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Legislative Failure in the Management of the Covid-19 Crisis: Identifying and Addressing the Lacune in the Extant Law

ANUP MENON V¹

ABSTRACT

Legislation that is aimed at tackling a global pandemic such as Covid-19 should be equipped with a proper legal framework that empowers a government to take swift action in the name of the most cardinal function of all, protecting human life. However, this can be a tricky tool to devise. The empowering of the State to manage and control dire circumstances such as a raging pandemic would, in all likelihood, require superseding or suspending some of the basic rights of individuals in a society. Despite this, such laws are necessary for saving mankind in chaotic situations and are in the greater interest of society. India was not in the least prepared for a catastrophic event like COVID-19. The fact that the best recourse that we had to such a calamitous epidemic was a 123-year-old archaic law is frightening and indicative of the reasons the pandemic has wreaked such havoc in our country. The focus of this paper is to analyze the existing legal framework in India for dealing with a health care emergency like Covid-19 to identify the shortfalls therein. The research paper will also strive to provide recommendations on various provisions that an ideal law dealing with pandemics should provide for.

Keywords: *Pandemic, COVID-19, Epidemic, Epidemic Diseases Act, Pandemic Laws*

I. INTRODUCTION - THE NEED FOR LAW AND THE FALLACIES OF AN ARCHAIC ONE

Judith Rich Harris, the revered American Psychologist, calls the heterogeneous nature of mankind the greatest mystery of Psychology.² This unmistakable heterogeneity of human nature renders imperative the need for law, as it can provide for certain preordained norms of comportment and conduct that bring disparate motley of individuals under an umbrella of uniformity. Though great calamities do see human beings be comparatively more consistent, as, in such times, most responses spring from an instinct to survive, there remains plenty of room for unpredictability and chaos. History bears witness to the fact that without *laws*, the

¹ Author is a Guest Faculty for Law at Prayaga School of Corporate Studies, India.

² Judith Rich Harris, *No Two Alike: Human Nature and Human Individuality*, New York: W.W. Norton & Co, 2006. Print. ISBN: 0393059480 9780393059489 0393329712 9780393329711 OCLC Number:61461712

feigned construct of society falls apart and gives way to anarchy and mobocracy. This legitimizes the State's authority and the resultant needs for laws in a society. Hence also the recognition in the *social contract theory* that the concept of a State is based on social solidarity and an outcome of the will of the people³. We see of what paramount significance this relationship between the people and the State escalates to in times of disasters, calamities, or any such phenomenon causing chaos at a large scale.

A pandemic of such easy transmissibility as Covid-19 doesn't take much time to spread throughout the world, and so before all of mankind even fully accepted the legitimacy of its existence, it was everywhere. Inevitable chaos ensued. In our times, it has been an unparalleled disruptor that has drastically transformed our way of living⁴. In such circumstances, legislations play a significant role in guiding human conduct. They provide guidance and a sense of security. Covid-19 is a travesty like no other and has shaken up the very foundation of our society. That it is an unprecedented event is perhaps best reflected in the lack of preparedness, especially from the legislative perspective.

Situations like these call for greater powers to be bestowed upon the State, sometimes even at the cost of curtailing some of our basic rights for the greater good and to restore normalcy. A pandemic law should be equipped with a proper legal framework that empowers a government to take swift action in the name of the most cardinal function of all, protecting human life. Pandemic laws can, however, be a tricky tool to devise. The empowering of the State to manage and control dire circumstances such as a raging pandemic would, in all likelihood, require superseding or suspending some of the basic rights of individuals in a society. Despite this, such laws are necessary for saving mankind in chaotic situations and are in the greater interest of society.

Framing laws to deal with a specific set of conditions that don't, as a rule, need to be dealt with often brings its challenges. We are no longer the cave-dwelling Neanderthals who walked the surface of this planet some 200,000 years ago. Our remarkable cognitive abilities make us an ever-changing phenomenon that is constantly evolving.⁵ As we and the conditions of our existence evolve, so does society. The laws that are created to preserve order in society and safeguard individuals need to evolve too. Laws are designed to regulate the conduct of human

³ O.P. Gauba, *An Introduction to Political Theory*, National Publishing House, 2019. Print. ISBN 9388658337, 9789388658331

⁴ Capra, F and Henderson, H (2020) 'Pandemics: Lessons Looking Back from 2050', EthicalMarkets. available: <https://www.bioarchitettura.org/storage/news/docs/pandemics-lessons-looking-back-from-2050-1-xD.pdf>

⁵ Neuberg, S. L., Kenrick, D. T., & Schaller, M. (2010). Evolutionary social psychology. In S. T. Fiske, D. T. Gilbert, & G. Lindzey (Eds.), *Handbook of social psychology* (pp. 761–796). John Wiley & Sons, Inc.. <https://doi.org/10.1002/9780470561119.socpsy002021>

beings living in a society at a given point in time. The societal norms, the fundamental rights of humans, and numerous other variables of the like nature are factored in a while drafting and promulgating a law. Whilst certain laws, especially in the criminal domain, remain the same, most of the others become redundant and ineffectual over time unless they are updated in line with the changing contours of societal norms and needs. Perhaps the only worse thing than the absence of law would have to be the persistence of an archaic one, for the former is clear on its consequences while the latter gives us a false sense of security, only to hit us in the dark when we are least prepared for it.

