

## **Safeguarding the Rule of Law – The need for consistency and adherence to established law by the Supreme Court in a Pandemic**

The past few months of the COVID-19 pandemic have posed novel policy and governance challenges. Since the public health crisis is akin to an emergency (a formal emergency under the Indian Constitution has not been declared by India), several urgent and rushed decisions have been taken by the administration to tackle the crisis. The governance situation currently is unique and complex. The following setup makes it so: - The Government has not been able to go through the route of a formal declaration of national emergency.<sup>1</sup> The Centre is indeed restricted in this regard since [Article 352](#) of the Constitution which provides for National Emergency only allows war, external aggression and armed rebellion as permissible grounds. No federal state in India either has declared a state emergency under [Article 356](#) of the Constitution.<sup>2</sup> The unique circumstance is that due to the nature of the pandemic, the Parliament has not been in session. It is debatable, whether the Parliament should or should not hold sessions in this period using video conferencing, but the fact is that it has not been functioning in the time since the lockdown was announced on March 24, 2020. The [two controlling laws that have been invoked](#) by the Centre and States through ordinances to tackle the COVID crisis are the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005. This entails that the onus of both passing of the laws and their implementation is with the executive i.e. the government.

This article aims to scrutinize the judiciary's role in maintaining the rule of law in a situation where one arm of the State (the legislature) has not been in function due to the nature of an unprecedented situation like the COVID-19 pandemic. It

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<sup>1</sup> A National emergency would give the Government drastic powers to deal with the situation including subverting (temporarily) certain fundamental rights in order to deal with the crisis at hand.

<sup>2</sup> Article 356 provides for provisions in case of failure of constitutional machinery in a State.

argues that the Supreme Court must strictly act as per its constitutional mandate and issue orders and judgments which are consistent and bound in sound legal reasoning. The court's own precedent must be adhered to and if a need to supersede existing law comes up, then given the extant circumstances, cogent reasons must be recorded. Adherence to this process is not only essential to ensure justice in the times of the pandemic but also for the continued and long-term sustenance of established democratic procedures of the country and maintenance of the rule of law. This, so far has not been the case though if one looks at the Supreme Court's orders in the COVID-19 period.<sup>3</sup>

India's Constitutional scheme envisages a Westminster [separation of powers](#) between the three arms of the State, i.e. the parliament, the executive and the judiciary. This in fact has been recognised as a part of the basic structure of the Indian Constitution.<sup>4</sup> The rationale behind the principle of separation of powers is that each arm of the State acts within the scope of powers assigned to it by the Constitution. The assumption is that each branch will provide checks and balances to ensure that no single branch exceeds the ambits of the power delegated to it or indulges in arbitrary use/misuse of such power. In crisis situations, where governments are more likely to exceed their powers especially with one arm (the legislature) of the system not functioning, it is imperative that the judiciary justifies its constitutional role. The court's role being one of adhering to the Constitution's mandates and acting as an adequate check on the Government, while also protecting the enforceable rights of its citizens. This essentially is the rule of law.

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<sup>3</sup> For the purposes of this article, the COVID-19 period is taken from March 24, 2020 i.e. the date on which a 21-day lockdown was announced by the Union Government up to the present.

<sup>4</sup> See: *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, Also see: Special Reference No. 1 of 1964 (1965) 1 SCR 413 and *Supreme Court Advocates-on-Record Association v. Union of India* (2016) 4 SCC 1.

## **The Supreme Court of India's inconsistent interventions since the lockdown**

The Government has (at least in theory) tried to ensure that it enforces social distancing while minimising the burden that its citizens have to bear in order to cope with the crisis and adapt to the government's measures. However, despite the partial success of governmental efforts such as enforcing social distancing *via* a strict lockdown, and declaration of numerous financial packages, in addition to ramping up medical and testing facilities, a number of preventable difficulties have had to be borne by India's citizens. In particular, the decision of the Government to ensue lockdown on March 24 with a four-hour notice without making adequate arrangements to take care of the transport, residential, nutritional and medical needs of millions of India's migrant workers, has become a [humanitarian crisis](#). It has captured the attention of the country and the world across demographics in the past few months.

