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Rights, Restrictions, and the Rule of Law

COVID-19 and Women
Street Vendors



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Rights, Restrictions, and the Rule of Law

COVID-19 and Women Street Vendors

Sharan Bhavnani, Prashant Narang, and Jayana Bedi¹

Introduction

Street vendors constitute nearly two percent of India's urban population (Bhowmik 2005). Together vendors play a pivotal role in the urban economy by providing access to essential goods. Until 2014, no national legislation existed to help regularise their informal economy. This often led to rent-seeking actions by local authorities or police officials (Ministry of Housing and Urban Affairs 2011). The Street Vendors Act (hereafter, referred to as The Act), passed in 2014, marked a watershed moment in the fight for the right to dignified livelihoods in India. The Act sought to formalise street vending through a rights-based approach. However, up until 2019, state governments had not implemented the law, rendering it toothless (Centre for Civil Society 2019).

Most street vendors have since continued to face the same hardships and harassment at the hands of the local authorities. Among them, particularly hard hit are roughly one million women street vendors. These women bear the burden of not just economic hardships, but also gender-based violence and other oppressive social norms (Chakraborty and Ahuja 2021). With the onset of COVID-19, and responding to the

World Health Organization's (WHO) global call to take "urgent and aggressive action" (WHO 2020), India prepared to curtail a broad gamut of rights in the name of public health. However, WHO noted that "countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights" (WHO 2020).

To strike this "fine balance", we must closely guide and limit the powers of the executive. However, empowered by the Parliament, the executive ordered closure of markets, imposed curfews, and prohibited movement. These COVID-19 restrictions beset vendors with additional adversities. Already living precarious lives, women vendors especially moved closer to poverty and severe economic and social hardships (Majithia 2020).

This policy brief evaluates the bearing of COVID-19 restrictions on women street vendors. In particular, it outlines: i) the approach adopted by the government to regulate street vending amidst the pandemic; (ii) areas of excesses and its impact on vendors; and (iii) international best practices that could guide the government's future approach in crises.

1. The findings of the brief are drawn from a forthcoming paper titled 'Assessing the Impact of COVID-19 Restrictions on Women Street Vendors in India: Overcoming Policy and Legal Challenges by Strengthening the Rule of Law' authored by Sharan Bhavnani, Prashant Narang, and Jayana Bedi.



COVID-19 restrictions: Documenting Violations of Civil and Economic Liberties

One of the first responses of the Union Government to the pandemic was notifying COVID-19 as a 'disaster' under the Disaster Management Act (DMA), 2005. This declaration empowers the Ministry of Home Affairs (MHA) to direct state governments and curtail freedoms in order to tackle health crises. These restrictions, though, severely affected the livelihoods of street vendors (Bhavnani, Narang and Bedi *forthcoming*)

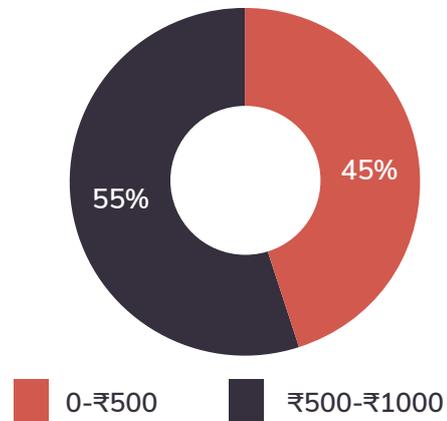
On 28 March 2020 the National Disaster Management Authority (NDMA), taking into account the possible impact of COVID-19 restrictions on the poor and vulnerable in India, instructed states to:

"Adopt a humane approach in dealing with the public, particularly those who are left adrift by the lockdown. Enforcement of the laid down restrictions must be tempered with compassion and a sense of duty of care for our citizens."

