

TIF - Justice and Rights In Viral Contexts In India

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Migrant workers walk to their villages amid the nationwide lockdown: At the Delhi-Ghaziपुर border on 28 March | Amarjeet Kumar Singh

There are dimensions of justice, human rights and constitutionalism that need to guide governments when there is a public health emergency as with Covid-19. The focus has to be on the right to health, empathy for the working poor and ethical state practice.

The Covid-19 pandemic, which has resulted in a global lockdown is a crisis as never before. In India, a three-week lockdown — in the nature of a ‘curfew’ — was announced with four hours’ notice by Prime Minister Narendra Modi on 24 March 2020. On Ambedkar Jayanti, 14 April 2020, the lockdown was extended for a further three weeks, this time with no advance notice. In the intervening period, India witnessed the largest exodus of workers and migrants on the highways, reminiscent of Partition.

A pandemic is serious and in a public health emergency, drastic containment measures are unavoidable. Even by this token, however, a total lockdown has been widely seen as ‘the harshest coronavirus containment measure in the world.’ We may assume that this was necessary for containment of Covid-19 for the preservation of public health and that the lockdown was evidence-based. With the increasing number of people testing positive, the rise in fatalities, and demands for increased and aggressive testing, the medical, scientific and health

establishments are under enormous pressure to meet the growing care needs while being inadequately protected themselves. In a climate of fear, panic and uneven access to healthcare facilities, they are rendered totally vulnerable to vigilantism and physical attack.

I. Introduction

In this essay, I attempt to foreground dimensions of justice, human rights and constitutionalism that need to guide state practice even as we deal with this emergency. I present my thoughts in seven sections. The first introductory section sets the context for thinking about justice in a larger context of hostile environments, exploring constitutional routes. This is a running theme in the second section that focuses on the right to health and the third that is centrally on vulnerability of the working poor in hostile environments. The fourth to sixth sections shift to an exploration of law, human rights standards and mitigation strategies by governments and courts through a close look at government orders and court judgements/public interest litigation. The seventh section returns to justice and the constitution in a context of hostile environments, making a case for a robust consideration of the Directive Principles of State Policy.

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To open up the framing of the discourse on justice in pandemic times, Prime Minister Narendra Modi's address to the nation on 14th April 2020 is apposite: 'The Constitution of India speaks of "We the people of India." Who are the people of India? This demonstration of our collective strength on Babasaheb Ambedkar's birthday is our best tribute to him.' This was the first time he was invoking the Constitution in the context of the novel Coronavirus, and importantly, the invocation was on Ambedkar Jayanti.¹ The invocation of the Preamble "We the People of India" frames the core concern for us in terms of citizenship, rights and state responsibility. It is a grim reminder that Covid-19 and the tumult it has brought in its wake needs to be seen through the lens of the constitutional commons² which belongs equally to all. As a starting premise, therefore, the most vulnerable and the most precarious have a prerogative over state resources and state protection on every count. For is that not the meaning of substantive equality which sits at the heart of the constitutional commons?

Cutting through the universalising discourse around the 'Covid-19 Pandemic,' at the risk of stating the obvious, it is a fact that the virus spreads its tentacles unequally across the country. The lives of the poor — rural, urban, forest dwelling, itinerant peoples — matter. The lives of migrant workers matter. The lives of the homeless matter. The lives of wage workers matter. The lives of persons with disabilities matter. Muslim lives matter. Dalit lives matter. Adivasi lives matter. The effects of the public health emergency that Covid-19 presents aggravate an existing and ongoing emergency that these communities have had to manoeuvre on a daily basis. The lives of medical and health professionals and care workers engaged in testing, treatment, and care matter. They have been rendered precarious by the systematic dismantling of public health systems in the country and the consequent ill-preparedness of governments, lacking in capacity and capability to handle a crisis of this scale.

We need to sidestep the universalising discourse for another reason: the pandemic context also provides a pretext for aggravating vulnerabilities, displaying public humiliation with impunity (turning untouchability into corona virality), offering relief under the shade of the Citizenship Amendment Act, 2019 to the favoured and targeting CAA protestors despite lockdown. Three illustrations are telling:

The imposition of a Covid-19 lockdown on Kashmir has disastrous consequences in that region already reeling under a nine-month lockdown post abrogation of Article 370. The report of the all-women team that visited

Kashmir in early February 2020 details the spiralling effect of the post-abrogation lockdown on everyday life and socialities in Kashmir — the loss of jobs and incomes, sale of land and assets to meet living expenses and medical emergencies, the blocking of all routes to decent work for fair wages — the majority pushed to the edge of precarity by the state. Two parts of that report are especially relevant. The first, the complete breakdown of the public health system made impossible by blockades and curfews was aggravated by the internet shutdown (and halting restoration of 2G connectivity) that made communication regarding supplies and accessing government programmes like Ayushman Bharat especially impossible. Does this second lockdown address the concerns of communication and mobility in the valley that have been raised in courts over the past nine months? How will this lockdown interlock with the large presence of the military, nominally under civil administration, that is in place? And what are the routes to justice in this context?

[D]o we go back to a precedent-driven, mechanical constitutional jurisprudence or do we open our minds out and acknowledge the utter inadequacy of our present methods of interpretation and redress.

