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The Dangerously Blurring Lines between Judicial Adventurism and Judicial Protection

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ABSTRACT

India is currently engaged in an unexpected and massive health crisis, battling potential economic and social risks as the country remains in lockdown due to the Covid-19 virus. At this juncture, the Apex Court's role in supplementing government's policies and acting in furtherance of reducing risk and exposure becomes pivotal. However, the same was recently made subject to a debate with respect to the court's decision to make testing for the virus free of cost in the approved private laboratories. The decision comes under scrutiny, as it becomes another example of judicial overreach wherein the court occupied the executive's domain as it re-created policy. In addition to violating the doctrine of separation of powers, the court's directions to oblige private entities with the object of enforcing fundamental rights was blatantly contrary to the well established rule that fundamental rights stand to be enforced only against the state. The article aims at analyzing the shortcomings of this decision including the impact it would have had economically as well as in terms of its affect on the fight against the novel virus had this order been allowed to sustain. The researcher shall also discuss the subsequent modification made in the order and how the same reflects poorly on the Supreme Court as it acknowledges with disconcert its own transgression. The article attempts to bring to light the pattern of unfortunate judicial supremacy in India and the impression it tends to create in the minds of the general public to the tune that every policy decision is accountable to the judiciary's modification of the same even if it does not involve any legal question whatsoever.

Keywords: Covid-19 Virus, Supreme Court, Lockdown, Free-testing, Private Laboratories

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MAIN MANUSCRIPT

The Democratic India lauds itself for its constitutional set up that is all embracing of virtuous ideals of Rule of Law, Equality, Liberty, Justice and Separation of Powers. To this effect, the three organs of the State are meant to operate in harmony to lift the country and its citizens to complete personal and social fulfillment. This harmony however does not come without certain caveats with respect to overreach and transgression between their functions. It is true that the model of separation of powers is not strictly applied in the Indian state, nevertheless its value and founding rationale cannot be ignored and its spirit cannot be waived even in the garb of public interest.

The Country is presently among the many nations that are putting up a strong fight against the almost malefic Covid-19 virus that has viciously invaded the life of every Indian. While the Government has taken a strong stand in terms of its strategy of social distancing evident in the early lockdown announced at a time when the number of deaths resulting from this virus had not touched the three digit mark, the role of the Supreme Court on the other hand came up for debate on account of overreach of judicial powers.

On April 8th 2020 the Supreme Court bench comprising of Justices Ashok Bhushan and Ravindra S. Bhat while hearing a petition against the ICMR guidelines on testing for the corona virus passed an order directing that the “*tests relating to COVID-19 in approved Private Laboratories to be free of cost.*”² The decision immediately stirred a debate in the legal fraternity over its validity and the court’s competence to make the same. It is no doubt that with the number of cases rising at a mechanical speed reaching almost over 9,000,³ the country is lamenting in a state of grim looking for any ray of light at all in this hour. This is why many appreciated the Supreme Court’s order citing reasons of poverty, equal access to all and moreover, the fact that increased testing would lead to faster detection and undertaking timely treatment. However, such appreciation overlooked a hefty cost, which may not have been patently visible in the first instance and which became the reason for this order’s prompt and almost disconcerting modification.

The concealed shortcomings of the order that fail to strike immediately because of the underlying *parens patriae* attitude of the court while making it, shall be revealed in a two-fold analysis of the same. First, in the context of its viability under the constitutional framework and second in the context of the potential impact it would have had, had this order been allowed

² Shashank Deo Sudhi v. Union Of India & Ors., Writ Petition (Civil) Diary No(s). 10816/2020

³ India Covid-19 Tracker, available at: <https://www.covid19india.org/> (last visited on Apr 14, 2020)

to sustain.

The judiciary's role as defined under the Constitution leaves no room for doubt that the Apex Court is the custodian of fundamental rights and the interpreter of the Constitution. While the order in question was passed by the court striking down a part of the ICMR guidelines dated 17.03.2020 and 21.03.2020 on '*Strategy of COVID-19 testing in India*'⁴ and '*Guidelines for COVID-19 testing in private laboratories in India*'⁵ which capped the tests for corona virus conducted by the private laboratories at Rs. 4500/-; the same was done without hearing the arguments of the ICMR and in fact in the absence of its counsel. Moreover, while the petitioner Shashank Deo Sudhi contended that the ICMR guidelines were in violation of articles 14 and 21⁶, the Court's response in the form of issuing directions to the private entities is not in tune with the well-established position that Fundamental Rights are enforceable against the State and not against private entities.⁷

The Contention that by capping the test prices at Rs. 4500/- access was denied to the economically weaker section was misinformed in the light of the provision for free tests already in place for such category of persons in the government laboratories. Even though the intention underlying the objective that the court attempted to achieve was admirable, by placing the obligation of enforcing fundamental rights on the private parties the court made the mistake of setting a questionable precedent that lacked rationale. The private laboratories so directed were not even made party to the hearing in question.

