

# The ‘Vaccine’ of Human Rights: Issues, Concerns and Compliance with Basic Human Rights during COVID-19 Health Pandemic in India

Dr. Shashikala Gurpur<sup>1</sup>

## Abstract

Health is the foremost aspect of human life and existence with its complete dimensions of physical, mental and social health. Right to health has found its apt place as an ingredient of the sacrosanct and topmost right to life in the scheme of fundamental rights within the constitutional interpretation and in the international human rights law as an indivisible right. In the web of rights that form right to life, woven by the various judicial interpretations and international conventions, this right cannot be visualised in the unprecedented crisis of COVID 19 pandemic, without explicit and exclusive references and considerations of other related human rights. The author has developed a compliance framework from global best practices inspired by the United Nations guidelines and their contextualisation in India. Applying the parameters of legal epidemiology, a unique conceptual framework, the author emphasises how the existing fault lines of socioeconomic inequalities and vulnerabilities in the form of gender, age, class, prisoners and location along with policy blind spots and gaps in the governance system exacerbate human rights violations or non protection, thereby arguing for a comprehensive approach centre-staging right to health, therefore right to life. Recommendations are suggested for India, from this perspective.

**Key words:** COVID-19, basic human rights, compliance framework, legal epidemiology, the vulnerable, right to health

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<sup>1</sup> Dean, Faculty of Law, Symbiosis International (Deemed) University; Director, Symbiosis Law School, Pune, India. I acknowledge the research support of Raj Varma, Asst. Professor, Symbiosis Law School, Pune and research as well as contribution of Aakarsh Banyal, IIIrd Year, B.A. LL.B. (Hons.), Dean’s Researcher, Symbiosis Law School, Pune.

## Introduction

As the world reels under the fearful shadows of a second wave of COVID-19 and a possible nightmare of a second lockdown, the time to emphasise human rights has come of age. The urgency cast upon the States due to the pandemic has led to multiple, immoderate measures being undertaken by various State authorities across the world. These measures have meted out disparate effects on the basic human rights of women, men, children, minorities, and other vulnerable groups. Highlighting the role of States to protect and uphold human rights, the United Nations Report on COVID-19 and human rights has postulated that an increased focus on human rights is about shaping better responses to the pandemic by centering on people, their livelihood, and safety to ensure an equitable and peaceful society of tomorrow.<sup>2</sup>

The Right to Life is the apotheosis in the assembly of human rights. Entrenched within this right are the Right to Health and access to healthcare. It casts a duty on the State to provide access to healthcare and prevent risks to health due to poor working conditions, diseases, etc. Art. 25, Universal Declaration of Human Rights [hereinafter, 'UDHR'] articulates this right in the following manner –

*“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness,*

<sup>2</sup> United Nations 2020, Covid-19 and Human Rights: We are all in this Together, [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf) (accessed on October 20, 2020)

*disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>3</sup>*

The International Covenant on Economic, Social and Cultural Rights [hereinafter, 'ICESCR'] further enunciates this right under Art. 12, recognising both components of health: *physical and mental*.<sup>4</sup> It is crucial to note that this right cannot be viewed in isolation from other human rights. This is owed to the interconnectedness of human-health to various '*underlying determinants of health*'.<sup>5</sup> It is for this reason that an '*equally*' affecting pandemic continues to produce such disparate outcomes. For instance, medical research suggests that individuals with vitamin deficiencies are more prone to develop graver symptoms of COVID-19.<sup>6</sup> These deficiencies can easily be assuaged through a balanced diet, *inter alia*. However, not all individuals have access to the requisite quantity or quality of food due to reasons associated to poverty. In this case, the interrelatedness of the right to health with the right to food is distinctive.

According to Dainius Puras, the UN Special Rapporteur on Right to Health, "*the most effective 'vaccine' against the global health challenges has been and will always be the full realisation of human rights including the right to physical and mental health through meaningful participation and empowerment of*

<sup>3</sup> Article 25, Universal Declaration of Human Rights.

<sup>4</sup> Article 12, International Covenant on Economic, Social and Cultural Rights.

<sup>5</sup> See in general, UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2000/4 (11 August 2000).

<sup>6</sup> See, Fiona Mitchell. 2020. 'Vitamin-D and COVID-19: do deficient risk a poorer outcome?', *Lancet Diabetes Endocrinol*, Vol. 8 Issue 7, 570.

*all people*".<sup>7</sup> Pandemics and epidemics have been the greatest health challenges, and the current COVID-19 crisis has exhibited it with nuances inviting deeper inquiry into the compliance of basic human rights. Post the summary of the global human rights framework to tackle the COVID-19 pandemic, the author shall analyse the Indian response to the global pandemic against the backdrop of the said framework. A brief conclusion follows.

### International Compliance Framework and Responses

Art. 26, International Covenant on Civil and Political Rights [hereinafter, 'ICCPR'] succinctly declares that every individual is conferred with the right to equal treatment of the law. In other words, the State cannot discriminate against groups and individuals on the basis of race, colour, sex, language, religion etc. The Committee on Social, Cultural and Economic Rights [hereinafter, 'CESCR'], in its General Comment with reference to *non-discrimination*, observed that both *formal and substantive* discrimination must be eliminated. Whereas the former refers to literal application of the prohibited grounds, the latter requires a detailed evaluation of the needs of the vulnerable groups whereby certain special measures might have to be undertaken by States to produce equitable outcomes. In line with this conception, a Malawi High Court temporarily set aside the lockdown order because the government's preparedness to tackle with the fiscal and health-related requirements of the

<sup>7</sup>Dainius Pūras, October 2020, Public Health Policy shapes COVID-19 final impact: UN Expert's final Report, <https://www.hhrjournal.org/2020/10/public-health-policy-shapes-covid-19-impact-un-experts-final-report/>; Dainius Pūras, Final report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/75/163 (July 16, 2020) at para 31.

impoverished was not factored in to reach an effective conclusion.<sup>8</sup>

To this end, the Special Rapporteur's final submission to the UN General Assembly highlighted how power imbalances resulting in *social injustice* and general lack of trust in a State's leadership aggravate the ongoing health crisis. Be it mental health, reach of healthcare, health worker's human rights in terms of liberty and life, women's issues, de-institutionalisation challenges for the prisons, *inter alia*,<sup>9</sup> a lack of trust in the government because of issues surrounding opaque policy formulation and executive overreach threaten the right to health. The inherent power imbalance across institutions, groups and individuals worsens this situation. For instance, the under-prioritisation of mental health as compared to physical health and the resultant funding imbalance can lead to ineffective health policies. Another challenge that stems due to lack of accountability and transparency, as mentioned in the report, is the questionable allocation of economic stimulus packages and related financial aid by governments.

