



**PRESERVING JUSTICE,
CONSTITUTIONALITY AND HUMAN
RIGHTS IN TIMES OF COVID-19**

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Abstract: -

The nation-wide lockdown enforced by the centre to combat Novel Coronavirus (Covid-19) has brought the nation to a halt. With businesses closed, services stopped, contracts terminated, this exercise in the times of crisis is unprecedented. Thus, subsequent to the stringent measures of quarantine; the need to keep the justice accessible to the public was paramount.

The nation in its battle with the pandemic had to deal with securing the health of the doctors and medical practitioners fighting the battle from the front line. Making it a preeminent issue to provide safeguard to them, by enforcing the pre-existing laws for the time of such epidemic.

To prevent the social machinery from falling out, the dimensions of justice, humanitarian principles, and constitutionalism must be checked. As cascading reports from all parts of the nation talk about hunger and starvation, prisons of the country were not far behind in raising serious human rights alerts. It is time for the Government and Courts to set a landmark in the eyes of the world, to show that the most complicated sovereign machinery in the world; is the most efficient one as well.

Keywords: -

Covid-19, Universal Declaration of Human Rights (UDHR), Commonwealth Human Rights Initiative (CHRI), The Disaster Management Act, 2005, The Epidemic Disease Act, 1897.

Introduction: -

The world as of today is under lockdown due to the outbreak of Novel Coronavirus. While the safety and health of the public are of primary importance, the havoc created by Covid-19 to other economical and legal machinery cannot be set aside.

In times of this crisis, only essential activities are allowed to function. In crucial government departments, the only limited and selective staff is allowed to come to work. The Judiciary has also dealt with the crisis at hand by taking only urgent and critical matters on board. Understanding the hazardous nature of the Pandemic all other administrative activities remain suspended by the Judiciary. To adhere to the strict need for social distancing, courts have expanded their horizon by allowing appearances through video conferencing and e-filing documents.

No doubt these measures renovate the antiquated court proceedings, but it is a sad reality that the reason behind the implication of such modern measures is to avoid a pandemic not to adapt to the changing nature of justice. Its high time that the modernization of the judiciary is taken as a priority and to improve the quality of the justice delivery system.

The crisis presented by the Covid-19 also affects the functioning of Article 21; the right to life, personal liberty, livelihood, and dignity. The constitutional path that needs to be chosen in such times should be the one that harmoniously construes the state's interest with that of the citizens'. Because the crisis is not only restricted to public health anymore. The prisons in India if left unattended may become the epicentre for the spread of the virus. Understanding the gravity of this issue, The Supreme Court took *suo moto*



cognizance of the problem of over-occupancy in Indian prisons, during the times of Covid-19 spread across the country. While isolation wards have cropped up in prisons all across the country, major steps for decongesting of prisons in the form of granting emergency paroles and interim bails to undertrials have started in many states of India, such as U.P., M.P., Maharashtra, etc. only to name a few. Also, some of the state governments have put a ban on prison visits from relatives, etc. for some time.¹

Kerala has been the first state to understand the need of the moment. On 25 March 2020 Kerala Government issued an order, GO No. 710/2020, which talks in detail about a set of guidelines; on food support, empowering local self-governments, the provision on uninterrupted essential medical services to persons suffering from cancer, diabetes and heart disease, specific support for transgender persons, etc. The order in its entirety talks about public well-being without any other deviations. In times like this, every state needs to follow the lead provided by the Kerala State Government and stand apart from the political agenda movements.

Accessibility to Justice: -

As per India's democratic framework, access to justice is a fundamental right granted to every citizen and thus, it must not be ignored. In times of Covid-19 where social distancing has become a need, to make sure that justice is still accessible to people should be of top priority. Technology by coming to the rescue;

opens up several doors to combat this situation. By granting access to most litigants, even while they are in self-isolation, quarantined, or following social distancing, technology can be of utmost help.

