



IS INDIA, LEGALLY READY TO FACE A PANDEMIC?

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Abstract

The ongoing pandemic of COVID-19 (caused by the Novel Coronavirus) has exposed flaws in India's domestic laws. There has been a vague structured legislation, which has fall back on. The Central Government in March advised states to invoke the Epidemic Diseases Act, 1897 to tackle the novel coronavirus pandemic in their jurisdictions. The 123-year-old colonial law, however, does not even define what a disease is, leave about an epidemic or a pandemic.

Furthermore, using of the National Disaster Act, 2005 was also baseless as COVID-19 has been characterized as a global pandemic by the World Health Organisation (WHO) and not as a disaster. Moreover, the Disaster Management Act, 2005 can't cover COVID-19 under its jurisdiction because of the definition of "Disaster" mentioned in the act. The current lockdown, which is governed by the Disaster Management Act, 2005 however can't be proclaimed as unconstitutional but, yes, the central government needs to draft a proper legislation to face a health emergency in future.

As a matter of fact, a Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill had been drafted in 2017, intended to replace the Epidemic Diseases Act of 1897. The Bill has yet to be tabled in the

Parliament. This brief aims to list the short comings of legal system of the country for a health outbreak caused by an epidemic or a pandemic.

Introduction

The year 2020, had kicked off with a life risking disease, first emerged at China's Wuhan City in December 2019 (and hence the name COVID-19). At the end of December, public health officials from China informed the World Health Organization (WHO) that they had an unknown health problem, a new virus was causing pneumonia like illness in the city of Wuhan. They quickly determined that it was a coronavirus and that it was rapidly spreading through and outside of the city of Wuhan. The WHO assessed the situation in China and other countries where the outbreak, caused by COVID-19 had started.

On 11th March 2020, Dr Tedros Adhanom Ghebreyesus, the director general of WHO, at a media briefing on COVID-19 declared it a Pandemic. He also mentioned that it was the first time that an outbreak caused by a coronavirus was being characterized as a Pandemic. Since, this was a new type of virus with no identified remedy and antidote, it was termed as The Novel Coronavirus.

In India, the states, which were being affected with the virus, acted systematically and closed all the public places including educational institutes and religious places including the places of worship. Prime Minister Narendra Modi was quick to react on the spread of coronavirus in the country. He firstly declared a Janta curfew on 22nd March 2020, followed by a nation-wide lockdown for 21 days starting from 25th



March 2020. On 14th April 2020, when the lockdown was to be uplifted, Prime Minister Modi, with the due acceptance from the Chief Ministers of various states decided to continue the lockdown till 3rd May 2020 in order to control the novel coronavirus outbreak.

Democratic countries such as Australia, Canada, England, and the United States have more comprehensive, detailed and updated legislations to deal with public health emergencies such as the ongoing pandemic. These countries have continuously adapted their existing laws to the present-day needs, enabling them to modify their responses to evolving and advanced emergencies. In contrast, the Indian government appears to have a limited range, comprising the colonial-era Epidemic Diseases Act, the worn-out Section 144 of the Indian Penal Code which prohibits public gatherings, and the Disaster Management Act, 2005.

A recent study conducted by the Oxford University on a country's government responses to COVID-19, gave India a perfect 100 scoring for its steps taken to fight the novel coronavirus pandemic.¹ The tracker is based on indicators such as closures of educational institutions, travel restrictions and bans as well as measures such as emergency investment in healthcare, and investment in vaccines by the governments.

At the time of writing (i.e. as on 16th April 2020), there were 1,991,562 confirmed cases of COVID-19 in 213 countries with 130,885 people being dead.² In India, there are 10,824 active cases with 420 deaths.³

The Epidemic Diseases Act, 1897: Limitations

The colonial-era Epidemic Diseases Act, 1987⁴ is India's only law that has been historically used as a framework for restricting the spread of various diseases including cholera and malaria. Singlehandedly, the Epidemic Diseases Act, comprising of four sections in a single page, might be insufficient and incomplete to deal with the ongoing pandemic of COVID-19.

The Epidemic Disease Act came into effect on the 4 of February 1897, amidst the outbreak of the bubonic plague in Bombay⁵. The law proved inadequate, and the plague soon spread to Bangalore and other parts of the country.

