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Black Swan Event of COVID-19: The Call for Judicial Review

ZUBIA REHAN* AND PRACHI TRIPATHI**

ABSTRACT

The COVID-19 pandemic, a genuine black swan event, tested the constitutional order by concentrating extraordinary power in the executive under the guise of emergency management. This paper argues that the unbridled discretion assumed by the government during the pandemic made robust judicial review not merely permissible but necessary. Tracing the historical evolution of judicial review from Dr. Bonham's Case and Marbury v. Madison to its constitutional entrenchment in India through Articles 13, 32, 226 and the basic structure doctrine, the paper then examines the role of the judiciary during the pandemic through five contemporary controversies: compulsory vaccination, burial and cremation rights, the plight of migrant workers, the privacy implications of the Aarogya Setu application, and the constitutional legitimacy of the nationwide lockdown. It contends that the space available for legitimate judicial review is inversely proportional to the executive's discretion as measured by public trust, and that the judiciary, by intervening to check executive excess, upheld rather than eroded the separation of powers and the rule of law. The paper concludes by proposing a harmonised model of judicial review and separation of powers, while acknowledging instances, such as the controversy over the PM CARES Fund, where the courts fell short of their constitutional duty.

Keywords: *Judicial review, COVID-19, separation of powers, rule of law, fundamental rights, executive overreach, basic structure doctrine, right to privacy.*

I. INTRODUCTION

The recent pandemic is unprecedented in human history. Its unanticipated worldwide spread was unexpected, as was its extent, which humanity has yet to fully fathom. The world witnessed the inadequacy of medical research, hospital facilities, and efforts to cure COVID-19 patients across the globe.¹ What was to follow baffled political institutions, administrations, and global leaders alike, whether liberal-democratic or authoritarian.

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¹ Attacks on Health Care in the Context of COVID-19, WORLD HEALTH ORG. (Nov. 15, 2021), <https://www.who.int/news-room/feature-stories/detail/attacks-on-health-care-in-the-context-of-covid-19>.

Global and local business, industry, and diplomacy lay in ruins. Daily, the humanitarian tragedy grew in depth and intensity, defying words. The pandemic-induced lockdown created a state of siege, requiring everyone to accept government authority. Many concerns arose from the lockdown and total shutdown, and the influence on the existing legal system, the legislative framework, and judicial institutions has been tremendous. Judicial review can safeguard or limit civil liberties while extending or restricting state authority; it establishes the value of individual rights and defines how, when, and why the state may limit them.² Disasters, however, disrupt daily life. Emergencies are the exception, and emergency laws may exclude persons from recognition and protection.³ Under an emergency, more forceful measures may be appropriate than in ordinary circumstances. In long-term crises, these exceptions may become the norm, diminishing human rights and the rule of law. The present scenario is treated here as an emergency in which the executive has been abusing its authority.

The question then arises: who will check the executive, when everything is being done under the guise of an emergency? Judicial review is required for several reasons, such as ensuring the dignity of the dead, prioritising vaccination for the vulnerable, decongesting jail cells, and maintaining stability in the payment of old-age pensions to the elderly. These considerations, connected to and constrained by governmental acts across the country, limited certain fundamental rights of inhabitants and created a labyrinth of concerns.⁴ Is it possible for judges to influence government decisions or protect basic rights while maintaining the separation of powers? Given the nation's dire situation, what is acceptable, and how far may judges intervene? Or would such interference limit a state's response to a catastrophe of this kind?

A. Literature review

A review of the literature was undertaken with regard to the topic at hand to develop a better understanding of the issues to be dealt with. During the COVID-19 pandemic, the extent of judicial review was enormous, refuting the premise that the judiciary is inadequate to assist in administrative crises (Fabrizio Cafaggi and Paola Iamiceli, 2021). The lockdown established a situation of embargo, forcing greater allegiance to administrative order, and the impact on the incumbent legal system, legal structure, and judicial processes has been equally, if not more, devastating (Shireen Seema Sadiq, 2021). The coronavirus outbreak wreaked havoc across the

² Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

³ INST. OF MED., *Crisis Standards of Care: A Systems Framework for Catastrophic Disaster Response* (2012), <https://www.ncbi.nlm.nih.gov/books/NBK201075/> (last visited Nov. 16, 2021).

⁴ Rakesh Kumar Singh, *Was Covid-19 Lockdown a Violation of Our Fundamental Rights?*, FREE PRESS J. (2020).

planet, causing death, damage, and instability, and bringing fundamental rights and freedoms to a halt (Rakesh K. Singh, 2020).