Accessibility is embedded in the core of the justice delivery system. Since the quality of adjudication in a courtroom is directly proportional to its reach to the litigants. In India, it is still a constraint for a lot many people to get access to justice. Some don't have the financial means to reach the court and seek justice while the other cannot afford the time required for the process of litigation. Not only this, the inaccessibility to courtrooms for the physically challenged people is also another roadblock.

All these obstacles add up to the need for videoconferencing at such times. With the boom in technology and its wide usage, it is available for access in the hands of every ordinary citizen, and there is no reason as to why the apex institution such as Judiciary must not make use of it. The Supreme Court in the case of Swapnil Tripathi v. Supreme Court of India² held that the entire judiciary must move towards the streaming of proceedings starting with the Supreme Court itself.

This may be the right time to bring in videoconferencing for good. Just like many employees will be able to prove the viability of working remotely in a post-Corona world, many litigants who have experienced videoconferencing and e-filing will question why these cannot continue after the pandemic abates.³

¹ Kalpana Kannabiran, Justice and Rights in Viral Context in India, The India Forum, (June 30, 2020, 03:31 PM), <https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india> .

² Writ Petition (Civil) 1232/2017.

³ Madhav Chandavarkar, the coronavirus pandemic is an unfortunate opportunity for India's judicial system to modernise, Coronavirus Crisis, (June 30, 2020, 08:30 AM), <https://scroll.in/article/958271/the-coronavirus-pandemic-is-an-unfortunate-opportunity-for-indias-judicial-system-to-modernise> .



The Supreme Court initially recommended litigants to use a US-based video conferencing app 'Vidyo'. But the application raised severe security and sovereignty issues, which were later added to by the linkage issues caused due to too much traffic. Hence, other means such as WhatsApp, Facetime, Skype were instructed to use as a mean to last resort.

Legal Developments-

On April 6, 2020, A Bench led by Chief Justice of India (CJI) Sharad A. Bobde laid down certain restrictions that deemed all restrictions laid down on people from entering, attending, or taking part in any court proceedings as lawful considering the situation in the wake of Covid-19.

The court invoked its extraordinary Constitutional powers under Article 142 to step away from the convention of open court hearings.⁴ Since open court hearings would lead to the gathering of a large number of people in very close proximity, thus making the people present in the courtroom more prone to the virus.

Videoconferencing Guidelines-

The Apex court also laid down certain guidelines for the courts and litigants to streamline videoconferencing. While giving a series of directions, the Supreme Court allowed the High Courts to decide the usage and necessary proceedings regarding the temporary transition to video conferencing in their respective states. District Courts would follow the mode of videoconferencing as instructed by their respective High Courts. The courts would also make the requirements

of the videoconferencing facilities for those litigants who do not have it.

Since this feature requires technical knowhow, helplines would also be established to solve technical related issues.

“In no case shall evidence be recorded without the mutual consent of both the parties by videoconferencing. If it is necessary to record evidence in a courtroom, the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the court,” the apex court order said.⁵

Right to Health: -

During the times of a pandemic, the consequences of neglect in the health sector can cause severe harm. The strata of society that gets affected the most in such times are the poor and marginalised. Due to the fear of the spread of infection an unplanned lockdown was enforced, thus, leading to negligence in the distribution of resources and violation of health rights.

Poor healthcare mechanisms and lack of proper equipment threatened the safety of a lot of doctors and medical staff working at the front line. Covid-19 brought into light the readiness of the system to fight the pandemic and the right to health as a fundamental right in India.

Even though the constitution of India doesn't expressly recognize the right to Health it is still an inherent part of life with Dignity and is undoubtedly a core component of Article 21⁶. During such times an important area that attracts concern is the testing of people to contain the pandemic. As the systematic dismantling of public healthcare has rendered us more vulnerable in terms of inadequate

⁴ Krishnadas Rajagopal, Coronavirus | Restrictions on court hearings lawful, says Supreme Court, National, (June 30, 2020, 09:00 AM), <https://www.thehindu.com/news/national/coronavirus>

-restrictions-on-court-hearings-lawful-says-supreme-court/article31274285.ece

⁵ Ibid.

