

Failed Preparations and Fatal Denials:

How India's Executive
Contributed to the
Devastation Wrought by
the Second Wave of COVID-19

A Briefing Paper February 2022

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® **Failed Preparations and Fatal Denials:** How India's Executive Contributed to the Devastation Wrought by the Second Wave of COVID-19

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I. INTRODUCTION

The persistence of the COVID-19 pandemic poses ongoing risks to the health and well-being of people in India and globally. The most recent variant of the disease—the Omicron variant was labelled a “variant of concern” by the World Health Organization (WHO) on 28 November 2021.¹ As of 19 January 2022, there were 8,961 reported cases of the Omicron variant in India, of a total caseload of 3,79,01,241, with the National Institute of Epidemiology, Chennai stating that the impact of the variant will only be evident after a lag.²

While India celebrated a milestone of having administered one billion COVID-19 vaccines on 21 October 2021,³ by 3 February 2022, it had fully vaccinated only 52% percent of its population.⁴ This is in sharp contrast to the world’s wealthiest nations, many of whom have now fully vaccinated well over 70 percent of their populations.⁵

It is important to analyze the Indian State’s actions prior to and during the catastrophic second wave of COVID-19 to assess how, in particular, the government responded and draw lessons in more effectively responding to any subsequent waves of the pandemic, while protecting and ensuring the human rights of all people in India. The absence of adequate checks and balances contributed to the lack of preparedness for the second wave of COVID-19 in India.

This briefing paper analyzes the obligations of the Indian executive in terms of the right to health in international and domestic law in the particular context of public health crises produced by the second wave of COVID-19 and COVID-19 response measures. The paper assesses the actions of the executive against international laws and standards concluding that the Indian executive usurped extensive legislative powers in order to respond to COVID-19, effectively disabling the system of checks and balances on executive action, which contributed to the lack of preparedness for the second wave of COVID-19 in India, thereby contributing to the devastation wrought through COVID-19 transmission, sickness and death. The executive effectively assumed emergency powers without declaring a formal state of emergency. It implemented, with little or no notice, strict lockdowns and other measures which were not subjected to either judicial legislative review or oversight. In the context of the second wave of COVID-19, the Indian Supreme Court as well as several Indian High Courts have wielded their power of *suo moto* judicial review (review taken on their own initiative). This has involved conducting what the Supreme Court has described as “dialogic judicial review” of executive

¹ World Health Organization, Update on Omicron, 28 November 2021, available at <https://www.who.int/news/item/28-11-2021-update-on-omicron>.

² “Covid-19 cases hit 8-month high in India, full impact weeks away” Reuters, LiveMint, 19 January 2022, available at <https://www.livemint.com/news/india/covid19-cases-hit-8-month-high-in-india-full-impact-weeks-away-read-here-11642583676312.html>.

³ “India crosses 100-crore COVID-19 vaccination doses milestone” The Hindu, 21 October 2021, available at <https://www.thehindu.com/news/national/total-covid-19-vaccine-doses-administered-in-india-crosses-100-crore-milestone/article37102911.ece>.

⁴ “Tracking Coronavirus Vaccinations Around the World”, New York Times, last seen 22 January, 2021, available at <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html>.

⁵ Id. As of 22 January, 2022, United Kingdom has fully vaccinated 72% of its population, Australia and Canada have fully vaccinated 79% of their populations.

decisions and policies by holding continuous hearings on a range of issues.⁶ For instance, both the Supreme Court and High Courts issued orders requiring authorities to ensure and enhance the supply of oxygen, essential drugs, medical equipment (such as hospital beds X-Ray machines, CT Scan machines), COVID-19 testing facilities and services, and medical personnel. The Supreme Court also issued orders regarding coordination among state governments and central government, asking the government to engage in dialogue with other parties as well as the court.

This paper is limited to analysis of executive and judicial action taken to respond to COVID-19 and specific actions taken by authorities leading up to and during the second wave between March and May 2021 and does not investigate the first wave of COVID-19 in India or subsequent transmission and measures since May 2021. It is focused on emblematic cases and orders of the High Courts and the Supreme Court and does not contain a comprehensive analysis of all judicial responses to COVID-19 during this period.

Overall, the ICJ in this briefing paper shows that the Indian executive failed to observe domestic law and its international human rights law obligations in respect of the right to health of all people during the second wave of COVID-19. Broadly, the Indian Government, even though it assumed significant powers under laws such as Disaster Management Act and Epidemic Diseases Act, failed to fulfil its international obligation to develop a strategy and a plan of action to address the health concerns of the whole population in relation to the potential second wave of the COVID-19 pandemic.⁷

The ICJ concludes that the Indian Government failed to ensure compliance with India's international legal obligations to make maximum use of its available resources to address the public health crisis as it did not ensure adequate supply of oxygen, essential medicines and hospital infrastructure. The Government failed to establish or put into effect an effective coordination mechanism to ensure distribution of critical health-related resources, including in particular oxygen supply, as needed.

Private actors also reportedly engaged in practices such as hoarding, black-marketing and overcharging. By failing to take effective measure to prevent or control these practices, the Indian Government failed to fulfil its obligation to ensure equitable distribution of health facilities and services.

Finally, the Indian Government engaged in violations of rights to freedom of expression and information by using the Information Technology Act to censor

⁶ See Gautam Bhatia, COVID-19 and Courts Symposium: India: Covid-19, the Executive, and the Judiciary, *Opinio Juris*, available at <http://opiniojuris.org/2021/07/26/covid-19-and-courts-symposium-india-covid-19-the-executive-and-the-judiciary/>; Supreme Court of India, In Re: Distribution Of Essential Supplies And Services During Pandemic, 2021, *Suo Moto Writ Petition (Civil) No. 3 of 2021*, available at https://www.livelaw.in/pdf_upload/in-re-distribution-of-essential-supplies-and-services-during-pandemic-april-30-392778.pdf.

⁷ See International Commission of Jurists, "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" September 2020, available at <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

information critical of its handling of the pandemic, alleging that the publication and dissemination of such information is against public order.⁸

II. INDIAN STATE'S OBLIGATIONS TO ENSURE RIGHT TO HEALTH

India acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979.⁹ Article 12 ICESCR provides for the right to the highest attainable standard of physical and mental health, including that :

"The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."¹⁰

It follows that India is required to take necessary measures to prevent, treat and control COVID-19 as well as create conditions to ensure medical service and medical attention for those sick with COVID-19.

The UN Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body for the ICESCR, has set out in detail what this obligation contains in its General Comment 14.¹¹ The CESCR affirms States Parties are obliged to respect, protect and fulfil the right to health. The obligation to **respect** requires States to refrain from interfering with people's right to health. The obligation to **protect** requires States to take measures to prevent third parties from interfering with person's rights to health. The obligation to **fulfil** requires States to adopt appropriate measures – including legislative, administrative, judiciary, budgetary among others - to ensure the full realization of right to health.¹²

While some of these obligations may be achieved progressively, others obligations are of "**immediate effect**". These include, broadly the obligations of:

1. **Taking Steps:** Deliberate, targeted, concrete steps towards full realization of right to health.¹³ This includes legislative, judicial, administrative, financial, educational and social measures;¹⁴

⁸ Information Technology Act, Section 69A.

⁹ OHCHR, UN Treaty Body Database, available at:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=IND&Lang=EN.

¹⁰ Article 12, International Covenant on Economic, Social and Cultural Rights.

¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (article 12 of the Covenant), UN Doc. E/C.12/2000/4, (2000).

¹² Id, para 33. See also International Commission of Jurists, Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level, No.8, (2014) available at:

<https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no8-Publications-Practitioners-guide-2014-eng.pdf> ("ICJ ESCR Practitioners Guide"), p 53.

¹³ Id, para 30.

¹⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), para 6, available at http://hrlibrary.umn.edu/instate/Maastrichtguidelines_.html; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011),

2. **Non-retrogression:** Avoiding any retrogressive steps decreasing existing access to health;¹⁵
3. **Non-discrimination:** Ensuring that health services, facilities and goods are available to all without discrimination;¹⁶ and
4. **Minimum Core Obligations:** Ensuring immediate access to at very least the “minimum essential level” of health services, facilities and goods.¹⁷

Regarding this fourth category of minimum core obligations, these include:¹⁸

1. **Non-discrimination:** To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for persons from marginalized groups;
2. **Minimum Essential Food:** To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
3. **Basic Amenities:** To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
4. **Provision of Drugs:** To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;¹⁹
5. **Equitable Distribution:** To ensure equitable distribution of all health facilities, goods and services;
6. **Strategy:** To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population. The strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

Further, the CESCR has identified **obligations of comparable priority to its minimum core obligations** which are as follows:²⁰

1. **Reproductive Health:** To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;
2. **Immunization:** To provide immunization against the major infectious diseases occurring in the community;
3. **Take Measures:** To take measures to prevent, treat and control epidemic and endemic diseases;
4. **Access to Information:** To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

para 24, available at <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-PrinciplesENG-booklet.pdf>.