The courts have refused to consider the release of political prisoners like GN Saibaba despite his increased vulnerability owing to multiple disabilities in the pandemic context; the courts also refused to stall the arrests of Anand Teltumbde and Gautam Navlakha by the National Investigation Agency (NIA) on 14 April 2020, with the NIA going so far as to seek the permission of the court to restrain Anand Teltumbde with handcuffs: “Permission may please be given to use Handcuff to avoid physical contact with the accused amidst Covid-19: Pandemic and spread of Novel Corona virus.”³ This is in clear violation of the Supreme Court guidelines on handcuffing – the permission is sought by re-purposing handcuffs to the same effect. It may be illegal to restrain an accused, but in pandemic times it is fully legal to use handcuffs to prevent contagion, the NIA seems to say, even as this argument folds into the contagion of untouchability in Anand Teltumbde’s case, banned under the Constitution (Article 17). But the ‘virus’ circumvents the need to provide the detailed justification for handcuffing that criminal law requires in the normal course.

A circular by the Director-General of Police, Haryana in pursuance of the National Disaster Management Act, 2005 (NDMA) is self-explanatory:

The Union Cabinet Secretary and Union Home Secretary...expressed their alarm and unhappiness at the large-scale movement of migrant labour...

In view of the clear directions from the Central Government the following directions are being issued for meticulous and comprehensive compliance.

1. The inter-state borders have been sealed and...persons...should be turned back without exception.
2. The persons who are travelling on foot...should be picked up, placed in buses and left in localities from where they started.
3. Directions are being issued by State Home Department *to declare big indoor stadiums and other similar facilities as Temporary jails, so that people who refuse to obey the lawful directions of district administration can be arrested and placed*

in custody for the offence committed by them under the Disaster Management Act (italics added)

To reiterate, the 'State government has [been] directed to follow Zero Tolerance Policy towards anyone who violate [sic] the lockdown guidelines'.⁴

Gujarat has a very unusual order issued during the lockdown that is telling:□

All those *people from Pakistan, Bangladesh, Afghanistan*, staying in Gujarat on long term visa or have applied for first LTV, who are in need should be given rations free of cost for the month of April as per the Ann Brahm scheme, for a single person 3.5kg wheat, 1.5 kg rice, 1 kg dal, 1 kg salt and 1 kg sugar and from among them if there are families, the PHH will be given 3.5kg wheat, 1.5kg rice, 1 kg dal, 1. kg, salt and Sugar per person for free for the month of April." (PDS-14/2020/171396/k. Government of Gujarat)

The Citizenship Amendment Act, 2019, that saw widespread protests in 2019-20, on grounds that it is discriminatory against Muslims by introducing a denominational basis for granting Indian citizenship is mirrored by the Gujarat order on relief quoted above:

"Provided that *any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan*, who entered into India on or before the 31st day of December, 2014... shall not be treated as illegal migrant for the purposes of this Act".

There are also clear discrepancies based on class and religious faith in the cases reported in the press of the provision of transport for instance for stranded persons – pilgrims, international travellers and migrant workers.

Already, right at the commencement of the lockdown, we are witness to the use and abuse of pandemic vulnerabilities and the inscription of states of exception.

For citizens who live more secure lives in the shade of majoritarian umbrellas of governance bolstered by class/caste privilege, Covid-19 is *the* threat (or so they believe), which once eliminated, will bounce them back into the 'normal.' The *ethical* question before the citizens of India today, however, is, after what we have witnessed since 24 March when the national lockdown was announced and the months of protests against the Citizenship Amendment Act, 2019 that preceded the lockdown, *should* we bounce back to life as before, or should we use this opportunity to revisit constitutional possibilities and societal arrangements? The related question is, do we go back to a precedent-driven, mechanical constitutional jurisprudence or do we open our minds out and acknowledge the utter inadequacy of our present methods of interpretation and redress.

II. Right to Health

Covid-19 brings into sharp focus the right to health as a fundamental right in India. At the core of international human rights standards, and undoubtedly a key component of Article 21, it is now at the centre of debate in more ways than one. An important part of the concerns related to the right to health at this time circulate around testing and containment of the pandemic. We know from people with long years of work in addressing the need for robust public healthcare systems in the country that the systematic dismantling of public healthcare has rendered us more vulnerable in terms of inadequate facilities, shortfall of trained personnel, and inadequate biotechnological support. We are also witness in the immediate aftermath of the lockdown to the

sharply skewed access to essential health services, to adequate food and nutrition, to housing and decent work. Cascading reports from across the country speak of hunger and starvation as bigger threats to life for the largest section of the population than the virus, especially consequent to the lockdown. This is also the population that urgently requires access to proximate, free health care —essential and Covid-19 specific treatment and care — and yet lacks adequate access to both.

In their 2014 policy brief on *Realising the Right to Healthcare*, Jan Swasthya Abhiyan pointed to the equitable access to social determinants of health – ‘secure livelihoods, adequate food and nutrition, housing, and safe water and sanitation’ – and freedom from social inequities as indispensable to the full enjoyment of the right to health. In the current context it is these very determinants that have been thrown into a crisis, ironically, even as coping strategies for the pandemic depend on precisely this access. The governmental presumption in declaring the lockdown was that without exception every person has food, housing, safe water, sanitation and enjoys equal status with all others to be able to access these without hindrance. We know how profoundly flawed the presumption was and has been demonstrated in the most graphic manner possible on the highways, the bus stands and railway stations in different parts of the country. 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. These have received scant attentiveness or interest from successive governments.

The rights of the poor and the vulnerable have been grossly violated in the very manner in which the lockdown was first announced and then extended.