India was not in the least prepared for a catastrophic event like COVID-19. The fact that the best recourse that we had to such a calamitous epidemic was a 123-year-old archaic law is frightening and indicative of the reasons the pandemic has wreaked such havoc in our country.

(A) Objectives

The focus of this paper is to analyze the provisions of the Epidemic Diseases Act, 1897⁶ (“**the Act**”) with the aim to understand the shortfalls therein. The research paper will also strive to provide recommendations on various provisions that an ideal law dealing with pandemics should provide for.

(B) Research Methodology

The primary aim of this study, as is stated earlier, will be to identify the issues attenuating the efficacy of the law presently and to suggest how best to overcome this. Keeping this in mind, the following research techniques have been utilized:

- **Doctrinal Research**

The Doctrinal Research approach has been used for the purpose of analyzing the existing laws and scholarly articles with an aim to identify gaps in the existing legal framework.

- **Qualitative Research**

The study has also utilized a qualitative research method in the nature of an interview to gain a better understanding of the issues at the ground level. For this, an eminent lawyer with extensive litigation experience of more than three decades has been being selected, and his views have been used to identify and corroborate the gaps in the present law. The same will be generalized with specific reference to the interview in the section dealing with the drawbacks of the present law. The interviewee selected for this purpose is Adv. Mohanram C Menon,

⁶ The Epidemic Diseases Act, 1897 (Act No. 3 OF 1897)

Managing Partner - 'Mohanram & Associates Law Firm'.

The interview was conducted using a questionnaire⁷ consisting of five questions. The main areas covered by the questionnaire include the views of the subject on, i) the adequacy of the present law, ii) issues regarding vagueness in the law, iii) lack of administrative oversight under the law, iv) issue of privacy violation and v) aspects that ought to be covered ideally under the law. The views of the interviewee will help substantiate the drawbacks and problems with the present law and how this affects the efforts to fight the pandemic.

(C) Research Hypothesis

The proposed paper is going to critically analyze the Act to identify the issues and challenges attenuating the efficacy of the Act and also to recommend measures to tackle the identified issues. Accordingly, it is hypothesized that the law in its present form has some major drawbacks and that it needs expeditious and rigorous revamping.

II. WHAT IS THE PRESENT LAW?

The Epidemic Diseases Act, 1897⁸ (“the Act”) is British Raj-era legislation, promulgated in the year 1897 as a result of the health crisis in the aftermath of the Bubonic Plague, which reportedly started in the Mandvi district of the erstwhile Bombay Presidency. The Act was a makeshift response from the British authorities, who at the inception of the plague did very little to curb any activities lest their economic and trade activities should take a hit. However, with the situation spiralling out of control, the Act was drafted and brought into force in the year 1897.⁹ It was an extemporary piece of legislation that ran two pages long and had four sections in it. Par for the course, the resultant loss of life due to the lax nature of the administration and the ineffectual legislation was calamitous. Prominent historian and academician Myron Echenberg places the number of deaths in India on account of the plague as between 1894 and 1901 to be around twelve million.¹⁰

In 2020, when the Covid-19 pandemic was wreaking havoc throughout the world, the Central Government of India advised the States to invoke the provisions of the Act to combat the rising Covid-19 cases.¹¹ In total, the Act has four sections. The Act through its provisions empowers

⁷The transcript of the entire interview can be accessed at:

<https://drive.google.com/file/d/1XeZHYeWmbi5T7lqAQlWqdUAc2tu7dz7H/view?usp=sharing>

⁸ The Epidemic Diseases Act, 1897 (Act No. 3 OF 1897)

⁹ Aanchal Malhotra, *When the 1897 bubonic plague ravaged India*, Mint, 26 Apr 2020, (online), last accessed on 23rd October, 2021

¹⁰ Myron J Echenberg, *Plague ports : the global urban impact of bubonic plague, 1894-1901*, New York : New York University Press, 2007