Over the years, no standard or Model Rules and Regulations have been suggested as a consequence to the previous law. The law merely outlines a set of basic elements, including travel restrictions, examination and quarantine of persons suspected of being infected in hospitals or temporary accommodations, and statutory health inspections of any ship or vessel leaving or arriving at any

¹ <https://www.bsg.ox.ac.uk/research/research-projects/oxford-covid-19-government-response-tracker>

² <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

³ <https://www.mygov.in/covid-19>

⁴ https://indiacode.nic.in/bitstream/123456789/10469/1/the_epidemic_diseases_act%2C_1897.pdf

⁵ https://en.wikipedia.org/wiki/Bombay_plague_epidemic



port. The law specifies consequences that will be faced by those violating the concern of the Act, with penalties being *pari passu* with Section 188 of the Indian Penal Code⁶, which is the law that deals with acts of mutiny to a government order.

The Epidemic Diseases Act is deficient for three key reasons. First, the law fails to define “dangerous”. There is no elaboration in the Act on the existing rules and procedures for arriving at a benchmark to determine that a particular disease needs to be declared as an epidemic. The law also doesn’t clarify on the steps to categorise an epidemic as ‘dangerous’ based on variables like the scale of the disease, the distribution of the affected population across various age groups, the brutality of the illness, or the absence of a known cure or even for that fact, an antidote.

The second limitation is that the Epidemic Diseases Act contains no provisions on the confiscating and the sequencing required for distribution of vaccines (if available), and the quarantine measures and other preventive steps that needs to be taken.

Third, there is no underlying explanation of the fundamental rights of citizens that needs to be observed during the implementation of the emergency measures in an epidemic. The Act emphasises only the powers of the central and state governments during the epidemic, but it does not describe the

government’s duties in preventing and controlling the epidemic, nor does it clearly state the rights of the citizens during the event of a significant disease’s outbreak.

The punishment prescribed in Section 3 of the Act that is *pari passu* with Section 188 of the Indian Penal Code also needs to be revisited. This Section provides for a fine of INR 200 (a college student is imposed with a higher amount of fine) and imprisonment of one month (not clarifying whether bailable or not) for violating an order of a public servant.

REIN [C] Disaster Management Act, 2005: Limitations

The Disaster Management Act, 2005⁷ was enacted for setting up the National Disaster Management Authority and State Disaster Management Authority respectively and to have a unified command over disaster management and not that of a health emergency.

The law that has been invoked to deal with COVID-19 and order a curfew that was fortified by a 21-day lockdown and now a 19-day lockdown, the Disaster Management Act, 2005 was never designed to cater to health emergencies. This is evident from the definition of “Disaster” in Section 2(d) of the said Act, as it states:

(d) “disaster” means a catastrophe, mishap, calamity or grave occurrence in any area,

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<https://indiacode.nic.in/bitstream/123456789/4219/1/THE-INDIAN-PENAL-CODE-1860.pdf>

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<https://www.ndmindia.nic.in/images/The%20Disaster%20Management%20Act,%202005.pdf>



arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.”⁷

This definition does not indicate to a medical emergency, except perhaps by a loose interpretation. Similarly, the two sections of the said Act under which notifications have been issued, namely Section 6(2)(1) and Section 10(2)(1), are both supplemental sections to the substantive provisions of this Act. Further, Sections 6 (1) & (2) read as follows:

6. Powers and functions of National Authority.⁷

(1) Subject to the provisions of this Act, the National Authority shall have the responsibility for laying down the policies, plans and guidelines for disaster management for ensuring timely and effective response to disaster.

(2) Without prejudice to generality of the provisions contained in sub-section (1) and sub section (1) reads as:

(1) take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary.

Similarly, Section 10(2)(I) states:

(1) evaluate the preparedness at all governmental levels for the purpose of responding to any threatening disaster situation or disaster and give directions, where necessary, for enhancing such preparedness.⁷

This much applauded law has so far has been used for localised disasters like floods (Uttarakhand 2013), cyclones (Odisha 2019), earthquakes etc., For the first time this law has been pressed into service on a pan India basis. It is also the first time it has been invoked to address a public health crisis; the pandemic of Covid-19.

On 25th march 2020, the Disaster Management Authority prescribed some guidelines to tackle the ongoing COVID-19 pandemic⁸. These Guidelines prescribe closure of certain establishments and institutions, places of worship etc. in order to avoid crowding and to ensure social distancing. Simultaneously they seek to ensure unhindered access to essential services like ration shops, pharmacies, health services, banking services, telecommunications, petrol pumps, manufacturing of essential commodities and unhindered supply of food, medical equipment etc.

