

JUDICIAL REVIEW: EXPLORING CONSTITUTIONAL OBLIGATIONS DURING CRISIS

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ABSTRACT

Last year a pandemic exploded and the name was Coronavirus Disease 2019, the world is still fighting with the pandemic. Because of the pandemic last year in March 2020 PM announced the complete lockdown in the nation and citizens faced so many problems, low income migrant workers stuck in the cities they were working without any job, income and any means of survival. Many of them began to walk home and more than 150 migrants died before reaching their destination. This was just the tip of iceberg.

The effect of the pandemic inevitably restricted fundamental rights and thus gives rise to a complex web of questions like, could court interfere with the other organs of government while respecting the doctrine of separation of power? How much judiciary can intervene in the matter of state? Although this question was quite settled earlier by numerous precedents and case laws but it becomes new again because of the pandemic.

Keywords: Judicial Activism, Judicial Review, Pandemic, Rule of Law, Separation of Power.

THE INCREASE IN EXECUTIVE POWER ADVERSELY IMPACTS THE CONSTITUTIONAL VALUES

During the pandemic the situation was of financial emergency and the GDP dropped drastically but the financial emergency was not imposed and the government adopted the 'legislative model' by relying on the various acts and statutes to fight the pandemic. Namely, "the central government has made use of the Disaster Management Act, 2005 (DMA), the state governments have invoked the Epidemic Diseases Act, 1897 (EDA), and district magistrates /commissioners of police who utilized Section 144 of the CrPC. Foremost was the institution of a national 'lockdown'ⁱ initiated and maintained through executive decrees issued by the NDMA, and supplanted with measures by the states. Using the broad discretionary powers conferred by these enactments", the government has introduced a series of measures which have raised concerns about the violations of first generation as well as second generation rights.ⁱⁱ

The state is required to restrain some rights like civil and political rights and those are rights are negative rights on the other hand the state is required to fulfill certain rights and those acts are positive rights like economic and social rights. The economic and social rights include right to livelihood, right to food and shelter, equality and non-discrimination in various manners.ⁱⁱⁱ Although the emergency was not declared but emergency like powers are being exercised by the government. The main purpose of this regime was to effectively solve the issue and get back to the normal democratic and constitutional process. Quick and effective action was indeed the need of the hour and this is precisely the executive is vested with such great powers.

However the measures taken by the executive must be proportionate because the fundamental rights were on the stake. The primary objective of any governmental action is to benefit the public even if the situation is of pandemic but often it happens that the government uses the 'state of exception' to expand their power over the territory. The same happened in India where privacy was invaded, potential data breached, and deployment of Arogya Setu application with a lack of clarity on the purpose the data could be used for. Serious doubts were there on the lockdown that was it really for the benefit of public because thousands of migrants were left stranded. And at the same time when citizens were in lockdown there were political parties

advertising on road in thousands. Another action which was widely criticized was the cover of pandemic for politically motivated arrests.

Hence over executive interference over time poses a great threat to the democracy and constitutional values in a long run.

RULE OF LAW, SEPARATION OF POWER AND PANDEMIC CRISIS

One of the most important facets of constitutionalism is restriction on arbitrary use of power by government and this can be achieved only by upholding rule of law and respecting separation of power.^{iv} Hence forth we adopted the concept of Judicial Review and Judicial activism from American jurisprudence to uphold the constitutional values. Now the question arises whether the judicial review really contributes to preserve the rule of law or has become the reason for its corrosion.