The increased vulnerability of health professionals to assault by healthcare seekers and patients’ families may be traced back to the privatisation of health care and the withdrawal of robust essential and critical care services in the public health system, among other causes. That this problem of vulnerability to assault and the need for doctors and health care workers to have specific legal protection has roots elsewhere is evident in the enactment of specific legislations protecting health professionals from assault in 19 states between 2008 and 2013.

If the systemic flaws that have deeper roots are one part of the crisis we face, the second part has to do with Covid-19 itself. Sujatha Rao, in a comprehensive commentary on what needs to be done, pointed to the importance of screening, contact tracing and testing. The prevarication of the Supreme Court in the matter of cost of testing, as Gautam Bhatia has argued, defeats Article 21 and Article 14 rights. Ironically, this issue connects right back to questions related to the privatisation of basic health care and the paucity of testing facilities under state control. The second issue has to do with the volume of testing and this is one that will have enduring consequences. CP Geevan urges us to rethink the low figures for positive cases in India and suggests that this might be attributed to flawed testing strategies.

Returning to our point on the right to health as part of the access to justice, if access to free testing in the Covid-19 context is one part of Article 21 rights, universal access to testing is another part of this right, one that is waiting to be addressed.

III. The Exacerbation of Vulnerability

The rights of the poor and the vulnerable have been grossly violated in the very manner in which the lockdown

was first announced (with four hours' notice) and then extended (with no notice); and in the abject neglect with which they were treated by the state in the first few days of the lockdown.

There are several reports on the calamitous effects of this abrupt announcement. We have searing details from Delhi after the first lockdown – both from communities affected by the recent violence in Northeast Delhi and from the exodus of migrant workers; and from Mumbai after the extension on 14 April. In a recent article on the implications of the Covid-19 lockdown for India's working poor, KP Kannan maps the worker population for us. His estimates show that out of 461 million workers, 92 million are designated as belonging to the formal sector. Of these, 49 million are informal workers in the formal sector, contract workers, temporary staff etc. This means that out of 461 million workers in India as of 2018, roughly 43 million belong to the formal sector with some security of employment and statutory protections, just about 10 percent. Scholars point to informality as a persistent condition of life for the majority in India – completely unregulated and unprotected in every way, precarity a defining condition of life.

We bear witness today to a mass dispossession of the working poor of this country that was the responsibility of the state and the courts to safeguard against.

How have women and transgender communities coped with the lockdown/lockout? The specific concerns of women migrant workers — in plantation, construction, domestic work, sex work, care work — and the concerns of transpersons require a keenly calibrated and empathetic approach. A consideration of care work is critical in the present context. Overwhelmingly a female, migrant and informal workforce, both paid and unpaid care work is rendered even more precarious in the context of a pandemic, rendering care workers vulnerable to exposure without adequate protection and placing demands of care on them that increase exponentially with the difficulties imposed by a lockdown on persons in need of carers. This is especially true for nurses, midwives, hospital staff, personal carers and sanitation workers.

Within care work, domestic workers face a different set of vulnerabilities related to arbitrary employment practices and exclusions. Caste discrimination manifests in aggravated forms of untouchability practices in relation to care workers engaged in conservancy, sanitation and related jobs, and, yet, the diktat to keep immediate environments 'hygienic' and ensure patient hygiene in medical care facilities makes care work *the* most indispensable of all forms of work in the present context.

We need also to bear in mind intersecting vulnerabilities. The targeting of Muslims especially has been an extremely troubling part of lockdown phase. While a news report of UP Chief Minister hosting a gathering invites an FIR on the editor, a congregation of Tablighi Jamaat has led to the spiralling of the politics of hate in an already fragile polity in the immediate aftermath of the anti-CAA protests and the riots that targeted Muslims in North-east Delhi in ways reminiscent of the 1984 anti-Sikh violence. Fake news reports and brazen incitement by a stridently Islamophobic media in TV shows on Covid-19; the setting up of different wards on the basis of faith in Gujarat, Muslim Gujjars in Punjab needing police protection to deliver milk, and reports of the refusal to receive relief from Muslim activists force us to think about pathways into a more just future. There are reports of a sharp increase in domestic violence and child abuse during the lockdown, with mental health of women and children trapped in abusive environments surfacing as a major concern.

The lockdown has decimated livelihoods *en masse*, with worksites collapsing, self-employment snuffed out, and supply chains choked, farmers in utter despair. We bear witness today to a mass dispossession of the working poor of this country that was the responsibility of the state and the courts to safeguard against. Without multiplying instances, official callousness takes gruesome forms, as was witnessed for instance in the spraying of insecticide on returning migrants and the multiple instances of police excesses/brutality that were brought

before courts and state authorities.

Locking down has meant locking out, shutting the gates, taking easy resort to mob policing and violence, unregulated state surveillance and a proliferation of surveillance among the people...

How does one begin to enumerate the violation of the rights of people in this situation? While immediate measures are extremely important and necessary, we need to move beyond speaking about solatium, compensation, subsistence wages, and provision of rations to eliminate hunger, to thinking about how we might pose the question of the governance of the constitutional commons. It is not a matter of a single right anymore. It is the question of 'full citizenship'. Locking down has meant locking out, shutting the gates, taking easy resort to mob policing and violence, unregulated state surveillance and a proliferation of surveillance among the people, and the total dispossession of the working poor.