¹¹ Bindu Shajan Perappadan, *States to be asked to invoke Epidemic Disease Act: Centre*, The Hindu, MARCH 11, 2020 (Online) accessed on 23rd October, 2021

the State Government, in the event of an epidemic disease outbreak, and wherein its opinion, the existing law, will not suffice to efficiently tackle the said disease, to make such necessary regulations of a temporary nature which shall be aimed at preventing the outbreak and spread of the said disease.¹² For this purpose, the State may inspect persons travelling and may further temporarily ‘segregate’ persons suspected of being infected with the disease and may keep them in hospitals or some other temporary accommodation set up for this purpose.¹³ The Act also empowers the Central Government, in the event of an epidemic disease outbreak, to promulgate rules and regulations to inspect any modes of travel, including buses, trains, ships, aircraft, etc., and to ‘detain’ any person travelling therein suspected of having been infected with the disease.¹⁴ There is a penalizing provision within the Act which provides for violation of any provisions of the regulations framed using the forgoing provisions under the Act by either the State or Central Government and states that any person violating the provisions of the regulations shall be punished in accordance with the provisions of Section 188 of the IPC¹⁵. With the increasing instances of violence against public health officials, the Government of India amended¹⁶ the Act in the year 2020 and, through the said amendment, provided for the protection of healthcare personnel. The Act defines the various acts of violence against healthcare personnel and also provides for punishments¹⁷ for persons engaging in such acts of violence. The Act also provides protection to persons engaged in the implementation of the provisions of the Act and states that no persons shall be subject to any legal proceedings on account of any of the actions taken by the said person under the Act.¹⁸

III. WHAT ARE THE SHORTFALLS OF THE ACT?

Brevity, whilst often an appreciable trait, is not something that you look for in legislation. An enactment that is aimed at protecting mankind during the outbreak of deadly epidemics should be an elaborate, well thought out piece of legislation that leaves no room for ambiguity or doubt. It should be the guiding force that will help the people navigate through such travesties and help them to return to normalcy. Does the Act live up to these standards? Unfortunately, no! Following are some of the major drawbacks of the present legislation.

- **Vagueness:** The amorphous nature of the Act is best exemplified by the fact that the Act does not define the very thing that it tries to prevent. The purpose of the Act, as stated out

¹² The Epidemic Diseases Act, 1897 (Act No. 3 OF 1897), s. 2(1)

¹³ *Id.*, s. 2(b)

¹⁴ *Id.*, s. 2A

¹⁵ the Indian Penal Code (45 of 1860), s. 188 (*Disobedience to order duly promulgated by public servant*)

¹⁶ the Epidemic Diseases (Amendment) Act, 2020 (NO. 34 OF 2020)

¹⁷ The Epidemic Diseases Act, 1897 (Act No. 3 OF 1897), s. 3(2)

¹⁸ The Epidemic Diseases Act, 1897 (Act No. 3 OF 1897), s. 4

in its opening lines, is to prevent the “.....spread of dangerous epidemic disease”. Now what constitutes a dangerous epidemic disease is not defined anywhere in the Act and is left to the discretion of the authorities to gauge. An ideal law should necessarily provide some metrics to arrive at declaring a health crisis as an epidemic. It should take into account multiple variables, including the nature of the disease, the way in which it affects the population, the means by which it is spreading, etc. The Act provides no such benchmarks. From the point of view of legislation, this is a cardinal sin. This lack of a proper framework to determine what shall constitute such a dangerous epidemic disease falls in line with the “makeup as you go along approach”. Similarly, the Act, regarding the invoking of the provisions contained therein, states that the Government shall be at liberty to do so whenever it is ‘satisfied’ with the fact that the normal laws that are existing won’t suffice to handle the situation at hand. Again, what factors are to be considered to reach such a conclusion are not provided.

During his interview, Adv. C. Mohanram, who is a senior advocate practising in Kerala with over 40 years of experience in litigation, weighed in on this matter. He said, “The provisions of the Act are indeed very vague. It does not even define what shall be considered as an epidemic disease, let alone define other technical aspects related to dealing with a pandemic. The Act is more of an open mandate that gives sweeping powers to the Government. This raises some serious questions about the constitutional validity of this legislation. A law cannot be expected to operate in a void where you don’t even define the very thing that you seek to prevent through the law. In-State of Madhya Pradesh v Baldeo Prasad¹⁹, a similar issue came up when the validity of the Goonda Act was questioned. The court, in fact, declared the law to be void on the ground that the law fails to define what the term Goonda means. Similarly, in Kartar Singh vs. the State of Punjab²⁰ and KA Abbas v Union of India²¹, wherein the Hon’ble Supreme Court of India deliberated and applied the doctrine of ‘void for vagueness’ and held the law to be void”.²²

- Lack of a system of ‘checks and balances’: Preventing the spread of a pandemic requires a significant amount of governmental action, which in turn means giving the government powers to curb and control various facets of human lives. Apart from the treatment of infected persons, the government will have to take up steps that will affect the day-to-day