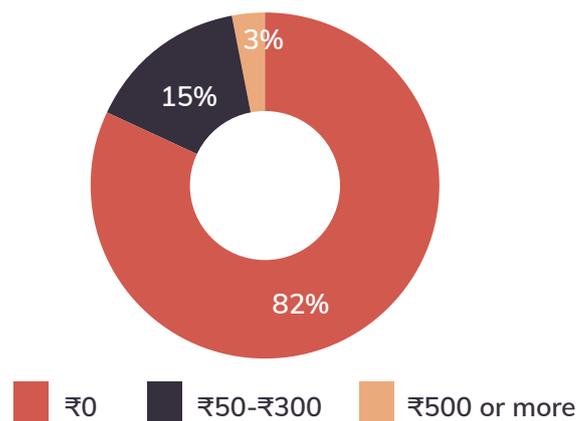


Earning of Women Street Vendors

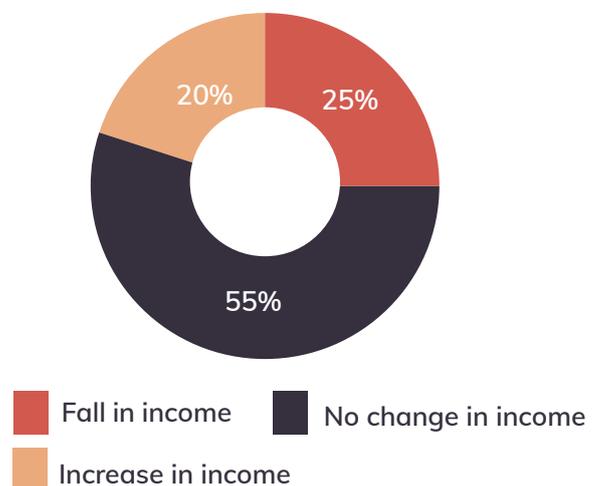
Before lockdown
(March 2020)



During lockdown
(March-July 2020)



After lockdown was lifted*
(Post July 2020)



*From pre-pandemic income levels

However, police brutality was rampant despite this instruction (Purkayastha 2020). Our recent study documents the challenges faced by women street vendors due to the COVID-19 restrictions. This documentation was based on interviews with 40 women street vendors from Delhi and Rajasthan (Bhavnani, Narang and Bedi *forthcoming*).

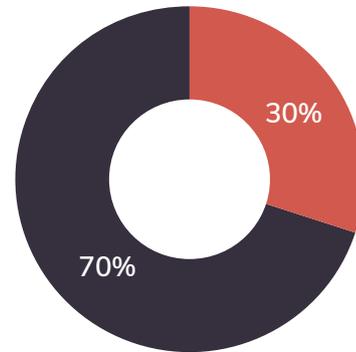
COVID-19 restrictions resulted in a sharp fall in income

Prior to the pandemic, 45 percent of the women vendors interviewed earned up to Rs 500 a day, whereas 55 percent earned between Rs 500 and Rs 1000 per day. During the pandemic-induced lockdowns, 82 percent of the women reported earning no income, while 15 percent reported earning between Rs 50 and Rs 300 a day. Even after restarting operations in July 2020 (when economic activity was permitted to resume), 25 percent of the women suffered a fall in their income. Of the women interviewed, 37.5 percent were the sole earners for their family. Moreover, nearly 87.5 percent of the women felt that both men and women street vendors faced the same challenge—immense financial distress.

Arbitrary application of orders by public officials

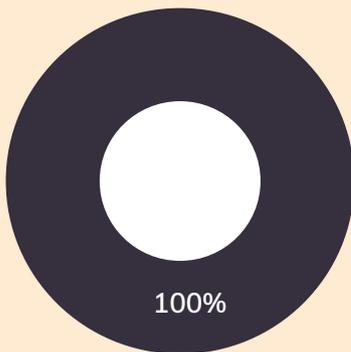
Almost a third (30 percent) of the respondents sold essential goods such as fruits and vegetables. Even though various central and state government orders permitted the sale of essential goods, none of the women vendors were able to continue vending from March to July 2020. Even after July, nearly 16 percent of those selling essential goods reported that they were restricted by local officials from conducting business. This is reflective of a larger trend wherein “over 45% of the 139 individuals [street vendors and shopkeepers] accused [of violating COVID-related orders] were providing essential services and goods” (CPA Project 2020).

Nature of goods sold by women vendors

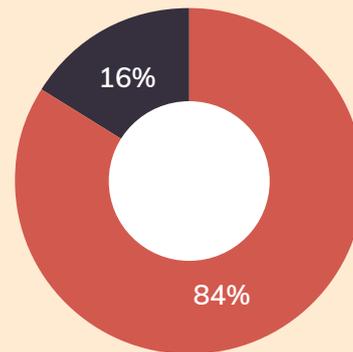


Restriction on women vendors selling essential goods

During lockdown



Post July



Harassment by public officials

Of those who continued street vending after July 2020, 80.55 percent reported that they faced restriction in some form or the other. Executive orders restricted the time of operation and number of people allowed at each stall. Most executive orders did not provide a clear justification for allowing vendors to set up stalls only on particular days and during set time periods. Recently, courts have labelled classifications like these as “arbitrary” (In Re Dinthar Incident Aizawl v. State of Mizoram).