New exclusions and modalities of surveillance have fitted in neatly with exclusions, violence and surveillance based on caste, religion, class and tribe. Returning migrants find themselves barricaded out of villages that are their home. Fear, anger, misinformation and the legitimizing of lynch politics make for a toxic combination at this time, triggered by extreme governmental arbitrariness. Article 15 of the Indian Constitution stands disarticulated as people begin to shut doors, using Corona to re-install more deeply entrenched prejudices with impunity.

Across these contexts, how does one rebuild a society that has been broken many times over and fenced into tighter and tighter concentric circles? More importantly, which is the ground on which post-pandemic India will land?

IV. Human Rights Standards in a Public Health Emergency

In order to embark on a discussion on human rights standards during a pandemic, it is useful to return to the opening reference to the Preamble and complete it:

'WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation'

The constitutional commons are constituted by the collective resolve to ensure justice, liberty, equality and fraternity in a democratic polity. It is these values that are enshrined in international human rights law as well, to

which India is party. In the context of Covid-19, Upendra Baxi underscores the importance of the peremptory jus cogens that categorically set out state obligations and goes on to observe that 'only new forms of human compassion and solidarity can help overcome this lethal and formidably grim challenge and [help build] a new future for global politics marked by empathy, fraternity, justice, and rights.'

An important part of the discussion on the lockdown has to do with whether it satisfies the proportionality test: in other words, was a measure as drastic as this (a) necessary and (b) the least restrictive option for the state to achieve its goal? This was a question discussed at length in both *Puttaswamy* I & II judgments. Without going into too much detail, we could, after Moller, state simply that '[t]he proportionality test stands for the idea that *respect* for a person's autonomy demands that any measures restricting it must pursue a legitimate aim and be suitable, necessary and not disproportionate to the achievement of that aim,' and that any effort to balance interest will be based on the recognition of equal status of all agents (Moller 2012: 208). Taking this further, we could after Moller, ask, whether in declaring the lockdown: has there been an 'interference' with a right or has there been a 'violation' of a right (2012: 4)?

Because liberty, a fundamental right under the Constitution, is curtailed, there must be a free flow of information and the guarantee of free speech and media freedoms as state responsibility.

What makes the Indian lockdown the 'harshest coronavirus containment measure in the world' is the modalities of that decision of 24 March. Let us assume for argument's sake that a lockdown was necessary. What does not meet the proportionality test is the means by which it was effected. There was arbitrariness, lack of transparency and absence of *empathy* and respect for the dignity of the working poor, and indeed their survival. The positive measures taken with the well-being of the largest section of people ought to have been spelt out down to the smallest detail in order for this decision to have met the proportionality test, and to mitigate the harm and suffering it caused. Given that the state controls resources and media, the mitigation of harm *prior* to the lockdown was well within the realm of the possible. Proportionality in this instance rests both in the means (the process) and the end (the measure). We can only address the question of proportionality of the measure, when we have settled the question of the process. Witness a repeat of the process on 14 April, when the lockdown was extended, *despite* the extreme hardship imposed the first time.

A cursory glance at international human rights standards tells us that under conditions of public health emergencies — where restrictions on liberty such as quarantine, self-isolation, lockdowns and mandatory distancing norms are deemed necessary — there must be a keen attentiveness on the part of states to ensure that these measures are not blanket, sweeping orders, but are calibrated to the specificities of situations on the ground and accordingly limited in application and time. Because liberty, a fundamental right under the Constitution, is curtailed, there must be a free flow of information and the guarantee of free speech and media freedoms as state responsibility. This would automatically entail the unequivocal censure of '*genocidal journalism*' in the country, especially with the stridency of the Hindu right in government.

Health sector workers who are the first to be affected have a right to full protection in recognition of their increased vulnerability, as part of Article 21 (Right to Life) and Article 14 (Right to Equality). The rights of children — Article 21 (which importantly include protection from abuse and violence) and 21A (Right to Education) — are paramount when schools and educational institutions are shut. While going online is an option available to a few, for the majority, including children in Kashmir, the closure of schools absent the privilege of internet connectivity and ICT access, presents the biggest challenge to human rights.

If the right to privacy is a fundamental right under the Constitution, freedom from surveillance is a core privacy guarantee, and state action on this front must conform to international and constitutional standards.

While from the standpoint of human rights, the need to decongest prisons has been a major concern voiced by courts and government what concrete measures need to be put in place to safeguard the rights of prisoners and persons who remain in custodial institutions? And those who are arrested during the lockdown? This so as not to render them more vulnerable through exposure and poor access to tests and treatment?

How will the rights of marginalised peoples, especially those covered by Article 15 be protected against cumulative abuse by state and civil society through a resurgence of prejudice, stigma and segregations now legitimized through discourses on contagion?

Since the concern is with the spread of Covid-19, tracking cases, contact tracing and identifying hotspots have resulted in a proliferation of unregulated surveillance operations, of which the Arogya Setu is just one. If the right to privacy is a fundamental right under the Constitution, freedom from surveillance is a core privacy guarantee, and state action on this front must conform to international and constitutional standards. The matter of surveillance was brought before the court in a case of a person released from prison in the *Kharak*

Singh case.⁵ Consent is mandatory for surveillance (itself strictly limited in deference to the fundamental right to privacy under the constitution), isolation, quarantine and treatment. In fact, the right to privacy has been one of the biggest casualties in the Covid-19 context and must be set right. Rather than reducing it to a bureaucratic exercise bolstered by punitive policing, we could insist that every state government is guided by a team of experts that consists of public health professionals across disciplines, epidemiologists, and policymakers and that the state government adopts evidence-based measures that are calibrated to specific realities. Citizen liberties, freedoms and dignity must be within the core, and transparency and state accountability must structure the method. We are in for a long haul, so course correction is always in the realm of the possible.