The rule of law is a basic feature of the Indian Constitution. There is heated disagreement on the exact meaning of “rule of law^v and no consensus has been arrived at regarding its exact content. Dicey famously defined it as forbidding the exercise of arbitrary power, equal subjection of all persons to the law, and a lack of special courts. Today, there is broad agreement that the rule of law requires a check on executive power.^{vi} The difference of opinion is with respect to the content of the law: A formal conception of the rule of law is concerned with preventing the arbitrary exercise of powers by the state and is indifferent to the substance or content of the law.^{vii} It is said to exist as long as there is conformity to publicly declared, prospective, general rules. This also known as the thin” version of the rule of law.^{viii}

Separation of power on the other hand is the bifurcation of powers and responsibility among the organs of the government and with a condition of not to interfere in each other’s working. The three organs of the government are the executive, the legislature and the judiciary. Each organ has separate members and functions and there must be no overlapping and one branch must not encroach in the functioning of other.

In India it is not a statement that each branch inevitably performs the functions of other branch. Like the primary function of the judiciary is to interpret the law but while interpreting the law

judiciary makes the law as well which is the function of the legislature. The executive performs the function of legislative organ by drafting delegated legislation and promulgating ordinances. And because of the erosion of the concept of separation of power there was a tussle of power from 1960 to 1980 between the Judiciary and the Legislature. But if we keenly observe our constitution the healthy encroachment is permitted and not an oblivious concept. Hence there is not a pure doctrine of separation of power.

There is considerable disagreement about what exactly the doctrine does and should entail, and consequently, different countries have different systems in place to ensure the separation of powers. However, “it is generally agreed that the value animating the doctrine is one that seeks to prevent the concentration of power with any one institution. The purpose of this doctrine is to create branches of government which are distinct from the executive and to which it will be accountable. This ensures governmental efficiency as well as a check on the abuse of power. Judicial review, then, is a manifestation of this value which seeks to prevent the supremacy of one institution over the others.”^{ix} It performs the important function of checking the executive when it acts in excess of its mandate and also ensures that constitutional rights are upheld. Rights without remedies are no rights at all “the courts ensure that the rights of people are not illusory by granting appropriate remedies. Judicial review ensures the supremacy of the Constitution as opposed to the supremacy of a particular institution. Hence, it is not antithetical to the separation of powers or the rule of law but is essential to ensure their existence. It is, of course, undeniable that much of the criticism directed at the courts for being activist is not unfounded”^x courts too must act with caution with respect to the remedies they grant.

THE NEED FOR JUDICIAL REVIEW IN TIMES OF CRISIS

So, what is the answer to the dilemma of a creeping executive in a crisis? Four principles are helpful: first, legislative oversight of the executive is required; second, extraordinary measures must be limited to those that are absolutely necessary; third, a sunset clause indicating the executive's extraordinary powers temporal limits is required; and fourth, judicial oversight is required.

The first requirement is not met in India. Neither the DMA nor the EDA require guaranteeing that the legislation supervises administrative actions. This is in stark contrast to other crisis powers when the constitution allows the government to declare a state of emergency or pass a law. If either of these paths is chosen, the legislature must approve the government's actions to ensure regular legislative oversight (if at least) even in times of crisis. There are no similar requirements in DMA and EDA that make it possible for the executive branch to evade parliamentary responsibilities. The third requirement has also not been met, because neither of these laws imposes time limits on the exercise of special powers.^{xi}

The second requirement can be met in two ways. First, the authorizing statute in question can contain limits or provide guidelines on the use of executive power and / or courts determine which measures are strictly necessary. Notably, neither of the statutes in question contain any restrictions on the executive.^{xii} To the contrary, they confer very broad discretion on it. Section 35(1) of the DMA enjoins the centre to take all such measures as it deems necessary or expedient for the purpose of disaster management. Similarly, the EDA does not not define a dangerous epidemic disease but allows state governments to take such measures as it shall deem necessary to combat one. It provides no further guidance on the limits of these measures the state's understanding of necessity prevails.^{xiii} Hence, the enactments themselves do not limit exceptional measures to those which are strictly necessary.

The second method is for the judiciary to ensure that special measures are limited to those that are absolutely necessary. This is possible in India because it has chosen the legislative model of responding to the pandemic through DMA and EDA, which does not prohibit judicial review.