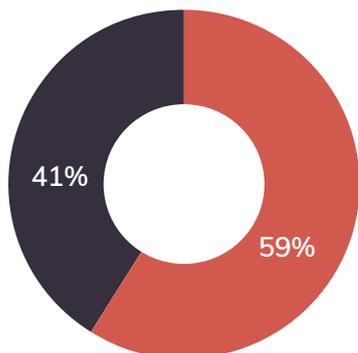
Nearly 59 percent of the interviewees reported that, apart from these orders, additional arbitrary restrictions were imposed by the police or local municipal officials. “They do not even allow us to set up our shop until we pay them”, said one street vendor. Nearly 27.58 percent reported that their goods were arbitrarily seized under the garb of violating COVID-19 norms, and that they would often have to bribe officials to recover their goods.

A few even mentioned, “my goods were destroyed by local officials”. This was reportedly done out of spite when the vendors could not pay the bribes demanded.

In 2020, “over 75% of all street vendors...were accused primarily on the grounds that they had opened their shop or continued their trade and gathered crowds, increasing the risk of spreading the virus. During the first and second lockdown (23 March-2 April), over 50% of street vendors’ goods, carts or two-wheelers used for trade were confiscated by the police” (CPA Project 2020).

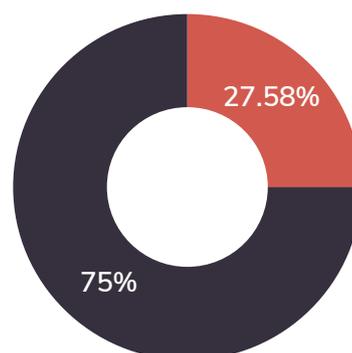
These interviews reveal how restrictive orders and abuse of power have a disproportionate impact on the poor. Together, they add to the financial distress of the informal economy and may exacerbate the socio-economic vulnerabilities faced by women vendors (Kochhar 2021).

Arbitrary restrictions on ground by public officials



■ Reported of arbitrary restrictions on sale of goods
■ Did not report of any arbitrary restriction

Arbitrary seizures by public officials



■ Reported of arbitrary seizure of goods
■ Did not report of arbitrary seizure

What went wrong in the government's response to the pandemic?

Unlike countries such as New Zealand, Sweden, and Taiwan, India has not enacted any specific legislation to tackle the COVID-19 pandemic. Instead, the executive in India created a complex "web of orders" (Bhatia 2020), under three legislations. These included: the DMA, 2005, the Epidemic Diseases Act (EDA), 1897, and the Code of Criminal Procedure, 1974. All actions undertaken by the government to control the outbreak are based on these three legislations.

These legislations do not provide any safeguards to prevent arbitrary conduct or misuse of powers on part of the executive. Below we list four principles that play a key role in promoting the Rule of Law and protecting individual rights (Bedi and Narang forthcoming). We find that the DMA and EDA fare poorly on all four aspects.

Guidance on discretion

An executive action involving discretion must be guided by certain criteria. Without this, it may be difficult to assess whether a particular administrative decision is "bona fide and based on merits and proper considerations or is mala fide and motivated by some improper and corrupt consideration" (Halsbury's Laws of India 2019). In case discretion is unguided, it may open room for corruption, arbitrariness, and misuse of powers. Neither the EDA nor the DMA provide any guidance on how discretion must be exercised by the executive (Bhavnani, Narang and Bedi forthcoming). For instance, Section 2 of the EDA allows a state government to (Section 2 of the EDA 1897):

"take...such measures and... such temporary regulations to be observed...as it shall deem necessary to prevent the outbreak of such disease."

This mandate is not accompanied with any guidance on either the form of orders that can be issued or their subject matter.

Procedural safeguards

Any government action which deprives an individual of their life, liberty, or property, must follow due process. At the minimum, this includes: getting an advance notice of such a government action; an order detailing the reasons for undertaking the particular action; a reasonable opportunity to be heard before such a deprivation is enforced; and a mechanism to challenge the executive's decision (Minattur 2015; Chauhan 1995). The DMA and the EDA, however, do not provide these safeguards.