The unexpected onset of the epidemic revealed governments' legal competence, or lack thereof, to mitigate and manage the disease's devastating effects (Kiran Kumar Gowd, Donthagani Veerababu and Veeraiahgari Revanth Reddy, 2021). The countrywide shutdown and COVID-19 have prompted a slew of judicial interventions in the context of healthcare rights and fairness, and the recent wave of judicial ingenuity marks a new way of thinking about India's public health governance and management (M.Z.M. Nomani, Zafar Hussain and Renu Dhawan, 2021).

B. Research problem

The coronavirus pandemic struck the entire world, with no comparable epidemic in recent human history. The outbreak was never anticipated, and its scope is unparalleled, with humanity still grappling with its effects. Moreover, under extreme circumstances such as disasters and crises, the executive tends to assume a pre-eminent role, which may escalate arbitrariness. This has necessitated judicial review of healthcare-related emergency measures alongside human rights violations, based on public expectations of how governments should interact with the judiciary while upholding the separation of powers. This paper contends that the amount of room for valid judicial review is inversely proportional to the government's discretion, as measured by public trust, and that a balanced relationship between the executive and the judiciary must be enunciated.

C. Hypothesis

The tentative assumption on which this study proceeds is that, keeping in view the unbridled power of the executive, the black swan event of COVID-19 demands judicial review.

D. Research questions and objectives

This paper aims to establish that the catastrophic situation of COVID-19 demands judicial review. First, the historical evolution of judicial review is traced. Next, the constitutional validity of judicial review is demonstrated, along with an elucidation of the separation of powers and the rule of law. The paper then examines the role of the judiciary in contemporary cataclysmic situations, including forced vaccination, burial rights, the migrant crisis, and the violation of privacy rights with special emphasis on Aarogya Setu, as well as the constitutional validity of the lockdown. Finally, the paper concludes by proposing a harmonised model of judicial review and separation of powers.

E. Chapterisation

This paper is divided into five parts. The introductory part sets out the scope of study and includes a detailed research methodology listing the literature review, research problem, hypothesis, and research questions. The second part contextualises the historical evolution of the concept of judicial review. The third part analyses the position of judicial review in the Constitution, thereby clarifying the basis of its legitimacy. The fourth part studies the need for judicial review in times of crisis, laying stress on contemporary issues encountered during COVID-19. The final part sets out suggestions and concludes the paper, while underscoring the controversy surrounding the PM CARES Fund.

II. TRACING THE ROOTS OF JUDICIAL REVIEW ACROSS THE WORLD

Any regulation or legislation is the result of extensive investigation and consideration, and no law can be said to have evolved overnight. Chief Justice Marshall is frequently credited with originating the notion of judicial review in the landmark case of *Marbury v. Madison*,⁵ decided in 1803. In that case, the then Chief Justice of the United States Supreme Court held that the petitioners were entitled to their commissions, and that Section 13 of the Judiciary Act,⁶ which allowed Marbury to bring such a claim, was in violation of the United States Constitution and was therefore declared unconstitutional. The concept nevertheless first arose in England in 1610, prior to the *Marbury* judgment, as can be seen in Lord Coke's statements in *Dr. Bonham's Case*.⁷

The precedent of the English legal system provided the foundation for American judicial review. The principles of parliamentary supremacy, on the other hand, prevailed, and the structure of English constitutional law was constructed upon them. The Blackstonian assumption that parliamentary authority is absolute and uncontrollable was to govern English judges from then on.⁸

The origins of what is now known as judicial review may also be traced to the thoughts of Alexander Hamilton, who adopted this notion as an ideological foundation. Writing in *The Federalist*, Hamilton observed that whoever carefully studies the various departments of power must recognise that, in a government where they are isolated from one another, the judiciary, by the nature of its functions, will always be the least dangerous to the political rights of the Constitution. The court has no control over the sword or the purse, no direction over the strength

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶ The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (1789).

⁷ *Dr. Bonham's Case* (1610) 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P.).

⁸ Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 YALE L.J. 1672 (2012).

or the wealth of the community, and no power to take active decisions. It has, in truth, neither force nor will, but merely judgment.

It is also worth noting that the Fifth and Fourteenth Amendments to the United States Constitution incorporated the Due Process Clause,⁹ allowing the Supreme Court to exercise its power of judicial review. However, it was only once Chief Justice Marshall decided *Marbury v. Madison* in 1803 that this understanding was firmly established as an inherent and vital feature of the American form of governance.

Although there is no express or direct provision for judicial review in India's Constitution, it is ingrained in the legal system. Judicial review in India is primarily concerned with preserving the fundamental rights of individuals entrenched in Part III of the Constitution. *Empress v. Burah*¹⁰ was the first case to recognise the competence of Indian courts in this regard.

After multiple judicial pronouncements, this idea gained traction and was incorporated into the Indian Constitution as Article 13.¹¹ Article 13 applies to all past and future Indian legislation. The Supreme Court and the High Courts of each State were given this power under Articles 32 and 226 of the Constitution, respectively. The context of Indian judicial review is explored in the following part.