Scholars like Philippe Sands have reflected on how WHO framework of International Health Regulation (IHR) itself is more leaning towards political expediency than legal integrity in terms of preparedness and particular responsibility of the state for the vulnerable.<sup>10</sup> Law as a social determinant,<sup>11</sup> in

<sup>8</sup> Lameck Masina, *Judge in Malawi Blocks Government Lockdown, at Least Temporarily*, VOA NEWS (APRIL 17, 2020), <https://www.voanews.com/covid-19-pandemic/judge-malawi-blocks-government-lockdown-least-temporarily> (accessed October 20, 2020).

<sup>9</sup> Joseph J Amon & Margaret Wurth, 2020, *A virtual Round table on COVID-19 and human rights with Human Rights Watch Researchers*, HEALTH AND HUMAN RIGHTS JOURNAL, Vol.22, at p. 399.

<sup>10</sup> Refer to, [https://www.youtube.com/watch?v=RqZdxX\\_YeL](https://www.youtube.com/watch?v=RqZdxX_YeL)

the form of human rights framework, must protect access, affordability and equity in healthcare.

Besides the Special Rapporteur's report, there are multi-country reports on responses to domestic violence, on human rights-centric pandemic response by UN agencies. In one report, the UN puts 3 rights in the forefront: right to life and duty to protect life (mechanisms to ensure livelihood with socio economic measures alongside public health measures, dignified treatment to the dead), the right to health and access to healthcare (to treat, save and prevent including hygienic and safe quarantine facilities), and, the right to freedom of movement (for preventing the spread of infection).<sup>12</sup> Although these rights are hailed as frontline rights, inadequate preparedness, partially due to transnational facet of this pandemic and related non-transparency as well as lack of a unified approach, created multiple patterns of conflict and convergence of these rights.

To this end, the Oxford-Bonavero Institute of Human Rights conducted a preliminary assessment of the lockdown measures that were undertaken in India from 11.03.2020-11.04.2020. Primarily a legislative and

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Y;<https://www.youtube.com/watch?v=d-IRZ6WPiCI>; European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP)); United Nations 2020, Covid-19 and Human Rights: We are all in this Together, [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf) (accessed on October 20, 2020)

<sup>11</sup> Scott Burris, *Law in a Social Determinants Strategy gram: A Public Health Law Research Perspective*, CDC, <https://www.cdc.gov/socialdeterminants/docs/burris-sdoh-symposium-101910-508.pdf>.

<sup>12</sup> United Nations 2020, Covid-19 and Human Rights: We are all in this Together, [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf) (accessed on October 20, 2020)

regulatory analysis, the measures were seen through the viewpoint of constitutional law and the broader scheme of human rights obligations owed by the State to its citizenry. The study showcased that India's best practices included the non-imposition of emergency, respecting state jurisdictions and our independent judiciary. However, the study underscores the concerns on poverty, excessive police powers and sudden excessive restriction on transport during lockdown, poor address of the socio-economic human rights and lack of public health dimension in the National disaster management laws.<sup>13</sup>

Media scan in India during the lockdown period, wading through the unlock phases, mirrors such issues with various shades. Although the early lockdown is hailed as a courageous step, it had a disproportionate impact on the impoverished and the vulnerable. In the ensuing segment, the author shall analyse the Indian experience with human rights and COVID-19.

### India Resonances

India being party to the ICCPR and the ICESCR is bound by the obligations detailed therein. The report by the Oxford-Bonavero Institute of Human Rights, as summed up supra, expressed four major concerns with the response of Indian authorities to the pandemic:

*“The excessive use of force by police in enforcing the lockdown measures across States without adequate inbuilt mechanisms of oversight*

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<sup>13</sup>Bonavero Institute of Human Rights, 2020, A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19, Bonavero Report No. 3/2020, at 13, [https://www.law.ox.ac.uk/sites/files/oxlaw/v3\\_bonavero\\_reports\\_series\\_human\\_rights\\_and\\_covid\\_19\\_20203.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf) (accessed on October 20, 2020).

*The excessive restrictions on freedom of movement, including a prohibition on essential services like transport for key workers, beyond what is necessary*

*The lack of engagement with socio-economic rights, in particular, the rights to food, health, shelter, livelihood and security under Article 21 of the Constitution, leaving millions in dire circumstances*

*The lack of a public health focus in the measures, including absence of emphasis on adequate testing and treatment of Coronavirus”<sup>14</sup>*

The Indian resonances to the global pandemic shall be analysed broadly across the following four dimensions.

#### **a) Excessive use of force by police**

The Indian Penal Code contains multiple provisions that allow for the prosecution of an individual who flouts the COVID-19 lockdown restrictions.<sup>15</sup> Furthermore, the Code of Criminal Procedure gives the police wide discretion to avert instances concerning these violations.<sup>16</sup> Interestingly, the accountability of the police force is mainly governed by the colonial legislation viz. Police Act, 1861. The Police Act contains several pitfalls in this respect, as have been highlighted by a report

<sup>14</sup> Ibid, at 53.

<sup>15</sup> See, Sections 188, 269, 270, 271, Indian Penal Code, 1860.

<sup>16</sup> See, Sections 129, 141, 197, Code of Criminal Procedure, 1973.

by the Commonwealth Human Rights Initiative.<sup>17</sup> Among them, lack of an independent accountability system echoes the findings of the Oxford-Bonavero Institute.

Numerous instances of police excesses have been witnessed across the country during the pandemic. Conventional use of force such as beating by police batons and ‘innovative’ punishments by the police authorities were widely circulated on social media platforms. Most notably, police apathy towards the migrants prompted a response from the UN High Commissioner of Human Rights. In response to the use of excessive force by the police officials against these workers, Michelle Bachelet stated, “*officers must show restraint and abide by international standards on the use of force and humane treatment in their efforts to respond to this pandemic.*”<sup>18</sup> Multiple sources reported the disproportionate and unnecessary use of force being employed against migrants which included beating by batons, spraying of disinfectant, going against ethical and legal standards of law enforcement.

One lamentable yet avoidable incident took place on 8th May, 2020, when sixteen migrant workers were trampled by a goods train while asleep, for they were following the railway track to avoid being beaten by the police.<sup>19</sup>

<sup>17</sup> See for an extensive discussion, Maja Daruwala *et al.*, ‘Police Act, 1861: Why we need to replace it?’

Police Reforms too Important to Neglect too Urgent to Delay’, Commonwealth Human Rights Initiative, (July 2005), [https://www.humanrightsinitiative.org/programs/aj/police/papers/advocacy\\_paper\\_police\\_act\\_1861.pdf](https://www.humanrightsinitiative.org/programs/aj/police/papers/advocacy_paper_police_act_1861.pdf).

<sup>18</sup> Sandeep Datta, *India: Migrant workers' plight prompts UN call for 'domestic solidarity' in coronavirus battle*, UN NEWS (April 2, 2020), <https://news.un.org/en/story/2020/04/1060922> (accessed on October 20, 2020).