¹⁹ 1961 AIR 293, 1961 SCR (1) 970

²⁰ 1961 AIR 1787, 1962 SCR (2) 395

²¹ 1971 AIR 481, 1971 SCR (2) 446

²² Excerpts from the interview with Senior Advocate C. Mohanram, Managing Partner, C. Mohanram and Associates Law Firm, Kerala. The transcript of the entire interview can be accessed at <https://drive.google.com/file/d/1XeZHYeWmbi5T7lqAQIWqdUAc2tu7dz7H/view?usp=sharing>

lives of people, and some of these actions may include strictures which may be ultra vires the fundamental rights guaranteed to a person in our country. Such restrictions may be in the form of lockdowns to prevent the spread of the disease, obligatory isolation of persons infected or suspected to have been exposed to the disease in hospitals or some other facilities, mandatory quarantine as a preventive measure to ensure that the person is not infected, etc. All these measures are, from a 'Rights' perspective, violating a person's basic rights, including the right to travel, the right to freedom of movement, etc. These compromises are necessary for the larger and greater interest of saving mankind and preventing the disease from spreading. The Act in its present form gives the Government powers to impose such restrictions. However, the problem lies in the fact that these powers are unbridled and without a system of oversight. One would imagine that such sweeping powers, before being used, should receive approval from some authority or, at the very least, should have a system of oversight to ensure that there is no misuse of such powers. Unfortunately, there is no such system of approval or supervision under the law.

- **Misuse of the law:** The result of an absence of a system of checks and balances in law is, in most cases, its rampant misuse. There have been increasing accusations against the various state governments that the provisions of the Act and other related laws²³ have been used arbitrarily to clamp down voices of dissent. Journalists and opposition leaders are some of the biggest casualties of the misuse of the law.²⁴ One has to remember that this law was enacted during a time of British rule in India when there was not much emphasis on Human Rights or Constitutional Rights. *Human Rights Watch*, an international NGO based out in New York, in a report released in February 2021, stated that the governments of a large number of countries, including India, have, under the pretext of the pandemic, taken despotic measures to curb free speech and violate human rights.²⁵ In so far as India is concerned, the report states there has been widespread misuse of the law to curb free speech, and the victims have been journalists, activists, and other bloggers. According to the report, in India, approximately 640 people (mostly students, bloggers, activists, journalists, etc.) were arrested for allegedly spreading false information in a span of just two months. The report also points out the case of Dr. Indranil Khan. He had posted pictures on social media pointing out how doctors were forced to wear rain coats on account of a PPE kit shortage, and this caused him to bear the

²³ The Disaster Management Act, 2005, No. 53 of 2005, The Indian Penal Code, 1860

²⁴ *Law as weapon*, The Indian Express, May 21, 2020 (Online) accessed on 24th October, 2021

²⁵ *Covid-19 Triggers Wave of Free Speech Abuse*, Human Rights Watch, February 11, 2021, (online) (last accessed on 16th November, 2021) available at <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>

brunt of the authorities, who detained and charged him for causing public disharmony.²⁶ Amnesty International, in its report titled “*Covid-19 Crackdowns Police Abuse and the Global Pandemic*”, had also pointed to such abhorrent cases of police abuse under the pretext of enforcing Covid-19 restrictions. The report highlights how in India, the police authorities have been using force to beat people with batons during the lockdown period.²⁷ Whilst the Act does not have any direct relation to fundamental rights or the violations thereof, the issue here is the lack of a proper framework within the law that clearly lays down what the authorities are allowed to do, what the rights of the citizens are during such restrictions imposed by the authorities and how the actions of the officials can be kept in check to ensure there is no misuse of the law.

Weighing in on this matter, Adv. Mohanram opined, “There have indeed been many report cases of arrests and other such matters. When a law is vague and gives an open mandate to the State to do whatever it deems necessary, without any system of checks and balances, it is bound to cause certain instances of misuse of the law. While it is not possible to say if all these arrests are genuine, what it does indicate is a drawback of the legislation”.²⁸

- The Act vis à vis Human Rights: The transmissible nature of the pandemics makes it ineluctable that the authorities have to implement certain restrictions on the freedom of movement and travel. Though these measures impact the basic rights of individuals in society, they are deemed to be a necessity in the larger interest of the wellbeing of mankind. However, the important question is where to draw the line? How far can basic human rights be suspended in the name of restrictions imposed during a pandemic? The answers to these questions are what ideally legislation should lay down. Pandemic legislation should lay down in detail the extent to which restrictions can be imposed and should also state the counterpoise to any violations of human rights under the pretext of the law. Unfortunately, the Act does none of these. What it does do, on the other hand, is give authorities blanket powers to do what they deem necessary. Add this to a lack of a system of check and balance, and what you get is a large-scale violation of human rights. A report of the United Nations in April 2020 pointed out the aspects of human rights violations experienced by the people of various countries as a result of the efforts to curb the pandemic.²⁹ The report talks at length about human rights violations

²⁶ *Ibid.*

²⁷ *Covid-19 Crackdowns Police Abuse and the Global Pandemic*, Amnesty International, report published in 2020 (online) (last accessed on 16th November, 2021) available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT3034432020ENGLISH.pdf>

²⁸ *Supra* Note 21

²⁹ *COVID-19 and Human Rights We are all in this together*, United Nations, April 2020, (online) (last accessed on 11th November, 2021) available at

faced by women, children, migrants, refugees, prisoners, and other marginalized communities during the implementation of lockdowns and other such restrictions in an effort to combat the pandemic.³⁰ In India, the abrupt lockdown caused hardships to millions of migrants as they were devoid of any work or resources to get home.³¹ Prisoners who were incarcerated in overcrowded detention facilities were left to fend for themselves, with data showing that many thousands of prisoners were infected with the virus.³² The Country Reports on Human Rights Practices for 2020 was also heavily critical of the situation in India and had highlighted the cases of many human rights violations that had happened in the name of enforcing Covid-19 restrictions.³³ Whilst one cannot pin the entire blame of such human rights violation on the lack of a proper pandemic law, a majority of such instances could have been avoided had the law laid down a proper framework for administrative accountability.