### **Stare Decisis<sup>5</sup>**

The decision-making of the Indian Supreme court while reviewing some of these situations has been unpredictable and inconsistent for several issues faced by citizens. The court has, on a few occasions, taken note of urgent matters and intervened. For instance, on [March 24](#), the apex court ordered all States to consider the release of convicts jailed for up to 7 years to decongest jails and contain the spread of COVID-19. [On April 27](#), it directed the Government to issue guidelines for the rational use of PPEs for health workers, and on [June 12](#), reprimanded the State Governments and hospital for their inordinate dealing with the dead bodies of COVID-19 patients. Yet, on other occasions it has refused to take cognizance of fundamental issues like that of the violations of rights of

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<sup>5</sup>The legal principle of determining issues in litigations according to precedent.

migrant workers only to intervene two months later on its own motion. Two petitions listed on March 30 spoke about the difficulties being faced by migrant labourers who, in several cases were compelled to walk hundreds of miles to their homes. This was a direct consequence of the lockdown, which had made it unviable for them to live in cities. There was a mismatch alleged by the petition in terms of the relief measures claimed by the government to have been executed and those available to the migrant labourers on the ground such as adequate nutritional, safety and sanitation measures. Oddly, in this case the Court, while passing an order on March 31 [relied](#) on the Government's uncorroborated response of the steps that it had taken in "dealing with the needs of the lower strata of the society by providing basic amenities..." . Refusing to intervene, the Court stated its satisfaction of the steps taken by the Government. The court here did not offer any specific reasoning for its satisfaction or dissatisfaction of the Government's response but spoke about the panic of the migrant workers caused by 'fake news'. As Aakanksha Saxena [points out](#) in a guest post on Gautam Bhatia's well know [Constitutional law blog](#), not only did this absolve the government of the need to justify its responsibility but instead shifted this onus to the media. Further, the order carried a direction stating that the media should ensure that unverified news capable of causing panic should not be disseminated and only official versions of the developments must be referred to. This direction also went against settled precedent on freedom of speech and expression, which permits compelled speech only if it informs further informed decision making.<sup>6</sup>

The doctrine of *stare decisis* is embedded in [Article 141](#) of the Indian Constitution. The Article makes the law declared by the Supreme Court to be the law of the land and the Supreme Court decisions have to be complied with by the High Courts and lower courts on points of law on which the Supreme Court has already decided. Of course, the Supreme Court can overrule its own precedent in

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<sup>6</sup> See: Union of India v. Motion Picture Association, 1999 (6) SCC 150.

case there are cogent reasons for doing so. Yet, there is an established procedure for this and by tradition, such matters have to be decided by a larger bench than the one whose decision is being overruled. However, in the case being discussed here, no reference was made to any existing precedent and no legal reasoning provided to distinguish it from existing case-law. This runs the risk of undermining the faith of the public in the judiciary since to a large extent; its legitimacy is based on the fact that it follows rules and settled principles of law instead of the caprices of individuals. In fact, the Supreme Court itself has [observed](#) on many occasions in the past that the institution must comply with the principles of consistency, propriety and judicial discipline.

### **Observance of legal logic**

In the order passed on [March 31](#), when the Court decided not to intervene in the petition concerning the issues faced by migrant labourers', there was barely any reference to law or legal rights as argued by [Anuj Bhuwania](#), Professor at OP Jindal Global University. Interestingly, the terminology used by the court was more in terms of welfare and charity. Further, as mentioned by Bhuwania in his piece, several petitions filed by activists were disposed of by the Court asking the Union Government to look into the matter. While passing these orders, the court did not question the government on whether it was fulfilling its statutory and constitutional obligations towards the fundamental rights of citizens. The Court stated that in times of such crisis, it would not want to interfere with government decisions.<sup>7</sup> This was also the case when instead of speaking in terms of legal rights, the Chief Justice asked the petitioners that if the “workers were being provided meals, why would they need money.” In another [instance](#), a petition was filed by Member of Parliament from the Trinamool Congress, Mahua Moitra,

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<sup>7</sup> See: “The Judiciary’s response” in *Migrant Workers, the Lockdown and the Judiciary*, Harsh Mander, May 11, 2020 available at: <https://www.theindiaforum.in/article/migrants-workers-lockdown-and-judiciary>.