⁶ Constitution on India.



facilities, shortfall of trained personnel, and inadequate biotechnological support.⁷

A major part of the population being from the lower economic group needs the government's support the most in the times of such pandemic. Whereas, on the contrary, the horrifying reports from all over the country show that hunger and starvation are a much bigger threat than the pandemic itself to these people. There are also people who require immediate access to the free healthcare services for essentials and Covid-19 both.

At the time of enforcing the lockdown, the Government's presumption that every person has access to food, water, housing, etc. was flawed. As a result, so many people who didn't have any access to even the basic necessities found their survival from hunger, and thirst to be more threatening than Covid-19 itself.

It is widely accepted that socio-economic factors and poverty heighten vulnerability to disease and death, and curtail access to quality health care. Abysmal public health expenditure, inadequate personnel, low investment in training and education, inadequate public health infrastructure, and lack of state commitment to build robust public health systems have been problems at the centre of public health research and policy.⁸

The health sector peoples who are fighting on the front line in this time, making them more vulnerable to the virus, have a right to full

protection under Article 21 and Article 14 of the Constitution.

Human Rights concern in times of a Public Health Emergency: -

At the time of the drafting of our constitution, the founding fathers inculcated the principles of Justice, Equality, Fraternity in the very Preamble of the Constitution to safeguard the dignity of an individual. It cannot be said that while drafting the constitution the founding fathers were unaware of the Universal Declaration of Human Rights (UDHR). Thus, paying importance to the necessity of the human rights mentioned in the UDHR, certain principles were included in the constitution.⁹

The coronavirus epidemic has now enveloped the globe and generated new forms of governmentality and bi-legitimation practices in its wake. But only new forms of human compassion and solidarity can help overcome this lethal and formidably grim challenge.¹⁰

An important reasoning to check the lockdown would be the 'Proportionality Test' which has been mentioned in the case of Puttaswamy¹¹. The test emphasises on two parameters, being

- (a) was the measure necessary and,
- (b) was it the least restrictive force needed by the state to achieve its goal.

The Indian lockdown could be said to be one of the harshest lockdowns in the world as it

⁷ Kalpana Kannabiran, Justice and Rights in Viral Context in India, The India Forum, (June 30, 2020, 03:31 PM), <https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india>.

⁸ Ibid.

⁹ Harshit Sankhla, International Humanitarian Law Combating the Indian Enigma, 3 IJLMH (ISSN 2581-5369) (2020).

¹⁰ Upendra Baxi, Nations must not ignore principles of existing international law in fight against COVID-19, The Indian Express, (July 02, 2020, 11:21 PM), <https://indianexpress.com/article/opinion/columns/india-lockdown-quarantine-coronavirus-cases-upendra-baxi-6355478/>.

¹¹ 10 SCC 1 (2017).



barely gave a 4-hour notice before its enforcement. But, the means by which this lockdown was enacted are arbitrary, lack transparency, and empathy towards the poor and don't respect their need for survival. These reasons make it a failure from the view of the 'Proportionality Test'.

The positive measures taken with the intent of doing good of the majority of the public should have been spelt out in every minute detail for the action to pass the 'Proportionality Test'. The harm caused could have been controlled by the government by meeting the requirements of the test, which could have been done by communication of the measures in detail and its entirety by the media. It's a given that the state controls the media and resources and thus if tried the damage could have been controlled.

If take a look at the standards laid down by the International Human Rights during the times of health emergencies, when restrictions on one's liberty were enforced in the form of quarantine, self-isolation, lockdowns and the compulsory distancing norms, it tells us that there need to be an attentiveness on the part of the state. The authorities must ensure that the measures are not stifling orders, but are well processed and calibrated to the need of the situation. Liberty being a fundamental right under the Constitution of India is curtailed under such times, there must be no restrictions on the flow of information and free speech must be guaranteed.

¹² Vartika Nanda, In a lockdown, the fate of prisoners, Hindustan Times, (July 03, 2020, 07:33 PM), <https://www.hindustantimes.com/analysis/in-a-lockdown-the-fate-of-prisoners/story-MUerHTjTxlBkkqpyrQXuN.html>.