<sup>19</sup> Mohammed Akhef, *Maharashtra: Train runs over migrant workers in Aurangabad, 16 dead*, Times of India, TIMES OF INDIA (May 8, 2020), <https://timesofindia.indiatimes.com/city/aurangabad/maharashtra-train-runs-over-a-dozen-migrant->

Similarly, thousands of migrant workers were beaten in Delhi in March when they were on their way to cross the Delhi border bare-feet.<sup>20</sup> Many of these incidents, as noted by the High Commissioner, display inhuman treatment and a complete violation of established human rights standards for law enforcement. In contrast, the general provisions of UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials enunciate that, “*law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.*”<sup>21</sup> Even to prevent unlawful assemblies, the least excessive measures have to be adopted by the police officials and violent recourse is to be taken only after the exhaustion of all peaceful means.<sup>22</sup>

Surprisingly, not much attention was paid to the specific issue of police brutality by the Hon’ble Supreme Court and High Courts. The Bombay High Court, while entertaining a petition over the issue, acknowledged that, “*some policemen think just because they have a lathi they can use it.*” However, it also reasoned that, “*if people violate laws, then they have to be dealt with strong hands*” and that the Court cannot decide on when use of

force may be required.<sup>23</sup> For this particular instance of alleged police violence, an SIT probe was ordered which reported on later hearing that a *departmental proceeding* will be conducted against the four accused officers.<sup>24</sup>

A Public Interest Litigation petition (PIL) filed in the Guwahati High Court outlined several instances of police brutality and requested for the Judiciary’s guidance. The High Court dismissed the petition, albeit acknowledged the unwarranted nature of such atrocities.<sup>25</sup> Lastly, the High Court held that individual action could be initiated against these public servants. The Supreme Court displayed a similar predisposition when it denied to intervene in a plea claiming police brutality following the COVID-19 guidelines, and encouraged the filing of individual complaints in cases alleging police brutality.<sup>26</sup>

What requires consideration is the wide amplitude of powers and discretion that the police has wielded in the enforcement of the lockdown guidelines. Even though the transmission was to be cut down with a strict enforcement of lockdown guidelines, the measures undertaken to reach that end cannot be at the expense of civil rights. States Parties to the ICCPR are obligated to uphold the dignity of its citizens and uphold their right to life. Furthermore, no citizen can be subjected

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workers-in-aurangabad/articleshow/75614987.cms (accessed on October 20, 2020).

<sup>20</sup> Maria Abi-Hassed& Sameer Yasir, *India’s Coronavirus Lockdown Leaves Vast Numbers Stranded and Hungry*, NY TIMES (March 29, 2020), <https://www.nytimes.com/2020/03/29/world/asia/coronavirus-india-migrants.html> (accessed on October, 2020).

<sup>21</sup> See, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> (accessed on October 20, 2020).

<sup>22</sup>*Ibid.*

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<sup>23</sup> Sonam Saigal, HC orders SIT to probe man’s death at hands of police during lockdown, THE HINDU, (AUGUST 18, 2020), <https://www.thehindu.com/news/cities/mumbai/hc-orders-sit-to-probe-mans-death-at-hands-of-police-during-lockdown/article32379700.ece> (accessed on October 20, 2020).

<sup>24</sup>*Ibid.*

<sup>25</sup> Rahul Sensua v. The State of Assam & Anr, PIL 25/2020.

<sup>26</sup> Legal Correspondent, Police working hard to implement lockdown: Supreme Court, The Hindu, (October 20, 2020), <https://www.thehindu.com/news/national/coronavirus-police-working-hard-to-implement-lockdown-supreme-court/article31351233.ece> (accessed October 20, 2020).

to cruel and inhuman treatment or punishment. The Right to Life, as aforesaid, is sacrosanct. Therefore, suspension of liberty with police raj alongside a State's full control had to be balanced with sacrosanct right to life and liberty with the ensuing accountability.

**b) Excessive restrictions on freedom of movement, including transport of workers**

Freedom of movement is a fundamental right conferred by the Indian Constitution by virtue of Article 19 to all citizens of India.<sup>27</sup> The ICCPR contains an obligation in this regard as well.<sup>28</sup> Any restriction to this right has to be non-discriminatory, necessary and proportional. The General Comment by the ICCPR further avers that not only the law, but also the application by the executive authorities has to satisfy this three-fold requirement.<sup>29</sup>

Pursuant to the Disaster Management Act, 2005, the nationwide lockdown sought to restrict this movement of people because of the public health crisis brought about by the pandemic. During the initial lockdown, all transport facilities were suspended, apart from emergency medical services, police etc.<sup>30</sup> In this context, internationally, there have been

discussions on the disproportionate effect of such restriction on movement on the 'blue-collar' workers. However, India's exceptional predicament concerns yet another vulnerable group: the 'ganji' workers - the internal migrants - forming the country's 'gig' economy (informal economy).

The sudden suspension of transport facilities and the inability to earn daily wages left these internal migrants defenceless against the pandemic. A report by Stranded Action Network observed that almost 50% of these workers had little to no access to rations.<sup>31</sup> Other setbacks included evictions due to arrears of rent and fear of transmission, no support system in terms of relatives and family, uncertainty surrounding end of lockdown, rumours about the raging COVID-19 deaths, etc. Therefore, post the announcement of the nationwide lockdown, there was a mass exodus of these migrants from various cities towards their hometown.

To tackle a possible threat of transmission emanating from these mass movements, various orders were issued by state and local authorities. The imprecise wording of such orders led to overreach by the authorities as observed by Bhatia.<sup>32</sup> For instance, an order from a DGP in Haryana stated, 'persons' travelling on foot should be picked up. The order does not provide any direction with respect to the number of person traveling

<sup>27</sup> Article 19(1)(d), Constitution of India.

<sup>28</sup> Article 12, International Covenant on Civil and Political Rights.

<sup>29</sup> See, UN Committee on Civil and Political Rights, General Comment No. 27: Article 12 (Freedom of Movement) CCPR/C/21/Rev.1/Add.9 (2 November 1999), at para. 13.

<sup>30</sup> Coronavirus: All passenger trains, metro, inter-state bus services suspended till Mar 31, complete lockdown in 75 districts, ECONOMIC TIMES (MARCH 22, 2020), [https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-all-passenger-trains-metro-inter-state-bus-services-suspended-till-mar-31-complete-lockdown-in-75-districts/articleshow/74759935.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cpps](https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-all-passenger-trains-metro-inter-state-bus-services-suspended-till-mar-31-complete-lockdown-in-75-districts/articleshow/74759935.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpps) (accessed on October 20, 2020).