¹⁵ Supra note 11, para 32.

¹⁶ Supra note 11, para 30.

¹⁷ Supra note 11, para 43.

¹⁸ Supra note 11, para 43.

¹⁹ See Resolution of the World Health Assembly, Action Programme On Essential Drugs And Vaccines, Agenda Item 22, Thirty Seventh World Health Assembly, 17 May 1984, available at https://apps.who.int/iris/bitstream/handle/10665/161032/WHA37_R32_eng.pdf?sequence=1&isAllowed=y

²⁰ Supra note 11, para 44.

5. **Training:** To provide appropriate training for health personnel, including education on health and human rights.

Further, each State must take steps to the maximum of its available resources towards full realization of rights guaranteed in ICESCR. In addition, States cannot justify non-compliance with the minimum core obligations “under any circumstances whatsoever”.²¹

The CESCR noted on 6 April 2020, that COVID-19 had arisen at a time when “health-care systems and social programmes have been weakened by decades of underinvestment in public health service”, thus limiting States capacity to respond effectively.²² The failure by many States to ensure the full realization of the right to health in the past has made it more difficult for States to respect, protect and fulfil the right to health during the COVID-19 pandemic.²³

Aspects of the rights to health are also protected under the International Covenant on Civil and Political Rights (ICCPR), to which India is Party, particular under article 6 which addresses the right to life. The UN Human Rights Committee, the supervisory body of the ICCPR has affirmed that “in the face of the COVID-19 pandemic, State parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction”.²⁴

A. RESTRICTIONS AND LIMITATIONS ON RIGHTS, INCLUDING IN PUBLIC HEALTH EMERGENCIES

Article 4 of the ICESCR provides that “the State may subject [Covenant] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” However, this provision “was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State” and “was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.”²⁵

A number of rights under the ICCPR are subject to limitation or restriction, such as freedom of movement, freedom of expression, freedom of association, freedom of assembly, among others. However, these may only be restricted for the legitimate purposes identified in the ICCPR, such as public health or morals, national security, public order or to protect the rights of others. Any such restrictions must be non-discriminatory, provided by law, and strictly necessary

²¹ Supra note 11, para 47.

²² UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (17 April 2020), para 4, available at <https://undocs.org/E/C.12/2020/1>.

²³ Id.

²⁴ UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, U.N. Doc. CCPR/C/128/2 (30 April 2020), available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

²⁵ Principles 46 and 47, The Limburg Principles On The Implementation Of The International Covenant On Economic, Social And Cultural Rights, Commission On Human Rights, 8 January 1987, UN Doc. E/CN.4/1987/17.

for one of those legitimate purposes. In addition, it must be proportionate and the least restrictive means of achieving those purposes.²⁶

When State authorities determine the existence of a situation that “threatens the life of the nation”²⁷ they may decide to declare a state of emergency or similar state of exception to address the situation. This could, in principle, include a situation of extreme public health crisis such as a pandemic. In such instances, a State may derogate from certain ICCPR rights on a temporary basis,²⁸ but only pursuant to a proclamation of emergency.²⁹

Furthermore, the State must notify other states through the UN Secretary General’s office of the provisions it has derogated from and the reasons for those measures.³⁰ Any such derogating measure must be: non-discriminatory;³¹ limited to the extent strictly required to meet the threat to the life of the nation in terms of duration, geographical coverage, and material scope;³² provided for by constitutional and other provisions of law,³³ and; be necessary and proportionate to the protective purpose of the derogation.³⁴

Moreover, derogation may only narrow the scope of application of certain rights, but may never suspend them entirely, as “no provision of the Covenant, no matter how validly derogated from, will be entirely inapplicable to the behaviour of a State party.”³⁵ In addition, certain rights may never be derogated from, even in emergency situations. These include, among others, the rights to life (article 6), the prohibition of torture or cruel, inhuman or degrading punishment (article 7),³⁶ the right to an effective remedy (article 2(3)),³⁷ the rights to recognition as a person before the law (article 16) and essential fair trial rights.

In the context of right to health, any limitations or derogations from rights to respond to a public health emergency must be “specifically aimed at preventing disease or injury or providing care for the sick and injured”.³⁸ Even in the narrow circumstances in which some human rights may be limited or derogated from to

²⁶See The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, American Association for the International Commission of Jurists, available at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>. See also, Human Rights Committee, General Comment 34- Article 19- Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, (2011) and Human Rights Committee, General Comment 37- Article 21-Right to peaceful assembly, UN Doc. CCPR/C/GC/37.

²⁷ Human Rights Committee, General Comment 29- Article 4: Derogations during a State of Emergency, U.N, Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 2.

²⁸ Id, para 1.

²⁹ Supra note 27, para 2.

³⁰ Supra note 27, para 17.

³¹ Supra note 27, para 8.

³² Supra note 27, para 4.

³³Human Rights Committee, General Comment 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 2.

³⁴ Id, para 4.

³⁵ Supra note 33, para 4.

³⁶ Supra note 33, para 7. See also, paras 11, 12, 13, 14, 15, 16.

³⁷ Supra note 33, para 14.

³⁸Supra note 33, paras 25-26 which read in full: “Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. Due regard shall be had to the International Health Regulations of the World Health Organization.”

respond to a public health emergency, such as COVID-19, the minimum core obligations identified above in terms of the right to health are not subject to such limitations or restrictions. These core obligations, therefore must, even in a public health emergency, be implemented immediately.³⁹

On 7 April 2020, the CESCR emphasized that “minimum core obligations...should be prioritized” in States responses to the epidemic.⁴⁰ The CESCR has further been clear that any limitations on rights recognized by the ICESCR must be: “necessary to combat the public health crisis posed by COVID-19”, “reasonable and proportionate”, “should not be abused”, and “should be lifted as soon as they are no longer necessary for protecting public health”.⁴¹

Finally, the CESCR recognizes that States are obligated to conduct due diligence by regulating private actors and can be held liable for breaches by third party actors.⁴²

B. DOMESTIC LAW ON RIGHT TO HEALTH

While the Indian Constitution does not explicitly provide for the right to health, jurisprudence developed by the Indian Courts have over the years consistently affirmed that the right to health is a component of the fundamental right to life guaranteed under Article 21 of the Indian Constitution.⁴³

In addition to the rights protected explicitly by the Indian Constitution, the Constitution includes a range of Directive Principles of State Policy (DPSP), which are considered fundamental for governance. The Indian Supreme Court has interpreted certain DPSP such as Article 47 on improvement of public health which requires the state to “regard ... the improvement of public health as among its primary duties” alongside the right to life with dignity (Article 21).⁴⁴

In particular, the Indian Supreme Court has affirmed that right to life includes the right to healthcare and that the government has a constitutional duty to provide health services.⁴⁵ The Court has further emphasized the extent to which “attending to public health” is of “high priority-perhaps the one at the top.”⁴⁶ The Court has clarified that the provision of adequate medical facilities is a primary

³⁹ Supra note 33, para 47.

⁴⁰ Supra note 22, para 12.

⁴¹ Supra note 22, para 11.

⁴² Supra note 11, paras 33 and 51.

⁴³ See for example Supreme Court of India, *Bandhua Mukti Morcha vs Union Of India & Others*, 1983, para 16, Supreme Court of India, *State Of Punjab & Ors vs Ram Lubhaya Bagga Etc.*, 1988, para 21, Supreme Court of India, *Vincent Panikurlangara vs Union Of India & Ors*, 1987, para 16. See also Amita Dhanda, “Realising The Right To Health Through Co-Operative Judicial Review: An Analysis Of The Role Of The Indian Supreme Court” in *Transformative Constitutionalism: Comparing the apex courts of Brazil, Indian and South Africa*, eds - Oscar Vilhena, Upendra Baxi and Frans Viljoen, pages 405-413.

⁴⁴ Constitution of India: Article 47 - Duty of the State to raise the level of nutrition and the standard of living and to improve public health - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

⁴⁵ Supreme Court of India, *State of Punjab v. MS Chawla*, 1996, para 3.