So the only option as a bastion against excessive administration and the erosion of democratic values is justice. Judicial review will ensure that constitutional rights are not impaired for no reason. In addition to verifying administrative excesses, the judiciary also legitimizes state actions through review. The legitimacy of the constitution and democracy comes not only from electoral responsibility, but also from judicial review. Judicial review is not only appropriate, but actually necessary to ensure the existence of such legitimacy.^{xiv}

Ensures that the executive branch is accountable to the public. Since the judiciary is the only institution required to accept complaints of rights violations, this understanding of judicial

review is of utmost importance. Both the executive and the legislative can (and often do) ignore any complaints from citizens, especially when they lack social and political power. Therefore, the court is the only forum that can really be used by the majority of the people affected by the emergency measures.

In addition, the decision of the judiciary becomes a precedent, and the government will follow this precedent. Therefore, they can “control the next emergency” by further enhancing the importance of their role. For example, the decision to maintain the right to privacy in the context of a crisis will also apply to future crises. Judicial review also fulfilled the function of "perfecting the general constitutional authorization into an essentially normative code of conduct". In other words, the decision of the judiciary to resolve individual claims or review specific policies related to constitutional rights clarifies the nature, scope, and applicability of these broad rights, and helps guide future state actions. Finally, judicial review usually forces the government to explain the purpose of its actions and the relationship between related restrictions and its purpose. It forces the government to rationalize its actions and avoid relying on uncertainties.

Perhaps the combination of some or all of these advantages has prompted the international community to recognize the role of the judiciary in emergency situations and its insistence on opening the courts. We should not ignore the fact that even well-intentioned actors may inadvertently exceed demand limits and judicial review will also help. In this way, the court has performed many useful functions when conducting judicial review, thereby enhancing transparency and accountability, better supervising government actions, controlling excessive administration, and protecting legal civil liberties.

Many people believe that the cost of judicial review of administrative actions in emergency situations outweighs the various benefits mentioned above. They argued that judicial review should be suspended during the crisis, or that special respect for the executive branch is necessary. In responding to these claims, it is important to point out as early as possible that epidemics are clearly different from "usual" emergencies, which usually refer to security threats. The most common way to oppose judicial review is that during wartime (or during periods when similar threats to national security persist), the state does not have the freedom to disclose the information it collects, because this will hinder the protection of judicial review. Judges are forced to make decisions based on incomplete information, which may lead to bad

or incorrect results. During a pandemic, this is certainly not the case. In this case, greater transparency will not hinder the country's ability to fight disease. Therefore, judicial review during a pandemic will not lead to bad or incorrect results because judges have all the information they need.^{xv}

The argument against judicial review in times of crisis is based on the assumption that the crisis in question will be limited and will soon return to its normal mode of operation. As regards the current situation, this assumption has been annulled. The pandemic will continue to exist for the foreseeable future, and is even referred to as the "new normal." Critics also believe that the standards applicable in the era of ordinary judicial review 'and' orderly 'will be too harsh and will hamper the government.^{xvi} This argument is untenable, because if the action is taken under certain circumstances, the state action is reasonable. Yes, then national action will be supported. This is an example of a recent order from the Gujarat High Court. After being reviewed, accept and support the state government's position on many issues related to epidemic management. Furthermore, the proportionality criteria of the review (considering the balance between the purpose, applicability, need and cost of the measures) and benefits) are flexible and allow different results depending on the context of their application. Therefore, judicial review is not inappropriate for emergencies or crises.^{xvii}

Another concern is that the judges are not experts; the country's response to the pandemic has raised various concerns in countless fields, including epidemiology, bioethics, economics, etc. They are not experts and are not suitable for decision-making on these issues; they must be subject to administration. This argument ignores the fact that executives are not made up of experts. It also has the external assistance of qualified personnel before making a decision.^{xviii} This can easily arise in court with the reasoning of the administration to formulate specific policies. If the relevant legal standards are met, the judge will support the administrative action. In addition, judges often rule on matters in which they have little experience, which does not hamper their ability to determine the validity of the law. Therefore, respect for public health does not require an overly submissive judiciary. On the contrary, respecting this fundamental value requires that the courts take public health seriously and examine whether state actions are intended to protect it.^{xix}