<sup>31</sup> Stranded Workers Action Network, *21 Days and Counting: COVID-19 Lockdown, Migrant Workers, and the Inadequacy of Welfare Measures in India*, THE HINDU (April 15, 2020), [https://www.thehindu.com/news/resources/article31442220.ece/binary/Lockdown-and-Distress\\_Report-by-Stranded-Workers-Action-Network.pdf](https://www.thehindu.com/news/resources/article31442220.ece/binary/Lockdown-and-Distress_Report-by-Stranded-Workers-Action-Network.pdf) (accessed on October 20, 2020).

<sup>32</sup> See, Gautam Bhatia, Coronavirus and the Constitution – VI: On the Freedom of Movement, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (MARCH 30, 2020), <https://indconlawphil.wordpress.com/2020/03/30/coronavirus-and-the-constitution-vi-on-the-freedom-of-movement/> (accessed on October 20, 2020).

together for them to be brought within the ambit of this order.<sup>33</sup>

As a response to the plight of migrants, various High Courts and the Supreme Court of India demanded responses from the Central and the respective State Governments. The Supreme Court's Order dated 31st March, 2020 warrants a closer look in this respect.<sup>34</sup> The Court considered the Status Report filed on behalf of Union of India, which underlined all measures that were taken to deal with the needs of these migrant workers, *inter alia*. In addition to the provision of basic amenities such as clean drinking water, food, medicines and shelter homes, the Report referenced the grant of a relief package totalling Rs. 1.70 lakh crores under the aegis of the PM Garib Kalyan Yojana. The Supreme Court held that it was satisfied with the measures that the Government had taken. Moreover, the Status Report had requested the Supreme Court to issue a direction whereby no media platform could disseminate information regarding the pandemic without consultation with the Central Government concerning the veracity of that information. The Court opined that it could not "*overlook this menace of fake news* ' and '*direct[ed] the media refer to and publish the official version about the developments.*" The Order also expected media to not publish unverified news sources.

Firstly, the sweeping acceptance of the Governmental measures based on the Status Report was upsetting, since multiple accounts following the Order contained incidents of migrant crises. The perceived executive deference in the matter and the unsympathetic approach adopted by the Supreme Court towards the repeated cases of police brutality and mismanagement of the pandemic in terms of transportation, shelter-homes, etc.

<sup>33</sup> *Ibid.*

<sup>34</sup> Alakh Alok Srivastava Vs Union of India, Writ Petition (Civil) No(s) 468/2020.

undermined the basic human rights of these workers.<sup>35</sup> Secondly, Art. 19(1)(a), Indian Constitution provides for the freedom of speech and expression.<sup>36</sup> In the international context, the ICCPR contains a similar guarantee under Art. 19(3).<sup>37</sup> The Supreme Court order did not clarify the nature of '*fake news*'. Coupled with the requirement of media houses to refer to '*official versions*', this creates an assumption that any other news source may fall within the category of '*fake news*'. This kind of assumption violates a citizen's right to know and right to access information enshrined under the global human rights and fundamental right under the Constitution and also curtails the media's freedom of speech and expression.<sup>38</sup>

In a latter case wherein the Supreme Court took suo-motu cognisance to provide constitutional protection to the migrant workers, the Court framed a series of questions asking the Centre to explain its stand on various issues related to the transport of migrants.<sup>39</sup> This resulted in a set of orders which sought to alleviate the miseries of migrant workers. These include transportation of migrants within 15 days free of cost, provision of meals and water, easing the process of registrations, withdrawal of cases against these migrants for violating lockdown

<sup>35</sup> See for more instances, Sanjay Hegde, Social Distancing from the powerless, THE HINDU (May 19, 2020), <https://www.thehindu.com/opinion/lead/social-distancing-from-the-powerless/article31617566.ece> (accessed on October 20, 2020).

<sup>36</sup> Article 19(1)(a), Constitution of India.

<sup>37</sup> Article 19(3), International Covenant on Civil and Political Rights.

<sup>38</sup> See, *Alok Srivastava v. India*, GLOBAL FREEDOM OF EXPRESSION, (2020), <https://globalfreedomofexpression.columbia.edu/cases/alok-srivastava-v-india/> (accessed on October 20, 2020).

<sup>39</sup> See, In re: Problems and Miseries of Migrant Labourers, Suo Motu Writ Petition (Civil) No(s) 6/2020.

measures etc.<sup>40</sup> Several High Courts such as Telangana and Karnataka took a similar, active approach in ensuring human rights protection, even during the crisis.<sup>41</sup>

### c) *Right to Health and inter-related rights*

Art. 21, Indian Constitution is the constitutional guarantor of life and liberty to every individual.<sup>42</sup> In the case of *Bandhua Mukti Morcha v. Union of India*, the right to health was included within the anthology of rights under Art. 21.<sup>43</sup> In another case, Supreme Court also observed the State's constitutional obligation to maintain health services.<sup>44</sup> The Directive Principles of State Policy, furthermore, contain numerous references to the maintenance health standards in workplaces, maternity relief, etc.<sup>45</sup>

Healthcare can be further split into 'preventive' and 'curative'.<sup>46</sup> As the names suggest, preventive healthcare aims to maintain health standards and protection so

that an individual does not fall ill. Curative healthcare aims at the care, treatment and/or easing the pain after an individual falls ill. Commenting upon the state of India's medical infrastructure, the Telangana High Court stated in an order–

*“The COVID-19 pandemic has exposed the poor medical infrastructure in the States where there are too few Hospitals/Primary Health centres, too few Doctors and nurses in Government sector, lack of medicines, and general poor-quality medical infrastructure with honourable exceptions. In fact, the long lockdown was imposed to ramp up the medical infrastructure – buy more medicines, create more isolation facilities, get more ventilators, import a lot of testing kits etc.”<sup>47</sup>*

<sup>40</sup>Sanya Talwar, *Transport Stranded Migrants To Native Places Within 15 Days; Consider Withdrawing Cases Taken Against Them For Lockdown Violations* : SC,LIVELAW (June 9, 2020), <https://www.livelaw.in/top-stories/transport-stranded-migrants-to-native-places-within-15-days-sc-158029> (accessed on October 20, 2020).

<sup>41</sup> See, Dr. Ramesh Kumar v. State of Andhra Pradesh, Writ Petition No. 8163/2020; See further, Mustafa Plumber, *No Migrant Should Be Denied Opportunity To Travel Back Only Because Of Incapacity To Pay Rail Fare* : Karnataka HC, LIVELAW (May 14, 2020), <https://www.livelaw.in/top-stories/no-migrant-should-be-denied-opportunity-to-travel-back-only-because-of-incapacity-to-pay-rail-fare-karnataka-hc-156729> (accessed on October 20, 2020).

<sup>42</sup> Article 21, Constitution of India.

<sup>43</sup>*Bandhua Mukti Morcha v. Union of India* (AIR 1984 SC 802).

<sup>44</sup> *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 SCC 117.

<sup>45</sup> Article 39E, 42, 47, Constitution of India.

