

INDIAN FEDERALISM PERSPECTIVES

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An overbearing Centre: Legal dimensions of India's COVID-19 response

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Over the course of this year, the Central as well as State Governments, along with statutory authorities at both levels, have taken a series of measures to address the COVID-19 epidemic in India. The two legislations that have been used most prominently have been the Disaster Management Act, 2005 (“DMA”) and the Epidemic Diseases Act, 1897 (“EDA”). Powers have been exercised under these laws simultaneously, with significant overlaps and in a complicated sequence of regulations, guidelines, orders, and letters.

Part I of this paper unpacks the constitutional and statutory framework regarding epidemic diseases in India. Through an examination of the relevant constitutional provisions and laws, it considers what an epidemic response should look like. Part II studies the exercise of powers under this framework by different authorities over the last several months, developing a cogent narrative of how India's COVID-19 response has unfolded. Part III draws certain inferences from the previous sections, assessing the dissonance between the constitutional vision and how it manifests in practice, as revealed in the present case.

I. The Constitutional and Statutory framework regarding Epidemic Diseases

A. The constitutional scheme

The Constitution divides legislative and executive power in India between the Centre and the States along the lines provided in the three lists of the Seventh Schedule.² The Centre has exclusive power over Union List subjects, the State over State List subjects and both the Centre as well as the States have powers over Concurrent List subjects. Regarding epidemics, several entries across the three lists are potentially relevant. These include the Union List entries on port quarantine and Inter-State migration and quarantine, the State List entry on public health, and the Concurrent List entry on the spread of infectious diseases from one State to another.³ Additionally, after the 73rd and 74th Constitutional amendments States are also expected to empower third-tier governments on a range of matters including health (although this is not a mandatory requirement).⁴ This is reflected, for instance, in specific State municipal laws which empower the Municipal Commissioner to address the spread of epidemic diseases.⁵

Broadly, all of this suggests that the Constitution envisages a

role for all three tiers of government when it comes to addressing an epidemic. With public health being a State List entry, and the aforesaid Union and Concurrent List entries referring only to ports and inter-State matters, a law that gives a primary role to States and a coordinating role to the Centre would likely reflect the constitutional scheme most accurately. Additionally, such a law should also provide a meaningful role to third-tier bodies. Since executive powers are also divided as per the Seventh Schedule, the manner in which governments exercise their powers when addressing an epidemic should also be grounded in this understanding.

B. Applicable laws

As far as the legal framework is concerned, the most directly applicable legislation to epidemics is the EDA. A colonial-era law, the EDA assigns primary responsibility to State Governments to take measures and prescribe temporary regulations to prevent the spread of any epidemic diseases.⁶ It assigns a relatively limited role to the Centre in this regard, only to inspecting buses, trains, ships, and aircraft and detaining any person travelling in them.⁷

The EDA is a very brief law, and it is not accidental that it contains so little guidance regarding how its powers ought to be exercised. The member who introduced the Epidemic Diseases Bill in the erstwhile Council of the Governor-General of India reportedly said at the time that people must "trust the discretion of the executive in grave and critical circumstances."⁸ While such an extraordinary and unfettered power being vested in the executive may be antithetical to our present constitutional understanding, the EDA remains, to date, the only statute that is directly concerned with epidemics.⁹

Given the limitations of the EDA, it was perhaps unsurprising that it was used in tandem with another law in the present case, i.e., the DMA. In contrast to the EDA, the DMA is a comprehensive legislation that creates various authorities at all three levels, has detailed provisions on roles and responsibilities, and establishes a clear chain of command. There is,

however, no entry in the Seventh Schedule that expressly covers disaster management.¹⁰ As such, the DMA can only be traced to the Union List entry on residuary powers.¹¹

This background is relevant, and should ideally have informed the manner in which these laws were operated in practice in the context of COVID-19. Other limitations aside, the EDA remains the primary law on epidemics in India, and any use of the DMA, a general law on disasters enacted under Parliament's residuary powers, should be cognizant of this. Moreover, the fact that the EDA gives primacy to the role of State Governments and assigns a supplementary role to the Centre is in keeping with the spirit of the constitutional scheme as aforesaid.