Principles of proportionality and nexus

Principles of proportionality help ensure that "when the government acts, the means it chooses should be well adapted to achieve the ends it is pursuing" (Mathews 2017). However, some of the orders issued under the EDA and the DMA, to control the spread of the virus, were disproportionate. For instance, the Odisha Government banned the use of all private vehicles as a curfew measure. This was eventually questioned by the High Court on grounds of proportionality (Mishra 2020).



Control over delegated legislation

Since rules and orders are not made by elected representatives, or subject to close scrutiny, the legislature must ensure that these do not run counter to the interests of the people. The parent legislation must lay down guidelines on the subject matter that rules and orders can regulate. The DMA and the EDA do not provide any such guidance to the executive. Consequently, the orders issued under these laws provide sweeping powers to district officials, who are further empowered to issue orders.

Both the DMA and the EDA are loosely worded and fail to introduce adequate checks on the powers of the executive. In the absence of any clear legislative guidance on tackling a health crisis, the executive dealt with the issue through a series of orders and clarificatory orders under the DMA and the EDA.

States responded in two ways. Some states like Delhi, Maharashtra, and West Bengal, issued regulations and orders under the EDA. Other states like Rajasthan and Karnataka introduced their own epidemic disease laws. These state level laws continue to grant expansive powers to the executive, and do not institute safeguards to protect the rights of individuals against abuse of power. Finally, even though the EDA requires the regulations enacted under it to be 'temporary', these regulations do not have an end date. Regulations under the EDA grant government officials extraordinary powers and limit the freedoms of individuals. An end date checks against a prolonged suspension of rights and helps review the need for these regulations based on the prevailing circumstances.

Executive orders passed by the Union and state governments

The orders passed by the Union and state governments were fraught with challenges.

Under an order dated 26 March 2020, the MHA allowed the suppliers of essential goods to operate with prior approval from the local authorities. However, the order did not mention the time period within which approval will be granted, the approval process, or any mechanism for appeal in case a supplier's application is denied. This leaves scope for the local authorities to implement it arbitrarily.

A study of executive orders passed by the governments in states that were most affected during the first wave of COVID-19—that is, Delhi, Maharashtra, Rajasthan, Karnataka, and West Bengal—reveals the following trends (Bhavnani, Narang and Bedi *forthcoming*):





It is difficult to establish clear lines of accountability within the government because multiple authorities were involved in tackling the pandemic. In some states, like West Bengal, this led to contradictory orders. While one order permitted vendors selling essential goods to operate, other orders disallowed such sales.



Most orders are vague on the nature of penalties applicable in case individuals violate the mandate. These orders use broad language such as "any other legal provisions as applicable" to prescribe penalties, compromising legal clarity and certainty. Some orders, such as those in Rajasthan and West Bengal, do not specify any penalties for breach.



No order, including ones that restricted the rights of individuals, was tabled before the Parliament. Neither the DMA nor the EDA mandate that orders be reviewed by the legislature.



Both the DMA and the EDA are silent on the mechanism to appeal against decisions of the executive. As a result, the only option for individuals adversely affected by executive orders is to approach the courts.

What can we learn from other countries?

Grogen and Weinberg (2020) list key principles that must be part of a country's legal framework while responding to a public health crisis. Three principles that India is yet to incorporate are listed below (Bhavnani, Narang and Bedi *Forthcoming*).

Legal certainty and clarity: New Zealand's Public Health Response Act

Laws must ensure legal certainty and clarity in public communication by being clear and prospective. For instance, New Zealand's COVID-19 Public Health Response Act 2020, emphasised legal specificity to be at the core of state action. Sections 8 of the Act lay down the prerequisites for executive orders. This includes the conditions under which COVID-19 orders can be brought in force (such as when an epidemic notice is under force).

Sections 14 and 15 of the Public Health Response Act prescribe a specific form for these orders. For instance, they mandate that the order:

- Mentions the area to which it applies and the date when it comes in force;
- Be published in the Gazette 48 hours before it comes in force (except under exceptional circumstances);
- Expires within a month, unless revoked before that or extended.

Respecting international human rights norms: Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights

Governments should only introduce

"measures which are necessary, proportionate, temporary in nature, and respect human rights and the principle of legality".