The latest argument against judicial review in the crisis is that the courts are completely ineffective in enforcing their constitutional mandate. It is true that the court often obeys the

executive branch in emergency situations. However, this does not rule out the possibility that they always fulfill their constitutional responsibilities. Nor does it help answer the normative question of whether the court should conduct a judicial review. The Constitutional Court of Ecuador was praised in cases for defending the rights of citizens during the pandemic, as opposed to, which violated the administrative sphere like many higher courts in India. The correct results obtained cannot be easily compromised. For all these reasons, judicial review can and should take place even in emergency situations, and the arguments in favor of suspending the review fail when carefully reviewed.

If the infamous *ADM Jabalpur v Shivkant Shukla*^{xx} case is not mentioned, the discussion will be incomplete, in which the Supreme Court ruled that basic rights including Article 21 can be suspended in an emergency and no court order can be issued. To enforce rights is generally regarded as one of the darkest moments in the history of the Supreme Court and was recently overturned in the *KS Puttaswamy v Union of India*^{xxi} case. If the potential value of this case (one of the great respect for the administration in times of crisis) it remains entirely on another issue, it will be discussed in the next section.

EVALUATING THE JUDICIARY'S RESPONSE TO THE PANDEMIC

Now that it has been established that the courts are bound by and must undertake some form of judicial review even in times of crisis, let us now turn to the question of whether they do so in practice. Some orders were selected to illustrate the general trend. The response of the Odisha High Court to the ban on unofficial vehicle use issued by the local police, namely the easing of the ban, is a useful example. Although the state argued that due to the vehicle deployment, there was no need to use vehicles to deliver essential goods to people in trucks, the court did not accept the face value of these submissions.^{xxii} It requires the government to convince the court of the existence of these measures before reviewing the order and partially reimposing the injunction.

In particular, it relaxed the ban in the first order because its cost exceeded the expected benefit to the public (a kind of proportionality analysis). What is particularly important here is that the court imposed a certain degree of strictness on the state when reviewing its actions and took

into account people's experience (rather than the paper sketches prepared for them) when transmitting his orders. It also takes into account the disproportionate impact of the ban on certain vulnerable groups: the elderly, pregnant women and the disabled. This is a popular and nuanced method of assessing violations of rights. The court also performed the function of restricting the emergency powers of the executive branch to strictly necessary measures.^{xxiii}

Likewise, other higher courts tend to perform their functions in a similar way (with some exceptions). To cite a few examples, the Kerala High Court refused to allow the government to deduct the salaries of state employees in the absence of relevant laws. It considers that, according to the DMA and EDA, the state does not have the right to do so. It also established strict guidelines for sharing data for a company contracted by the government to manage information related to the epidemic. Madras High Court ordered the state to provide migrant workers with food, shelter and medical facilities in the event of war and submit a report on compliance. The Gujarat High Court also required the state government to prove that its policies on a number of issues were reasonable and passed an order to modify some of these policies based on the reasons provided. It also approved basic rights to enforce orders, if necessary.^{xxiv}

Therefore, the High Court in general has been conducting judicial review and safeguarding basic rights. Perhaps more important than its conclusions is the procedure used to reach these conclusions: The Superior Court carefully reviewed the positions of the states and did not adopt an overly submissive attitude toward the executive branch. They made explanatory adjustments when considering the special problems caused by the pandemic, so that states have the flexibility to respond to crises while still defending their rights. Therefore, the High Court's response to the epidemic favors the maintenance of the rule of law.^{xxv}

