

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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The Judiciary: Guardian Of Citizens **During A Public Health Emergency**

*“There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured”.*¹

--Dr. B.R. Ambedkar

Authored By-Maeen Mavara Mahmood

Introduction:

The COVID-19 Pandemic has been the biggest Health Emergency that the world has come to face. In times like these, roles of the democratic agencies come to stand the test of times. Health Emergencies like any other emergency requires quick, prompt and effective responses to meet the exigency of the matter at hand.

Lawrence Gostin, an American law professor specializing in public health law, suggests a “Duty-Power-Restraint” framework for enacting effective legislations in the sphere of public health law.² He suggests that public health legislations must clearly mandate responsibilities of the government and public health agencies by imposing positive duties (Duty). It must also equip the government and the public health agencies with adequate powers to carry out the necessary steps in order to tackle any public health emergencies effectively (Power). Lastly, it must lay down provisions of restraint in the form of safeguards and remedies in order to prevent overreach and violation of individual rights by the government and its agencies (Restraint).

Broadly speaking, India lacks the presence of a comprehensive law solely focusing on public health emergencies. Due to the absence of such law, it lacks the legal preparedness required in facing a health emergency effectively. Gostin’s theory along with various guidelines as suggested by the World Health Organisation (WHO) requires a public health law to fulfill various legal and executive functions.

¹ Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949), in CONSTITUENT ASSEMBLY DEBATES, vol.VIII, 258.

² Gostin, Lawrence O., "A Theory and Definition of Public Health Law" (2007), *Georgetown Law Faculty Publications and Other Works*.

However, the existing central and state laws such as the Epidemic Diseases Act, 1897,³ The Disaster Management Act, 2005⁴ etc., fail to fulfill the necessary preconditions.

Hence, interjections by courts to issue orders that authorize certain actions may be undertaken to protect the public health. It must perform its functions and apply restraint in matters where the civil liberties of individuals are being violated with regards to actions of the public health authorities.

As an essential backdrop, this article will briefly introduce the basic structure and functioning of the judicial system in India. It'll then move on to recognising various powers, responsibilities and the limitations of the judiciary during a public health emergency.

Judicial System In India:

The Constitution of India lays down a single integrated Judicial System with a three tier structure. At the root level it consists of subordinate courts, at the secondary level the High Courts⁵ and the Supreme Court⁶ at the apex. Articles 32 and 226 confer the Writ Jurisdiction upon the Supreme Court and High Courts respectively. This allows courts to take suo moto cognizance for the protection of fundamental rights.

The Constitution provides for an independent judiciary. It ensures fair adjudication of rights of individuals and certain rights of the government free from any political or extraneous influence. The intention of the makers for an independent judiciary is evident through the constituent assembly debates. Dr. Rajendra Prasad stated, “We have provided in the Constitution for a judiciary which will be independent...”⁷.

³ Epidemic Diseases Act, No. 3, Acts of Parliament, 1897 (India)

⁴ Disaster Management Act, No. 53, Acts of Parliament, 2005 (India)

⁵ INDIA CONST. art. 214

⁶ INDIA CONST. art. 124

⁷ Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, Speech to the Constituent Assembly of India preceding the motion to adopt the Constitution (Nov. 29, 1949), in 11 CONSTITUENT ASSEMBLY DEBATES, 498.

Public Health Emergency:

The International Health Regulations (2005) is a legal framework formed by the World Health Organization (WHO) that “defines countries’ rights and obligations in handling public health events and emergencies that have the potential to cross borders”.⁸ An instrument that is legally binding on all 196 countries. These regulations also outline the criteria to determine whether or not an event constitutes a “public health emergency of international concern” (PHEIC). It defines a “PHEIC” as

“an extraordinary event which is determined, as provided in these Regulations:

- to constitute a public health risk to other States through the international spread of disease; and
- to potentially require a coordinated international response”. This definition implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State’s national border; and may require immediate international action”.⁹

On 30th January 2020, WHO declared the COVID-19 virus as a “PHEIC”. Since then the world along with India has seen the worst epidemic to have struck in recent times. Currently the country has an estimated 33,53,765 active cases as of 18th May 2021.¹⁰

Since the declaration of a public health emergency, the country has faced troubles of various kinds. In order to curb the spreading of the virus, a nationwide lockdown was announced twice and all citizens were asked to quarantine themselves within their own homes. This lockdown also meant the shutting down of all businesses apart from essential services. As a result of this emergency, apart from public health concerns, various other concerns came to light. Rising unemployment, wage cuts, deserted migrant workers and labourers, illegal eviction of the poor from residential spaces etc. were among such concerns.

Recently, due to the sudden rise of the second wave of the virus, there have been several issues with regards to non-availability of hospital beds for the sick, shortage of vaccines and oxygen cylinders, malpractices in the treatment of patients etc. have also been on a constant rise.

⁸ World Health Organization, International Health Regulations, 2005

⁹ *Id.* at 14

¹⁰ Ministry of Health and Family Welfare, <https://www.mohfw.gov.in/>, 10:23 PM

Judiciary And Public Health Emergency:

The judiciary plays the role of a guardian of individual's rights. In performing this role, it has certain powers which it may exercise, including the power of judicial review, taking suo moto cognizance, performing its function of interpreting laws and invoking the writ jurisdiction. These powers help courts to review the actions of the legislature as well as the executive, in order to ensure that justice is upheld.