Prisoner's Rights during Pandemic: -

Prisons in India are at a high risk of becoming the breeding grounds for Covid-19 due to the paucity of space and inadequate healthcare facilities. Due to the lack of cells and overcrowding in prisons, the idea of social distancing seems like an impossible task to achieve. Thus, making prisons a threat to not only the inmates but also to the authorities working there.

A two-judge bench of Chief Justice SA Bobde and LN Rao issued a notice to the director-general, Prison, and chief secretaries of all states and Union territories on March 16, asking them about the precautionary measures taken to prevent the spread of the virus in the jails.¹²

According to the last count published by the National Crimes Record Bureau in 2018, the country has about 450,000 prisoners against a mandated capacity of 396,000 inmates in its over-1339 central, district and sub jails.¹³ Before lockdown jails were running at 50% higher than their occupancy. Thus, creating an environment of panic among the prisoners as well as the working staff. Hence, prisons are releasing 14 categories of prisoners including severely sick inmates and women prisoners as well.

The courts have ordered the states and union territories to formulate a High Powered Committee (HPC) to decide the categories of prisoners that are to be released on parole/Interim Bail to avoid the issue of

¹³ Murali Krishnan, Indian inmates released from crowded jails to limit Covid-19 spread, International, (June 29, 2020, 10:00 PM), <http://www.rfi.fr/en/international/20200516-indian-inmates-released-from-overcrowded-jails-to-limit-covid-19-spread-lockdown>.



overcrowding in prisons. The Court suggested the following categories for consideration of release;

1. Prisoners who are convicted/undertrial for one offence for which the sentence is upto seven years.
2. Any categories identified by the HPC based on of the nature of offence, duration of the sentence, and severity of the offence.¹⁴

According to the data gathered by the Commonwealth Human Rights Initiative (CHRI), which is an international NGO, most of the states have started the release process for the prisoners with the exception of those charged with the offences of Murder, Rape, Terror and held guilty or under trial for the offences under The Narcotic Drugs and Psychotropic Substances, Act, 1985 and The Prevention of Children from Sexual Offence Act, 2012.

Constitutional Remedies-

Even though the Right to health isn't expressly mentioned in the Constitution of India, it still remains a core part of the Right to life i.e. Article 21 of the constitution. According to the judgement of the Supreme Court in the case of Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others¹⁵, the right to life included an obligation to provide timely medical treatment necessary to preserve human life.

¹⁴ State/Ut Wise Prisons Response to Covid 19 Pandemic in India, Common Human Rights Initiative, (03 July, 2020, 02:30 AM), <https://www.humanrightsinitiative.org/content/stateut-wise-prisons-response-to-covid-19-pandemic-in-india>.

¹⁵ A.I.R. SC 2426 (1996).

The question that still arises is whether the fundamental right to health is available to the prisoners just like any ordinary citizen or not. To that, The Supreme Court of India in its decision in Charles Sobhraj v. The Superintendent, Central Jail, Tehar, New Delhi¹⁶, held that imprisonment does not “spell farewell to the fundamental rights.” Though the implication of these rights to prisoners may be slightly different from that of other citizens due to the restrictions imposed because of the imprisonment. Though, this to not be treated as an excuse to deny the health remedies to prisoners; as any violation may lead to court's interference to provide the remedy.

Apart from the Indian Constitution, Section 4 of the Prisons Act, 1894, provides for the provision of sanitary accommodation facilities to prisoners. At the same time, Section 7 of the same legislation contemplates the provision of shelter and safe custody facilities to such prisoners who may be found to be in excess of the prison capacity of a prison.¹⁷ The Act also makes it mandatory for the prisoners to go through a medical examination before their admission into the prison.

The Model Prison Manual, 2016 lays down some guidelines for prisoners in the wake of an epidemic. In such cases of spread of a pandemic, the manual directs segregation of infected prisoners into separate cells and sanitization of the infected inmates' clothes, belongings, and cells. The manual also rules

¹⁶ A.I.R. 1514 (1978).