The Disaster Management Act, 2005 was passed to enable the central government to provide a legal framework for setting up of a National Disaster Management Authority under the chairmanship of the Prime Minister of India and not more than nine members

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<https://www.ndmindia.nic.in/images/The%20Disaster%20Management%20Act,%20202005.pdf>

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<https://ndma.gov.in/en/media-public-awareness/covid-19-advisories.html>



nominated by him. While the scheme of the Act does not specifically deal with the control of a pandemic like COVID-19, the powers of the National Disaster Management Authority under Section 6 of the Act can be broadly interpreted to give a unified command to the central government to effectively manage a disaster throughout India, which the government had done in the case of the ongoing COVID-19 pandemic but rightfully noting that COVID-19 is not a disaster but a pandemic.

Ideally, present-day legislation should clearly provide both the cause and the cautions in empowering the state to curb or restrict certain rights of the citizens like that of liberty, privacy, movement, and property. This would then lead to predictable and transparent decision-making. India's Epidemic Diseases Act, 1987 as well as the Disaster Management Act, 2005 fails in this regard; similarly, it fails to address the human aspect of healthcare. Indeed, the Union Ministry of Health & Family Welfare had drafted a Public Health (Prevention, Control and Management of epidemics, bio-terrorism, and disasters) Bill, 2017⁹ to fill these gaps. Jointly prepared by the National Centre for Disease Control (NCDC) and the Directorate General of Health Services (DGHS), it also tried to address, though in a limited manner, the need to empower local government bodies given the peculiarities of each emergency situation. It was expected that with the

implementation of this law, the old Epidemic Diseases Act, 1897 would be revoked. However, for reasons that remain unclear, the Bill has not been tabled in Parliament.

The key pillar of a national epidemic law must be of equal access to healthcare services. The Epidemic Diseases Act, 1987 fails on this count, too. The obligations of healthcare professionals and other workers, compared with their rights and the safety standards that they would be entitled to, also needs to be defined, along with the responsibilities of civil society during such a crisis.

The Union government, however, has been unable to convince states to adopt the law since health is a State subject. Many Indian states have had their own epidemic disease acts since the colonial era, like the Madras Public Health Act, 1939¹⁰.

The National Health Bill, 2009¹¹ was similarly targeted at providing an overarching legal framework for the provision of essential public health services by recognising health as a fundamental right of the people. It also provided for a response mechanism for public health emergencies by exactness a collaborative central framework. However, none of these initiatives ever fructified as the states considered it as an invasion on their domains.

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<https://www.prsindia.org/uploads/media/draft/Draft%20PHPCM%20of%20Epidemics,%20Bio-Terrorism%20and%20Disasters%20Bill,%202017.pdf>

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http://www.sanchitha.ikm.in/sites/default/files/MadrasPublicHealth_%20Act1939..pdf

¹¹

https://www.prsindia.org/uploads/media/Draft_National_Bill.pdf



Division of powers between the centre and the state government

Article 245¹² of the Constitution of India states that the Parliament or the central government may make laws for whole or any part of India, and the state government may make laws for the entire or any part of the state. Article 245, places the basis for the division of powers between the centre and the state, whereas, Article 246¹³ provides for the distribution of Legislative Subjects between the central and state governments. It does so by creating three lists, reckoned in the Seventh Schedule¹⁴ of the Constitution, namely the Union List, the State List, and the Concurrent List.

The Union List contains the subject matter on which Parliament has an exclusive power to legislate, similarly, the State List contains the matters on which the state government has an exclusive power to legislate, and lastly the Concurrent List, contains the subject matter on which, both the centre as-well-as the state, governments can legislate.

Constitutionally, the state government is empowered to deal with matters related to public order and public health, listed in the state list Entry 1 and 6¹⁵, respectively. However, Entry 29¹⁶ of the Concurrent List authorizes the central and state governments to legislate on matters pertaining to the prevention of an infectious or contagious disease spreading from one state to another. The entry does not limit the powers of the legislating authority to simply public order or

health, but allows for any relevant legislation to be passed, so long that it is to prevent the disease from spreading across state jurisdictions. Entry 29¹⁷ of the concurrent list reads:

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

Since, both central and state government are empowered to legislate on an entry in the Concurrent List, a possible collision or inconsistency between the two legislations cannot be ruled out. In order to address this concern, the makers of the Constitution provided for Article 254¹⁸, which reads:

Article 254 - Inconsistency between laws made by Parliament and laws made by the Legislatures of State

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by the Parliament, which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of the State shall, to the extent of the repugnancy, be void”.