These are concerns that bring international human rights standards and constitutional standards together on the ground.

V. Legislative Framework for Covid-19

In February 2017, the Government of India circulated a draft *The Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill, 2017* (PHB), that was meant to repeal the *Epidemic Diseases Act, 1897* (EDA). There is much work on the EDA, especially its workings in colonial India by historians, and it is undoubtedly an extremely draconian legislation which needs to be repealed. However, any Act which replaces it must be firmly located within the constitutional framework and integrate human rights and public health concerns seamlessly. The PHB, it has been argued by public health experts, falls short on several counts, and fully reproduces the authoritarian writ of the state. Puducherry enacted a Public Health Act in 1973 with fairly comprehensive provisions, although most states have relied on the archaic EDA. The point of even alluding to the alternative to the EDA is to underscore the absence of an alternative to the act, so it is a default setting that goes against the public interest and the common good. That said, is it still possible for state governments to frame regulations under the Act that integrate human rights concerns into the implementation of the Act? While some states have framed regulations, the test lies in the integration of human rights standards.

Its brevity (4 sections in all) can be seen as a boon by an insurgent administration. It leaves the field open for state governments to devise their own modalities and designate the requisite resources in terms of finance,

personnel and institutional mechanisms. It is possible, therefore, for a state, through administrative and executive empathy, to write the constitution into its implementation, taking on board the concerns voiced by epidemiologists, public health professionals and human rights advocates on the PHB. There is nothing to stop a state government from setting out a thoroughly democratic, transparent and consultative process in its implementation.

The National Disaster Management Act, 2005 (NDMA) which has been invoked occupies a very different administrative and legislative space. A critical review of this act is outside the scope of this essay. Going by the fact that it is an enactment that has been invoked, we simply look at the (in)adequacy of its provisions for state action on Covid-19. As a starting point, an epidemic/pandemic is not a disaster and cannot be treated as one. By that token, the public authorities responsible for handling and mitigating disasters, namely the Ministry of Home Affairs, are singularly unsuited to oversee state action in a pandemic context.

The deep pitfalls in the application of the NDMA to the present situation is demonstrated by two instances. The first is the instance of the Haryana administration invoking its punitive provisions against the poor by ordering their confinement in jails (see note 4). The second is the use of its authority under the NDMA by the Ministry of Home Affairs to trigger surveillance in states that have opposition governments, precipitating a conflict on the ground that is counter-productive in every way imaginable, as was the case with West Bengal. The multi-tiered structure of the NDMA could have some pointers for how states might structure authorities in a decentralized manner with an effective reporting and consultative mechanism built in. Into this decentralized plan, we could write in the important dimension of informed consent that is a non-negotiable part of any public health measure.

Rather than hastily promulgate yet another ordinance that is manifestly draconian, the legislative endeavours of the states ought to have informed the debate on vulnerability of health care providers...

However even as these questions are being settled up, the Central Government promulgated the Epidemic Diseases Ordinance, 2020 on 23 April 2020, to amend the Epidemic Diseases Act and institute provisions for the protection of medical and health personnel from assault. This follows close on the heels of an infructuous bill circulated by the Ministry of Health in 2019. Rather than dwelling at length on the provisions of the ordinance, it is necessary to recall the enactments by 19 state governments between 2008 and 2016 that were titled Medicare Service Personnel and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act – Delhi (2008), Punjab (2008), Rajasthan (2008), Tamil Nadu (2008), Andhra Pradesh (2008), Chhattisgarh (2010), Karnataka (2009), Orissa (2009), Maharashtra (2010), Assam (2011), Gujarat (2012), Kerala (2012), Telangana (2016, adapting AP Act 11 of 2008), were some of the states with enactments in place.

These state enactments were the result of intense lobbying by state chapters of the Indian Medical Association to check violence by patients' families. The provisions of the state legislations are almost identical: they defined medical personnel, medical institutions, violence, and prescribed reliefs. All states defined the offence under the act as cognisable and non-bailable and outlined near-identical procedures, compensation and punishments. Clearly the impetus for this law was identical -- increasing attacks on hospitals and health care providers. Dr. Neeraj Nagpal, in a 2017 essay, suggested that:

'government spending on healthcare must be increased and the Indian Penal Code should be changed to provide for a tougher penalty that could act as a deterrent to violence against doctors'.

Tripura, which had enacted a similar law in 2013, repealed it in 2018, citing the adequacy of provisions of the Indian Penal Code as the reason for repeal. To elaborate, the enactment was 'to prohibit violence against Medicare service persons and damage to property in Medicare service institutions' and for related matters; It provided for a 'imprisonment extending up to 3 years and a fine extending up to 50,000 rupees.' The reasons for the repeal were three: (a) 'The Indian Penal Code 1860 provides a punishment of imprisonment of 1 year and a fine up to 1000 rupees for causing hurt (Section 323) and imprisonment up to 7 years and fine for causing grievous hurt (Section 325). Therefore, this Act is redundant as the victims may proceed under the Indian Penal Code, 1860 itself.' (b) 'Upon application of the Tripura Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013, *the act of causing 'hurt' as defined under Section 319 of the Indian Penal Code is over criminalized by prescribing a punishment that is not proportionate to the Act.*' (c) 'This is against the principles of criminalization and therefore is detrimental to the cause of ensuring justice'.

