).

<sup>22</sup> The National Disaster Management Plan, 2019, NDMA, Government of India.

<sup>23</sup> Reference taken from report of the 15<sup>th</sup> Finance Commission for FY 2020-21 (India).

member states to invoke state emergency and allows such derogation only in the time of war or other public emergency threatening the life of the nation. Spain, United Kingdom and Italy are signatories of ECHR and are the worst effected by COVID-19 yet have resorted to Regulations/Ordinances instead of invoking state emergency.

Indian Constitutional lacunas after the political upheaval in 1977 general elections were filled by the 44<sup>th</sup> Constitutional Amendment 1978, but Article 355 and 356 accommodated the provision for contingent emergency like health where the union may take over under the rubric of ‘internal disturbance’. The Sarkaria Commission has pointed out that ‘physical breakdown’ may result in ‘constitutional breakdown’ which may empower the union.<sup>24</sup> The cardinal question is whether there a pressing need for proclamation of emergency to tackle a pandemic? The emergency proclamation would suppress the power of the states which are working relentlessly in curbing the spread. For instance, Kerala has flattened the curve of the COVID-19 growth, the emergency provision would rather make the decision making provisions more sluggish as the states under such circumstances require decision making autonomy to curb the transmission on the local level. The Union Cabinet has passed an ordinance amending the Epidemic Diseases Act 1897, to protect the medical workers from unscrupulous elements backed by penal sanctions. The government needs rapid changes in the legislation through ordinances which has a foundational base in law as the Parliament is not in session and such ordinances may easily become inoperative if not approved by the Parliament within six weeks of reassembly. There are a plethora of action plans which is pertinent to combat the contagion of the virus, the legislature needs to stick to the plan/guidelines to prevent its transmission instead of invoking Emergency. In the past the members of the Joint Parliamentary Committee had shown a strong dissent stating that such provision would be an ‘infringement in the domain of the provincial autonomy’.<sup>25</sup> During the Emergency brave minority had nurtured constitutional morality, H.R Khanna was one of them. In his book ‘Making of India’s Constitution’ he writes “If the Indian constitution is our heritage bequeathed to us by our founding fathers, no less are we, the people of India, the trustees, and custodians of the values which pulsate within its provisions! A constitution is not a parchment of paper, it is a way of life and has to be lived up to. Eternal vigilance is the price of liberty and in the final analysis,

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<sup>24</sup> Supra Note 7, at 1

<sup>25</sup> BIDYUT CHAKRABARTY, INDIAN CONSTITUTION 236 (1 ed. 2017).

its only keepers are the people. The imbecility of men, history teaches us, always invites the impudence of power.”