Turning now to the Supreme Court, its ruling stands in stark contrast to the Superior Court ruling. One of the most pressing issues facing the courts during the pandemic is the impact of the blockade on the rights of migrant workers. As thousands of people were forced to travel hundreds of kilometers (on foot, no less), multiple petitions were filed with various higher courts and the Supreme Court, with varying effects. In late March, the Supreme Court refused to instruct the government to provide food and shelter for these workers. In doing so, it accepted the "status report" presented by the union at face value; the "status report" provided detailed information on various details. These plans are said to be aimed at ensuring the well-being of

workers.^{xxvi} No effort has been made to determine if these plans are of any use in mitigating the specific problems caused by the crash.

In addition, the statement issued by the Attorney General denied that even one person walking home on the day of the order was accepted, although it was absolutely wrong. The court also ordered the media to publish the official version of the incident, which involved pandemic and accusing of false news immigration departure. This is considered compulsive speech and violates Art.19 (1) (a).^{xxvii}

The Supreme Court also upheld the favorable orders of the Allahabad and Kerala High Courts. In view of the pandemic, the restoration process was temporarily postponed under certain regulations.^{xxviii} The reason for the suspension is that the government is aware of the problems related to the pandemic and will develop the appropriate mechanisms to solve them. The basis for this conclusion is, once again, the verbal assurance given by the Deputy Attorney General.

In a petition calling for the payment of wages to migrant workers, the Chief Justice asked why migrant workers needed wages if they had food and said this would not "replace" the government's own wisdom. Strange twist in a series of events, the court ultimately did the following: The central government ordered companies to pay workers during the shutdown. By challenging the order, the court effectively canceled the state relief to the workers. Furthermore, if he approved the order in accordance with the rights of the people, he reversed his position incomprehensibly, or did so too little too late. It is true that there are some cases in which the court has applied standards of legal review and granted relief accordingly, but these constitute exceptions rather than rules.^{xxix}

Therefore, it is obvious that the Supreme Court generally shows a high degree of respect for the executive branch. It did not apply the legal standard to the matters before it, but chose to accept the state's version without any review of it.^{xxx} In doing so, it gave up its constitutional role of conducting judicial review and ensuring that the executive branch is not supreme, while protecting basic rights. The legal profession has also emphasized this resignation of its functions.^{xxxi}

In doing so, the Supreme Court created what Dyzenhaus called a "gray legal loophole,"^{xxxii} which is in sharp contrast to the High Court's application of explanatory convenience. Gray legal loopholes are spaces where there are some legal restrictions on administrative actions...

but these restrictions are so vain that the government can do whatever it wants. Create the appearance of the rule of law and legitimacy. Periodic hearings and court-approved orders did just that. They undermine the rule of law, not uphold the rule of law. The point of contention is not that the court should assume the role of the executive branch and formulate policies, but that the court should be held accountable for its policies and ensure that they do not exceed the requirements. As shown in the previous section, this will ensure the existence of separation of powers, thereby ensuring the rule of law.^{xxxiii}

A Case for Strong-Form Review for First Generation Rights

First-generation rights or civil and political rights are considered "negative rights" because they require the state not to act in a way that violates them. The third part of the Constitution codifies these rights into law, and Article 13 sets out constitutional obligations. In addition, Article 32, paragraph 2, authorizes the Supreme Court to issue an appeal to enforce these fundamental rights. Even if the legislature has the same reasonable interpretation, the court's constitution is final. Therefore, the Constitution requires Indian courts to conduct a strong judicial review of first-generation rights. In the context of a pandemic, this will mean the right to life and livelihood, the right to action and the right to privacy, all of which may be violated by state actions.^{xxxiv}