Rather than hastily promulgate yet another ordinance that is manifestly draconian, the legislative endeavours of the states ought to have informed the debate on vulnerability of health care providers, with state governments bringing these legislations into public discussion and increasing citizen awareness. There is some evidence of these acts having been used in some states, with mixed results. Is the proliferation of legislation and ordinances the answer to non/poor-implementation of existing laws? Or is it the case that the central government did not engage in a detailed and informed review of the legislative status of these enactments? How will a new ordinance address this gap?

VI. Post-Lockdown Mitigation by States and Courts

State Action

A look at close to 500 Government Orders (GOs) and notifications issued by the different state governments and the Central Government point to the specific and general ways in which state governments have attempted to mitigate the effects of the lockdown while providing testing, care and treatment to Covid affected persons/families. The GOs do not, of course, focus only on 'relief', but on a range of administrative actions necessitated by the lockdown. There are some common elements across all states: food support (cooked and dry rations), income support, MGNREGA wages and altered shelf of works. Some states have GOs on doorstep delivery of essential items, release of certain categories of prisoners on parole, advisories against termination of employees during lockdown, food and shelter to migrant workers, homeless and others who need shelter, cash equivalents of midday meals (in a few states), etc.

Then there are specific measures that stand out. The Kerala government order GO No. 710/2020 dated 25 March 2020, is an extremely detailed order that sets out a range of guidelines: on food support, empowering local self-governments, provision on uninterrupted essential medical services to persons suffering from cancer, diabetes and heart disease, specific support for transgender persons, etc. The modalities of implementation detailed in this order focusing on general well-being, total devolution of powers and from what we see in news reports, this is supported by detailed press and media briefings that are dialogic and participatory. In pandemic times, especially in the Indian case, this is something that stands apart.

While there is a slew of measures on paper, their translation into robust relief on the ground is one that requires close monitoring and reporting, with governments having to cultivate the willingness to

Among the others, besides the general orders, Chhattisgarh has an order that earmarks two distilleries for production of alcohol for the preparation of sanitizers; Delhi notified a hunger helpline and a hunger cell; Jharkhand notified officers responsible for the well-being of Jharkhandi workers stranded outside the state; Odisha has a specific order on income support for 65,000 street vendors; Rajasthan has an advisory against black-marketing of pulses in times of short supply; and of the orders issued by the Central Government, the child support and child helpline guidelines, as well as guidelines for support for persons with disabilities including passes for carers are important.

With Covid-19, the Jammu and Kashmir government passed an order dated 3 April 2020, which stated that “internet speed restrictions have...not posed any hindrance to Covid-19 control measures” and will therefore continue. A public interest litigation (PIL) asking for the restoration of 4G internet in order to be able to deal with a public health emergency in the valley filed on 2 April 2020, is still pending before the Supreme Court. The second problem had to do with large scale detentions under the Public Safety Act (PSA), which saw young men sent to jails outside Kashmir. The order of the Supreme Court on the need to decongest jails in the country has resulted in detained persons being released either on bail or in some cases with charges mysteriously dropped. However, the requirement by the Supreme Court that safe transportation be provided to prisoners so released has not been complied with. Families find themselves having to raise up to Rs. 30,000 each to travel by private taxi during lockdown to distant jails like Agra to bring back their wards.

This points us to the dark corners of executive and judicial action, not limited to Jammu and Kashmir. While there is a slew of measures on paper, their translation into robust relief on the ground is one that requires close monitoring and reporting, with governments having to cultivate the willingness to engage with and respond to criticism

Courts

The legal contestation over rights and state prerogatives/interests has been intense, as also the inscription of new modalities and virtuality in viral jurisprudence.

A cursory glance at the petitions before various high courts, but primarily the Supreme Court is illustrative: the urgency of the restoration of internet in Kashmir; wages for workers during lockdown; emergency housing and subsistence for ousted workers; payment of wages to job card holders under MGNREGA without forcing them to report at worksites; PPE and adequate safeguards for sanitation workers who are at increased risk of infection and aggravated stigmatization on grounds of caste; protection from eviction by landlords – of medical personnel and of workers; price control for Covid-19 testing; nationalization of healthcare; provision of personal protective equipment (PPE) for medical and healthcare personnel as well as a clearly outlined national plan to combat Covid-19 and police protection for medical personnel; seeking orders against sealing of state borders disallowing emergency transportation causing medical emergencies and rise in fatalities;⁶ and seeking access to medical services for pregnant women during the lockdown.

Finally, the right to a decent burial and treatment with dignity in death as part of the right to life under Article 21 in the case of a doctor who died of Covid-19 in Chennai, brings back into focus a longstanding demand of human rights movements that the desecration of the dead is a grave human rights violation.

Several petitions pointed to mistreatment, excesses and brutality by the police. Others addressed the need to contain the spread of Covid-19 through stopping print newspapers, demanded a stay on a community survey planned by the government of Goa; and the denial of branded cat food to a pet cat amounting to a

'CATastrophe,'⁷ are examples. In relation to prisoners, judicial deliberations focused on decongestion of prisons; testing of persons prior to arrest and provision of PPE and provision of sanitizers inside prisons, even while people (activists and journalists) were being arrested in fresh cases under Unlawful Activities Prevention Act.