¹⁷ Akash Anurag and Aniket Raj, Covid19-IX: Rights of Prisoners During a Pandemic, Law School Policy Review, (July 4, 2020, 3:33 PM), <https://lawschoolpolicyreview.com/2020/04/25/covid-19-ix-rights-of-prisoners-during-a-pandemic/>.



against overcrowding of prisoners in cells or wards during the times of an epidemic.

Legislative Framework: -

Without effective human intervention, a pandemic can only end when the virus kills every host it has infected. Thus, the authorities need to step into the picture and bring the machinery of the legislative framework into motion to reduce the damage as much as possible. Under the Indian Constitution, public health and sanitation are the responsibilities of the state and local governments while the union government manages port quarantine, inter-state migration, and quarantine.¹⁸

- In January, using the power enshrined under The Disaster Management Act, 2005 the government tried to enhance the preparedness at the hospitals to contain the Covid-19 virus. By declaring the Covid-19 spread as a pandemic thus, a disaster gave the states the authority to use the funds from the State Disaster Response Fund for the relief work.
- In March, the Ministry of Health notified the states to invoke Section 2 of the Epidemic Disease Act, 1897, which deals with providing special powers to centre and state government to deal with the prevention of transmission of the epidemic.

- India being a signatory to the International health regulations, 2005 (IHR), needs to establish a firm and considerate health response to the spread of the Covid-19 virus on an international scale. This is done by the Integrated Disease Surveillance Program (IDSP).

The Disaster Management Act, 2005-

As per the directions of the Union Ministry of Home Affairs under the Disaster Management Act, 2005, the state governments and district authorities initiated the lockdown. The act's intent is "to provide for the effective management of disasters and matters connected therewith or incidental thereto".

Under the Act, the National Disaster Management Authority (NDMA) was established, headed by the Prime Minister. In pursuance of the Act, a committee was formulated by the ministry i.e. National Executive Committee (NEA) which is chaired by the Home Secretary. As per this act, the Ministry of Health and Family Welfare regulated the sale of surgical masks, hand sanitizers, and gloves and have added them as Essential goods under the Essential Commodity Act, 1955 to prevent hoarding and black marketing.¹⁹

On March 24, 2020, the NDMA and NEA issued orders directing the Union Ministries, State governments and authorities to take effective measures to prevent the spread of

¹⁸Harleen Kaur, Can the Indian legal framework deal with the COVID-19 pandemic? A review of the Epidemic Diseases Act, Parliament Columns, (July 04, 2020, 06: 32 PM), <https://www.barandbench.com/columns/can-the-indian-legal-framework-deal-with-the-covid-19-pandemic-a-review-of-the-epidemics-diseases-act>.

¹⁹ Press Information Bureau, Government invoke Disaster Management Act to ensure prices regulation and availability of Surgical and protective mask, Hand sanitizer and Gloves, (July 03, 2020, 05:13 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=200240>.



COVID-19, and laid out guidelines illustrating which establishments would be closed and which services suspended during the lockdown period.²⁰

The Epidemic Disease Act, 1897-

Time and again the need to update the age-old law has been raised, but the legislature has felt against it. David Arnold describes the law as "*one of the most draconian pieces of sanitary legislation ever adopted in colonial India.*"²¹

The Epidemic Act, 1897 was designed to bring the government machinery into motion in times of the threat of an epidemic and not to deal with the general public health system. The law consists of four sections which bestow wide powers to the government. The state governments are entitled to regulate 'dangerous epidemic disease'. The union government governs the movement of ships and vessels into the territory of India. Disobedience to the law attracts penal actions. The act allows state governments to ban public meetings, gatherings and also close schools and colleges till the threat is passed.

The intent of the drafters of the act was to establish a nexus with international laws regarding the epidemics. The primary concern of the government was to build harmonious relations with the International Sanitary Convention, to protect trade and commerce in the times of the spread and to

eliminate any fears in the international countries about the spread of plague or cholera outside India.