We believe that the most appropriate standard of review during a pandemic is proportional review. There are four aspects of the proportionality standard: first, the state action that is imputed must be to achieve an appropriate purpose; second, the measure must be reasonably related to the purpose or be adequate to achieve the purpose; third, it must be the least restrictive. To achieve the purpose fourth, there must be proportionality in the strict sense, or a balance between the costs and benefits of the measures.^{xxxv} Although the Supreme Court has referred to the proportionality test for decades, it has not always applied it in this way. In fact, the test was established in this way at the *Modern Dental College and Research Centre v State of Madhya Pradesh*.^{xxxvi} The Supreme Court generally applies Winsbury's reasonableness to determine whether the restrictions on rights are reasonable, even though it has stated that it is applying the proportionality test. However, it does take proportional rates into account. In other words, the court's reasoning will allow one, some, or even all of the above four things, but not bind any of them.^{xxxvii} When deciding on offenses related to the pandemic, the court must apply the trial version of the four aspects.

The proportionality test is the most appropriate for the administration to assume responsibility, because its own structure needs to prove the legitimacy of behavior based on public reason. This is especially important, because crises can easily generate ideological reasoning; at this time, expressions of applicability to national measures are described as weaknesses.^{xxxviii} He often witnessed ideological reasoning during the war. In fact, the pandemic sparked war talks, and this precisely led to this line of thinking. The proportionality test can help counteract ideological reasoning by preventing the legalization of other objectionable state conduct. The second and third teeth are particularly useful in this work.^{xxxix}

In addition, the proportionality review is preferable to the reasonableness standard because it allows flexibility while ensuring that there is no undue respect. It also ensures that judges do not ignore important factors that are worth considering, unlike the standard of reasonableness. This in turn ensures that they will issue reasonable orders and may even change their decisions based on evidence to reflect better results. A proportional review will not allow the courts to accept state guarantees at face value because every aspect of the test must be met. On the contrary, reasonableness allows the government to have broad discretion, because an act should be only one of the many reasonable acts available. In addition, in the process of proving that its measures are reasonable based on the four-pronged test, the state may decide to change the policy for yourself. You can also calibrate your follow-up strategy (even before launching the challenge) based on this standard, knowing you need to justify yourself for this.^{xi}

In particular, critics of the standard criticized it for not seeing "right as a victory." This concept puts rights above other considerations and is therefore incompatible with the fourth aspect of the test. This criticism was not very effective during the crisis for two reasons: First, the four-pronged proposal was clearly stated before and was part of the law.^{xii} This makes it easier for the courts to start applying it instead of devising a relatively new standard. Second, and most importantly, the flexibility provided by proportional review is particularly useful during a pandemic, because it is practically impossible to characterize rights as a victory. It fully embodies the value of public safety.^{xliii}

This method does not violate the principle of separation of powers, because the judiciary does not legislate or decide which policies to adopt. It only tests whether the adopted policies are in accordance with the constitution and provides the corresponding remedies.^{xliiii} This is expressly

permitted by article 13 and article 32 of the Constitution.^{xliv} Therefore, proportional review is the most appropriate test and Exhibit is necessary to infringe rights.

A Case for Weak-Form Review of Second Generation Rights

The right of second generation or economic and social rights are part of the constitutional description of these rights. They are not private, but they act as the guidelines followed by the province. For many years, the Supreme Court did not adopt a test that defines the scope of these rights, although social rights are correct. The first is a good thing like Qmismimon Core, clothing, shelter, medical care, etc., which is generally adopted. This approach provides individual remedies. The second approach is conceptualized by the Constitutional Court of South Africa. That is the opposite of. It is considered a kind of weaker revision.^{xlv}

The Supreme Court did not use these two methods to determine social rights. Instead, it adopts the conditional social rights approach, in which the violation of rights is conditional on state action. This goes beyond the paradigm occupied by the lower core and the rational approach, and is an entirely different model. In this model, social rights are not protected unless the State has taken measures in this regard (that is, it assumes obligations in the form of policies or plans) and has failed or improperly implemented (that is, it has not complied with the obligations previously assumed). A custom review is possible here, but only if there is a pre-existing government plan.