The ‘Doctrine of Repugnancy’¹⁹, which is exceptionally explained by the Supreme Court of India in the case of *M. Karunanidhi v. Union of India*²⁰, deals with an event that where the requirements of a Central

¹² <https://indiankanoon.org/doc/574894/>

¹³ <https://indiankanoon.org/doc/77052/>

¹⁴ <https://www.mea.gov.in/Images/pdf1/S7.pdf>

¹⁵ <https://www.mea.gov.in/Images/pdf1/S7.pdf>

¹⁶ <https://www.mea.gov.in/Images/pdf1/S7.pdf>

¹⁷ <https://www.mea.gov.in/Images/pdf1/S7.pdf>

¹⁸ <https://indiankanoon.org/doc/1930681/>

¹⁹ <http://www.desikanoon.co.in/2014/05/doctrine-of-repugnancy-and-constitution-of-india.html>

²⁰ (1979) 3 SCC 431



Act and a State Act in the Concurrent List are fully inconsistent and are absolutely conflicting, the Central Act will triumph and the State Act will become void in view of the repugnancy.

Therefore, the Constitution recognizes the primacy of parliamentary law over state legislation in the concurrent list. The operation of Article 254 is not multifaceted. The real problem that arises in practice is that of determining whether a particular provision in the order passed by the state is offensive to the order passed under the central act. Fortunately, we have a catena of judicial decision taken by the Supreme Court, which lay down the rules for determining repugnancy.

Choices the Government had with the existing laws in hand

There is some debate in the media and among the citizens, that the government could have declared a national emergency under Article 352 of the Constitution. However, this was, legally not permissible and possible as post the amendment of this Article in 1978 (44th Amendment), such an emergency can be declared only if the security of India or any part of the country is threatened by a war or an external aggression or an armed rebellion. These are the only three grounds under which an emergency can be declared under Article 352 and in the case of the outbreak caused by COVID-19, none of the above given conditions are fulfilled. So, effectively, the only choice that the government had was to rely on Entry 29 of the Concurrent List and invoke its powers under the Disaster Management Act, 2005 which it did, thus

making the most of it, as it could with the existing legislature.

Other countries health policies

Certain lessons can be drawn from contemporary laws that exist in advanced democratic countries such as Australia, Canada, Britain, and the US. With the intent of this study the authors recommend/suggest the government of India to realize the importance of health and have a separate legislation for the same in order to avoid (in future) any chaos and disturbance caused by any other health hazard.

REIN [CUI] • Canada

In Canada, emergency measures and emergency management requirements at the federal level are governed by the Emergency Act of 1988²¹ and the Emergency Management Act 2007.²² Most provinces also have their own Health Acts that clearly delineate measures that are to be implemented in case of a health emergency. However, there is a comparatively higher bar for the federal government to take the lead in the situation of a health emergency. Therefore, most health crises in Canada are handled at the provincial level, in close coordination with the Central government.

The Public Health Agency of Canada Act of 2006²³ led to the creation of the Public Health Agency of Canada (PHAC) which is responsible for the promotion of health, prevention and control of chronic

²¹ <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html>

²² <https://laws-lois.justice.gc.ca/eng/acts/e-4.56/>

²³ <https://lois-laws.justice.gc.ca/eng/acts/P-29.5/>



diseases, infectious diseases, and preparation and response to public health emergencies. The Public Emergency Act gives the power to the Federal government to regulate movement of people, the requisition and disposition of property, the regulation of distribution of essential goods, the establishment of emergency hospitals, and the imposition of fines. Furthermore, the Quarantine Act of 2005²⁴ permits the Minister of Health to establish quarantine stations and facilities anywhere in Canada.

- Australia

In Australia, the National Health Security Act, 2007²⁵ draws the processes and structures to pre-empt, prevent and, in a contingency, deal with national health emergencies. Designated entities provide coordination and oversight at the national level, with the provinces applying their own laws, jurisdictional responses, and coordination processes. The National Security Health Arrangement, 2008²⁶, supports the National Health Security Act, 2007 and the National Health Security Regulations, 2008. Both of these give effect to the WHO's International Health Regulations (2005)²⁷. These regulations required Australia to develop multi-level capacities in the health sector

to effectively tackle the public health threats and to develop, strengthen and maintain the capacity to detect, report and respond to an epidemic.

The National Health Security Arrangement, 2008 is primarily concerned with strengthening Australia's public health surveillance and reporting system. It clearly lays down the responsibilities of the national and state level government with regard to surveillance and reporting of communicable diseases and responding to significant public health events. The National Health Emergency Response Arrangements, 2008 also called the National Health Arrangements. The document further provides structure for information flows during a health emergency, while also providing a governance structure for coordination, command and control.