Of the orders issued by the courts, the order of the Supreme Court ordering the release of prisoners who had served two years in detention centres under the Foreigners' Act in Assam with a much-reduced surety was an especially welcome move. There were also estimates based on information from the states that approximately 34,000 prisoners would be released on bail/parole across the country. Several of the cases brought before the court were in the nature of *suo motu* interventions by the court, and PILs seeking specific directions.

The petition to nationalize hospitals till the pandemic was under control was rejected by the Supreme Court. Importantly, this petition invokes the Directive Principles of State Policy along with Article 21. At least three states — Chhattisgarh, Rajasthan and Madhya Pradesh — had temporarily taken over all private hospitals for Covid-19 patients. There are questions raised by public health professionals and collectives like the Jan Swasthya Abhiyan on what is in effect a suspension of healthcare and treatment for people at large. This was an occasion for the Court to embark on a different route to thinking about comprehensive health care access and state responsibility.

A second petition asked for the takeover of all hotels by the state to provide reasonable accommodation for evicted migrant workers: "The petitioner submitted that these self-contained accommodations might be more cost-effective, less time-consuming and are already equipped with electricity, water, power back up, lifts, ventilation, better sanitation, hygiene, and security." The Supreme Court dismissed this petition observing that many people will come up with many suggestions and government cannot listen to all of them.

The unwillingness to explore a different idea of justice that is grounded in the Constitution and yet informed by the aggravated suffering and harms the pandemic and the lockdown have imposed on the poor, is difficult to comprehend.

The equivocation of the apex court on media freedoms is cause for concern. Its refusal to restrain genocidal incitement (to echo Suchitra Vijayan) that passes as journalism, declaring that it will not "gag the press" is cause for concern, especially when evidence of fake news reports and blatant ethnic profiling was brought to the notice of the Court. We note also that this stands in stark contrast to the Court's acceptance of the state's unsubstantiated argument that it was "fake news" that drove the workers of Delhi onto the highways on 24 March, as also of the state's 'advisory' to the media to refrain from negative reporting of governmental action in the pandemic context.

There is a very fragile, tenuous quality to the Court's response to the suffering of the working poor of this country on whom the country is utterly dependent. This is, ironically, a failure to recognise that it is not the workers who are dependent on the country, but the country that is dependent on its workers. For instance, in response to a plea to ensure payment of wages to migrant workers, the Chief Justice of India asked the petitioners 'why wages are required when meals are provided by the government.'

In a petition brought to the Court on account of the extreme hardships imposed by an inexcusably arbitrary and disproportionate state action, we have the court placing sole reliance on the status report furnished by the same government in the matter of the condition of migrant workers. The court took on board the state's argument that the exodus was caused by rumour-mongering and 'fake news'. It is not clear what was 'fake'. The lockdown announcement? The threat of stern action on anyone violating lockdown? The refusal of employers to pay wages? The eviction by owners? The fact that life in the city is circumscribed by work and wages – absent that,

the only option is a return home – is that fake? The narration of suffering by workers on a death trail? The fact that for this section it is a choice between death by hunger or death by Covid-19?

One paragraph is especially telling: the direction to the media to engage in “responsible reporting by publishing daily bulletins of the government – the official version about the developments.” A similar word of caution was refused, as we have seen, in the petition pleading to restrain the media from ethnic profiling of Muslims.

The unwillingness to explore a different idea of justice that is grounded in the Constitution and yet informed by the aggravated suffering and harms the pandemic and the lockdown have imposed on the poor, is difficult to comprehend.

The first and most important point is to never lose sight of the fact that it is the workers who make or break this nation. Already reeling from decades of mistreatment and callousness, to just fling them into destitution – no matter what the emergency – is plainly unacceptable.

VII. The ‘Triadic Ethical Framework’ of the Constitution

When the right to privacy was declared a fundamental right, the historic dissent of Justice HR Khanna in *ADM Jabalpur v. Shivkant Shukla* was resurrected in eloquent terms by the Supreme Court. This, to recall, meant that fundamental rights cannot be suspended even in conditions of emergency. How have we forgotten that? The jurisprudence of this public health emergency must centre on calling the state to account on behalf of the poorest, most disempowered citizens. It is only if the courts and law are seen to be just in the reliefs they order that we can move forward. This is an extraordinary time and there is a need to understand the vulnerability of the working poor and to recall constitutional jurisprudence triggered by the Vishakha case. This will help us situate rights claims within a larger constitutional mandate to eliminate hostile environments generally on all grounds of dispossession and disempowerment not limited to gender and workplace.

The problem with the Covid-19 pandemic has been posed as an Article 21 issue: the right to life, personal liberty, livelihood and dignity. We could consider a different constitutional route. This connects back to the question of balancing state interests with citizens’ rights. By now, the question is not limited to public health. The manner in which this pandemic has been handled is a sign of the place of “we the people” in the imaginary of this national government. We need to look at ways of reimagining our place with Dr. Ambedkar and his ideas of constitutionalism at the centre. To explore this I suggest a different route – Part IV of the Constitution – the Directive Principles of State Policy – as an anchor for state action.⁸

[T]he state is under obligation to minimise inequalities – in income, status, facilities and opportunities amongst individuals and amongst groups residing in different areas or engaged in different vocations.