II. Exercise of powers under the DMA and EDA

A. Initial State-led response

The States initially led the domestic response to COVID-19. On March 11 2020, Karnataka became the first State to exercise its powers under the EDA by issuing the 'Karnataka Epidemic Diseases, COVID-19 Regulations, 2020'.¹² Several States followed Karnataka's lead over the next ten days or so, including Haryana, Maharashtra, and Kerala, issuing regulations for testing, quarantine, penalties, etc. Interestingly, this was in keeping with the Centre's position at the time. The Union Ministry of Health and Family Welfare ("MoHFW") was then advising States to address the spread of COVID-19 by invoking their powers under the EDA.¹³ These regulations also empowered the district administration to implement containment measures within their jurisdiction if COVID-19 cases were reported therein. The nature and extent of these measures were left to the judgment of the district authorities, with the regulations themselves only containing an illustrative list of measures including sealing, closure of schools, and banning vehicular movement.

Apart from the district administration as aforesaid, which includes administrative officers

such as the Municipal Commissioner or the District Magistrate, elected local governments at the third tier were also actively involved in some areas. In Delhi, for instance, local bodies made it mandatory for markets, hotels, and malls to set up sanitation points for washing hands, in the exercise of their powers under their municipal law.¹⁴ Therefore, in this first stage of domestic measures against COVID-19, the response was led by State Governments, but with significant involvement of governments and authorities at the third tier as well. The participation of the third tier was not just in terms of implementation either, but it was also afforded a degree of discretion as regards the type of measures to be implemented.

This stage, however, did not last for very long. On March 23 2020, several States issued orders announcing a "lockdown" that would be effective until March 31 2020. Kerala's lockdown order, for instance, imposed wide-ranging and detailed restrictions on numerous matters including public transport and commercial establishments and carved out specific exceptions as well.¹⁵ A perusal of some of these orders indicates that the States were not completely clear about the source of the power that they were exercising in order to issue these lockdowns. Most of the orders state that they had been issued in exercise of the powers conferred under Section 2 of the EDA "read with all other enabling provisions" of the DMA, with specific provisions of the latter not being identified. Another noteworthy feature about these State lockdown orders is that they empowered the district administration only to the extent of enforcing and implementing these orders, including through the use of Section 144 of the Code of Criminal Procedure.¹⁶ This can be contrasted with the previous stage, where district authorities had a degree of discretion as aforesaid.

C. The Centre assumes complete control

Almost immediately after the State lockdown orders, the Centre drastically changed its stance. From advising States to use their powers under the EDA, the Centre, acting under the DMA and reportedly without consulting the States,¹⁷

unilaterally imposed a sweeping lockdown across the country from March 25 2020 to April 14 2020 ("Lockdown-1"). This decision was taken by the National Disaster Management Authority, which is headed by the Prime Minister, and its order cited a "need for consistency in the application and implementation of various measures across the country".¹⁸ This was followed by a detailed set of guidelines issued by the Union Ministry of Home Affairs ("MHA"), which again specified a wide range of restrictions and specific exceptions.¹⁹

The Home Secretary wrote to all the State Chief Secretaries on the same day, asking them to ensure strict implementation of the Lockdown-1 guidelines.²⁰ This letter asked States to send daily reports regarding implementation to the MHA so that it could monitor the same. As for the third-tier, district authorities were merely asked to ensure implementation of the guidelines in their jurisdictions.

Therefore, at the beginning of this stage, as outlined above, the Centre had exercised its powers under the DMA in a manner that sought to bring about consistency in the COVID-19 measures being undertaken in every State and district across the country. In other words, just as the issuance of State lockdown orders saw States taking away the limited discretion that was earlier vested in district authorities; the third stage began with the States' discretion being overridden by the Centre.