III. UNEARTHING THE CONSTITUTIONAL LEGITIMACY OF JUDICIAL REVIEW IN INDIA

In India, judicial review is an essential constitutional guarantee for numerous personal freedoms. The concept is sacrosanct and forms a vital basis of the Constitution. Judicial review is the process of establishing a viable constitutional relationship between the legislature and the executive, assuring that no power structure abuses its position.

The first case in India to discuss judicial review was *Empress v. Burah*. The Privy Council and the Calcutta High Court both accepted that Indian courts possessed the authority of judicial review, but only under certain conditions. This opinion was reinforced in a number of later judgments before the Government of India Act, 1935, took effect.¹²

The Supreme Court and the High Courts in India possess the authority of judicial review, and a court may use this power to review its own decision or order. Judicial review thus refers to a court's ability to declare a legislative enactment unconstitutional, a power clearly enshrined in

⁹ Due Process, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Nov. 17, 2021).

¹⁰ *Empress v. Burah*, (1878) ILR 3 Cal 63 (India).

¹¹ INDIA CONST. art. 13.

¹² The Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8, c. 2 (UK).

Article 13 of the Constitution. Judicial review of pre-constitutional legislation is also established by Article 372(1). The Supreme Court and the High Courts are entrusted with the functions of guardian and guarantor of basic rights under Articles 32 and 226. According to Dr. B.R. Ambedkar, Articles 32 and 226 are the heart of the Constitution, precisely because these provisions furnish constitutional remedies and bestow the sacred authority of judicial review on the courts. Furthermore, it is clear from a reading of Articles 251 and 254 that, in the event of a conflict between Union and State law, the State law will ordinarily be overridden. Article 245 sets out the powers of Parliament and the State legislatures to enact legislation subject to the provisions of the Constitution, and Article 246(3) stipulates that the State legislature has exclusive authority over the State List. Articles 131 to 136 empower the Supreme Court to decide disputes between individuals, between individuals and the State, and between the States and the Union; the Court may also be called upon to interpret the provisions of the Constitution, and its assessment becomes the law that all courts of the country must follow. Under Article 137, the Supreme Court has a special power to review any judgment or order it has made. An order in a criminal proceeding may be reviewed and overturned only if there are errors apparent on the record. All of these provisions, whether express or implied, illustrate the role of the judiciary.

Judicial review is still evolving, and it has left a trail of judgments in its wake. Even the framers of the Constitution acknowledged this. Because they were fully aware of the potential problems in judicial review, they sought to regulate its scope and incorporated a number of safeguards to prohibit courts from overstepping their authority and acting as super-legislators or permanent third chambers.

The Supreme Court used the power of judicial review for the first time in *A.K. Gopalan v. State of Madras*,¹³ where Chief Justice Kania observed that the founders of the Indian Constitution had incorporated the precise provisions of Article 13 only out of prudence. He remarked:

"In India it is the Constitution that is paramount and that a statutory law to be valid must be in accordance with the constitutional requirements, and it is for the court to decide whether any enactment is constitutional or not."

In 1964, the Supreme Court heard *Sajjan Singh v. State of Rajasthan*,¹⁴ in which the Constitution (Seventeenth Amendment) Act was challenged. The Court upheld the Seventeenth Amendment, holding that Article 368 was not subject to judicial review in the manner contended.

¹³ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 (India).

¹⁴ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 (India).

The same amendment was challenged again in *Golaknath v. State of Punjab*,¹⁵ and the Supreme Court reversed its previous two decisions. The majority declared the amendment null and void on the ground that it breached Article 13(2) of the Constitution by removing or restricting basic rights. The doctrine of prospective overruling was applied for the first time, so that the decision would have only prospective effect, and the Seventeenth Amendment would therefore remain valid for past transactions.

In *Kesavananda Bharati v. State of Kerala*,¹⁶ the Supreme Court upheld the challenged land reform and amendment Acts. The majority recognised Parliament's power to amend any or all articles of the Constitution, provided that the amendment did not damage the basic structure of the Constitution. The only provision struck down was the section of the Constitution (Twenty-fifth Amendment) Act denying the possibility of judicial review. As a result, the Court came close to returning to the position in *Shankari Prasad* by reinstating the supremacy of Parliament's amending power, while effectively strengthening the power of judicial review.

These fundamental features, according to Justice Sikri, are plainly discernible not only from the Preamble but also from the entire scheme of the Constitution. He went on to observe that the Constitution was founded on the principles of individual dignity and freedom, which could not be taken away. On that occasion, it was also pointed out that the foregoing was merely illustrative and not exhaustive of all the limitations on the power to amend the Constitution. In *Indira Nehru Gandhi v. Raj Narain*,¹⁷ a Constitution Bench struck down clause (4) of Article 329A, inserted by the Constitution (Thirty-ninth Amendment) Act, which sought to place the Prime Minister's election beyond judicial scrutiny, holding that it violated the basic structure of the Constitution, namely free and fair elections, the rule of law, and judicial review.