<sup>46</sup>Fuhmei Wang, *The roles of preventive and curative health care in economic development*, 13 PLOS ONE e0206808 (2018).

As of 2017-18, India's expenditure on public health has been a meagre 1.28% of its GDP.<sup>48</sup> Furthermore, based on FY-17 National Health Accounts data, 80% of the funds are spent on curative healthcare and only about 7% on preventive treatment.<sup>49</sup> This is one of the main reasons that the country faced a shortage in the

<sup>47</sup>*Ganta Jai Kumar v. State of Telangana and Ors.*, W.P. (PIL) 75 of 2020.

<sup>48</sup> Himan Chanda, *At 1.28% of GDP, India's expenditure on health is still low although higher than before*, THEPRINT (October 31, 2019), <https://theprint.in/health/at-1-28-gdp-india-expenditure-on-health-still-low-although-higher-than-before/313702/> (accessed October 20, 2020).

<sup>49</sup> Surbhi Bhatia & Sneha Alexander, *Covid-19 shows why we need a healthcare reboot for India*, LIVEMINT (March 30, 2020), <https://www.livemint.com/politics/policy/will-covid-19-prompt-health-reboot-11585497828527.html> (accessed October 20, 2020).

supply of PPE kits and other protective equipment, demonstrating obvious unpreparedness for pandemic of this magnitude.

The aforementioned High Court order dealt with a case wherein the State Government had disallowed private hospitals from conducting diagnostic tests or to provide treatment. The High Court upheld the right of an individual to choose its hospital, be it public or private. The State Government's order to check such testing was in furtherance of Section 2, Epidemic Diseases Act, 1897. However, the Court observed that the said provision did not empower the State Government to pass such an order, while simultaneously upholding the non-derogable nature of Art. 21, Indian Constitution despite precarity in the country.<sup>50</sup>

The diagnostic testing entailed yet another hurdle. Based on ICMR's advisory, the price of such tests was capped at Rs. 4500. However, the judiciary stepped and passed an order which made diagnostic testing free of cost in both approved government and private hospitals, saying that reimbursement to these private hospitals would be considered later.<sup>51</sup> This placed a burden on private hospitals and hence, in order to reach a balance, this order was modified. The modification meant that COVID-19 testing would be free for economically weaker sections and for individuals below poverty line, who furnish their AYUSH ID.<sup>52</sup>

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<sup>50</sup>Ganta Jai Kumar v. State of Telangana and Ors., W.P. (PIL) 75 of 2020.

<sup>51</sup>Krishnadas Rajagopal, *Supreme Court urged to modify order on free COVID-19 testing by private labs*, THE HINDU, (April 11, 2020), <https://www.thehindu.com/news/national/coronavirus-supreme-court-urged-to-modify-order-on-free-covid-19-testing-by-private-labs/article31316430.ece> (accessed on October, 2020).

<sup>52</sup>SC modifies earlier order, says free Covid-19 testing only for poor, TIMES OF INDIA, (April 13, 2020), [https://timesofindia.indiatimes.com/india/free-](https://timesofindia.indiatimes.com/india/free-covid-19-testing-only-for-poor-sc-modifies-earlier-order/articleshow/75125690.cms)

Given the characteristics of the COVID-19 pandemic where the world is still developing a vaccine and only certain preventive measures are effective, it is reasonable to suggest that diagnostic testing falls under minimum obligation owed by the State as per the ICESCR. Hence, via this Order, the judiciary has balanced the right to health with the financial requirements of private hospitals. This approach by the Supreme Court has been considerate of the disproportionate impact of the pandemic on the person below a certain income level and hence, seeks to uphold substantive equality as prescribed by the CESCR.

In addition to judicial compliance in India, the earlier cited report by the UN Special Rapporteur noted that power imbalances between private and public healthcare sector was categorised as yet another reason that affects an individual's right to health. The report, in view of the same and keeping in line with the recommendations of the CESCR,<sup>53</sup> stressed on the obligation of States to maximally utilise resources available to them whether it be private or public facilities. India's efforts to increase testing capacity by allowing authorised private laboratories to conduct the same in a phased manner echo the recommendation. Similarly, private hospitals were authorised to admit patients, wherein ICU's were even reserved for COVID-19 patients. This was accompanied by several innovative steps such as the conversion of

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covid-19-testing-only-for-poor-sc-modifies-earlier-order/articleshow/75125690.cms (accessed on October 20, 2020).

<sup>53</sup>Dainius Pūras, Final report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/75/163 (July 16, 2020) at para 31.

train coaches into COVID-19 facilities to keep abreast the upsurge in COVID-19 cases.<sup>54</sup>

In sum, there was a lack of preparedness to effectively deal with an adversity on such a huge scale, which the Indian Judiciary tried to balance and humanise as evident in these cases.

Further, there was a disproportionate impact on the socio-economic rights of specific vulnerable groups including but not restricted to 1) women, 2) LGBTIA+ community, 3) healthcare workers 4) persons deprived of liberty, 5) children/aged/disability. However, the author is highlighting a few groups.

*(i) Women*<sup>55</sup>

Through an epidemiological lens, men are disproportionately affected by COVID-19. However, the impact on the health and safety of the woman due to COVID-19 is seemingly worse from a legal perspective. The ‘shadow’ pandemic of Gender Based Violence, as termed by UN Women, caused tremendous strife to women and girls across India.<sup>56</sup> Statistics from the National Commission for Women recorded a doubling of reported cases of domestic violence.<sup>57</sup> This is despite the fact

that majority of women do not report cases of domestic violence. Most notably, due to the lockdown, the propinquity of the perpetrator and victim disallowed reporting *via* traditional measures such as physical reporting and/or phone calls.

Although the State authorities brought in measures such as reporting through WhatsApp, the exceedingly low internet penetration rate combined with digital-illiteracy amongst majority of the Indian population limited the effectiveness of such provisions.<sup>58</sup> This massive upsurge in cases of domestic violence, indirectly brought about by lockdown measures, affected both the physical and mental health of women.

The High Courts, in this case, were proactive to look into global best practices to demand answers from the State Governments concerning measures that have been undertaken to counter this negative trend. For instance, the Jammu and Kashmir High Court took suo motu cognisance of this matter and directed the state Government to take innovative steps to uphold the women’s right to health. Some of them include:

“[...] (iv) *Designated informal safe spaces for women, say grocery stores and pharmacies, where they can report domestic violence/abuse without*

<sup>54</sup> <https://www.livemint.com/news/india/railways-to-convert-503-coaches-into-covid-19-isolation-wards-in-delhi-11594463527760.html>

<sup>55</sup> Forthcoming, Shashikala Gurpur & Aakarsh Banyal, *Shades of Shadow Pandemic: Global Comparisons and the Indian Situation of Domestic Violence During COVID-19*, *CMR Journal of Contemporary Legal Affairs*.