If the court concludes that the actions of the executive or the legislature infringe upon the individual's rights then it may declare such actions as unconstitutional and order the said functionaries to correct their actions.

In a public health emergency the legal environment is bound to change. Priorities may change to cater to the urgent matters at hand. Hence, it is the responsibility of courts to ensure justice is served fairly and is not delayed. In an emergency, courts actions could include, affirming and enforcing an order to a public health official as a proper exercise of discretion, overturning an order of a public health official for lack of statutory authority, or striking down a public health law or order for unduly interfering with an individual's constitutional right to liberty.

In a recent order, *In Re: Distribution of essential supplies and services during the pandemic*¹¹, the SC took suo moto cognizance. The Chief Justice of India led bench declared it to be a national health emergency and ordered the government to respond on several questions regarding, vaccinations, free oxygen supply, availability of beds etc. and went on to state, " prima facie, we are inclined to take the view that the distribution of these essential services and supplies must be done in an even handed manner according to the advice of the health authorities which undoubtedly take into account relevant factors like severity, susceptibility, the number of people affected and the local availability of resources. We expect the Central Government to place before this Court a national plan for dealing with the above services and supplies during Pandemic".¹²

¹¹In Re: Distribution of essential supplies and services during the pandemic.

¹² *Id.* at 17

Similarly, the Gujarat High Court has registered a suo moto PIL with regards to deterioration in public health services in the state during the pandemic, citing media reports.¹³

In the current public health emergency the common man has suffered the most.

Many such difficulties faced can be traced down to poor governance, the reason for which can be led back to absence of laws and regulations in place to effectively solve concerns that continue to rise in these unprecedented times.

In times like these, the importance of the judiciary's role is enhanced during this emergency.

For instance, after the announcement of the first nationwide lockdown in the early months of 2020, the hardest hit community were the migrant workers and labourers. Several migrant workers were left stranded and jobless to contain the pandemic. As a result, several migrant workers were left to walk back to their native places due to denial in or non-availability of residential spaces and transport. Upon failure of the central and state governments to adequately handle the matter, the Supreme Court *In Re: Problems and Miseries of Migrant Labourers*¹⁴ took suo moto cognizance and ordered the central and state government to provide food and shelter to 100 million migrant workers free of cost. This was one of the landmark judgements passed by the Supreme Court during the pandemic.

Similarly, courts have adjudicated on several matters such as proper treatment of COVID-19 patients and dignified handling of dead bodies¹⁵, directions in the interest of children falling within the ambit of Juvenile Justice Act, 2015¹⁶ etc.

The Supreme Court also used its power of interpretation and observed that the "right to health is a fundamental right guaranteed under Article 21 of the Constitution of India. Right to health includes affordable treatment. Therefore, it is the duty upon the State to make provisions for affordable treatment and more and more provisions in the hospitals to be run by the State or local administration are made".¹⁷

¹³ In Re : Uncontrolled upsurge and serious management issues in COVID control

¹⁴ In Re: Problems and Miseries of Migrant Labourers, Suo Moto Writ Petition,

¹⁵ In Re: The Proper Treatment of COVID-19 patients and Dignified Handling of Dead Bodies in the hospitals etc., Suo Moto Writ Petition

¹⁶ In Re: Contagion of COVID-19 Virus in Children Protection Homes, Suo Moto Writ Petition,

¹⁷ *Id.* at 14

Through the various judgements passed during the COVID-19 pandemic, the judiciary has effectively exercised its powers of judicial review and interpretive functions granted under the Constitution and fulfilled its role as the protector of individual rights and guardian of constitutional values.

Limitations:

One of the biggest limitations that can be faced by the judiciary during the public health emergency is the health emergency in itself. For instance, in order to contain the COVID -19 pandemic, during the first lockdown, the judiciary suspended all judicial and administrative work keeping an exception of urgent matters. To meet the needs of social distancing rules, the courts depended on appearances via video calling and e-filing of documents.

Data from the National Judicial Data Grid (NJDG) estimates that due to the suspension of judicial work, the pendency of cases rose by 10.35% in the Supreme Court, 20.4% in the 25 High Courts and by 18.2% in the lower courts over a one year period between 2020-21.¹⁸

Another limitation the courts face is in the actual adjudication of matters. In the COVID-19 pandemic courts were open to adjudicate on urgent matters only. Therefore, as mentioned earlier, a public health emergency naturally changes the environment of legal services. The judiciary was to give importance only to matters that were urgent and related to the emergency. Adjudication of matters not related to the emergency were left unattended and justice was delayed.

However, a situation of emergency calls for certain sacrifices and flexibility in law in order to cater to matters having a greater impact on the whole society.

¹⁸ National Judicial Data Grid, <https://njdg.ecourts.gov.in>, 11:14 PM

Conclusion:

In a health emergency such as the current COVID-19 pandemic, the weakest and most vulnerable would be the common man. The citizens depend upon governments to equip them with necessary essentials to combat the consequences of the health emergency. In this situation, accountability of the executive organ can only be ensured by the judiciary.

The existing laws are ambiguous and incomplete as they do not provide specific regulations and procedures to follow in a public health emergency. For instance, the archaic Epidemic Diseases Act, 1897 does not even define the term “epidemic”. They are not sufficient in helping to curb a fast growing pandemic like the COVID-19 virus. In the absence of a law and the lacunae in existing laws, legal intervention is inevitable. Due to this, the role of the judiciary to protect constitutional values such as rule of law and act as guardian of civil liberties, becomes paramount during a public health emergency.