Justice P.N. Bhagwati, C.J., held in *S.P. Sampath Kumar v. Union of India*¹⁸ that it was well settled that judicial review was a basic and vital feature of the Constitution, citing *Minerva Mills Ltd. v. Union of India*. The essential structure and independence of the Constitution would be jeopardised if the power of judicial review were completely removed. The Court further stated in *Sampath Kumar* that a law made under Article 323-A(1) that excluded the High Court's jurisdiction under Articles 226 and 227 without establishing an efficient and effective alternative institutional mechanism for judicial review would violate the basic structure and would therefore lie outside Parliament's constituent power.

¹⁵ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643 (India); see also *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 (India).

¹⁶ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (India).

¹⁷ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 (India).

¹⁸ *S.P. Sampath Kumar v. Union of India*, AIR 1987 SC 386 (India).

Judicial review had already been invoked in a number of cases. It was not only approved, but was also treated as a necessary component of the constitutional scheme.

A larger Bench of seven judges declared in *L. Chandra Kumar v. Union of India*:¹⁹

"The power of judicial review over legislative action vested in the High Courts under Article 226 and the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure."

As a consequence, judicial review became a settled judicial power and function. Its expansion was aided even more by its detractors. It came to be regarded as a means to defend the Constitution against the ideological beliefs of whichever political organisation was in power.

IV. ROLE OF JUDICIAL REVIEW IN TIMES OF COVID-19

Whenever the central government's authority is enhanced during a catastrophe, it becomes easier for the government, and harder for its people, to preserve civil liberties. In a crisis, governmental action widens the idea of normalcy and establishes a precedent for future disasters. Fear, as well as political party influence, has resulted in the normalisation of previously unfamiliar legal structures and measures. People grow resentful because the government, having drawn attention to its exercise of ultimate authority, finds it increasingly difficult to relinquish that power.²⁰ As a consequence, unchecked executive power jeopardises the democratic republic and its ideals by granting the executive unrestricted influence over the legislature and the judiciary, thereby endangering personal liberty. The Indian government relied on a legislative paradigm based on earlier independent enactments to tackle the coronavirus outbreak. It invoked the Disaster Management Act, 2005, while district authorities and police commissioners used Section 144 of the Code of Criminal Procedure, 1973. The strict lockdown, enforced through executive directions and State-sponsored measures, was the most critical aspect. The central government has taken a variety of preventive steps, raising serious concerns regarding the infringement of first- and second-generation citizen rights. Overall, residents' rights to health, food, shelter, livelihood, fairness, and equality were placed under strain by the nationwide lockdown.²¹

The executive's unfettered power necessitates checks and balances among the three branches of government. The theory of separation of powers seeks to prevent the accumulation of power within a single institution; its purpose is to keep the executive distinct from the rest of the

¹⁹ *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125 (India).

²⁰ Unbridled Power? Executive Powers in Times of Crisis, EQUAL JUST. PROJECT.

²¹ Singh, *supra* note 4.

government and to hold it accountable. This keeps the government functioning smoothly and prevents the misuse of authority. Judicial review exemplifies this goal by preventing one institution from controlling the others. It holds the administration accountable when it exceeds its jurisdiction and protects constitutional rights.²² The supremacy of the Constitution over any particular institution is thus ensured by judicial review. It is therefore not incompatible with the separation of powers or the rule of law, but rather necessary for their existence. To be sure, some of the criticism levelled at courts for acting as activists is justified, and courts must be cautious when issuing remedies.

The role of judicial review in times of COVID-19 can be illustrated through the following instances.

A. Compulsory vaccination: a transgression of human rights?

The coronavirus outbreak brought the idea of compulsory vaccination to the forefront once again. The World Health Organization classified vaccine hesitancy as one of the ten major threats to global health at the start of 2019. Where the procedure of immunisation is prescribed by law, it is known as coerced or mandatory vaccination.²³ Individuals can no longer decide, on their own reasoning and free choice, whether to allow this external substance into their bodies. Even though the Ministry of Health and Family Welfare has repeatedly declared, through public announcements, that vaccines are entirely voluntary, the Indian government retains a number of legal mechanisms to make vaccination mandatory should circumstances warrant it, for instance if the number of cases increases. Many critics argue that even these options override individual freedom, which is guaranteed to every person in India by the Constitution, the highest authority. Several constitutional provisions bear directly on mandatory vaccination, in particular Article 21,²⁴ which assures the protection of life and personal liberty, including the right to privacy, and Article 25,²⁵ which secures the freedom of conscience and the free profession, practice, and propagation of religion. Compelled vaccinations violate these rights because an individual's personal autonomy in how he or she wishes to live is taken away, and the freedom to practice one's profession is infringed when employees are given veiled threats to be vaccinated or face dismissal.