⁴⁶ Supreme Court of India, *Vincent Panikurlangara vs Union Of India & Ors*, 1987, para 16.

duty at both the federal level and the state level and has stated that the government is required to run hospitals and other health centres which provide medical care.⁴⁷ Indeed, as Article 21 of the Constitution protects the right to life of every person, the Supreme Court has stated public hospitals are “duty bound to extend medical assistance for preserving human life”, and “failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”⁴⁸

In a case in which a severely injured person in need of immediate medical attention was denied medical treatment by various government hospitals, and was finally treated in a private hospital, the Supreme Court found a violation of his right to life and stated that “the State cannot avoid its responsibility for such denial of the constitutional right”.⁴⁹ With respect to financial resources for operating medical facilities, the Court held that “it is the constitutional obligation of the State to provide adequate medical services to the people. *Whatever is necessary for this purpose* has to be done.” (Emphasis Added).⁵⁰ The Court indicated that the right to health obligation requires the government to devise “time-bound plan” for providing essential medical services and steps to be taken to implement the plan.⁵¹

The Court has also recognized that medical treatment must be provided but to the extent that “finance[s] permit” and cannot be unlimited,⁵² clarifying however that sufficient funds must be allocated as the inhabitants of India look “towards the State for it to perform this obligation with “top priority” including by way of “allocation of sufficient funds,” as well as by ensuring that the government hospitals are of the highest quality with the best facilities and trained staff.⁵³

As this brief overview of the relevant jurisprudence of Indian Courts shows, the right to health and to healthcare has been recognized as part of the right to life. In line with India’s international human rights legal obligations towards right to health under Article 12 of ICESCR, Indian Courts have also recognized the Indian state’s obligation to devise a strategy for ensuring provision of essential medical services and medical attention and ensure timely medical treatment to all persons in need thereof. The Courts have specifically stated that the government is required to fulfil its obligation by running hospitals and other health care centers with the best facilities and highly trained staff.

III. INDIAN GOVERNMENT RESPONSE TO COVID-19 PANDEMIC

⁴⁷ Supreme Court of India, *Kirloskar Brothers Ltd v. Employees' State Insurance Corpn*, 1996, para 6.

⁴⁸ *Id.*

⁴⁹ Supreme Court of India, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, 1996, para 10.

⁵⁰ *Id.*, para 7.

⁵¹ *Id.*, para 7.

⁵² Supreme Court of India, *State of Punjab & Ors. v. Ram Lubhaya Bagga & Ors.*, (1998) 1 SCR 1120, para 25.

⁵³ *Id.*, para 22.

The Indian Government did not declare COVID-19 an “emergency” under the Constitution but instead declared it a “notified disaster” on 14 March 2020.⁵⁴ This is in part because under the Indian Constitution a declaration of emergency can only be made in response to a state of war, external aggression, or an armed rebellion (Article 352).⁵⁵ The Constitution, therefore, does not make provision for the declaration of an emergency for reason of public health emergency. Instead the Indian Government employed a “legislative model” whereby the executive has additional delegated powers under law to deal with the crisis.⁵⁶ The primary tool used by the executive has been nationwide and/or state-wide lockdowns via executive decrees issued under either the Disaster Management Act (central law)⁵⁷ or Epidemic Diseases Act (state law).⁵⁸

States can and typically do adopt exceptional measures to protect public health, as in other areas, without formally declaring an emergency, which restrict certain rights.⁵⁹ Notably, many countries, even those that have a detailed constitutional emergency regime have not declared a state of emergency and instead relied on legislative oversight to manage the pandemic.⁶⁰

The Central Government invoked the Disaster Management Act, 2005 (DMA) and issued guidelines under this law on 24 March 2020,⁶¹ deriving its power to act in this regard from Entry 29 of List III (Concurrent List) of the Indian Constitution in terms of which both parliament and state legislatures are competent to legislate on matters involving inter-state spread of “infectious or contagious diseases”.⁶² While the definition of disaster does not in terms of the DMA expressly include

⁵⁴ Letter from Ministry of Home Affairs, Government of India, to Chief Secretaries (All States), Items and Norms of assistance from the State Disaster Response Fund (SDRF) in wake of COVID-19 Virus Outbreak, (14 March 2020), available at <https://ndmindia.mha.gov.in/images/COVID-19.pdf>.

⁵⁵ Constitution of India, Article 352: Proclamation of Emergency

⁵⁶ John Ferejohn Pasquale Pasquino, “The law of the exception: A typology of emergency powers”. International Journal of Constitutional Law, (April 2004), available at <https://www.researchgate.net/publication/profile/Pasquale-Pasquino>, p 217.

⁵⁷ National Disaster Management Authority, Government of India, NDMA Orders and Advisories, available at https://ndma.gov.in/covid/NDMA-Orders_Advisories: 1. NDMA Order on lockdown dated 24.03.2020, available at <https://ndma.gov.in/sites/default/files/PDF/covid/ndmaorder240320.pdf>; 2. NDMA Order 14.4.2020 about extension of measures for social distancing up 3rd May available at <https://ndma.gov.in/sites/default/files/PDF/covid/NDMA-Order-for-extending-the-Lockdown-Period-till-030520.pdf>; 3. NDMA order dated 1.5.2020 regarding extension of lockdown for 2 more weeks after 4.5.2020 available at <https://ndma.gov.in/sites/default/files/PDF/covid/NDMA-ORDER-DTD-1.5.20.pdf>.

⁵⁸ Sample of orders – Delhi - <https://covidlawlab.org/wp-content/uploads/2020/06/Govt-of-NCT-Delhi-COVID-Regulations-copy.pdf>; Bombay - <https://covidlawlab.org/wp-content/uploads/2020/06/Maharashtra-State-Regulations.pdf>.

⁵⁹ See OHCHR, Emergency Measures and COVID-19 Vaccine, 27 April 2020 available at https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

⁶⁰ Tom Ginsburg and Mila Versteeg, “The bound executive: Emergency powers during the pandemic”, International Journal of Constitutional Law, 24 June 2021, pages 21-29, available at <https://doi.org/10.1093/icon/moab059>. See also, International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Geneva (2011), available at <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

⁶¹ Ministry of Home Affairs, Government of India, Order, 24 March 2020, available at https://www.mha.gov.in/sites/default/files/MHAOrder%20copy_0.pdf

⁶² Constitution of India, Entry 29, List III - Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants

epidemics,⁶³ the National Disaster Management Authority (NDMA) formulated guidelines in 2008 on biological disasters which includes epidemics.⁶⁴ In 2019 it issued a revised National Disaster Management Plan which also dealt with biological and public health emergencies,⁶⁵ thereby presumably including pandemics within the domain of disasters. However, according to the 2008 Guidelines and the 2019 Plan, it is the Ministry of Health and Family Welfare that is supposed to be the “nodal ministry” to coordinate the response to a biological disaster including epidemics.⁶⁶ Notwithstanding this apparent allocation of responsibility, the Ministry of Home Affairs has in fact been designated as the nodal ministry to respond to COVID-19.⁶⁷

Under the DMA, the Central Government has extensive powers. The NDMA, which is the central body under the law has the Prime Minister as the chairperson who can appoint a maximum of nine members.⁶⁸ The NDMA has the responsibility of “laying down the policies, plans and guidelines for disaster management for ensuring timely management and effective response to the disaster”,⁶⁹ including issuing guidelines to be followed by state governments.⁷⁰ The DMA allows the NDMA to constitute a National Executive Committee to assist the NDMA.⁷¹ Section 10(2)(I) of DMA gives wide powers to the NEC to:

“lay down guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster.”⁷²

Under this law, the Central Government can, irrespective of any law in force, issue directions to any authority in India to facilitate disaster management, including-

⁶³ Disaster Management Act, 2005, Section 2(a) and 2(d).

⁶⁴ National Disaster Management Guidelines: Management of Biological Disasters, National Disaster Management Authority, Government of India, July 2008, available at https://www.thehinducentre.com/the-arena/current-issues/article32504367.ece/binary/biological_disasters.pdf.

⁶⁵ National Disaster Management Plan, 2019, National Disaster Management Authority, Government of India, November 2019, available at <https://www.thehinducentre.com/the-arena/current-issues/article32504959.ece/binary/ndmp-2019.pdf>.