While Kerala has been a front-runner in this matter, a cursory glance at the orders passed by state governments does point to a tremendous effort to scramble resources together to remedy the suffering unleashed by the sudden lockdown.

The Directive Principles of State Policy are a guide to governments. In finding our way through this crisis, these principles are ‘fundamental in the governance of the country’ (Article 37). In its striving for ‘a social order in which justice, social, economic and political, shall inform all the institutions of the national life’, one focused on promoting the welfare of the people, it is the Directives that provide the constitutional precepts. In particular,

the state is under obligation to minimise inequalities – in income, status, facilities and opportunities amongst individuals and amongst groups residing in different areas or engaged in different vocations (Article 38). In Justice Sudarshan Reddy's words,

'though not enforceable in any court, but nevertheless fundamental in governance, codifies a part what the Preamble sets forth as the goal of the nation i.e. national development as both a process and a situation in which conditions of complete justice prevail. These conditions are essential for maintenance of social order in which our people can live with dignity and fraternity [and] a concept of welfare that subsumes within itself the benefits of the conditions of justice'.

Not only must the state direct its policy towards securing the right to an adequate means of livelihood, but it shall ensure under Article 39

'(c) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused...

(f) ...that childhood and youth are protected ... against moral and material abandonment'

The obligation of the state, as set out in the Directive Principles of State Policy, shall be supported by a legal system that promotes justice and ensures that "opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities" (Article 39A).

Repudiating the disaggregated interpretation of the Directives, Justice Reddy underscores 'the structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other'. Consequently, he observes, 'Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions.' Article 41 mandates state provision of 'public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want,' a living wage (Article 43), special care for the 'educational and economic interests of the weaker sections of the people" protecting them from social injustice and all forms of exploitation' (Article 43). Finally, ensuring adequate nutrition, standard of living and public health standards are to be regarded as 'among its primary duties' (Article 47).

It is time for the courts and governments to revive a robust memory of the constitution, of the directive principles, and act on that basis alone.

Observing that equality (including and beyond Article 21) is 'a necessary condition for achievement of justice', Justice Sudarshan Reddy sets out the expansive scope of inter-reading and justiciability of the Preamble-Fundamental Rights-Directive Principles triad: 'India was never meant to be a mere land in which the desires and the actions of the rich and the mighty take precedence over the needs of the people. The ambit and sweep of our egalitarian ideal inheres within itself the necessity of inter-generational equity'.

The clear picture that now emerges is a road map for governmental action in which the most marginalized and vulnerable sections must be at the centre of policy more now when we are battling a pandemic than ever before.

How might we reimagine constitutionalism with what Justice Reddy has called the “triadic ethical framework” of the Constitution (para 97), foregrounding in the process the centrality of Part IV to an understanding of citizenship and state responsibility in a social, political and economic democracy (Kannabiran 2010). What this moment presents to us is an opportunity to map the fields of constitutional jurisprudence and constitutionalism anew. We need to do this without taking recourse to languages of war. Upendra Baxi urges us to repudiate the Latin maxim that in times of war the law is silent. While repudiation is one route, another route is eschewing the languages of war and enemies (along with its attendant proxy fences and securitized borders) in a crisis around a pandemic/disease/illness that needs a coming together.

It is time for the courts and governments to revive a robust memory of the constitution, of the directive principles, and act on that basis alone. Finally, any action, state or judicial must be based on *empathy* and a deep *ethical commitment* to constitutional morality, not on the assertion of prerogative and the distribution of largesse. We all inhabit the constitutional commons equally and have an equal stake in it – from the dispossessed worker to the chief justice and president of India. Lest we forget.

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The India Forum *welcomes your comments on this article for the Forum/Letters section.*
Write to editor@theindiaforum.in.

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Human Rights
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Footnotes:

1. I will for the moment ignore his countervailing references to '*saptapadi*' and '*agnipariksha*' at the conclusion of this address and his reference to self-isolation as inscribing a '*lakshman rekha*' in his previous address, although they fence in the reference to the Constitution and Preamble with patriarchal Brahmanical rhetoric.
2. Drawing on commons scholarship my work has looked at the constitution-as-commons, which I use interchangeably with constitutional commons. Hudson and Daniels explore what they term 'constitutional commons' to different effect in the specific context of the US (also drawing on commons scholarship), to look at how constitutional communities act upon the distribution of public goods and common goods.
3. *State (NIA) v. Anand Teltumbde*, Spl Case No. 414/2020 (NIA Case No. RC. 01/2020/NIA/MUM). Remand Application. On file with author.
4. WAN Message, From Director General of Police, Haryana. No. 5264-5304/L&O-3 dated March 29, 2020.
5. *Kharak Singh v. The State of U. P. & Others*, 1963 AIR 1295. Surveillance under Covid-19 remains a major, unaddressed concern. A detailed consideration of this is outside the scope of this essay.
6. *State of Karnataka v. State of Kerala & Ors.* SLP (Civil) 10823 of 2020; and counter affidavit filed by the state of Kerala Interestingly the governments in these two states, Bharatiya Janata Party and Communist Party of India (Marxist) have been political adversaries, a fact that may have a bearing on the sealing of the border.
7. *N. Prakash v. State of Kerala & Anr.* WP (C) TMP-28 of 2020. The judgment recalled the five freedoms that are central to animal rights - freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour.
8. See Baxi (1969) for a detailed exposition on the 'textual anchorage' of the Directives in the Constitution, making state action rooted in the Directives, possible.