These principles form the heart of the Rule of Law, and are reflected in international legal norms such as the "Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights", which was adopted by the UN ECOSOC in 1984 (Donald and Leach 2020). Under these principles, nations that restrict individual rights to tackle health crises must ensure that the restrictions are: carried out in accordance with the law; specifically and strictly necessary to tackle the crises; the least restrictive and intrusive; not arbitrary or discriminatory in their nature or application; limited in their duration; subject to review; and lastly, respectful of human dignity.



Standing committee to scrutinise delegated legislation: the case of Australia

Countries must institute and protect oversight mechanisms to “enable processes to challenge the application of emergency regulations”. To ensure oversight, delegated laws ought to be subject to regular Parliamentary approval and scrutiny.

The Australian Upper House has a Standing Committee to Scrutinise Delegated Legislation (Senate Committee). The Committee produces a weekly report called the ‘Delegated Legislation Monitor’, and tables it before the Senate. This report assesses delegated legislation on ten key

parameters (Senate Standing Committee 2019) such as whether the order complies with the law or trespasses liberties unduly, contains matters that need parliamentary enactment, was made after consultation with affected parties, and is drafted in an unclear manner.

The Senate Committee conveys its comments and recommendations to the relevant Minister or Authority. All communication between the Committee and executive is recorded and published. Further, every undertaking given by the executive is published. Lastly, the Senate Committee tracks the action taken by the executive after giving an undertaking. All these reports and responses are made easily accessible for public scrutiny (Parliament of Australia).

This detailed process enables the Senate Committee to perform its duties effectively. Similar mechanisms also exist in the United Kingdom and New Zealand where Committees were specifically constituted to review COVID-19 related legislation and delegated legislation (Westminster Foundation for Democracy 2020).

Learning from, and incorporating such mechanisms, would make the Indian Parliament’s role robust in preventing executive overreach.



How can we apply these learnings to our country?

The expansive language of the DMA and the EDAs has allowed the executive to act arbitrarily. However, there are multiple ways in which the legislature can check the powers of the executive to uphold the Rule of Law. Below, we present some recommendations based on international best practices outlined.

Recommendation 1: EDA and DMA should offer proper guidance for executive orders

The Indian response should adopt specific legal language rather than broad and vague legal phrases. Section 2 and 2A of the EDA must be amended to provide for the following:

- A list of the subject matter that the executive may regulate and the nature of restrictions the executive can put in place;
- Mandate executive orders to mention the date of force, area of applicability, and the section and sub section of the Act under which powers are exercised.

Section 35 and 38 of the DMA must be amended to provide for the following²:

2. Section 35 and 38 of the DMA allow the executive to undertake necessary 'measures', which is defined broadly. However it does not define the legal instruments that may be used to exercise these powers.

- Mandate all orders passed by the Union and state governments to mention the date of force, area of applicability, and the section and sub section of the Act under which powers are exercised.

This will not only help ensure legal clarity in the laws, but also the orders issued under them.

Recommendation 2: EDA and DMA must mandate executive orders passed during emergency to be temporary and undergo Parliamentary review

In New Zealand, legislation allowing the executive certain powers is subject to Parliamentary approval, and contains a sunset clause which repeals the law after two years of enactment (Part 1, Section 3, COVID-19 Public Health Response Act 2020). This has also been observed in Taiwan and Sweden (Chien-Liang 2020; Cameron and Cornell 2020). Such a mechanism does not currently exist in India's legislative framework with regards to COVID-19.

Section 2 and 2A of the EDA grant powers to prescribe regulations to the state and the Union governments respectively. However, the Act does not require these to be laid before the respective legislatures. The EDA must be amended to provide for the following:



- Mandate that rules, which enable and guide executive orders, made under the Act, be placed before the respective legislative body for review and passage;
- Specify a time-limit for such laying and passage;
- Empower the legislature to revoke any rules which it, deems unnecessary to counter health crises;
- Mention the duration after which rules made under it will lapse (unless extended otherwise by the legislature).

Section 77 of the DMA requires only regulations made by the National Institute of Disaster Management to be laid before the Parliament, and not regulations or orders issued by the National Executive Committee. The DMA must be amended to provide for the following:

- Mandate that rules, passed by the National Executive Committee, under the Act be placed before the Parliament;
- Specify a time-limit for such laying and passage;
- Empower the Parliament to revoke any rules which it deems unnecessary to counter health crises;

- Mention the duration after which rules made under it will lapse (unless extended otherwise by the Parliament).