⁶⁶ National Disaster Management Guidelines: Management of Biological Disasters, National Disaster Management Authority, Government of India, July 2008, page 21, available at https://www.thehinducentre.com/the-arena/current-issues/article32504367.ece/binary/biological_disasters.pdf; National Disaster Management Plan, 2019, National Disaster Management Authority, Government of India, November 2019, page 285, available at <https://www.thehinducentre.com/the-arena/current-issues/article32504959.ece/binary/ndmp-2019.pdf>. Even the Government of India’s Allocation of Business Rules, 1961 amended in 2017 clarifies that the Ministry of Home Affairs will be the nodal ministry for all disasters “other than drought, hailstorm, pest attacks or epidemics”. See Government of India (Allocation of Business) Rules, 1961, page 83, available at https://www.thehinducentre.com/the-arena/current-issues/article32504968.ece/binary/1_Upload_1187.pdf

⁶⁷ Ministry of Home Affairs, Government of India, Order, 23 March 2020, available at https://www.mha.gov.in/sites/default/files/MHAOrder_23032021.pdf

⁶⁸ Section 3, Disaster Management Act, 2005.

⁶⁹ Section 6, Disaster Management Act, 2005.

⁷⁰ Section 6(2)(d), Disaster Management Act, 2005.

⁷¹ Section 8, Disaster Management Act, 2005.

⁷² Section 10(2)(I), Disaster Management Act, 2005. Also, Section 35, Disaster Management Act, 2005.

ministries; the National Executive Committee; State Executive Committees; any statutory body, government officer or employee.⁷³

In India, the union home secretary who is the administrative head of Ministry of Home Affairs has been appointed as the chairperson of the National Executive Committee with the Ministry of Home Affairs, having administrative control of the disaster management.⁷⁴

At the state level, the Central Government ordered the states and union territories to implement Epidemic Diseases Act (EDA), 1897 “so that all advisories being issued from time to time by the Ministry/State/UTs are enforceable”.⁷⁵ Many State Governments, including Karnataka, Delhi, Maharashtra, Punjab, Himachal Pradesh have invoked the EDA.⁷⁶ Notably, EDA is a short colonial era law of four provisions, which does not define an epidemic but provides significant and broad powers to state governments to counter epidemics. Similarly to the DMA, the EDA provides broad powers to the state governments empowering them to “prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease” when they have determined that “ordinary provisions of the law for the time being in force are insufficient for the purpose.”⁷⁷ It is a criminal offence to disobey any regulation or order under the EDA.⁷⁸ However, the EDA restricts the Central Government’s power to inspection and detention of ships or person leaving or arriving in the country.⁷⁹ Similarly to the DMA, the EDA too does not provide for any grievance redressal mechanisms.⁸⁰

Finally, Section 144 of the Code of Criminal Procedure (CrPC) has been used to authorize magistrates and assistant police commissioners⁸¹ to pass orders to restrict individual movement and prohibit assembly of five or more people when

⁷³ Section 62, Disaster Management Act, 2005.

⁷⁴ Ministry of Home Affairs, Government of India, Order, 23 March 2020, available at https://www.mha.gov.in/sites/default/files/MHAOrder_23032021.pdf

⁷⁵ Bindu Perappadan, “Coronavirus | States to be asked to invoke Epidemic Disease Act: Centre” The Hindu, 12 March, 2020, available at <https://www.thehindu.com/news/national/coronavirus-states-to-be-asked-to-invoke-epidemic-disease-act-centre/article31043653.ece>.

⁷⁶ See State Government Notifications, available at <https://www.ciicovid19update.in/state-govt-notifications.html>.

⁷⁷ Section 2, Epidemic Diseases Act.

⁷⁸ This punishment is according to Section 188, Indian Penal Code, which provides for a fine of Rs 200 and simple imprisonment of one month for violating an order of a public servant. The penalty of Rs 1,000 and imprisonment of six months can also be imposed, depending on the impact of the disobedience. See Section 3, Epidemic Diseases Act and Section 188, Indian Penal Code.

⁷⁹ The Indian Government issued its travel ban in exercise of its power under Section 2A, Epidemic Diseases Act. See Section 2A, Epidemic Diseases Act.

⁸⁰ The Epidemic Diseases Act was amended via an ordinance in April 2020 to penalize acts of violence against healthcare personnel. See The Epidemic Diseases (Amendment) Ordinance, 2020, 22 April 2020, available at <https://egazette.nic.in/WriteReadData/2020/219108.pdf>. As recommended by report of taskforce set up to review DMA, the DMA should incorporate the rights, duties, responsibilities and role of citizens and communities. It should incorporate provisions specifically mentioning women, children and other disadvantaged section. It should include the role, responsibility and liability of private sector. Finally, it should provide a grievance redressal mechanism for relief, rehabilitation and reconstruction. Report Of The Task Force: A Review of the Disaster Management Act, 2005, Ministry of Home Affairs, Government of India, March 2013, page 127, available at https://www.ndmindia.nic.in/images/TaskForce_report_DMact.pdf.

⁸¹ Notification, Ministry of Home Affairs, 9 September 2010, available at https://www.mha.gov.in/sites/default/files/SNO191_18012018.PDF.

there is an anticipated danger to human “life, health or safety”, within their jurisdictions.⁸² However, the Supreme Court has clarified that section 144 CrPC orders are open to judicial review and need to pass the test of “reasonableness”.⁸³ Section 144 CrPC was used in various states throughout the first and second wave of COVID-19 to stop people from gathering.⁸⁴

Both the DMA and EDA do not require legislative oversight and do not have any built-in procedural controls, such as restrictions on executive action or a sunset clause indicating when the law elapses. These laws, therefore, give the executive continuing enormous powers completely bypassing legislative review. By way of comparison, even under a constitutional emergency under Article 352 of the Constitution, legislative oversight is built-in, as the Parliament is required to approve the emergency after one month and again after six months.⁸⁵ Notably, the Indian Government’s decision to bypass legislative oversight is unlike the actions taken by the majority countries.⁸⁶

In these circumstances and in the absence of legislative oversight the Courts are the most realistic forum available to hold the government to account and ensure that executive measures implemented to respond to COVID-19 conform to constitutional norms of proportionality and reasonableness. In nearly half of over 100 countries surveyed in a particular study undertaken early in the pandemic, the judiciary was involved in the State responses to COVID-19 in one of the following ways:⁸⁷

- Ensuring procedural requirements were followed when constitutional emergency measures were invoked. Where constitutional emergency measures were not invoked, requiring the legislature to enact laws to provide the basis for any restriction on rights;

⁸² Section 144, Power to issue order in urgent cases of nuisance of apprehended danger, Code of Criminal Procedure.

⁸³ Supreme Court of India, *Anuradha Bhasin v. UOI*, (2020), para 140, <https://indiankanoon.org/doc/82461587/>.

⁸⁴ See “Amid Covid-19 surge, Section 144 imposed in various cities”, ed. Amit Chaturvedi, *Hindustan Times*, 21 September 2020, available at <https://www.hindustantimes.com/india-news/amid-covid-19-surge-section-144-imposed-in-various-cities-read-details/story-veffZfMvCyApp3djAS3EIJ.html>; See also, “Coronavirus Outbreak: Section 144 in Some Parts of the Country”, *The Quint*, 19 March 2020, available at <https://www.thequint.com/news/india/coronavirus-outbreak-section-144-in-few-parts-of-the-country#read-more>. See also, “COVID-19: Section 144 imposed in Ghaziabad till THIS date, new guidelines issued”, *DNA*, 17 March 2020, available at <https://www.dnaindia.com/india/report-covid-19-section-144-imposed-in-ghaziabad-till-may-10-new-guidelines-issued-2881738>

⁸⁵ Constitution of India, Article 352(4)(5). Article 352(4) says, “Every Proclamation issued .. shall be laid before each House of Parliament and shall...cease to operate at the expiration of one month..”. Article 352(5) says, “..a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament the Proclamation shall, unless revoked, continue in force for a further period of six months..”

⁸⁶ The survey shows that in the first few months of the pandemic (up until July 2020) most countries surveyed provided for legislative oversight either by use of laws that have legislative oversight built into them (Japan, Germany) or by enacting new laws, which are temporary and require legislative approval (United Kingdom, Belgium, Philippines, Slovenia). See Tom Ginsburg and Mila Versteeg, “The bound executive: Emergency powers during the pandemic”, *International Journal of Constitutional Law*, 24 June 2021, page 30, available at <https://doi.org/10.1093/icon/moab059>

⁸⁷ *Id*, pages 21-29.

- Balancing the public health goals with any limitations on fundamental rights;
- In case of executive inaction, demanding that the government take action to fulfil their constitutional obligations.

