"Human Rights and Justice in India during Covid-19"

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Abstract:

There are dimensions of justice, human rights and constitutionalism that need to guide governments when there is a public health emergency as with Covid-19. The focus has to be on the right to health, empathy for the working poor and ethical state practice. The Covid-19 pandemic, which has resulted in a global lockdown, is a crisis as never before. In India, lockdown — in the nature of a 'curfew' witnessed the largest exodus of workers and migrants on the highways, reminiscent of Partition. Here in this paper focus is on justice in a larger context of hostile environments, exploring constitutional routes, right to health and on vulnerability of the working poor in hostile environments, an exploration of law, human rights standards and mitigation strategies by governments and courts through a close look at government orders and court judgements/public interest litigation.

Key Words: human rights, justice, Covid-19, law, public interest litigation.

Introduction:

A pandemic is serious and in a public health emergency, drastic containment measures are unavoidable. Even by this token, however, a total lockdown has been widely seen as 'the harshest corona virus containment measure in the world.' We may assume that this was necessary for containment of Covid-19 for the preservation of public health and that the lockdown was evidence-based. With the increasing number of people testing positive, the rise in fatalities, and demands for increased and aggressive testing, the medical, scientific and health establishments are under enormous pressure to meet the growing care needs while being inadequately protected themselves. In a climate of fear, panic and uneven access to healthcare facilities, they are rendered totally vulnerable to vigilantism and physical attack.

Hostile environments, exploring constitutional routes

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

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

The imposition of a Covid-19 lockdown on Kashmir has disastrous consequences in that region already reeling under a nine-month lockdown post abrogation of Article 370. The Citizenship Amendment Act, 2019, that saw widespread protests in 2019-20, on grounds that it is discriminatory against Muslims by introducing a denominational basis for granting Indian citizenship is mirrored by the Gujarat order on relief.

There are also clear discrepancies based on class and religious faith in the cases reported in the press of the provision of transport for instance for stranded persons – pilgrims, international travellers and workers. Already, right at the commencement of the lockdown, we are witness to the use and abuse of pandemic vulnerabilities and the inscription of states of exception.For citizens who live more secure lives in the shade of majoritarian umbrellas of governance bolstered by class/caste privilege, Covid-19 is *the* threat (or so they believe), which once eliminated, will bounce them back into the 'normal.'

Right to Health

Covid-19 brings into sharp focus the right to health as a fundamental right in India. At the core of international human rights standards, and undoubtedly a key component of Article 21, it is now at the centre of debate in more ways than one. An important part of the concerns related to the right to health at this time circulate around testing and containment of the pandemic. We know from people with long years of work in addressing the need for robust public healthcare systems in the country that the systematic dismantling of public healthcare has rendered us more vulnerable in terms of inadequate facilities, shortfall of trained personnel, and inadequate biotechnological support. We are also witness in the immediate aftermath of the lockdown to the sharply skewed access to essential health services, to adequate food and nutrition, to housing and decent work. Cascading reports from across the country speak of hunger and starvation as bigger threats to life for the largest section of the population than the virus, especially consequent to the lockdown. This is also the population that urgently requires access to proximate, free health care essential and Covid-19 specific treatment and care and yet lacks adequate access to both.

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

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

The Exacerbation of Vulnerability

The rights of the poor and the vulnerable have been grossly violated in the very manner in which the lockdown was first announced (with four hours' notice) and then extended (with no notice); and in the abject neglect with which they were treated by the state in the first few days of the lockdown.

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

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

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

Human Rights Standards in a Public Health Emergency

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

'WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; And to promote

among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation'

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

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

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

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

Since the concern is with the spread of Covid-19, tracking cases, contact tracing and identifying hotspots have resulted in a proliferation of unregulated surveillance operations, of which the Arogya Setu is just one. If the right to privacy is a fundamental right under the Constitution, freedom from surveillance is a core privacy guarantee, and state action on this front must conform to international and constitutional standards. In fact, the right to privacy has been one of the biggest casualties in the Covid-19 context and must be set right. Rather

than reducing it to a bureaucratic exercise bolstered by punitive policing, we could insist that every state government is guided by a team of experts that consists of public health professionals across disciplines, epidemiologists, and policymakers and that the state government adopts evidence-based measures that are calibrated to specific realities. Citizen liberties, freedoms and dignity must be within the core, and transparency and state accountability must structure the method. We are in for a long haul, so course correction is always in the realm of the possible.These are concerns that bring international human rights standards and constitutional standards together on the ground.

Legislative Framework for Covid-19

In February 2017, the Government of India circulated a draft *The Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill*, 2017 (PHB), that was meant to repeal the *Epidemic Diseases Act*, 1897 (EDA). There is much work on the EDA, especially its workings in colonial India by historians, and it is undoubtedly an extremely draconian legislation which needs to be repealed. However, any Act which replaces it must be firmly located within the constitutional framework and integrate human rights and public health concerns seamlessly.

Its brevity (4 sections in all) can be seen as a boon by an insurgent administration. It leaves the field open for state governments to devise their own modalities and designate the requisite resources in terms of finance, personnel and institutional mechanisms. It is possible, therefore, for a state, through administrative and executive empathy, to write the constitution into its implementation, taking on board the concerns voiced by epidemiologists, public health professionals and human rights advocates on the PHB. There is nothing to stop a state government from setting out a thoroughly democratic, transparent and consultative process in its implementation.

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

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

Conclusion:

There are dimensions of justice, human rights and constitutionalism that need to guide governments when there is a public health emergency as with Covid-19. The focus has to be on the right to health, empathy for the working poor and ethical state practice. The Covid-19 pandemic, which has resulted in a global lockdown is a crisis as never before. In India, lockdown — in the nature of a 'curfew' witnessed the largest exodus of workers and migrants on the highways, reminiscent of Partition.

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6. See Baxi (1969) for a detailed exposition on the 'textual anchorage' of the Directives in the Constitution, making state action rooted in the Directives, possible.