²² Doreen Lustig & J.H.H. Weiler, *Judicial Review in the Contemporary World: Retrospective and Prospective*, 16 INT'L J. CONST. L. 315 (2018).

²³ Anja Krasser, *Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR*, 15 VIENNA J. ON INT'L CONST. L. 207 (2021).

²⁴ INDIA CONST. art. 21.

²⁵ INDIA CONST. art. 25.

A number of other laws, in addition to the Constitution, authorise the government to administer mandatory vaccination only where it is in the national interest and for the protection of public health. This is the inherent and crucial factor that underpins all mandatory vaccination policies.

On this issue, the judiciary played a pre-eminent role and took a stand on behalf of citizens. The Meghalaya High Court recently held that, while vaccines were urgently needed to combat the COVID-19 pandemic, compelled or coerced vaccination was a breach of an individual's basic rights. Compulsory vaccination for public health was found to be self-defeating, as it infringed an individual's right to live as he or she saw fit.²⁶

Compulsory vaccination also infringes the right to choose one's own trade or profession under Article 19(1)(g) of the Constitution, as became apparent when State and local authorities began issuing orders permitting only vaccinated merchants, vendors, and cab drivers to continue their businesses. The Court held that such persons could not be compelled to display a notice indicating whether the establishment's employees were vaccinated, and that any order to be vaccinated could only be advisory and not mandatory.

Article 21 requires that individuals exercise their right to informed consent through the exercise of personal liberty, and denying an individual that autonomy of choice amounts to an infringement of civil liberties, which has itself been recognised as a component of Article 21. Compulsory injections and other essential chemicals are also incompatible with certain religious beliefs and thus contravene Article 25 of the Constitution. It is clear that widespread vaccination is essential in the event of any outbreak or epidemic, particularly the COVID-19 pandemic. Individual compulsion, however, is not the route to take, particularly in a country such as India, as has been well established by the judiciary.²⁷

B. Can COVID-19 flout burial rights?

The greatest pandemic of the twenty-first century, COVID-19, brought life to a halt. Not only was working life disrupted, but so were personal lives. People no longer went to work, school, college, or public venues, and fear was induced in the population. Families who lost a loved one to the disease suffered not only financially, but also mentally and emotionally.

COVID-19 had a significant impact on religion as well. Congregational prayers were no longer held, and even festivities lost their joy. The manner in which the bodies of the deceased were disposed of was the most affected. Every religion has its own method of laying the dead to rest,

²⁶ *Registrar General, High Court of Meghalaya v. State of Meghalaya*, 2021 SCC OnLine Megh 130 (India).

²⁷ Covid-19 and Mandatory Vaccination, VIDHI CTR. FOR LEGAL POL'Y, <https://vidhilegalpolicy.in/blog/covid-19-and-mandatory-vaccination/> (last visited Nov. 7, 2021).

and there are rules on how a body may be disposed of and how the accompanying ceremonies should be performed. The World Health Organization and individual countries published instructions to avoid the social gatherings that are common at the time of a funeral.

The Indian government issued instructions for the disposal of bodies. Although the Ministry of Health and Family Welfare stated that the chance of contracting COVID-19 infection from a dead body was low, it nonetheless required that certain precautions be taken:²⁸

Any ceremony involving touching the body, such as bathing or embracing it, was prohibited by the authorities; and gatherings at the cemetery or crematory were to be avoided.

For the sake of public health and safety, the government established these rules. Some of the guidelines offered were incompatible with the requirements of certain religions. The practices of *ghusl* (bathing of the dead body) and *namaz-e-janaza* (funeral prayer), for example, could not be carried out. Similarly, the Hindu practice of cremation of the deceased was hampered. There were cases in which petitions alleged that the government had disposed of the remains of the deceased in an uncereemonious and indecent manner, thereby violating the applicable standards. The Jamiat Ulama-i-Hind accordingly approached the Supreme Court, arguing that burial is an intrinsic element of Islam and so cannot be regulated.

The petitioner raised four points in *Vineet Ruia v. Principal Secretary, Ministry of Health & Family Welfare, Government of West Bengal*.²⁹ The first two concerned the subject at hand: the petitioner alleged that the remains of infected persons were being disposed of in an inhumane way, and that the deceased's relatives and friends were not permitted to pay their last respects or perform the last rites. The learned judges rendered a thorough decision.