Other Legislature-

1. **Aircraft (Public Health) Rules, 1954-** Government has also taken recourse to the Aircraft (Public Health) Rules, 1954. Since travel in such times is of very inflammatory nature as it may lead to a rise in the spread of the virus, special extraordinary measures need to be taken. The Act warrants a health officer to check the citizens arriving from international countries at the airports.²²
2. The administration can also take recourse to **Sections 269, 270, 271 of the Indian Penal Code** to ensure effective enforcement of the public healthcare rules. For successive enforcement and effective regulation, we require the amalgamation of public safety laws to efficiently track the execution of reaction to an outbreak.²³

Conclusion

The spread of Covid-19 across the globe is unprecedented and drastic times call for desperate measures, hence the lockdown. The Novel Coronavirus has spread so rapidly that it has changed the rhythm of the globe. India being a country with such a vast population faced the threat of the spread of Covid-19 the most. Due to the poor healthcare facilities in most rural parts of the country, the chances of the virus to spread like wildfire were very high. Thus, all necessary steps were taken by

²⁰ Manuraj Shunmugasundram, India needs to enact a COVID-19 law, Lead, (July 04, 2020, 06:54 PM) <https://www.thehindu.com/opinion/lead/india-needs-to-enact-a-covid-19-law/article31529036.ece>.

²¹ Arnold D. Science, Technology and medicine in colonial India, United Kingdom: Cambridge University Press 143 (2000).

²² R. 2(8) Aircraft (Public Health) Rules, (1954).

²³ Aniket Sachan & Sakshi Agarwal, India Fights COVID-19: Where We Stand?, (July 04, 2020, 11:34 AM), <https://countercurrents.org/2020/03/india-fights-covid-19-where-we-stand/>.

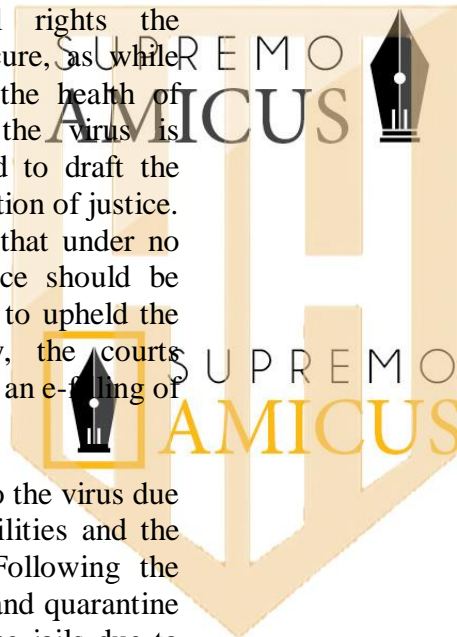


both the central and state governments to curb the damage to its minimum.

should not be put to halt under any circumstances.

In times like this, the danger is not only limited to people's health. The constitution also faces a risk, as people's fundamental rights may be overlooked by the government to safeguard their health. With the shift in priority the necessity to guard the basic rights arise. Supreme Court of India played a very firm role as a custodian to make sure that no violations either of the constitution or of human rights go unchecked.

With the ocean of landmark judgements as a shield to the fundamental rights the constitutionality remained secure, as while the governments made sure the health of people are improved and the virus is eliminated, the courts worked to draft the guidelines to ensure the protection of justice. The courts were of the view that under no circumstances access to justice should be compromised, hence the need to uphold the functioning of the judiciary, the courts adopted the videoconferencing an e-filing of cases.



The prisons were very prone to the virus due to the lack of health care facilities and the shortage of space in jails. Following the practices of social distancing and quarantine were of utmost difficulty in the jails due to the problem of overoccupancy. To solve that issue and to safeguard the health and rights of the prisoners, decided to grant interim bail/parole to a certain category of prisoners.

Life of a human being is not just animal existence; it is far more important than that. Hence, it must be protected from any form of inhumane treatment. To make sure that doesn't happen, the justice delivery system