It is not recommended that the courts continue to use the "conditional social rights" approach during the pandemic, because the lack of government plans to solve specific problems actually means that relevant rights do not exist.^{xlvi} On the contrary, it would be helpful for the courts to establish a clear standard for adjudicating social rights. The minimal basic approach would require courts to grant injunctive relief in every case they hear, which may not be suitable for a pandemic characterized by resource constraints. This also means guiding the country's expenditures, which is a policy issue.^{xlvii}

The rationality method is more suitable for pandemics because it recognizes the limitations of the country. He wanted to know whether the course of action chosen by the state could promote the realization of rights, and avoid direct monitoring of policies. For these reasons, it will not violate the principle of separation of powers.^{xlviii} Therefore, no matter what method is usually

adopted, the pandemic needs to define the scope of social rights. In this case, the plausibility test is the most appropriate.

Refashioning the Separation of Powers Doctrine

As mentioned above, the pure theory of the separation of powers is unrealistic. However, judicial review must still respect this principle. So, what would a more sustainable understanding of this principle look like? Kavanaugh redefines the separation of powers as a coordinating agency effort in joint governance. He admits that this may seem discordant, because pure doctrine governs our understanding of the separation of powers. However, this is a more realistic version that takes into account the independence and interdependence of branches. Inter-institutional courtesy is the key idea of this re-conceptualization; every branch of the country (judicial, legislative, and executive) should respect each other. This means the requirement of evasion and the “requirement of mutual support”. Proportionality review and reasonableness standards are consistent with this cross-departmental politeness.^{xlix}

The room requirement requires that each branch give other branches room to perform their own functions. It requires each branch to respect jurisdictional boundaries and exercise self-discipline by acknowledging that another branch is more capable of performing certain tasks. In the context of this issue, if the court finds that the closure order is improper and violates the law, migrant workers who migrate can meet the requirements for maneuvering margin by ordering the government to ensure that the workers arrive at their destination within the specified time frame.^l However, it is crucial that the court will not issue an order on the exact way to execute the order. For example, the government can restart trains or provide buses or allow private operators to reopen by setting flat rates. This policy issue will be determined independently as you deem appropriate. Similarly, with regard to social rights such as the right to health, the court will respect the state's policy on how to realize this right (applicable standard of reasonableness).^{li} The government can decide to subsidize medical services, or provide or reimburse private hospitals for free in government hospitals, among other options.

The requirement of mutual support requires each department of the government to actively support decisions made by other departments. This support can be expressed by implementing these decisions or interpreting them sincerely in a manner that respects the underlying substantive value. In the context of judicial review, administrative departments need to truly

implement judicial decisions. In my opinion, if you don't do this, the judicial department can step in again, this time to issue more specific instructions. To take the previous example again, if the government cannot ensure that migrant workers return home within the prescribed time frame, then the judicial department has reason to order it, for example, to temporarily reopen the train line for this specific purpose. In fact, the lack of enforcement power of the executive branch is the reason why some judges felt compelled to issue continuous performance orders in the past. If the judiciary does not do this, the rights it defends will be useless. Inapplicable rights are not rights at all.

CONCLUSION

We have shown that the excessive expansion of executive power can do serious damage to our democratic constitutional structure and to the various rights and freedoms that we value. To prevent this situation, the judiciary must exercise its power of judicial review. The Constitution of India allows the judiciary to carry out a strict scrutiny of civil and political rights. The judiciary can perform a weak review of social and economic rights issues. This must be done separately using standards of proportionality and reasonableness to ensure the separation of powers. Judicial review has unique value during the crisis, but unfortunately, the Supreme Court did not comply and waived its constitutional obligations. On the other hand, the Superior Court offers a glorious example of upholding basic rights and the checks and balances function of the executive branch, while upholding the rule of law.

ENDNOTES

ⁱ The term finds no definition in the law and is used colloquially to collectively refer to the restrictions imposed by the central and state governments.