Weighing in on this matter, Adv. Mohanram opined, “A law dealing with matters of grave consequences such as the pandemic should take into account the human element involved in the implementation of the law. The law, at the end of the day, does not act simply as a deterrence, but the primary aim of the same is to help people to get back to normalcy. Accordingly, it should take a humanistic approach in all its aspects, and violation or misuse of the law should be taken seriously. This can only be achieved when there is proper administrative accountability within the law. Take, for example, the case of England. They had promulgated the Coronavirus Act 2020, in which they have ensured that there is accountability through parliamentary scrutiny. The actions of the government are periodically laid before the Parliament for review, and any extension of provisions of the law needs the approval of the Parliament. Such measures ensure that the State does not engage in arbitrary measures and this will go a long way to ensure that there is no misuse of the law”.³⁴

- The Act vis à vis the right to privacy: The right to privacy, as has often been emphasized by the judicial systems worldwide, is an integral part of the Fundamental Rights of an individual. Post the onset of the pandemic, the Government of India, using the powers bestowed on it under the Act and for the purpose of contact tracing, has been taking up measures. One

https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf

³⁰ *Ibid.*

³¹ Kumar, N. et al. (2021) ‘Indian Migrant Workers’ Experience During the COVID-19 Pandemic Nationwide Lockdown’, Journal of Asian and African Studies. doi: 10.1177/00219096211046278.

³² Bansal, S. and Sahni, S. (2021) ‘Bail, prisons and COVID-19: An Indian perspective’, Alternative Law Journal. doi: 10.1177/1037969X211038636.

³³ Country Reports on Human Rights Practices for 2020, United States Department of State, Bureau of Democracy, Human Rights and Labor (online) (last accessed on 11th November, 2021) available at <https://www.state.gov/wp-content/uploads/2021/03/INDIA-2020-HUMAN-RIGHTS-REPORT.pdf>

³⁴ *Supra* Note 21

such action taken by the authorities in this regard has been the development of the Aarogya Setu App, which collects data of individuals and is utilized to track the movement of individuals. Whilst the purpose of such an application seems noble, there are underlying privacy concerns. A report published by a renowned cyber-security consultant in Paris stated that Aarogya Setu App, apart from its ability to track the movement of the user, can also be used as a tool to access the data in the mobile and has the capability to turn on sensors in the phone including the inbuilt microphones.³⁵ Apart from this, there have been many instances in India in the past year that have raised concerns of privacy experts. The Delhi High Court, while granting bail to an activist Umar Khalid, imposed a condition in its order that the party should install Aarogya Setu App in his mobile.³⁶ In Jammu and Kashmir, an RTI filed by activist Saurav Das revealed that the administrative authorities of the State had shared data concerning the personal health of certain individuals collected through the App with Police officials.³⁷ Incidents like these, which raise concerns of intrusive surveillance and tracking, are not isolated and have been far and many. The counter-argument is that such measures of data collection and surveillance are necessary to combat the threats posed by the pandemic. What such issues point to is a lack of mechanism within the Act to balance public interest and privacy matters of individuals.

Weighing in on this matter, Adv. Mohanram opined, “Bearing in mind the Act is more than a century old, and there have been no comprehensive overhauls through recent amendments, it’s obvious that such an ancient law would not have provided for matters like human rights and privacy..... The concerns with the Aarogya Setu App, using of drones for surveillance, and the lack of a strong data protection law are some of the issues that have raised these privacy concerns. This boils down to a legislative vacuum in the area of data protection rather than a proper pandemic law. However, laws dealing with pandemic laws also do have provisions regarding privacy. Again going back to the UK law, there are specific provisions in the Coronavirus Act 2020 that State that for the Secretary of State in the UK to retain the DNA, fingerprints, and other biometric markers beyond the stipulated time prescribed under relevant

³⁵ The analysis was carried out by Defensive Lab Agency in Paris and the results are published in their websites and can be accessed at <https://forensic.defensivelab.agency/covid/reports/c70f65be3100a5f7d5fa05b7c170bda1d7345b5a3868d5af6dc3f4146000ad88/>

³⁶ Bail Application No.506/2021, State V/s Umar Khalid: FIR No.101/2020: PS Khajuri Khas (Crime Branch), order of the court can be accessed at https://www.livelaw.in/pdf_upload/display-2021-04-15t175958407-391928.pdf