challenging a Government circular which said that contribution towards Chief Minister relief funds could not claim the tax benefit accorded to Corporate Social Responsibility (CSR) funds. The grounds of the petition were pure legal questions under Article 14<sup>8</sup> of the Constitution. The petitioner had claimed that there was an unfair treatment of identical contributions and this would discourage corporate contributions and thus was against public policy. In this case, the Court refused to admit the plea stating that since the aggrieved party was not before the court and further since the petitioner was a Member of Parliament, she could raise the issue in Parliament. Now, the rules of standing in a PIL have increasingly been liberalised through the Court's jurisprudence over the last 50 years. Indeed, as far back in 1980, Justice Krishna Iyer had observed in *Municipal Council, Ratlam v. Vardichand*, AIR 1980 SC 1622 that:

*“... shifting the centre of gravity of justice from the traditional individualism of locus standi to the community orientation of public interest litigation is a constitutional mandate enshrined in the preamble.”*

In the present case, the Court did not offer reasoning as to why it did not think that the petitioner had a locus given that the question was of great public importance, possibly denying relief funds to thousands of people. Further, since the question of contribution to the CM fund was predicated on the need for immediate relief, the reasoning of its possible discussion in the parliament (when it would start functioning again) also belies logic.

### **Swayed by Public Opinion?**

In the last few weeks there seems to be have been a sudden shift in the stance of the court as reports of widespread [criticism](#) have surfaced from the media as well as from 20 senior advocates regarding the Court's inaction on the migrant labour

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<sup>8</sup> Right to Equality.

crisis. On May 26, the Court took *Suo-moto* cognizance of the issues faced by migrant labourers, issuing [notices](#) to the Centre and State Governments asking them to list out the measures taken by them to mitigate the crisis. There was no explanation of the legal basis on which the court had decided to intervene now after stating earlier that policy decisions in a pandemic would not be questioned by the Court. Whether, the Supreme Court was reacting to public opinion and criticism cannot be said for certain but it does certainly make one doubt the consistency of judicial responses. Even more so in this case since after the hearings, on June 9, the Supreme Court passed an [order](#) with no specific reliefs granted but which relayed the list of measures taken by various governments. No Constitutional, statutory or case-law was relied on. This belies another argument in favour of consistency and precedent that the law declared by the Court must be in line with legitimate expectations of the people. These expectations are based on well-reasoned, and principled legal analyses. In the absence of these, it is hard for an individual citizen to tailor their behaviour so as to be in conformity with the law.

### **The Rule of Law**

Undoubtedly, the current situation is unprecedented in several ways and often a better course of reasoning appears in hindsight. However, in a democratic system based on federalism where there are independent courts, the judiciary should and must fulfil its role in a systematic way where due process is not only followed but also explained. Thus, even in situations of an emergency or especially in situations of emergency, it is essential that the Court does not abdicate its responsibility in maintaining the rule of law. Progress towards this ideal would be easier if the court grounds its judgments not only in heuristics but in strong, just, consistent, and replicable legal reasoning. Without this, the ideal of the rule of law might remain illusory. It is important to remember that the Indian Supreme

Court in particular carries exemplary powers<sup>9</sup>, and has been on several occasions described as the most powerful court in the world.<sup>10</sup> With this power, however, comes also the crucial responsibility that these powers are used as per the Constitutional mandate and that justifiable reasons are provided for use or omission of these powers.

Open and transparent governance along with accountability is key in maintaining democratic polities. And, when these processes are under stress such as in times of a pandemic, the role of the judiciary in maintaining the faith of citizens in these systems of governance is enhanced. Judicial review is one aspect but it is more important for the court to in the least ask the right questions to the Government so that it is clear whether it is fulfilling its lawful role to the people who elected them. Even prior to the pandemic, there has been a trend worldwide of [reduction in faith in democracies](#) due to sub-optimal functioning of its structures. This would only increase if courts stop short of reinforcing accountability mechanisms.

As Alicia Yamin, faculty member at the Harvard TH Chan School of public health, [argues](#) that rights and health in a “*pandemic and normal times is tethered to the functioning and arrangement of major institutions.*” The legal responses of the judiciary in these situations thus are crucial to ensure the maintenance of democratic norms and a continued adequate functioning of major institutions of the State. The judiciary at the end of the day is not an extension of the Government but a check on the Government.

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<sup>9</sup> Article 142 of the Indian Constitution gives power to the Supreme Court to pass any decree or order for doing complete justice in any matter before it.

<sup>10</sup> Paul S., *In Conversation with Prof. William Hubbard*, published by the Economic Times, October 9, 2019, available at: <https://economictimes.indiatimes.com/blogs/courts-commerce-and-the-constitution/in-conversation-with-prof-william-hubbard/>.