<sup>56</sup> UN Women, *The Shadow Pandemic: Violence against women during COVID-19*, UN WOMEN (2020) <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> (accessed 15 October 2020).

<sup>57</sup> Scroll Staff, *Covid-19 lockdown: Domestic violence cases reported to NCW nearly double in last 25 days*, SCROLL, (April 2020), <https://scroll.in/latest/959515/covid-19-lockdown-domestic-violence-cases-reported-to->

[ncw-nearly-double-in-last-25-days](#) (accessed on October 20 2020).

<sup>58</sup> Statista, ‘India’s Internet Penetration Rate from 2007 to 2020’, STATISTA, <https://www.statista.com/statistics/792074/india-internet-penetration-rate> (accessed 15 October 2020); Shemin Joy, *Digital literacy for rural population hasn’t met half of the target*, DECCAN HERALD, (March 15, 2020) <https://www.deccanherald.com/national/digital-literacy-for-rural-population-hasnt-met-half-of-the-target-813995.html> (accessed October 15 2020).

*alerting the perpetrators.  
(v) Immediate designation  
of safe spaces (say for  
instance empty  
hotels/education institutions  
etc) as shelters for women  
who are compelled to leave  
their domestic situation.  
These shelters must be  
treated as accessible  
shelters. [...]*<sup>59</sup>

The other threat to women came from the inaccessibility to reproductive healthcare facilities on account of the COVID-19 lockdown. Foundation for Reproductive Health Services estimated 26 million couples would not have access to contraceptive during the pandemic. This could in turn lead to unsafe abortion practices and also impeding the realisation of SDG 3 concerning maternal mortality rate and well-being of children, *inter alia*.<sup>60</sup> Another study by Marie Stopes International projected that 6.5 lakh unintended pregnancies accompanied by 2,600 maternal deaths may be caused due to the lockdown measures.<sup>61</sup>

<sup>59</sup> Akshita Saxena, *J&K HC Takes Suo Moto Cognizance Of Domestic Violence Cases Amid Lockdown; Issues Guidelines*, LiveLaw (April 18, 2020), <https://www.livelaw.in/top-stories/breaking-jk-hc-takes-suo-moto-cognizance-of-plight-in-domestic-violence-cases-amid-lockdown-issues-guidelines-read-order-155440> (accessed 15 October 2020).

<sup>60</sup> Department of Economic and Social Affairs, *Goal 3: Good Health and Well-Being*, UN, <https://www.un.org/development/desa/disabilities/envision2030-goal3.html>, (accessed on October 20, 2020).

<sup>61</sup> Associated Press, *1.3 million women in India lost access to contraceptives, abortions during the COVID-19 pandemic*, FIRSTPOST (20 August 2020), <https://www.firstpost.com/health/1-3-million-women-in-india-lost-access-to-contraceptives-abortions-during-the-covid-19-pandemic-report-8732021.html> (accessed October 20, 2020).

The issue of maternal healthcare comes at direct loggerheads with the ‘principle of non-retrogression’ under the ICESCR. This principle of non-retrogression requires the State to ensure that the existing economic, social and cultural rights are not diminished in any manner. Even during exigencies such as the one at hand, States must take all necessary measures to curb such retrogression. It was only in mid-April that “Reproductive, Maternal, Newborn, Child, Adolescent Health and Nutrition Services” (RMNCAH+N) were included under the ‘essential’ services category by Health Ministry.<sup>62</sup> In spite of that, the prevailing fear of transmission and curbed movement dulled the efforts of the State authorities.

#### (ii) *LGBTIA+ Community*

Discrimination based on sexual orientation, gender expression and gender identity are encompassed within the extant ambit of the principle of non-discrimination.<sup>63</sup> This read with Art. 12(1), ICESCR which guarantees right to health, both physical and mental, obligates States to secure access to healthcare and other related facilities for the persons belonging to the LGBTIA+ community.<sup>64</sup> Due to the pandemic, these guarantees are again threatened by a myriad concerns. Stigmatisation and lack of awareness on

<sup>62</sup> Ministry of Health and Family Welfare, *Guidance Note on Provision of Reproductive, Maternal, Newborn, Child, Adolescent Health Plus Nutrition (RMNCAH+N) services during & post COVID-19 Pandemic*, MINISTRY OF HEALTH AND FAMILY WELFARE (APRIL, 2020) <https://www.mohfw.gov.in/pdf/GuidanceNoteonProvisionofessentialRMNCAHNServices24052020.pdf> (accessed October 20, 2020).

<sup>63</sup> Office of the High Commissioner for Human Rights, *Born Free and Equal*, p. 41, <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> (accessed October 20, 2020).

<sup>64</sup> Article 12, International Covenant on Economic, Social and Cultural Rights.

various fronts is one of major factors that has led to such depredation.

The chief fiscal issue that remains is the reach of welfare schemes to community members. This is because only 2,500-3000 out of 4.8 lakh trans people have the requisite documentation and Government IDs.<sup>65</sup> Most notably, the economic stimulus package of Rs. 1.7 lakh crore, overlooked the transgender community, along with other marginalised groups. Amnesty International reported that as on 1st April, 2020, only the state of Kerala had announced relief kits for transgender persons.<sup>66</sup> In some instances, the support proffered by the National Institute for Social Defence fell short, since the application procedure was online along with limited time slots.

With respect to mental health, restrictions imposed by the lockdown, drew a distance between the LGBT+ persons and support groups. As stated *supra*, access to internet and digital literacy makes it difficult for LGBT+ individuals to have online access to such services. Being prone to violence from relatives, these individuals have no governmental facilities to take shelter in and avoid persecution from family and society alike. From the perspective of physical health, media reports suggest that there has been a decreased access to HIV medication in such times.<sup>67</sup> This again has a bearing on the

community members since according to data by NACO, 2.69% homosexual men and 3.14% of transgender persons are currently patients of HIV.<sup>68</sup> Structural discrimination and power asymmetries have a negative impact on the employability of members of the LGBT+ community. The unprecedented situation of COVID-19, which led to huge economic losses to industries, implicitly puts community members at a higher risk of job loss.

To remedy the situation, the National Human Rights Commission issued an advisory based on the recommendations of the Committee of Experts on Impact of Covid-19 Pandemic on Human Rights and Future Response that comprised domain experts, civil society organisations etc.<sup>69</sup> Suggestions include a toll free helpline, protection from eviction based on gender, access to health service including HIV testing and availing of therapy and counselling. The advisory, furthermore, recommends increased access 'social security' in terms of documentation requirements for all welfare schemes.

### (iii) Healthcare Workers

A major unit of frontline warriors during the pandemic is the healthcare sector's workforce. They are at the highest risk of contracting

<sup>65</sup> G. Ram Mohan, *Eviction Fear Heightens as Lockdown Signals Loss of Livelihood for Transgender People*, THE WIRE (May 1, 2020) <https://thewire.in/rights/transgender-people-lockdown-coronavirus> (accessed October 20, 2020).