Section 78 of DMA requires regulations made by state governments to be laid before the respective state legislatures. However, the Act does not provide a time-limit for doing so. The DMA must be amended to include this in the law:

- Mention the duration after which rules made under it will lapse (unless extended otherwise by the Parliament).

Recommendation 3: Parliamentary or Standing Committee review must be guided by certain principles

Parliamentary review can take two forms. First, all executive orders that have a bearing on individual liberties must be tabled before the Parliament for consideration. Second, a standing committee be set up for periodically reviewing all executive orders. Further, this review must be guided by a set of principles. These include (Senate Standing Committee 2019):

- Checking whether the order goes beyond the mandate of the Parent Act;



- Checking against arbitrary³ or excessive⁴ restrictions on freedoms (this includes checking whether orders unduly trespass personal rights and liberties);
- Checking against lack of clarity or limited guidance that gives the executive scope for abuse of power (this includes ensuring that penalty for non-compliance is prescribed clearly);
- Ensuring the order allows for review of decisions that affect life, liberty, rights, obligations, and interests;
- Checking whether the order contains matters more appropriate for enactment by the Parliament;
- Whether the order is freely accessible.

India currently has sub-committees under both houses of the Parliament to review subordinate legislation. These sub-committees are empowered

3. Arbitrary restrictions are ones that have no nexus with the overall objective or end goal.

4. Excessive restrictions are more restrictive than necessary to achieve the overall objective or end goal.

to test whether an executive order (Rule 209 of the Rules of Procedure and Conduct of Business in Rajya Sabha):

“Is in accord[ance] with the provisions of the Constitution or the Act pursuant to which it is made; Contains matter which in the opinion of the Committee should more properly be dealt within an Act of Parliament; Whether the order appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made.”

These committees, however, have not made any observations on the COVID-19 specific executive orders. Although a Rajya Sabha Standing Committee noted that the lockdown was sudden, it does not systematically review government orders passed during COVID-19 (Department-related Parliamentary Standing Committee on Home Affairs 2020). Further, the mandate of these committees does not include reviewing subordinate legislation on some of the principles listed above.

Recommendation 4: EDA and DMA must provide a mechanism for appeal against the decisions of the executive

No mechanism to appeal decisions exists in the DMA and the EDA. This prevents any person impacted by orders of the executive authority to seek administrative recourse, leaving only the already overburdened High Courts or the Supreme Court as an option to challenge the restrictions imposed.

The EDA and the DMA must introduce a mechanism of administrative appeal or review.

- This could be to a quasi-judicial or the order-issuing executive body. An instance of this is seen in Section 144(5) and 144(6), Code of Criminal Procedure of India. They permit any magistrate or state government to, either on its "own motion or on the application of any person aggrieved, rescind or alter any order made under this section". The Code further provides guidance in Section 144(7), to "afford to the applicant an early opportunity of appearing before it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall

record in writing the reasons for so doing."

- Another mechanism could be establishing separate administrative courts or tribunals to hear matters emanating from executive orders. Instances of this can be seen in various countries. In New Zealand, the District Courts are specifically empowered to hear Covid-19-related matters emerging from executive action. In Sweden, a separate court is established to hear administrative matters, including executive decisions regarding restricting rights during the pandemic. Similar to Sweden, France has an independent administrative court. In the United States, the Administrative Procedure Act, 1946, guides the executive to establish a structure of quasi-judicial appeals to enable those aggrieved by executive action to seek recourse.

India had previously proposed The Public Health (Prevention, Control and Management of Epidemics, Bio-terrorism and Disasters) Bill, 2017 (hereafter, referred to as the Bill) to tackle public health crises. It sought to incorporate the aforementioned principles of legal clarity, legislative review, and appeal mechanism. The Bill defined terms like "isolation" and "social distancing", which currently remain undefined in law. Section 13 of the Bill articulated a mechanism for the Parliamentary approval of executive orders, and prescribed a time-limit of 30 days for the same. Finally, it attempted to introduce such a procedure for appealing against an executive order. The Bill, however, was not enacted.

Every crisis presents one with the opportunity to prepare better for the future. Similarly, this pandemic has shed light on several international legal norms which India can assimilate to strengthen its own structures. Hopefully, the norms we institute would protect India's impoverished and disadvantaged through any crises in the future.



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