On their part, the States attempted to implement the MHA guidelines for Lockdown-1, as well as for subsequent lockdowns, through various means. Among the States that had already imposed EDA lockdown orders, some of them extended the dates of those lockdowns as well, in keeping with the Centre's lockdown orders.²¹ In some cases, in addition to this, the State-level DMA authorities also issued complementary orders for implementing the MHA guidelines.²²

As highlighted above, the MHA intended to monitor the implementation of its guidelines by the States. Letters written by the Home Secretary to the State Chief Secretaries on March 31, 2020,

and April 12, 2020, reveal the extent to which States were expected to toe the Centre's line during Lockdown-1. The first letter observed that some States were allowing exceptions beyond what was permitted in the MHA guidelines, and stated that this amounts to a "violation" of the guidelines.²³ States were asked to implement the same "in letter and spirit". The second letter noted a contrasting situation, where some States were imposing restrictions with respect to activities that were permitted under the MHA guidelines.²⁴ The MHA disapproved of this as well, and the letter once again asked for strict observance of the guidelines. This meant that, in Lockdown-1, States had no discretion whatsoever with respect to COVID-19 measures; they could neither reduce nor increase the number of restrictions imposed by the Centre.

D. A gradual increase in State discretion

In Lockdown-2, which was from April 15 2020 to May 3 2020, the Centre changed its stance again. The MHA guidelines for this lockdown expressly clarified that while States could not dilute the instructions and would have to enforce them strictly, they could impose stricter measures if required.²⁵ This represented a marginal increase in the level of discretion afforded to the States by the Centre. However, Lockdown-2 also saw the Centre constituting "Inter-Ministerial Central Teams".²⁶ These teams were asked to go to certain districts in the States of West Bengal, Maharashtra, Rajasthan, and Madhya Pradesh to assess compliance with MHA guidelines. They were also empowered to give directions to State authorities and were asked to report back to the Centre. This reveals the extraordinary degree of oversight that the Centre continued to exercise during this period.

This policy of permitting stricter State measures compared to the MHA guidelines, but barring any dilution of the said guidelines by States, was continued into Lockdown-3 (May 4 2020 to May 17 2020). The MHA guidelines for this lockdown provided for the categorisation of districts across the country as Green, Orange, or Red Zones, depending on their COVID-19 risk profile (in ascending order of risk).²⁷ The MoHFW was to

share the list of districts falling within each of these categories with the States. However, States were given the power to add districts to the Orange and Red Zones. However, they were expressly barred from 'lowering' the MoHFW's risk classification of any district. Within the Orange and Red Zones, State and district authorities were to identify 'Containment Zones' based on MoHFW guidelines.

Lockdown-4 (May 18 2020 to May 31 2020) saw States being granted even more discretion. For all areas except Containment Zones, movement of vehicles within the State would be as decided by the States themselves, and inter-State movement of vehicles would take place with the mutual consent of the concerned States.²⁸ Additionally, the delineation of Green, Orange, and Red Zones would now be as decided by States, taking into consideration MoHFW parameters.

Following Lockdown-4, the next set of MHA guidelines, covering the period from June 1 2020 to June 30 2020 ("Unlock-1", as per the guidelines), provided for a phased reopening for all areas except Containment Zones.²⁹ These guidelines also allow States to impose additional restrictions "based on their assessment of the situation", but do not permit any dilution of the guidelines. Despite this, the extent of central micro-management remains remarkable. For example, the guidelines for Unlock-1 not only specify the States' roles, but also painstakingly demarcate distinct roles for district authorities: Containment Zones are to be demarcated by district authorities as per MoHFW guidelines, adjacent 'Buffer Zones' have to be identified by States, and restrictions within these Buffer Zones may be put in place by district authorities as considered necessary.

However, the above account does not mean that State discretion uniformly increased from Lockdown-2 onwards. One example of a change in the opposite direction can be seen in the context of special trains for migrant workers. Lockdown-2 guidelines were amended on April 29 2020 and May 1 2020 to allow stranded migrant workers to return to their home States through special trains and other means.³⁰ States

were asked to develop standard protocols for sending and receiving such persons, and this would involve consultation and mutual agreement, with the Union Ministry of Railways (“MoR”) coordinating with States. After some issues in implementation,³¹ a new Standard Operating Protocol was issued by the MHA for special trains on May 19 2020, i.e. during Lockdown-4.³² Now, train schedules, including stoppages and destinations, would simply be communicated by the MoR to all concerned States, who would have no choice but to make suitable arrangements accordingly.