<sup>66</sup> *Nayantara et al.*, As The World Comes Together, India's Transgender Community Fights COVID-19 Alone, AMNESTY INTERNATIONAL INDIA (April 1, 2020) <https://amnesty.org.in/as-the-world-comes-together-indias-transgender-community-fights-covid-19-alone/> (accessed October 20, 2020).

<sup>67</sup> See for instance, Sohini Chattopadhyay, *India's COVID-19 lockdown hits HIV+ and chronic patients hard*, AlJazeera (March 30, 2020),

<https://www.aljazeera.com/news/2020/3/30/indias-covid-19-lockdown-hits-hiv-and-chronic-patients-hard> (accessed on October 20, 2020).

<sup>68</sup> Yesha Kotak, *Calls from HIV+ LGBTQ members increased during lockdown: Counsellors*, HINDUSTAN TIMES (May 9, 2020) <https://www.hindustantimes.com/mumbai-news/calls-from-hiv-lgbtq-members-increased-during-lockdown-counsellors/story-WVJvVawEGHLthqjV5aDc3I.html> (accessed October 20, 2020).

<sup>69</sup> Live Law News Network, *NHRC Issues Human Rights Advisory For Protection Of LGBTQI+ Rights Amid COVID-19 Pandemic*, LIVELAW (October 20, 2020) <https://www.livelaaw.in/news-updates/nhrc-issues-human-rights-advisory-for-protection-of-lgbtqi-rights-amid-covid-19-pandemic-164741> (accessed October 20, 2020)

COVID-19. Art. 12(2)(b), ICESCR provides the right to healthy and safe working environment. The right obligates the States to ensure, “*minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.*”<sup>70</sup> In addition, Art. 7(b), ICESCR, guarantees everyone the right to just and favourable conditions of work, specifically in the context of healthy working conditions. In CESCR’s COVID-19 statement, States were called to provide protective gear to all healthcare workers.<sup>71</sup>

Despite the efforts, there was an acute shortage of PPE kits for the healthcare workers. As of June, 2020, India required around 0.1 million PPE Kits per day to keep pace with the virus’ spread.<sup>72</sup> This shortage led to multiple healthcare workers including doctors and nurses contracting the virus and in some cases, complete shutdown of hospitals.<sup>73</sup> The dire need of the hour propelled some doctors to wear raincoats to protect themselves and in some states like Bihar, these frontline workers only had gloves and masks

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<sup>70</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (11 August 2000).

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/1 (April 6, 2020).

<sup>72</sup> Subhrojyoti Bhowmick, *Covid-19: Indian healthcare workers need adequate PPE*, TheBMJOpinion (June 19, 2020) <https://blogs.bmj.com/bmj/2020/06/19/covid-19-indian-healthcare-workers-need-adequate-ppe/> (accessed October 20, 2020).

<sup>73</sup> See, Jyoti Shelar, 52 staffers in Mumbai’s Wockhardt hospital test positive, THE HINDU (April 6, 2020), <https://www.thehindu.com/news/cities/mumbai/52-wockhardt-staffers-test-positive/article31274460.ece> (accessed on October 20, 2020).

to rely on.<sup>74</sup> The International Council of Nurses, to this end, had called upon States to maintain data on infections and death of healthcare workers due to the pandemic.<sup>75</sup> However, in a recent response to a question in the Rajya Sabha, the Minister of State (Health Ministry) states that no data was being recorded by the Ministry of Health and Family Welfare.<sup>76</sup>

On an aside, some healthcare workers took to social media to express their opinion and concerns regarding the non-provision of PPE kits to these workers. Calcutta High Court dealt with a matter in this regard wherein a FIR had been registered against the petitioner for remarking upon the faulty PPE kits on a social media platform. The High Court held that the petitioner be released immediately, since Article 19 of the Indian Constitution is “*to be scrupulously upheld by the State even if an expression of opinion brings the government into disrepute.*”<sup>77</sup> However, in the following paragraphs, the Court also added a caveat prohibiting the petitioner from posting online further on this issue.<sup>78</sup> This instance reveals the worrisome trend of curtailment of negative opinion on State’s conduct during the pandemic, which is in direct contravention of the rights as mentioned in the ICCPR.

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<sup>74</sup>*Ibid.*

<sup>75</sup> Press Information, *International Council of Nurses calls for data on healthcare worker infection rates and deaths*, (May 6, 2020), [https://www.icn.ch/sites/default/files/inline-files/PR\\_20\\_Infections%20and%20deaths%20from%20COVID-19%20among%20nurses.pdf](https://www.icn.ch/sites/default/files/inline-files/PR_20_Infections%20and%20deaths%20from%20COVID-19%20among%20nurses.pdf) (accessed October 20, 2020).

<sup>76</sup> LiveLaw News Network, *No Data On Health Workers, Police Personnel Who Died During Covid-19: Central Govt Tells Parliament*, LIVE LAW (September 17, 2020), <https://www.livelaw.in/news-updates/no-data-on-health-workers-police-personnel-who-died-during-covid-19-central-govt-tells-parliament-read-statements-163080> (accessed on October 20, 2020).

<sup>77</sup> Indranil Khan v. State of West Bengal, W.P. 5326(W) of 2020.

<sup>78</sup>*Ibid.*

Yet another issue was the increasing cases of violence against the doctors and other medical personnel. The general frustration owing to the pandemic compounded with the ignorance and fear of individuals has increased violence against healthcare workers. The government took cognisance of the worker's predicament and introduced an ordinance to the Indian Epidemic Diseases Act, 1897, which makes any such untoward actions against doctors a non-bailable offence with imprisonment up to 7 years.<sup>79</sup> In some instances, the Courts remarkably endeavoured to remind the public of its responsibilities towards the frontline warriors, while also directing appropriate authorities to take action against such people.<sup>80</sup>

#### (iv) Prisoners

International human rights law directs the States to ensure adequate provision of healthcare facilities, even to individuals who have been deprived of their liberty.<sup>81</sup> This responsibility cannot be shirked away by the authorities by citing financial constraints. These guarantees also include access to healthcare including medical officers, medicines etc. Since imprisonment and/or detention causes suffering, it ought not be further exacerbated unreasonably by the authorities. The international human right

legal framework also denounces any unnecessary interference with an inmate's access to family and/or legal aid.<sup>82</sup>

The Indian prisons have historically faced problems of overcrowding, with some prisons running at 150% of their actual capacity.<sup>83</sup> Therefore, the risk of infections is extremely high in such overcrowded prison facilities. In March, 2020, the Supreme Court directed all states and Union Territories to decongest prisons by releasing certain classes of prisoners on bail or parole. The Supreme Court also directed High Powered Committees to oversee this matter.<sup>84</sup>

However, the force of this measure was blunted. This is because the release of prisoners was counteracted by the increasing influx of prisoners, who flouted the COVID-19 rules. Furthermore, the extant poor environment in prisons remains unaddressed. For instance, in Jammu and Kashmir, reports suggest that the Central Jail is severely cramped and there is no provision of proper medicine, food and drinking water.<sup>85</sup> In addition, some High Powered Committees excluded the undertrial prisoners booked for serious offences as under PMLA, NDPS, etc. along with foreign nationals from the ambit of decongestion.<sup>86</sup> The main lacuna in this case

<sup>79</sup> Karthikeyan P Iyengar, Vijay Kumar Jain & Raju Vaishya, *Current situation with doctors and healthcare workers during COVID-19 pandemic in India*, POSTGRAD. MED. J. postgradmedj-2020-138496 (2020); The Epidemic Diseases (Amendment) Ordinance, 2020.