The Court reasoned that the right to life entrenched in Article 21 protects not only the right to live with dignity, but also the rights of the deceased. The human body must be handled with reverence, and the mortal remains cannot be treated by society with dishonour. The Court cited, among other cases, *Vikash Chandra Guddu Baba v. Union of India*,³⁰ in which it had criticised the inhumane disposal of dead bodies and held that final rites should be performed in accordance with the known faith of the deceased. Furthermore, in *Ashray Adhikar Abhiyan v. Union of India*,³¹ the Court went a step further and held that a homeless person who dies on the street is entitled to a respectful burial in accordance with his or her religious beliefs.

²⁸ Ministry of Health & Family Welfare, GOV'T OF INDIA, COVID-19: Guidelines on Dead Body Management, https://www.mohfw.gov.in/pdf/1584423700568_COVID19GuidelinesonDeadbodymanagement.pdf (last visited Nov. 19, 2021).

²⁹ *Vineet Ruia v. Principal Secretary, Ministry of Health & Family Welfare*, 2020 SCC ONLINE Cal 1620 (India).

³⁰ *Vikash Chandra Guddu Baba v. Union of India*, 2008 SCC OnLine Pat 905 (India).

³¹ *Ashray Adhikar Abhiyan v. Union of India*, (2002) 2 SCC 27 (India).

The Court also noted *Pradeep Gandhi v. State of Maharashtra*,³² in which a Division Bench of the Bombay High Court declared that the right to burial was an inherent aspect of the right to freedom of religion. The Court observed that it found little reason to deprive the dead of their last right, namely a decent burial according to their religious rites, in the face of there being no evidence, at least at that stage, that COVID-19 infection could spread to living human beings from the body of any suspected or confirmed COVID-19 infected individual.

Although a court may dismiss a plea under Articles 25 to 28 because those rights are subject to public order, health, and morality, it may be inferred from the rulings cited above that such restrictions cannot be used as a blanket licence to infringe citizens' fundamental rights. As these cases demonstrate, the judiciary has intervened and reconciled the interplay between citizens' fundamental rights and governmental management of the pandemic.

C. COVID-19 through a migrant's lens

The COVID-19 pandemic wreaked havoc around the globe. The virus's ferocity and the extraordinary exponential spread of the contagion prompted widespread lockdowns not only in India but around the world. Individuals, particularly the most vulnerable, suffered greatly as a result. Some have said that, during the pandemic, India lost its credibility and moral conscience. Daily wage earners were more likely to experience stress and anxiety, especially those who had moved away from their native places. After the lockdown was imposed, the migrant worker community, in large numbers, decided to leave their States of employment and return home. This journey, undertaken with little money, no food, and partly on foot, resulted in a humanitarian crisis of an unprecedented scale. Except for a few community-minded persons who sought to move the Supreme Court through public interest litigation, this was largely overlooked at first.

During these challenging times, the Supreme Court made a number of orders concerning migrant workers. From the question of how they could be stopped from walking, to the suo motu writ petition in *In Re: Problems and Miseries of Migrant Labourers*,³³ the Court directed that migrants not be held accountable for infringing lockdown guidelines, and sought to provide explicit directions for alleviating their suffering, including guiding the States to make provision for their return home.

The Court also cited *Confederation of Ex-Servicemen Associations v. Union of India*,³⁴ which held that workers' entitlement to health and medical assistance during and after duty is a basic

³² *Pradeep Gandhi v. State of Maharashtra*, 2020 SCC OnLine Bom 662 (India).

³³ *In re Problems & Miseries of Migrant Labourers*, Suo Motu Writ Petition (Civil) No. 6 of 2020 (India).

³⁴ *Confederation of Ex-Servicemen Associations v. Union of India*, (2006) 8 SCC 399 (India).

right. According to the Court, it has the authority to issue orders to the State or its instrumentalities, or even to private businesses, in appropriate circumstances, so as to make the right to life meaningful and to compensate injured workers.

The Madras High Court likewise directed the State to provide adequate food, lodging, and medical care to migrant workers. The Gujarat High Court further directed the State government to justify its new policies on a variety of issues, to amend some of them, and to enforce fundamental rights wherever necessary. The judiciary thus once again demonstrated its position as a guardian of basic rights.³⁵

D. Aarogya Setu: a violation of the right to privacy in times of COVID-19?

The COVID-19 contact-tracing application raised concerns on a variety of counts, including security, data confidentiality, legal implications, and surveillance. The application infringes privacy rights because it was implemented by executive order rather than by law. The data security issue first surfaced when a French ethical hacker notified the central government of flaws in the application that posed a threat to data security. Despite this, the Uttar Pradesh government raised a further concern when it decided to penalise persons found without the Aarogya Setu application installed on their smartphones.³⁶