III.A disjointed federation

Surveying the various response measures taken by governments and authorities acting under different laws over the past few months reveals not just several upheavals in policy, but also certain discernible trends. The Centre’s initial position was to encourage States to exercise their EDA powers. States obliged but allowed district authorities to exercise a degree of discretion in determining response measures. As the situation worsened, however, multiple States invoked powers under the EDA as well as the DMA to enter into lockdown. The Centre soon repeated this at its level, imposing a blanket lockdown in all States and districts of the country. Lockdown-1 was marked by complete central control, and all successive lockdowns, for the most part, ceded more and more power to States. While Lockdown-1 almost certainly caught the States off-guard, they adapted the use of their EDA and DMA powers in order to ensure consistency with the Centre’s guidelines and to implement the same. Wherever this was lacking, the Centre was quick to intervene and demand strict compliance, going to the extent of sending Ministers to States to monitor implementation.

As the analysis in Part I showed, a constitutionally grounded response to a nation-wide epidemic necessarily involves active participation by all levels of government, with a primary role being assigned to State Governments. The Centre’s exercise of powers under the DMA should have ideally been along these lines. Instead, it interpreted its DMA

powers in almost the broadest possible sense, setting itself the objective of achieving absolute consistency across the country; albeit with some course correction attempted later. Not only was this at odds with the federal constitutional scheme, but it also was almost certainly not the most efficient way of tackling this crisis either.

In the Constituent Assembly, Dr B.R. Ambedkar had to defend against complaints that the Centre-heavy Constitution had reduced States to the status of municipalities. He did so by highlighting that under the Constitution, the States are co-equal with the Centre in the sense that both independently derive their powers from a common source, i.e. the Constitution itself.³³ In other words, States are not dependent on the Centre for their legislative or executive authority. While how this works out in practice obviously depends upon particular constitutional and statutory provisions, the over-arching point is that States should not be seen as mere branch offices that are fit only to carry out the Centre’s orders. This particularly holds true in the case of an epidemic that is nation-wide in its application but varies significantly from region to region.³⁴

In a three-tier federal system, the charge of over-centralisation does not apply exclusively to the Centre either. States also concentrate powers in their hands even though there is considerable merit in enabling third-tier governments to respond effectively in their jurisdictions. For responsive and efficient governance, it is essential that all levels of government have a clear sense of their roles and responsibilities, and are allowed and equipped to fulfil them. Unfortunately, as India’s COVID-19 response amply demonstrates, the potential of its multi-level polity remains under-utilised.

Notes

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²See Articles 73, 162, and 246, Constitution of India.

³Entries 28 and 81 in List I, Entry 6 in List II, and Entry 29 in List III, Seventh Schedule, Constitution of India.

⁴Article 243G read with Entry 23, Eleventh Schedule, Constitution of India; Article 243W read with Entry 6, Twelfth Schedule, Constitution of India.

⁵See Section 479, Kolkata Municipal Corporation Act, 1980.

⁶Section 2, Epidemic Diseases Act, 1897.

⁷Section 2A, Epidemic Diseases Act, 1897.

⁸Rai, S. K. (2020, April 2). How the Epidemic Diseases Act of 1897 Came to Be. *The Wire*. [Read here](#)

⁹In 2017, a Public Health (Prevention, Control and Management of Epidemics, Bioterrorism and Disasters) Bill was drafted but was never tabled in Parliament.

¹⁰Commissions have recommended in the past that a new legislative entry on disaster management should be inserted in the Seventh Schedule. Report of the National Commission to Review the Working of the Constitution. (2002). para 8.2.14. [Read here](#). Third Report of the Second Administrative Reforms Commission. (2006). Crisis Management: From Despair to Hope. para 4.1.5. [Read here](#).