ⁱⁱ Government of India, Ministry of Home Affairs, Orders dated 24.03.2020, 14.04.2020, 01.05.2020 <<https://ndma.gov.in/en/media-public-awareness/ndma-orders-advisories.html>>

ⁱⁱⁱ Bonavero Institute of Human Rights (University of Oxford), *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* (No. 3/2020, 6 May 2020)

^{iv} John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (OUP 1991) 33

^v *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299

^{vi} AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915) 120

^{vii} *Ibid*

viii Ibid 5

^{ix} Tom Ginsburg and Mila Versteeg, 'States of Emergencies: Part II' (*Harvard Law Review Blog*, 20 April 2020) <<https://blog.harvardlawreview.org/states-of-emergencies-part-ii/>> accessed 10 June 2021

^x Karan Gupta, 'Cracks in India's Constitutional Framework: Structural Implications of the Response to Covid-19 on Indian Constitutionalism' (*Verfassungsblog*, 28 April 2020) <<https://verfassungsblog.de/cracks-in-indias-constitutional-framework/>> accessed 10 June 2021

^{xi} Karan Gupta, 'Cracks in India's Constitutional Framework: Structural Implications of the Response to Covid-19 on Indian Constitutionalism' (*Verfassungsblog*, 28 April 2020)

^{xii} Indeed, the 'legislative model' of responding to an emergency requires that ordinary judicial review remain in place. Ferejohn and Pasquino (n 4)

^{xiii} Disaster Management Act 2005, s 35(1)

^{xiv} Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 Eur JL Studies 1

^{xv} Eduardo Jordão and Susan Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review' (2014) 66 Administrative L Rev 1

^{xvi} David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Michigan L Rev 2565, 2592

^{xvii} Pamela Karlan, 'The Paradoxical Structure of Constitutional Litigation' (2007) 75 Fordham L Rev 1913, 1915

^{xviii} Gustavo Prieto, 'How Ecuador's Constitutional Court is Keeping the Executive Accountable During the Pandemic' (*Verfassungsblog*, 24 April 2020) <<https://verfassungsblog.de/how-ecuadors-constitutional-court-is-keeping-the-executive-accountable-during-the-pandemic/>> accessed 01 June 2021

^{xix} Ibid

^{xx} (1976) 2 SCC 521

^{xxi} AIR 2017 SC 4161

^{xxii} Odisha High Court, Order dated 9 April 2020 in WP(C) No. 9095/2020 (Odisha High Court Order)

^{xxiii} Ibid

^{xxiv} Gross 'Chaos and Rules' (n 18)

^{xxv} Ibid

^{xxvi} See, for instance, Tanushree Venkatraman, 'In long walk back home, migrants battle hunger, scourge of Covid-19' (*Hindustan Times*, 16 May 2020) <<https://www.hindustantimes.com/india-news/in-long-walk-back-home-migrants-battle-hunger-scourge-of-disease/story-TizRfUz69osJQ0Uqmm6jZN.html>> accessed 6 June 2021 (reporting even months after the Supreme Court's order that migrants were walking home)

^{xxvii} Akanksha Saxena, 'Coronavirus and the Constitution – VIII: A Critique of the Supreme Court's Migrants Order' (*Indian Constitutional Law and Philosophy*, 4 April 2020)

^{xxviii} Government of India, Ministry of Home Affairs, Order dated 29.03.2020

^{xxix} If meals are given...: Supreme Court's query' (*Telegraph*, 7 April 2020)

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^{xxxiii} MP Jain (n 46)

^{xxxiv} Tushnet (n); Kavanagh (n 59)

^{xxxv} Prateek Jalan and Ritin Rai, 'Review of Administrative Action' in Sujit Choudhury et al (eds), *Oxford Handbook of the Indian Constitution* (OUP 2016)

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^l *ibid*

^{li} *ibid*