By executive action, the Aarogya Setu application was implemented in a manner that breaches the basic right to data protection. India still had no information privacy law in place, despite the fact that the Personal Data Protection Bill³⁷ had been introduced in Parliament in December 2019 and examined by the Joint Parliamentary Committee. The Information Technology Act, 2000,³⁸ on the other hand, contains provisions for data privacy and accountability for security. It provides that the application provider falls within the category of intermediary, that it is obliged to secure the customer's data, and that it is responsible for any information leakage. The privacy policy for the data gathered under the Aarogya Setu application reads as follows:³⁹

"The personal information collected from or about you under Clause 1(a) above, will be stored locally in the App on your device and will only be uploaded to and used by the Government of India (i) in anonymized, aggregated datasets for the purpose of generating reports, heat maps

³⁵ Mohamed Imranullah S., Coronavirus Lockdown: Madras High Court Directs Centre to Disclose Number of Migrant Labourers Who Died on the Way to Their Home States, *HINDU* (May 17, 2020).

³⁶ Sangeeta Ojha, Aarogya Setu: Phones Without App Will Draw Punishment for Users in Noida, Greater Noida, *MINT* (May 6, 2020), <https://www.livemint.com/news/india/aarogya-setu-phones-without-app-will-draw-punishment-for-users-in-noida-greater-noida-11588738138253.html>.

³⁷ The Personal Data Protection Bill, 2019, Bill No. 373 of 2019 (India), <https://prsindia.org/billtrack/the-personal-data-protection-bill-2019> (last visited Nov. 9, 2021).

³⁸ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

³⁹ Aarogya Setu, Privacy Policy cl. 2(a) (2020).

and other statistical visualizations for the purpose of the management of Covid-19 in the country and/or (ii) in the event you have tested positive for Covid-19 or have come in close contact with any person who has tested Covid-19 positive. Any personal information uploaded to the cloud will only be used for the purpose of informing you, or those you have come in contact with, of possible infection. Such personal information may also be shared with such other necessary and relevant persons as may be required in order to carry out necessary medical and administrative interventions."

The provision expressly states that the government will share the user's information with clinical and other entities as needed. Persistent surveillance is conducted by this application, of the kind that was regarded as a grave violation of privacy in *PUCCL v. Union of India*.⁴⁰ It is manifestly troubling that data might be shared with the wrong persons under the guise of medical and administrative purposes, and that any data breach would not hold the government accountable, given the minimal liability policy under the terms of use. Justice B.N. Srikrishna, one of the architects of the Data Protection Bill, expressed various concerns about the application's privacy implications and about the executive's implementation of the application through executive action rather than legislation. The judiciary has recognised the right to privacy⁴¹ as falling within the ambit of the basic rights guaranteed by Article 21 of the Constitution, and the government cannot implement such measures without a valid law enacted by the legislature.

In the well-known Aadhaar judgment, *Justice K.S. Puttaswamy (Retd.) v. Union of India*, a nine-judge Bench of the Supreme Court held:⁴²

"Right to Privacy as an intrinsic part of the Right to Life and Personal Liberty under Article 21 and the part of freedom guaranteed under Part III of the Constitution of India."

The privacy complications arising from the Aarogya Setu application have been examined from several perspectives by the judiciary. While deciding a petition questioning the central government's directions making use of the application compulsory for employees, both public and private, as well as for cross-city commuting, the Kerala High Court and the Karnataka High Court issued notices to the central government, seeking a response on the applicable privacy guidelines.⁴³

⁴⁰ *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 (India).

⁴¹ M.P. Jain, *INDIAN CONSTITUTIONAL LAW* 1159 (8th ed. 2018).

⁴² *Justice K.S. Puttaswamy (Retd.) v. Union of India*, AIR 2017 SC 4161 (India).

⁴³ Rupali Bandhopadhyaya & Arun Gupta, *Data Privacy & Aarogya Setu Covid-19 App*, TIMES OF INDIA (Apr. 20, 2020).

E. Lockdown in India: constitutionally legitimate or not?

The Prime Minister, as Chairperson of the National Disaster Management Authority, declared a nationwide lockdown on 24 March 2020 in accordance with the Disaster Management Act, 2005. State governments were required to follow the directions issued under Section 38⁴⁴ of the legislation, and Section 72 of the Act⁴⁵ provides that it will take precedence over all other legislation to the extent of any conflict. As a result, State directions were superseded by orders issued by the central government.