In the context of the second wave of the COVID-19 in India, the judiciary could have been more proactive in demanding that the government take action to protect public health. While the judiciary ultimately did engage extensively with executive responses through the use of “dialogic review” during the second wave, nevertheless the overall lack of checks on executive conduct contributed to the lack of preparedness for the second wave of COVID-19 by the government.

A. SECOND WAVE OF COVID-19 IN INDIA

The second wave of the COVID-19 pandemic in India occurred between mid-March 2021 and mid-May 2021 and resulted in more than half of all COVID-19 deaths that took place between March 2020 until May 2021.⁸⁸ The reported death count was at least 166,632,⁸⁹ a figure which experts believe to be a substantial undercount of the actual total.⁹⁰ The number of recorded deaths in the three month period from 2021 are: April 2021 – 45,882; May 2021 – 120,770; June 2021 – 69,354.⁹¹ Notably, before April-May 2021, the highest number of deaths in India were reported during September 2020, in the peak of the first wave of COVID-19 with 33,035 deaths.⁹² Among the most affected states during the second wave reportedly were National Capital Territory of Delhi,⁹³ Maharashtra, Uttar Pradesh, Kerala,⁹⁴ Karnataka,⁹⁵ Tamil Nadu.⁹⁶ At the peak of the second wave, according to media reports, one person was dying of COVID-19 every four

⁸⁸ Chetan Chauhan, “Half of all Covid deaths in India took place in April-May, shows government data”, Hindustan Times, 25 July 2021, available at <https://www.hindustantimes.com/india-news/half-of-all-covid-deaths-in-india-took-place-in-april-may-shows-government-data-101627204345380.html>.

⁸⁹ Id. See Rajya Sabha, Unstarred Question No. 877, Shri Narrain Dass Gupta, State/UT-Wise Lists Of Deaths Due To Covid-19, available at <https://pqars.nic.in/annex/254/AU877.pdf>.

⁹⁰ Jeffrey Gettleman et al, “As COVID-19 Devastates India, Deaths Go Undercounted”, The New York Times, 31 May 2021, available at <https://www.firstpost.com/health/complete-massacre-of-data-experts-flag-undercounting-of-indias-covid-19-deaths-in-second-wave-9562541.html>.

⁹¹ Note that June data includes reconciled deaths which authorities did not mention in April and May 2021. Supra note 93.

⁹² Supra note 93.

⁹³ See Health Bulletin for Month of April 2021, Ministry of Health and Family Welfare, Government of Delhi, available at http://health.delhigovt.nic.in/wps/wcm/connect/doit_health/Health/Home/Covid19/Bulletin+April+2021.

⁹⁴ See Kerala: COVID-19 Battle, Government of Kerala Dashboard, available at <https://dashboard.kerala.gov.in/covid/daily.php>.

⁹⁵ Media Bulletin: Novel Corona Virus, Department of Health and Family Welfare, Government of Karnataka, available at <https://covid19.karnataka.gov.in/storage/pdf-files/EMB-APR21/30-04-2021%20HMB%20English.pdf>.

⁹⁶ COVID-19: District-wise Statistics of all cases in Tamil Nadu as on 28/04/2021, Government of Tamil Nadu, available at https://tn.data.gov.in/resources/covid-19-district-wise-statistics-all-cases-tamil-nadu-28042021#web_catalog_tabs_block_10; See “Maharashtra, UP, 8 other states account for 73% of Covid-19 cases in India”, PTI, Business Standard, April 30, 2021, available at https://www.business-standard.com/article/current-affairs/maharashtra-up-8-other-states-account-for-73-of-covid-19-cases-in-india-121043000413_1.html.

minutes in National Capital Territory of Delhi, one of the hardest-hit states.⁹⁷ Chhattisgarh also had a nearly 30 percent positivity rate by April 2021.⁹⁸

At the peak of the second wave in India, it had the largest number of reported daily new cases globally at over 400,000, with over 2.5 million active cases of COVID-19 in that period.⁹⁹ Reportedly, while in early April 2021 the number of cases reported daily was 90,000,¹⁰⁰ by 30 April 2021, it had increased to 400,000,¹⁰¹ peaking on 7 May 2021 at 414,000, with daily deaths ranging around approximately 3,500.¹⁰² The number of transmissions and deaths reportedly began to drop from 25 May 2021.¹⁰³

During the second wave the Indian healthcare system faced severe shortages of medical oxygen in certain states, in part due to supply chain bottlenecks as cryogenic tankers and transport options from states that produced medical oxygen were lacking.¹⁰⁴ These shortages were also reportedly contributed to by hoarding and black-marketing by private actors.¹⁰⁵

Hospitals also experienced severe shortages of hospital beds, oxygen supply, essential medicines and a shortage of staff. Ultimately testing laboratories and crematoriums were not able to keep up with the surge.¹⁰⁶ The inability of testing laboratories to process RT-PCR tests in a timely manner in turn hampered hospital admissions, as hospitals required positive COVID RT-PCR tests to admit a

⁹⁷ Alia Chughtai et al, "India's second COVID wave in maps and charts", Al Jazeera, 27 April 2021, available at <https://www.aljazeera.com/news/2021/4/27/indias-second-covid-wave-in-maps-and-charts>.

⁹⁸ Id.

⁹⁹ "Third Covid wave likely to peak in October, India may see 1.50 lakh cases per day: Report" ed. India TV News Desk, August 2, 2021, available at <https://www.indiatvnews.com/news/india/coronavirus-third-wave-peak-october-covid19-third-wave-predictions-cases-per-day-723693>.

¹⁰⁰ Arpan Rai, "India's Covid-19 cases rose from 9,000 to 90,000 in less than 50 days", Hindustan Times, 4 April 2021, available at <https://www.hindustantimes.com/india-news/indias-covid-19-cases-rose-from-9-000-to-90-000-in-less-than-50-days-101617533782376.html>.

¹⁰¹ "Coronavirus | India becomes first country in the world to report over 4 lakh new cases on April 30, 2021", Special Correspondent, The Hindu, 1 May 2021, available at <https://www.thehindu.com/news/national/coronavirus-india-becomes-first-country-in-the-world-to-report-over-400000-new-cases-on-april-30-2021/article34453081.ece>.

¹⁰² "Record 4.14 lakh Covid-19 cases in India, 5 states behind 50% of infections", India Today Web Desk, India Today, 7 May 2021, available at <https://www.indiatoday.in/coronavirus-outbreak/story/covid-cases-deaths-india-may-7-vaccine-lockdown-1799762-2021-05-07>.

¹⁰³ Amit Bhattacharya, "After 40 days, daily Covid cases fall below 2 lakh", Times of India, 25 May 2021, available at <https://timesofindia.indiatimes.com/india/after-40-days-daily-covid-cases-fall-below-2-lakh/articleshow/82927909.cms>.

¹⁰⁴ Deeptiman Tiwary, "Oxygen crisis: More than supply, lack of tankers and plant location key challenges", Indian Express, April 28, 2021, available at <https://indianexpress.com/article/india/coronavirus-second-wave-oxygen-crisis-more-than-supply-lack-of-tankers-and-plant-location-key-challenges-7291716/>.

¹⁰⁵ A survey by LocalCircles, a community social media platform, of 38000 responses from 389 districts in India highlighted that 70 percent of the people overpaid for ambulances, 36 percent for oxygen, and 19 percent for medicines. See Massive Black Marketing during the COVID 2nd wave and lessons for 3rd wave: 70% citizens overpaid for ambulances, 36% for oxygen; 19% for medicines, Local Circles, available at <https://www.localcircles.com/a/press/page/covid-blackmarketing-survey>.

¹⁰⁶ Shruti Menon, "India Covid: How bad is the second wave?" BBC, 7 May 2021, available at <https://www.bbc.com/news/56987209>.

patient.¹⁰⁷ Crematoriums too were overflowing and sometimes asked grieving families to wait for several days before conducting funerals due to the number of deaths.¹⁰⁸

Hospitals, family members and patients themselves were reportedly forced to turn to courts and to make pleas on social media to gain access to oxygen supply, drugs, hospital beds. Family members were witnessed to have been forced to make extraordinary efforts to secure hospital beds, oxygen supply and essential drugs for their loved ones, but were often unsuccessful.¹⁰⁹ Hospitals too were sending emergency calls for support to the government, using social media to publicize lack of oxygen supply or the lack of hospital beds and shortage of medicines and approaching courts to ask for help.¹¹⁰ Many courts initiated suo moto action and held daily hearings and often multiple hearings in a single day to provide support.¹¹¹

These necessarily belated efforts of hospitals, civil society, and courts as well as the executive did not compensate for the lack of preparedness for the seemingly predictable second wave of COVID-19. For instance, according to independent researchers, at least 682 entirely preventable deaths occurred due to lack of oxygen, shortage of oxygen or denial of oxygen in hospitals in India.¹¹² However, in response to a question in the Upper House of Parliament, the Minister of State, Health and Family Welfare denied this reality, claiming that “no deaths due to lack of oxygen has been specifically reported”.¹¹³

B. INDIAN EXECUTIVE RESPONSE TO SECOND WAVE OF COVID-19

The government authorities were not adequately prepared for the second wave at the central or state government level. This is reflected in the Central Government’s public statements. For example, on January 28 2021, the Indian Prime Minister asserted at the World Economic Forum that “India has not only defeated COVID

¹⁰⁷ Supra note 102.