Interestingly, the violation of principles of natural justice was not the only veiled problem in this order. To understand the foundation of the case, it is important for one to acknowledge that testing of the COVID-19 virus and the price set up for the same is strictly a matter of policy. Its merits and demerits do not stand open to the Court's scrutiny to the extent of re-shaping or re-creating the policy. This is a direct transgression into the executive domain and a violation of the doctrine of separation of powers. The Court's observation that, "*private laboratories must extend philanthropic services in the hour of national crisis*"⁸ once again brought to light the pattern of unfortunate judicial supremacy in India where every decision's validity hangs by

⁴Strategy of Covid-19 testing in India, available at:

https://icmr.nic.in/sites/default/files/upload_documents/Strategy_COVID19_testing_India.pdf (last visited on Apr 14, 2020)

⁵Guidelines for COVID-19 testing in private laboratories in India, available at: https://icmr.nic.in/sites/default/files/whats_new/Notification_ICMR_Guidelines_Private_Laboratories.pdf (last visited on Apr 14, 2020)

⁶Art. 14 & 21, The Constitution of India, 1950

⁷ See S.K. Mukherjee v. Chemical Allied Products, AIR 1962 Cal 10; Kochuni K.K. v. State of Madras, 1960 AIR 1080; P.D. Shamdasani v. Central Bank Court, 1952 SCR 391

⁸Supra note 1

a thin thread waiting for the judicial take on the same as if the democratically elected government is responsible not to the people at large but to those few alone who occupy high judicial offices.⁹ It is without a doubt questionable whether it is for the Supreme Court to decide how the resources are to be mobilized and deployed given that not even the economic impact of such free testing had been opened for discussion before the bench.

The order was clearly a philanthropic decision but the same was made in the absence of necessary power and moreover in the absence of any question of legality that required judicial intervention thus subjecting the order to critical scrutiny.

Moving away from the constitutional imperatives if one views the order in terms of its impact in the fight against the novel corona virus it appears that still the arguments in favor of the decision will fail to stand even on moral grounds. The court while imposing the free testing obligation on private laboratories did not make any requisite direction as to who would bear the cost of the same. The idea of free testing no doubt germinated from positive intentions rooted in humanitarian grounds however, it appears that the Supreme Court overlooked the fact that while it may have directed something to be availed for free, it would nevertheless bear a cost. Leaving the model for 'reimbursement' to be decided at a later stage¹⁰ did nothing but open doors for further litigation¹¹ and create massive anxiety amongst the private laboratories. Questions as to who shall bear the cost, if the government is to cover the same then to what extent shall it be done and when shall the reimbursement model come in force, left ample of uncertainty which was not expected from a decision of the Apex Court. Moreover, it is important to point out that this uncertainty would have had a direct impact on the effective management of the virus as the private laboratories would have soon chosen to either drop the frequency of testing or terminate services fearing going out of business altogether.

This would in fact have lead to a shortage of testing and thus, prove to be counter-productive.

As predicted, in response to this order an application seeking its modification was filed by Dr. Kaushal Kant Mishra. The applicant contended that without reimbursement the equipped laboratories might stop testing at all, which will only add to the problem. Moreover, the applicant suggested that directing free tests for established EWS category would be a better alternative and more viable in the present circumstances.

Consequently, on April 13th the Supreme Court modified its order acknowledging the

⁹See Supreme Court Advocates-on-Record-Association & anr. v. Union of India, Writ Petition (Civil) No. 13 Of 2015; Shyam Narayan Chouksey v. Union of India, Writ Petition (Civil) No.855 Of 2016

¹⁰ Supra note 1

¹¹ Application filed by Dr. Kaushal Kant Mishra, I.A. No.48265/2020

submissions that already 157 Government laboratories are providing free testing for the Covid-19 virus and furthermore, those covered under the Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana— almost 50 crore beneficiaries—are also subject to free testing in both government and private laboratories. Falling back to its original domain, the court this time *suggested* that the Government may consider extending free testing services for others like those falling under the EWS category.

Fortunately, the obvious transgression of authority was duly noticed and rectified as the Supreme Court observed that, “*We are conscious that framing of the scheme and its implementation are in the Government domain, who are the best experts in such matters.*”¹²

The private laboratories too were allowed to continue chargeable testing as per the ICMR guidelines and reimbursement for any free tests conducted to be made as per notification of the Government in this regard.

The modification order was clearly necessary in the light of the dangerous precedent that was previously set, fortifying a pattern of unnecessary judicial adventurism that reveals itself at different junctures of the Country’s progress including this time of an unexpected and massive health crisis.

This is the exact situation that demands harmony between the three organs instead of unwarranted transgression. The judiciary must in fact ensure that the governmental measures are enforced and may issue supplementing guidelines in tune with the governmental policy instead of recreating the policy.

The Supreme Court’s role in a state of affairs that have the country at a standstill is pivotal in shaping our response to the crisis and in rehabilitating and taking things back to the status quo once the dust settles. Therefore, setting another example of judicial overreach and creating an impression that the democratically elected government’s decisions are all subject to the whip of the Court does nothing but taint this role. Moreover, the modification that followed goes on to show how evident the transgression has been and puts the Apex Court in an almost embarrassing position, which must be avoided for all future purposes.

¹² Supra note 1, I.A. No.48265/2020, Application for Intervention allowed.