Several State governments had, however, exercised the powers granted to them by the Epidemic Diseases Act, 1897, before the Disaster Management Act, 2005, was invoked. The States have exclusive power to make laws on public order and public health under Entries 1 and 6 of the State List, respectively. There is no field of disaster management in the State List or the Concurrent List, and no entry in the Union List that deals with it directly. According to the eminent Supreme Court advocates Prashant Bhushan and Shyam Agarwal, the Disaster Management Act, 2005, could only have been adopted by Parliament using its residuary powers under Article 248 read with Entry 97 of the Union List.⁴⁶ As a result, an Act adopted under Article 248 arguably cannot be applied to a pandemic, because the power to make public health regulations has been assigned to the States. This sparked a contest between the Centre and the States over who had ultimate authority to impose a lockdown and to what degree that authority could be exercised. In the view of this paper, this called for the involvement of the judiciary to determine who held the true power to impose restrictions.

Another point to consider is that, whereas the Janata Curfew was preceded by several days' notice, crores of Indians were given only four hours' notice to organise their lives and businesses before the lockdown. Can the right to life, which includes the right to livelihood of these unfortunate people, be suffocated solely by relying on Article 256 read with the Disaster Management Act, in the absence of any fixed wage, minimum income, or compensation?

Assembly is ordinarily prohibited by Section 144 of the Code of Criminal Procedure and by similar prohibitions in State police laws, such as Section 30 of the Delhi Police Act, 1978. While Section 144 of the Code of Criminal Procedure prohibits collective assembly, could the National Disaster Management Authority order a lockdown that brought the lakshman rekha to the citizen's door and effectively confined her for twenty-one days? Was this not, in effect, a death

⁴⁴ The Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005, § 38 (India).

⁴⁵ *Id.* § 72.

⁴⁶ Pallav Shishodia, *The Pandemic, Law and Judicial Review*, BAR & BENCH (May 26, 2020), <https://www.barandbench.com/columns/the-pandemic-law-and-judicial-review>.

sentence for the everyday labourer, the street vendor, the migrant worker, and the small business owner? Article 39(a) and (e)⁴⁷ direct the State to ensure that citizens have access to adequate means of livelihood. The lockdown, however, created conditions incompatible with these commitments, making the choice between COVID-19 and economic ruin a difficult one.

Returning to the original question, is a lockdown legally permissible without a proclamation of emergency, and thus with the freedoms of movement and livelihood remaining in force? After all, necessity knows no rule, as the doctrine of necessity emphatically declares.⁴⁸ Yet, even if it is conceded that these unforeseeable times compelled action outside the bounds of ordinary legislation, the judiciary must nonetheless step in and take a firm stance.

V. CONCLUSION AND SUGGESTIONS

The situations discussed above show how executive overreach may wreak havoc on the constitutional foundation of the democracy, as well as on the numerous freedoms and liberties that citizens cherish. To avoid this, the judiciary must use its powers of judicial review. The Indian Constitution enables the judiciary to conduct a strong-form examination of civil and political rights, in which the interpretation of the Constitution by the apex and subordinate courts is final, even where the executive has a plausible understanding of its own. In light of the present pandemic, this includes the fundamental rights to life and livelihood, freedom of movement, and privacy from data intrusion and other forms of invasion, all of which were affected by State and executive measures.

It is necessary, however, to keep in view all the criticism to which the judiciary has been subjected in the course of performing its duties as guarantor of the Constitution. The prominent criticism that emerged during this crisis is that the judiciary crossed the limits prescribed by the separation of powers and the rule of law and subjected itself to judicial overreach. The question, then, is whether the judiciary, by intervening and upholding the Constitution, eroded the notion of separation of powers. It did not; rather, by intervening and exercising its power of judicial review, the judiciary curbed the rampant power of the executive and preserved the notions of democracy that were sought to be replaced by autocracy during the crisis, and it did so in pursuance of its constitutional powers. At times, however, the Supreme Court failed to deliver appropriate orders and abdicated its constitutional duty. The controversy surrounding the PM CARES Fund in *Samyak Gangwal v. CPIO, PMO*,⁴⁹ for instance, raised the issue of whether

⁴⁷ INDIA CONST. art. 39, cls. (a), (e).

⁴⁸ Russell A. Eisenberg & Frances F. Gecker, The Doctrine of Necessity and Its Parameters, 73 MARQ. L. REV. 1 (1989).

⁴⁹ *Samyak Gangwal v. CPIO, PMO*, Writ Petition (Civil) No. 3430 of 2020 (India).

this charitable trust is a State within the meaning of Article 12.⁵⁰ If it is not a State within that meaning, then it must nonetheless furnish information under the Right to Information Act, which, in the view of this paper, warranted the intervention of the judiciary. On the other hand, it cannot be disregarded that the High Courts set a shining example of defending fundamental human rights and functioning as a check on the administration while maintaining the rule of law.

Ultimately, at the risk of inevitable criticism, this paper submits that these were very difficult choices that required a balancing act between the executive and the judiciary, and that such a balance can be achieved only through the careful exercise of judicial review.

⁵⁰ INDIA CONST. art. 12.