<sup>80</sup> See for instance, *Corona-Virus Covid-19 Pandemic v. Government of Andhra Pradesh*, 2020 SCCOnline AP 78; LiveLaw News Network, *'Doctors Are Frontline Warriors Against Coronavirus': Tripura HC Directs Test Identification Parade Of Covid Patients Who Harassed Doctor*, LIVELAW(July 31, 2020), <https://www.livelaw.in/news-updates/tripura-hc-directs-test-identification-parade-of-covid-patients-160783?infinite-scroll=1> (accessed on October 20, 2020).

<sup>81</sup> Article 9, International Covenant on Civil and Political Rights.

<sup>82</sup> Article 12, Universal declaration of Human Rights; Article 17, International Covenant on Civil and Political Rights.

<sup>83</sup> CHRI, *State/UT Wise Prisons Response To Covid 19 Pandemic In India*, CHRI, <https://www.humanrightsinitiative.org/content/state-ut-wise-prisons-response-to-covid-19-pandemic-in-india> (accessed on October 20, 2020).

<sup>84</sup> See, *In Re : Contagion Of Covid 19 Virus In Prisons*, *Suo Motu Writ Petition (C) No. 1/2020*.

<sup>85</sup> K. Yousuf, *COVID-19: Kashmiris Complain of Crowded, Unhygienic Quarantine Facilities*, NEWSCLICK(1 April 2020), <https://www.newsclick.in/COVID-19-Kashmiris-Complain-Crowded-Unhygienic-Quarantine-Facilities> (accessed on October 20, 2020).

<sup>86</sup> *Minutes of High Powered Committee dated 18.05.2020, Delhi High Court*

has been the ignorance of the prisoners' health conditions to reach this determination, falling foul of the purported rationale of the Supreme Court order itself.

The orders passed by Bombay and Rajasthan High Court regarding bail applications also reflect a contradiction with the approach as taken by the Supreme Court. Despite the Supreme Court's effort to decongest jail, the Bombay High Court dismissed the bail application of an individual via ex parte order. The reasoning supplied was that the release of an individual after the issuance of a bail writ increases chances of transmission amongst the authorities, considering the amount of work that goes into the process. The Court further expounded that, "*In his situation, the prisoner by remaining inside till completion of lockout period will help and save the life of many others.*"<sup>87</sup> The Court relied on a previous order by the Rajasthan High Court which also based its decision on the exigencies of the pandemic.<sup>88</sup> These orders, however, tend to turn the oft-quoted quote by Justice Iyer, "*Bail is the Rule and Jail the exception*", on its head.

In addition, the Bombay High Court's order seemingly conflates general 'movement' with movement in clusters. An individual's movement, if he/she has not contracted the virus, has little to no correlation with the pandemic.

Lastly, in Delhi, prison authorities suspended '*Mulaqat*' services to contain the spread of the virus. However, with no alternate measures such as video-conferencing. Although these facilities were then adopted by June 22, 2020,

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<https://delhicourts.nic.in/Circulars/May20/18b.pdf>. (accessed on October 20, 2020).

<sup>87</sup>Sopan Lanjekar v. State of Maharashtra, Cri. Bail Application No. 691/2020.

<sup>88</sup>Shahrukh v. State of Rajasthan, S.B.Criminal Miscellaneous Second Bail Application No.17767/2019.

it was restricted only to consult their lawyers and not family members at the time.<sup>89</sup> The drastic measures fail to meet the international human rights standards governing prisoner's rights. Especially during the health crisis, complete isolation without any means of communication to the outside world affects the mental health of the prisoners, who are already under tremendous stress due to other factors such as under maintenance and overcrowding of prisons throughout the country.

### Recommendations and Conclusion

The foregoing analysis shows the comprehensive UN Framework and comparative benchmarks being complied with by Indian approaches as well. Despite its mixed approach at the start, the Indian Judiciary has demonstrated its commitment to International Human Rights framework in both category of right: ICCPR and ICESCR during such unprecedented crisis. The National Human Rights Commission has complemented this progressive approach by turning its empathetic attention to the vulnerable, in particular case of the LGBTIA+ community. Several other judicial reminders, policy best practices across Indian states provide unique examples of innovative human rights approach in tackling the pandemic.

The police, the municipal corporation and the health workers created first response, community watch groups, alternative instant defusing mechanisms among many. Initiatives in Pune city with the Charity commissioner's initiative with many non-governmental organisations to provide mass meals and

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<sup>89</sup> Video conference facility available to all prisoners to get in touch with legal aid lawyers: Prison authority to HC, OUTLOOK INDIA (June 29, 2020),

<https://www.outlookindia.com/newsscroll/video-conference-facility-available-to-all-prisoners-to-get-in-touch-with-legal-aid-lawyers-prison-authority-to-hc/1880648> (accessed on October 20, 2020).

testing, disinfecting and sanitisation services free of cost, collaboration with private hospitals, Aarogya Setu app are some shining examples to be institutionalised as well as encouraged through comprehensive legislations and guidelines.<sup>90</sup> However, like war and crisis, post-lockdown and eventually, post-pandemic measures will require public hearing, robust redressal mechanism, incorporating compensation, restitution and reparation mechanisms. The author hopes that there will be global and national consensus leading to such a Commission soon.

In terms of long term solutions, India has to evolve a comprehensive public health policy with human rights in the center in all approaches to any national disaster, in the line of UN framework and CDC reflections on the vulnerable with interdepartmental coordination, as in case of Pune's local response to domestic violence cases. A committee within the national Human Rights Commission or a separate task force on human rights in public health could undertake first responder's role with interdisciplinary expertise informing their approach. National human rights legislations and institutions require reforms to prioritise socio economic human rights, their indivisibility from civil and political rights along with the innate focus on strengthening public health system till the pandemic exits or tames itself. Else, the collective conscience of the world as a vaccine, must tame or decimate it.

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