¹¹Entry 97, List I, Seventh Schedule, Constitution of India.

¹²Government of Karnataka. (2020). Notification. (HFW 54 CGM 2020). [Read here](#)

¹³Ministry of Health and Family Welfare, Government of India. (2020). High-level Group of Ministers reviews current status, and actions for prevention and management of COVID-19. [Read here](#)

¹⁴Section 157, Delhi Municipal Corporation Act, 1957; (2020, March 16). COVID-19: Local bodies impose health regulations in Delhi.

Outlook. [Read here](#).

¹⁵Government of Kerala. (2020). Order. (G.O. (Ms) No. 49/2020/GAD). [Read here](#)

¹⁶This provision empowers the District Magistrate to direct any persons residing in a particular area to abstain from certain acts if the magistrate feels that such direction is likely to prevent danger to human life or health.

¹⁷Nair, S. K. (2020, March 31). Coronavirus: PM should have consulted State govts. before announcing lockdown, says Chhattisgarh CM Bhupesh Baghel. *The Hindu*. [Read here](#)

¹⁸See Section 6(2)(i), Disaster Management Act, 2005; National Disaster Management Authority, Government of India. (2020). Order. (1-29/2020-PP (Pt. II)). [Read here](#).

¹⁹See Section 10(2)(I), Disaster Management Act, 2005; Ministry of Home Affairs, Government of India. (2020). Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for containment of COVID-19 Epidemic in the Country. (40-3/2020-DM-I(A)). [Read here](#)

²⁰Home Secretary, Government of India. (2020). [Read here](#)

²¹See Government of Himachal Pradesh. (2020). Order. (HFW-A-A(3)1/2020). [Read here](#)

²²See Section 24(e), Disaster Management Act, 2005; Government of Himachal Pradesh. (2020). Order. (Rev (DMC) (C) 20-2/2020 – COVID 19). [Read here](#)

²³Home Secretary, Government of India. (2020). [Read here](#)

²⁴Home Secretary, Government of India. (2020). [Read here](#)

²⁵Ministry of Home Affairs, Government of India. (2020). Consolidated Revised Guidelines on the measures to be taken by Ministries/

Departments of Government of India, State/UT Governments and State/UT Authorities for containment of COVID-19 in the country. (40-3/2020-DM-I(A)). [Read here](#)

²⁶See Section 35, Disaster Management Act, 2005; Ministry of Home Affairs, Government of India. (2020). Order. (40-10/2020-DM-I(A)). [Read here](#)

²⁷Ministry of Home Affairs, Government of India. (2020). New Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/UT Governments and State/UT Authorities for containment of COVID-19 in the country for the extended period of National Lockdown for a further period of two weeks with effect from May 4, 2020. (40-3/2020-DM-I(A)). [Read here](#)

²⁸Ministry of Home Affairs, Government of India. (2020). Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/UT Governments and State/UT Authorities for containment of COVID-19 in the country upto May 31, 2020. (40-3/2020-DM-I(A)). [Read here](#)

²⁹Ministry of Home Affairs, Government of India. (2020). Guidelines for Phased Re-opening (Unlock 1). (40-3/2020-DM-I(A)). [Read here](#)

³⁰Ministry of Home Affairs, Government of India. (2020). Order. (40-3/2020-DM-I(A)). Retrieved from https://www.mha.gov.in/sites/default/files/MHAordernew_29042020.PDF; Ministry of Home Affairs, Government of India. (2020). Order. (40-3/2020-DM-I(A)). [Read here](#)

³¹Daniyal, S. (2020, May 8). Fearing the spread of infection, Bengal pays only lip service to the idea of getting back its migrants. Scroll.[Read here](#)

³²Ministry of Home Affairs, Government of India. (2020). Standard Operating Protocol (SOP) for movement of stranded workers by train. (40-3/2020-DM-I(A)). [Read here](#)

³³Ambedkar, B.R., Constituent Assembly

Debates. (1949). [Read here](#)

³⁴See also James, K. (2020, April 3). Covid-19 and the Need for Clear Centre-State Roles. Vidhi Blog. [Read here](#)