¹⁰⁸ Debarshi Dasgupta et al, “Families allowed to bury dead in backyards as India's Covid-19 surge overwhelms crematoriums”, The Straits Times, 30 April 2021, available at <https://www.straitstimes.com/asia/south-asia/families-allowed-to-bury-dead-in-their-backyard-with-crematoriums-overwhelmed-by>.

¹⁰⁹ “We are in the endgame of Covid-19 pandemic in India: Harsh Vardhan”, PTI, Times of India, March 7, 2021, available at <https://timesofindia.indiatimes.com/india/we-are-in-the-endgame-of-covid-19-pandemic-in-india-harsh-varadhan/articleshow/81378288.cms>.

¹¹⁰ Tanika Godbole, “Coronavirus: Indians turn to social media in search of oxygen, beds” DW, 30 April 2021, available at <https://www.dw.com/en/coronavirus-indians-turn-to-social-media-in-search-of-oxygen-beds/a-57389156>.

¹¹¹ See for example High Court of Madhya Pradesh, In Reference (Suo Motu) v. Union Of India And Others et al, W.P. No.8914/2020; High Court of Nagpur, Court on its own motion vs. Union of India and Ors. Etc Suo-Motu P.I.L. No.4 of 2020, 2020; Delhi High Court, Rakesh Malhotra v. Govt of NCT and Others, W.P.(C) 3031/2020.

¹¹² Oxygen Shortage Deaths, COVID-19 India Datasets by DataMeet, 3 August, 2021, available at https://projects.datameet.org/covid19/oxygen_shortage_deaths/

¹¹³ “No deaths due to lack of oxygen reported by states during second Covid wave, claims Centre”, Scroll, July 21, 2021, available at <https://scroll.in/latest/1000671/no-deaths-due-to-lack-of-oxygen-reported-by-states-during-second-covid-wave-claims-centre>.

but it has also built adequate infrastructure to handle it".¹¹⁴ On 7 March 2021, the Indian Health Minister stated "we are in the endgame of the COVID-19 pandemic in India."¹¹⁵ These assertions put forward by senior state officials directly contradicted expert advice given by the Indian SARS-CoV-2-Genetics Consortium of scientists, set up by the central government in December 2020 to detect variants of the virus. The Consortium had warned the Government of the virulent nature of the new variant in early March 2021,¹¹⁶ calling the mutations of "high concern". The Government made the findings public two weeks later but failed to refer to it as a variant of high concern.¹¹⁷ The Government's stance also flew in the face of recommendations of the Indian Parliamentary Committee on Health and Family Welfare in November 2020, which stated that India must be "prepared to combat a possible second wave of COVID-19 in the ensuing winter season and super-spreading series of festive-events"¹¹⁸ and had recommended the enhancement of medical oxygen supply, hospital beds, testing facilities, healthcare workers in secondary and tertiary public hospitals.¹¹⁹

In addition to apparently disregarding these warnings, the government also failed to respond adequately or promptly to the initially increased transmission at the beginning of the second wave.¹²⁰ For instance, the National Task Force for COVID-19, a group of 21 experts and government officials set up to provide scientific and technical guidance to the Ministry of Health and Family Welfare on the pandemic, did not hold any meetings in February and March 2021. It met in January 2021 and then again only after the cases surged in April 2021.¹²¹ By 15 April 2021 the National Task Force for COVID-19 "unanimously agreed that the situation is serious and that we should not hesitate in imposing lockdowns". The Indian SARS-CoV-2 Genetics Consortium too in an 18 April 2021 meeting with the government highlighted the need for urgent drastic measures.¹²² On 19 April 2021, the National Center For Disease Control Director told a private gathering that a strict lockdown

¹¹⁴ Shekhar Gupta, "As Modi govt faces up to Covid disaster, BJP learns a tough truth — the virus doesn't vote", The Print, 24 April 2021, available at <https://theprint.in/national-interest/as-modi-govt-faces-up-to-covid-disaster-bjp-learns-a-tough-truth-the-virus-doesnt-vote/644949/>.

¹¹⁵ "Harsh Vardhan says India is in the endgame of Covid-19 pandemic", PTI, Hindustan Times, March 7, 2021, available at <https://www.hindustantimes.com/india-news/harsh-varadhan-says-india-is-in-the-endgame-of-covid-19-pandemic-101615128329364.html>.

¹¹⁶ "Scientists says Indian government ignored warnings amidst Cononavirus surge", Reuters, May 1, 2021, available at <https://www.reuters.com/world/asia-pacific/exclusive-scientists-say-india-government-ignored-warnings-amid-coronavirus-2021-05-01/>.

¹¹⁷ Id.

¹¹⁸ Department-Related Parliamentary Standing Committee On Health And Family Welfare , One Hundred Twenty Third Report: The Outbreak Of Pandemic Covid-19 And Its Management, Rajya Sabha, Parliament of India, 2020, para 2.80, available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/14/142/123_2020_11_15.pdf

¹¹⁹ Id.

¹²⁰ Maxwell Salvatore et al, Resurgence of SARS-CoV-2 in India: Potential role of the B.1.617.2 (Delta) variant and delayed interventions, MedRxiv, 30 June 2021, available at <https://www.medrxiv.org/content/10.1101/2021.06.23.21259405v1>.

¹²¹ Vidya Krishnan, "India's COVID-19 taskforce did not meet in February, March despite surge, say members", The Caravan, 22 April 2021, available at <https://caravanmagazine.in/health/india-covid-19-taskforce-did-not-meet-february-march-despite-surge-say-members>.

¹²² "Scientists says Indian government ignored warnings amidst Cononavirus surge", Reuters, May 1, 2021, available at <https://www.reuters.com/world/asia-pacific/exclusive-scientists-say-india-government-ignored-warnings-amid-coronavirus-2021-05-01/>.

was already necessary “15 days before”.¹²³ However, the Central Government only took note of the crisis starting 20 April, only after many states experienced rapid surges in infections, health systems started collapsing and after there was mass panic and outcry both inside of India and across the world.¹²⁴ Even on 20 April, when the number of daily cases was close to 300,000 and the total number of cases were over 1,500,000,¹²⁵ Prime Minister Modi in his speech suggested that lockdowns should be considered a last resort saying that “we have to save the country from lockdowns.”¹²⁶ This appeared to neglect the evident reality that the need for “last resort” measure had long been reached. Finally, on 25 April 2021, the central government issued an implementation framework for containment of COVID-19.¹²⁷

The first comprehensive lockdown during the second wave was implemented only on 14 April 2021 and was imposed by the Maharashtra State Government at which point there had been staggering growth in infections in the state.¹²⁸ This was followed by lockdowns in the National Capital Territory of Delhi on 19 April 2021,¹²⁹ with other states also following suit.¹³⁰

Bhramar Mukherjee, an epidemiology and public health expert at the University of Michigan based on her analysis concluded that had the Government declared a timely lockdown in the second wave between mid to late March 2021, the daily cases would have likely peaked at 20,000–49,000 and not 414,000. According to her, 13 million cases and 100,000 deaths could have been averted.¹³¹ The analysis concludes:

“[t]o summarise, had action taken place at any time in March, it is plausible that more than 90% of observed cases and deaths between March 1 and May 15 could have been potentially avoided.”¹³²

Moreover, the Government appeared not only to ignore expert advice but to deprioritize COVID-19 entirely in early 2021, as it also failed to focus on procuring COVID-19 vaccines for its population, as the second wave was also exacerbated

¹²³ Id.

¹²⁴ Id.

¹²⁵ “Coronavirus India update: State-wise Covid-19 cases, deaths on April 20”, DH Webdesk, Deccan Herald, 20 April, 2021, available at <https://www.deccanherald.com/national/coronavirus-india-karnataka-maharashtra-delhi-tamil-nadu-kerala-update-state-wise-total-number-of-confirmed-cases-vaccine-deaths-on-april-20-976399.html>.