³⁷ J&K shared Setu data with cops: RTI reply, Anam Ajmal, Times of India, March 31, 2021 (online) last accessed on 17th of November, 2021, available at http://timesofindia.indiatimes.com/articleshow/81770246.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

laws he/she has to ensure that the specific metrics defined under the law are satisfied. Thus when it comes to the matter of privacy, what is required is a pragmatic approach which needs its basis to be laid down in a strong data protection law and be then supplemented by provisions under the laws dealing with epidemics”.³⁸

IV. RECOMMENDATIONS

An analysis of the above-discussed matters makes it amply clear that the Act miserably falls short of serving its purpose. The legal mechanisms prevailing in the Act need a major overhaul, and there is an urgent need to bring comprehensive legislation that will help our country to tackle the imminent threat of another pandemic. This part of the research paper tries to identify the core areas and aspects that an ideal pandemic law should cover in order to ensure an organized and effective response on a national scale to tackle pandemics such as Covid-19.

- Scope of the Legislation

The purpose of the legislation should be to layout a national-scale legal mechanism that will oversee a swift and effective public health response in the event of a pandemic. It should be able to identify and lay out the restrictions that are absolutely necessary and should, at all costs, avoid arbitrary regulations that interfere with the rights of the citizens. The principles of the legislation shall be to ensure the health and welfare of the people of the nation and at the same time to also ensure that due regard is given to basic human rights and constitutional rights of individuals while putting in effect the provisions of the legislation.

- Clearly defining ‘epidemic disease’ and other related terminologies

As discussed in the earlier part of this paper, one of the major drawbacks of the existing legislation is that it failed to define what shall constitute a *dangerous epidemic disease*. Due regard should be given to the different variables, including the scope of the disease spreading, the effect on the health, the possibility of curing the same, etc., and a criteria checklist should be laid down under the law that will enable authorities to determine if a disease should be categorized as an epidemic and consequently if the provisions of the law should be brought into force.

The International Health Regulation, 2005³⁹ (“**the Regulation**”), as laid down by the World Health Organization, can be a guiding force in this regard. The regulation lays down three criteria⁴⁰ that will help to identify a potential public health crisis. The first criteria are aimed

³⁸ Supra Note 21

³⁹ International health regulations (2005) -2nd edition, World Health Organization, ISBN 978 92 4 158041 0

⁴⁰ Examples for the application of the decision instrument for the assessment and notification of events that may

at addressing the seriousness of the disease⁴¹ and putting forth certain questions. These include questions regarding the deaths or number of infected cases being relatively high in terms of the given area, a timeline of the disease and the population affected, etc. It also takes into account the possibility of the disease having a considerable impact on public health. In order to determine the same, the regulation lays down some guiding indicators such as the potential of the pathogen causing the disease to transmit, resulting in a pandemic, scope of existing treatment protocols to cure the disease, healthcare personnel infected by the disease, density of population present at ground zero, the ability of the pathogen to affect the vulnerable population, etc. Criterion one also takes into account the lack of adequacy in terms of resources to detect, treat and control the disease. It states that if the present resources in terms of manpower, laboratories, drugs/vaccines, and the present system in place for surveillance are inadequate, then the same is also an indicator of the seriousness of the public health event at hand. The second criterion is aimed at addressing the nature of the disease and if the same is unusual.⁴² It lays down certain model indicators such as an unknown source for the disease, the atypical nature of the evolution of the disease in terms of the symptoms exhibited, morbidity, fatality, etc. The third and final criterion is aimed at addressing the transmissibility of the disease.⁴³ It takes into account factors such as reported similar events in other countries and the potential of the disease-transmitting cross border.

The legislation should lay down criteria of similar nature that will enable the authorities to decide if the provisions of the law need to be utilized to tackle the public health emergency at hand. Apart from the same, the law should also clearly define other terminologies such as *quarantine*, *public health risk*, *surveillance*, etc.

- Provisions to ensure the adequacy of healthcare professionals, social workers, and volunteers

The Covid-19 pandemic revealed to one and all the value of health care professionals. Their sacrifices and efforts have no doubt saved countless lives who would have otherwise perished in the onslaught of this extremely dangerous virus. We also witnessed the physical and mental trauma that these healthcare professionals had to go through on account of the scale of this pandemic. Events like Covid-19 are out of the ordinary, and therefore the resources of a nation,

constitute a public health emergency of international concern, International health regulations (2005) -2nd edition, World Health Organization, ISBN 978 92 4 158041 0

⁴¹ *Ibid.* at page 44

⁴² International health regulations (2005) -2nd edition, *Examples for the application of the decision instrument for the assessment and notification of events that may constitute a public health emergency of international concern*, page 45, World Health Organization, ISBN 978 92 4 158041 0