Apart from having sophisticated legislation, Australia has also set up coordination entities such as the Australian Health Protection Committee²⁸, National Health Emergency Management Subcommittee²⁹, Communicable Diseases Network Australia³⁰ and the Public Health Laboratory Network³¹. They all respond

²⁴ <https://laws-lois.justice.gc.ca/eng/acts/q-1.1/index.html>

²⁵

<https://www.legislation.gov.au/Details/C2016C00847>

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<https://www.legislation.gov.au/Details/F2013C00171>

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<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=1B7812247E24A27EA3D72B261EC584BE?sequence=1>

²⁸ <https://www.health.gov.au/committees-and-groups/australian-health-protection-principal-committee-ahppc>

²⁹

<https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-response-arrangement-nov11-1>

³⁰

<https://www1.health.gov.au/internet/main/publishing.nsf/Content/cda-cdna-index.htm>

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<https://www1.health.gov.au/internet/main/publishing.nsf/Content/cda-cdna-phln-index.htm>



to, and coordinate efforts during disease outbreaks such as in the current outbreak caused by COVID-19. Furthermore, the Bio Security Act, 2005³² clearly defines what a quarantine is and lays out for what purposes people can be quarantined along with punishments for those who fail to comply. The keystone of this administrative superstructure is transparency. The Department of Health, through the National Notifiable Diseases Surveillance System, provides information on notifiable diseases.

- England

The Public Health (Control of Disease) Act of 1984³³ came into force with the aim of creating specific roles for different authorities in response to a national health emergency. This Act provides for a clear chronological chain in which the primary, secondary and tertiary responders needs to operate when dealing with a health emergency. Responsibilities from the local level up till the national level are clearly defined in the Act. Not only does England have laws in place to deal with an outbreak of the magnitude of COVID-19, but it is updating these laws to adapt to current challenges.

A Coronavirus Bill was introduced on 23rd March 2020 in the House of Commons³⁴; it is currently being debated in the House of Lords. The provisions include

empowering the police to enforce isolation for those who are symptomatic, and to shut down ports. The Bill provides for a host of capacity-building measures for the National Health Service (NHS) such as return of retired staff, reduced paperwork for discharge of patients, and extra employment safeguards for volunteers to allow them to suspend their jobs for up to four weeks.

- The United States of America

While the guiding US legislation is dated (The Public Health Services Act 1944³⁵), it is comprehensive enough to facilitate necessary action and creates an administrative framework through which any public health emergency can be channelled. It even foresees the need for supplemental personnel by creating a reserve corp. The law was last amended in December 2019. President Donald Trump has also invoked the Defence Production Act 1950³⁶ to battle the pandemic.

Conclusion

The COVID-19 public health emergency provides the Union government a rare opportunity to update the country's health laws; otherwise, this legislative and policy gap could soon prove to be India's vulnerable point.

An Approach Paper on a new Public Health Act proposed by a Task Force³⁷ put

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<https://www.agriculture.gov.au/biosecurity/legislation/biosecurity-legislation#biosecurity-emergencies>

³³ <http://www.legislation.gov.uk/ukpga/1984/22>

³⁴ <https://commonslibrary.parliament.uk/research-briefings/cbp-8857/>

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<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403520/pdf/pubhealthrep00059-0006.pdf>

³⁶ https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final__defense_production_act_091030.pdf

³⁷

<http://nhsrindia.org/sites/default/files/Task%20Force>



together by the government in 2012 had suggested that laws needed to be an integral part of a strong public health system. The paper contended that shortages in the public health system's legal preparation found generally in relation to planning, coordination and communication, surveillance and protection of persons during a public health emergency, that needs to be addressed by the proposed new public health act.

When push comes to shove, India, with its bare-bones legislative structure, would find it hard to find an enabling legal framework that will allow an efficient lockdown of entire cities, the quarantining of people, the temporary closure of business, and the distribution of medicines. There is a subjective evidence of travellers who, upon returning from abroad, have been reported as unwell by their neighbours and consequently picked up by the police.

With little or no legal backing for the government's actions, it has had to resort to the much-defamed and the worn-out Section 144 of the Indian Penal Code, curfews, and other draconian measures to limit the spread of COVID-19. One must bear in mind that other countries of the Commonwealth, that have analogous legal provisions in criminal law such as Section 144, are not compelled to invoke them to control the spread of an infectious diseases due to well-structured and sensitive contemporary legislation on public health situations.

This analysis of the gaps in the existing 1897 law along with Disaster Management Act, 2005, and the illustration of global best examples, make it clear that India is short of a legal architecture to effectively fight a global pandemic like COVID-19. Without an updated and comprehensive law on health emergencies, the state governments are resorting to the use of Section 144 of the Indian Penal Code and other draconian laws. Once the COVID-19 crisis abates, the country's lawmakers should use this opportunity to repeal the colonial law and pave the way for a new one that can better address health emergencies that India might face in the future.