¹²⁶ “We Need to Save the Nation from Lockdown”: PM Modi Asks Migrant Workers to Stay Put”, The Wire Staff, The Wire, 20 April 2021, available at <https://thewire.in/government/narendra-modi-address-covid-19>.

¹²⁷ Letter from Home Secretary to Chief Secretary of All States, 26 April 2021, available at https://www.mha.gov.in/sites/default/files/MHADOLettertoStates_26042021_0.pdf.

¹²⁸ Break the Chain Order, Department of Revenue and Forest, Disaster Management Relief and Rehabilitation, Government of Maharashtra, 13 April 2021, available at <https://cdn.s3waas.gov.in/s3ffeabd223de0d4each9a3e6e53e5448d/uploads/2021/04/2021041458.pdf>.

¹²⁹ Order, Delhi Disaster Management Authority, Government of NCT of Delhi, 19 April 2021, available at https://www.livelaw.in/pdf_upload/delhi-curfew-392079.pdf.

¹³⁰ “Covid-19 second wave: Here’s a list of states that have imposed full lockdown” Indian Express, 9 May, 2021, available at <https://indianexpress.com/article/india/covid-19-second-wave-heres-a-list-of-states-that-have-imposed-lockdowns-7306634/>.

¹³¹ Supra note 121.

¹³² Supra note 121.

by the slow progress in vaccination. By 4 May 2021, only 2.1% of the Indian population were fully vaccinated against COVID-19,¹³³ averaging 2.8 million doses of vaccines per day in April 2021,¹³⁴ a small number considering India's population of 1.4 billion. This sluggish vaccine rollout is particularly unacceptable considering that India's production capacity is 60% of the global vaccine manufacturing and supply, and India is said to have the potential to deliver some three billion doses of COVID-19 vaccines annually.¹³⁵ India started vaccinating its healthcare workers and frontline workers between mid-January and February 2021; older persons in March 2021, and the general population as late as 1 May 2021, once the second wave was already exacting a significant toll.¹³⁶ Starting 10 January 2022, India has begun providing booster doses to priority groups including older persons, healthcare workers and frontline workers.¹³⁷

In addition, despite warnings, the Central Government and many state governments generally made little or no effort to stop large public gatherings that violated COVID-19 guidelines of masking and social distancing.¹³⁸ Instead, for example, election campaigns were allowed to be conducted in five states and union territories – Pondicherry, West Bengal, Tamil Nadu, Kerala, and Assam – in which political candidates and parties held mass rallies in March and April 2021, without any COVID protocols.¹³⁹ This failure to ensure at least the wearing of face masks and adherence to social distancing norms flew in the face of MHA guidelines which mandated face masks and social distancing.¹⁴⁰ It also failed to adhere to

¹³³ Coronavirus (COVID-19) Vaccinations, 22 January, 2022, available at <https://ourworldindata.org/covid-vaccinations>.

¹³⁴ S.V. Subramaniam, "India faces a challenge with its mass vaccination efforts" 3 June 2021, available at [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(21\)00260-6/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(21)00260-6/fulltext).

¹³⁵ Gayatri Vaidyanathan, "India will supply coronavirus vaccines to the world — will its people benefit?", *Nature*, 3 September 2020, available at <https://www.nature.com/articles/d41586-020-02507-x>.

¹³⁶ Revised Guidelines for implementation of National COVID Vaccination Program, Ministry of Health and Family Welfare, Government of India, 2021, available at <https://www.mohfw.gov.in/pdf/RevisedVaccinationGuidelines.pdf>.

¹³⁷ Guidelines for COVID-19 vaccination of children between 15-18 years and precaution dose to HCWs, FLWs & 60+ population with comorbidities, Ministry of Health and Family Welfare, Government of India, 2022, available at <https://www.mohfw.gov.in/pdf/GuidelinesforCOVID19VaccinationofChildrenbetween15to18yearsandPrecautionDoseToHCWsFLWs&60populationwithcomorbidities.pdf>.

¹³⁸ See Election Commission of India, Order, 22 April 2021, available at <https://eci.gov.in/files/file/13649-order-regarding-covid-19-pandemic/>; See Letter from Election Commission from India to Chief Secretary, State of West Bengal, dated 23 April 2021, "Compliance of COVID-19 norms, under the Disaster Management Act, 2005, during public campaign in the ongoing elections in the State of West Bengal-regarding", available at <https://eci.gov.in/files/file/13650-compliance-of-covid-19-norms-under-the-disaster-management-act-2005-during-public-campaign-in-the-ongoing-elections-in-the-state-of-west-bengal-reg/>.

¹³⁹ See Deepankar Basu, "Did Political Rallies Contribute to an Increase in COVID-19 Cases in India?" *The Wire*, 2 May 2021, available at <https://thewire.in/politics/election-rally-covid-19-case-spike>; See also, "Festivities, election rallies: What happened in the weeks leading up to India's 2nd COVID-19 wave", *Down To Earth*, 6 January 2022, available at <https://www.downtoearth.org.in/news/governance/festivities-election-rallies-what-happened-in-the-weeks-leading-up-to-india-s-2nd-covid-19-wave-81001>.

¹⁴⁰ Guidelines for Effective Control of COVID-19, Ministry of Home Affairs Order No 40-3/2020-DM-I(A) dated 23 March 2021, page 3, Government of India, available at https://www.mha.gov.in/sites/default/files/MHAOrder_23032021_0.pdf; See also Letter from Election Commission of India to President/ General Secretaries of National/State political parties, 9 April 2021, available at <https://eci.gov.in/files/file/13646-reiterating-guidelines-for-strict-observance-of-covid-protocols-during-election-rallies-meetings-campaigning-etc-regarding/>.

the Election Commission of India's guidelines for conducting elections, which allowed [p]ublic gatherings/rallies to be conducted but "subject to adherence to extant COVID-19 guidelines".¹⁴¹ The Election Commission of India repeatedly noted violations of its guidelines and the lack of enforcement of COVID-19 protocols.¹⁴² The then Health Minister of Assam, Himanta Biswa Sarma, had publicly said that people in the state did not need to wear masks,¹⁴³ directly contradicting the Ministry of Home Affairs Guidelines and the Election Commission of India's Guidelines. On 16 April Minister for Home Affairs Amit Shah stated that there was no connection between election rallies and COVID-19,¹⁴⁴ while the next day the Prime Minister even applauded the unprecedented large crowds at election rallies.¹⁴⁵

Furthermore, the state and central government allowed a major Hindu religious gathering, Kumbh Mela, which happens once every four years and saw three million devotees congregating to go forward from mid-March 2021 in the midst of the second wave.¹⁴⁶ On April 14 2021, the Uttarakhand Chief Minister said, "Kumbh is at the bank of the River Ganga. Maa (mother) Ganga's blessings are there in the flow. So, there should be no corona."¹⁴⁷

The Government's responses to the second wave in relation to the securing and provision of oxygen mirror the Government's generally myopic approach to preparation for the second wave detailed above. The Health Ministry informed the public on 18 April 2021 that of 162 oxygen plants,¹⁴⁸ only 33 were set up,¹⁴⁹

¹⁴¹ Broad Guidelines For Conduct Of General Elections/ Bye-Elections During Covid-19, Election Commission of India, August 2020, available at <https://eci.gov.in/files/file/12167-broad-guidelines-for-conduct-of-general-electionbye-election-during-covid-19/>.

¹⁴² See Order, Election Commission of India, dated 22 April 2021, available at <https://eci.gov.in/files/file/13649-order-regarding-covid-19-pandemic/>; See also Letter from Election Commission of India to Chief Secretary, West Bengal, dated 23 April 2021, "Compliance of COVID-19 norms, under the Disaster Management Act, 2005, during public campaign in the ongoing elections in the State of West Bengal-regarding", available at <https://eci.gov.in/files/file/13650-compliance-of-covid-19-norms-under-the-disaster-management-act-2005-during-public-campaign-in-the-ongoing-elections-in-the-state-of-west-bengal-reg/>.

¹⁴³ "No need to wear mask, Corona has gone, will tell you when it returns: Assam health minister Himanta Biswa Sarma", India Today, 4 April 2021, available at <https://www.indiatoday.in/elections/assam-assembly-polls-2021/story/assam-corona-covid-health-minister-himanta-biswa-sarma-elections-beauty-parlour-1786914-2021-04-04>.