⁴³ *Ibid.*

including its health care professionals, may not be sufficient to meet the needs of such a pandemic. Therefore it is imperative that the law governing such pandemics should provide for emergency recruitment of healthcare professionals and other support staff. Though states like Kerala constituted a support team⁴⁴ to ensure there were adequate health care staff and support staff in hospitals, a similar mechanism at a national level would have helped organize a swift and organized response throughout the country. The law should lay out a framework to help State Governments quickly recruit, temporarily, sufficient doctors, nurses, support staff, and social workers during such a public health crisis. These provisions should ideally remove obstacles in the nature of stringent eligibility criteria to help the ease of recruitment. Recently retired doctors and other health care support staff should be made eligible to become part of such a task force, and final year medical students, as well as social work students, should also be recruited to give responsibilities that they can take care of based on their level of education. The pandemic would inevitably imply higher stress and workloads for the frontline staff, and accordingly, the law should also contain provisions to decrease the administrative duties usually imposed on these frontline staff to the bare minimum as this will help them to focus their energy where it is most needed.

- Health service indemnity, insurance, and other provisions for front line workers

The law should provide an appropriate authority who shall indemnify or make provisions to indemnify authorized persons engaged in relevant services under the law and who has incurred a liability in the nature of a tort. The law should clearly define who shall be deemed to be authorized personnel, what shall be a qualified liability, and who the authority shall be to give such indemnity and to decide on matters thereon. Apart from such indemnities, the government should also develop a uniform scheme of insurance to cover the risks of death or serious health ailments that the frontline workers may suffer on account of their duties. Provisions should also be made for their accommodations on account of their possible exposure to the disease.

- Powers of the authorities with regard to testing, isolation, and quarantine

The law should provide for provisions that lay down the extent and nature of the power of the appropriate government in matters of persons who have either contracted the disease or have been exposed to such virus and therefore potentially may become infected. The law should classify with whom the powers are vested lay down the norms that will define an infected person as well as a potentially infected person. The relevant provisions of the law should begin

⁴⁴ *With Covid Brigade, Kerala is building up human resources to combat spike*, Vishnu Varma, The Indian Express, September 2, 2020, (online) last accessed on 18th November, 2021, available at <https://indianexpress.com/article/india/kerala/kerala-covid-brigade-pinarayi-vijayan-6582037/>

with when and how such powers shall come into place. It should define the appropriate authority who shall assess the situation and decide on the need to exercise such powers. The law should put on the concerned authority the duty to consult with the Health Ministry before deciding on such matters. The powers should confer upon an authorized public health personnel/health care worker the right to order a person to undergo testing for the disease when in the bona fide opinion of the health personnel/health care worker the same is necessary for the protection of the individuals or in the interest of protecting others from the infectious disease. Consequently, the appropriate health care personnel must also be entrusted with the power to ask individuals to provide biological samples for testing of the disease, provide medical history, and other relevant details that are necessary for contact tracing. If the person is found to be infected, the appropriate author should have the power to order for the isolation and quarantine of the individual in earmarked facilities till such time as deemed necessary and in accordance with the quarantine protocol determined from time to time by the government.

The Police officials should be entrusted with the duty to assist such health care workers where persons refuse to follow the direction of the health care worker. Police officials may be given the power to enter into premises and to use reasonable force upon individuals who refuse to follow the orders of the health care officials concerning testing or isolation. The law must also define, as a measure of deterrence, the consequence of such non-compliance in the form of a suitable punishment. However, measures should be put in place to ensure that such powers are not misused. This can be done by putting in measures like providing the concerned citizen with a right to know why such an action was deemed necessary, putting in place a reporting system whereby the health care professionals and the police department are required to report to the authorized authority at the District Level the actions taken on a day to day basis and providing reasons for their decisions in the report. This will ensure accountability and prevent misuse of powers.

Apart from hospitals, the appropriate government should be empowered to identify and earmark facilities like public buildings for the purpose of accommodating individuals undergoing quarantine or isolation.

- Constitution of a Task Force

The law should provide for provisions that enable the Government at the central level to form a Task Force that shall be headed by a senior official of the government with a proven administrative track record. The task force should also contain expert members from other relevant fields. The task force should have provisions to form an emergency committee

containing appropriate technical experts that shall recommend to the appropriate government on matters such as determining if an event shall constitute a health emergency warranting the implementation of the provisions of the Act. The law should provide for the functions of such a task force and should confer on it the necessary authority and powers to carry out its functions effectively. In order to fix the accountability of such a task force, it should be made to report to Parliament at regular intervals on the actions taken by it to bring the situation under control. The task force should be entrusted with the duty to provide recommendations on matters of restrictions to be imposed nationwide about public gatherings, movement of goods, and people between states as to matters of such nature.

- Constitution of a National Database and mechanism to register deaths:

A pandemic of such global proportions invariably causes deaths, as was the case with Covid-19. One of the major allegations levelled against various governments of the world, including India,⁴⁵ was the supposed suppression of the actual number of deaths caused as a result of the disease. This again comes down to a lack of provision under the law to properly account for the number of deaths. The law should empower the appropriate government to issue detailed notifications based on the guidelines issued by the World Health Organization on criteria for classifying a death as being caused due to the pandemic at hand. The WHO has issued such a guideline in the case of Covid-19.⁴⁶ The law should provide for the maintenance of a national database to record such deaths and hospitals and other concerned authorities at the state level should be put under stringent obligations to update this database in real-time with data including the number of cases tested, number of cases that turned out to be positive for the infection, the number of persons admitted, the number of beds available in ICUs and hospitals, number of deaths, etc.

- Measures for Administrative Accountability:

The restrictions that need to be imposed to curb a pandemic can oftentimes be draconian. Lockdowns and other such measures impact the day-to-day life of citizens of a country like India, wherein a very vast majority of the population is engaged in daily wages to work. Accordingly, when a law such as the Act proposes to give sweeping powers to the State, albeit with a noble motive of protecting human life, there should be measures in place within the

⁴⁵ Jeffrey Gettleman, Sameer Yasir, Hari Kumar and Suhasini Raj, *As Covid-19 Devastates India, Deaths Go Undercounted*, New York Times, April 24, 2021 (online) (last accessed on 18th November, 2021) available at <https://www.nytimes.com/2021/04/24/world/asia/india-coronavirus-deaths.html>

⁴⁶ *International guidelines for certification and classification (coding) of covid-19 as cause of death*, World Health Organization, 16th April 2020, https://www.who.int/classifications/icd/Guidelines_Cause_of_Death_COVID-19.pdf

legislation to ensure that such powers are not misused. To ensure a system of checks and balances, a system of parliamentary scrutiny should be implemented. Once the provisions of the Act have been enacted, the Parliament should review the actions of the Government periodically to ensure administrative accountability.

The Health Ministry should be entrusted with the duty to prepare and present before the Parliament a comprehensive report periodically on the extraordinary powers exercised under the law, the justification for wielding such powers, and the need, if any, for the continuance of extreme measures such as a national lockdown and ban/restriction on travel. The Parliament should debate on the merits of the matter and may thereafter vote on the need to implement or renew the proposed measures under the Act. The legislature may, in addition to these measures, form a bipartisan ad-hoc parliamentary committee to not only oversee the implementation of the law but also to recommend measures to overcome any lapses or shortfalls. These steps shall prevent any arbitrary measures by the ruling Government and ensure parliamentary scrutiny over the actions of the Government.

- Supporting Legislation, Economic and Welfare Measures:

Efforts to control a pandemic often include some harsh measures such as isolation of individuals or families, imposing lockdowns in an area, or, as we saw in India, a national lockdown. These measures have severe consequences on the people as they are in effect incapacitated from earning a living. While the Government must take such restrictive actions to curb the spread of the pathogen causing the pandemic, equally important is the responsibility of the Government to ensure that ancillary measures are put in place to support and care for the people. A pandemic law cannot be a one-stop solution for all the problems. The government needs to ensure that there are supporting measures in place to help people financially navigate through such hard times. Similarly, small businesses should also be protected since the restrictions imposed take a toll on their business.

The Act should contain provisions that empower the Government to prohibit landlords from forcefully evicting such businesses due to their inability to pay the rent on account of the lockdown and its effects. Similarly, the government should also work towards constituting mediation camps to help these small businesses negotiate with the landlords on pending rents so that they may continue to do business and take steps towards recovery. Similarly, the government should also have in place a comprehensive data and privacy protection law that will lay down the outline of the practices to be followed to ensure there is no breach of privacy. The Act should supplement the same by making exemptions, whenever necessary, for

authorities to collect the data but at the same time should also ensure that the same is only on a need basis and does not violate any privacy rights of individuals through the misuse of any such data collection.

V. CONCLUSION

A law dealing with epidemics, being one that has a far-reaching impact on the lives of the common people, should give due regard to the value and dignity of human lives and should be carefully drafted to make sure that people are not arbitrarily deprived of any of their rights. Granted that a thoroughly revamped law for dealing with pandemics is no panacea, it is still the need of the hour because it is evident that the present legislation is largely wanting in efficacy. Its inherent vagueness and the lack of a system of checks and balances make it extremely inefficient in achieving its purpose, i.e. facilitating a legal mechanism that can effectively aid in reigning in the chaos caused by haphazard efforts to curb a pandemic. The recent pandemic had affected the lives of people in ways that couldn't have been imagined before the world experienced it. While harsh restrictions may be warranted to curb the spread of such diseases in the larger interest of society, it should be made sure that people are not left to fend for themselves without a proper mechanism of structure and support from the State. After all, one of the purposes of the law is to facilitate a society to function with ease. The lacunae in the Act, as identified and outlined in the research paper, prove the hypothesis "*that the law in its present form has some major drawbacks and that it needs expeditious and rigorous revamping.*" It is high time that the Government of our nation promulgates a comprehensive law that can be the foundation for ensuring preparedness for any such future crises.