¹⁴⁴ "Coronavirus: 'Not right to link elections to surge in cases,' says Amit Shah" The Scroll, April 18 2021, available at <https://scroll.in/latest/992579/coronavirus-not-right-to-link-elections-to-surge-in-cases-says-amit-shah>.

¹⁴⁵ Monideepa Banerjee, et al, "Have Witnessed Such A Rally For The First Time...": PM Modi In Bengal" NDTV, 18 April 2021, available at <https://www.ndtv.com/india-news/west-bengal-assembly-election-2021-prime-minister-narendra-modi-in-west-bengal-have-witnessed-such-a-rally-for-the-first-time-2416162>.

¹⁴⁶ Akshay Kumar Dongare et al, "Kumbh Mela Will Not Be Cut Short, Say Officials", NDTV, April 14, 2021, available at <https://www.ndtv.com/india-news/kumbh-mela-may-end-today-say-sources-amid-criticism-covid-19-concerns-2413544>.

¹⁴⁷ "Maa Ganga's Blessings in Flow, There Should Be No Corona': U'khand CM on Kumbh", The Wire, 14 April 2021, available at <https://science.thewire.in/health/maa-gangas-blessings-in-flow-there-should-be-no-corona-uttarakhand-cm-on-kumbh-vs-markaz/>.

¹⁴⁸ Oxygen plants are industrial systems designed to generate oxygen.

¹⁴⁹ Ministry of Health tweet, "Out of 162 PSA #Oxygen plants, 33 have been installed. By end of April, 2021, 59 will be installed. By end of May, 2021 80 will be installed", April 18, 2021, Twitter available at https://twitter.com/MoHFW_INDIA/status/1383651682270072846?s=20; See Vijayta Lalwani et al, "India is running out of oxygen, Covid-19 patients are dying – because the government wasted time", Scroll, 18 April 2021, available at <https://scroll.in/article/992537/india-is-running-out-of-oxygen-covid-19-patients-are-dying-because-the-government-wasted-time>.

reflecting the lack of preparedness to counter any oxygen shortage during the second wave. It was ultimately only as late as 16 April 2021 that the Central Government, acting in terms of the Disaster Management Act, issued an order indicating that there should be no restriction on movement of medical oxygen between states.¹⁵⁰ This order was implemented in response to measures taken by states, including Haryana, Uttar Pradesh and Rajasthan blocking movement of trucks carrying medical oxygen out of state.¹⁵¹ However, these last-ditch interventions might be characterized as too little, too late. By this stage, COVID-19 infections had spread rapidly and state governments were in open competition with each other over essential medicines, oxygen cylinders and blocking supplies. Several countries sent emergency aid to India in the form of oxygen supplies, medicines, raw materials for vaccines and ventilators.¹⁵² However, often the shipments of oxygen cylinders and concentrators were reportedly stuck in customs which created delays in reaching dire patients.¹⁵³

The devastating healthcare crisis that people in India faced in the second wave of COVID-19 is due in part to the lack of preparedness of the central and state governments who ignored expert advice, delayed crowd restrictions for large gatherings such as Hindu festivals and election campaigning, and moved far too slowly to increase vaccination rollout. However, as the analysis below shows, and compounding these failings of the executive, the lack of preparedness of the executive was in part facilitated by the lack of judicial and legislative oversight and review.

IV. INDIAN JUDICIAL RESPONSE TO SECOND WAVE OF COVID-19

At least 11 of 25 high courts and the Indian Supreme Court took cognizance of the public health crisis¹⁵⁴ and engaged in dialogue with the executive requiring the executive to justify its actions with respect to the issues brought before the judiciary and to propose solutions, in the midst of the second wave.

In order to understand and evaluate the Indian court's responses to COVID-19, the extensive powers and innovative methods employed by Indian Courts in vindicating human rights must be comprehended. These include Public Interest

¹⁵⁰ Letter from Home Secretary to Chief Secretaries of All States dated 16 April 2021, available at https://www.mha.gov.in/sites/default/files/Administrator_18042021_0.pdf.

¹⁵¹ Kamaljit Kaur Sandhu, "MHA invokes Disaster Management Act to ensure unobstructed inter-state movement of medical oxygen", India Today, 22 April 2021, available at <https://www.indiatoday.in/coronavirus-outbreak/story/covid-wave-corona-oxygen-supply-chain-mha-invokes-disaster-management-act-1793907-2021-04-22>.

¹⁵² Nikunj Ohri, "India receives 17,755 oxygen concentrators in foreign aid: Health ministry" Business Standard, 24 May 2021, available at https://www.business-standard.com/article/current-affairs/india-receives-17-755-oxygen-concentrators-in-foreign-aid-health-ministry-121052401548_1.html

¹⁵³ "Oxygen Concentrators Stuck in Customs, Says Hospital; Delhi HC Seeks Details From Centre" The Wire, 3 May 2021, available at <https://thewire.in/law/oxygen-concentrators-stuck-in-customs-says-hospital-delhi-hc-seeks-details-from-centre>.

¹⁵⁴ Akshita Saxena, "How Various High Courts Have Been Monitoring COVID19 Issues In Their Jurisdictions?", Live Law, 23 April 2021, available at <https://www.livelaw.in/top-stories/how-various-high-courts-have-been-monitoring-covid19-issues-in-their-jurisdictions-172973>.

Litigation procedures, courts' *suo moto* powers, retention by courts of jurisdiction over matters through a writ of continuing mandamus and most recently what the Supreme Court has referred to in the context of the COVID-19 pandemic as dialogic judicial review. The box below briefly explains these important facets of judicial protection of human rights in India.

Indian High Courts and Supreme Court's Innovative Remedies

The Indian Courts, particularly the Indian Supreme Court have developed a range of innovative remedies that are proactive as well as reactive in facilitating the exercise of the right to effective remedy for rights violations as required by the Indian Constitution as well as international human rights law. The Indian Courts have the power to use these remedies to check the authority of the executive and legislation, particularly in the context of India's positive obligations such as the right to health.

Public Interest Litigation (PIL): In PIL proceedings, a court relaxes the rules of standing (*locus standi*) in order to broaden access to justice. Where a legal injury is caused to a person or to a class of persons by violation of their rights and they are unable to approach a court for relief, PIL proceedings allow any member of the public or any bona fide social action group to bring an application in a High Court or the Supreme Court seeking judicial redress for the injury.¹⁵⁵ Courts have allowed members of the public/civil society organizations that espouse a social cause to move the Court, even by simply writing a letter, which would be regarded as an "appropriate proceeding" under Article 32 of the Constitution. This come to be known as "epistolary" jurisdiction.¹⁵⁶

Suo Moto Powers: The *suo moto* jurisdiction of courts involves a court taking up a matter on its own accord without a petition from an individually aggrieved individual or organization acting in the public interest.¹⁵⁷ Around 2002, *suo moto* powers began to be used to refer to instances in which the court proactively takes cognizance of a matter in case of executive inaction. Such initiatives have become markedly more prevalent since 2010.¹⁵⁸ In 2014, the procedure for *suo moto* petitions at the Supreme Court was formalized by the adoption of Order 38, Rule 12(1)(a) in the Supreme Court Rules, 2013.¹⁵⁹ Between January 2020 and May 2021, the Supreme Court took up 13 cases *suo moto* and the High Courts took up many more *suo moto* cases including some of the most important cases relating to the pandemic.¹⁶⁰ The Supreme Court used its *suo moto* power

¹⁵⁵ Justice P.N.Bhagwati et al, "The Judiciary in India: A Hunger and Thirst for Justice" 5 NUJS L. Rev. 171 (2012), pages 177-178, at <http://nujslawreview.org/2016/12/04/the-judiciary-in-india-a-hunger-and-thirst-for-justice/>.

¹⁵⁶ Id.

¹⁵⁷ See Supreme Court of India, Anil Yadav v. State of Bihar, 1982 (2) SCC 195; S.P Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits (New Delhi: Oxford University Press, 2002).

¹⁵⁸ Marc Galanter, "Snakes and Ladders: *Suo Moto* Intervention and the Indian Judiciary" Vol.10, No. 1, FIU Law Review, page 11, available at <https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1239&context=lawreview>.

¹⁵⁹ Supreme Court Rules 2013, Order 38: Application for enforcement of fundamental rights (Article 32 of Constitution)- Rule 12: Public Interest Litigations : A Public Interest Litigation Petition may commence in any of the following manners: (a) as a *Suo motto* petition in pursuance of the order of the Chief Justice or Judge of the Court. (b) in pursuance of an order of the Chief Justice or a Judge nominated by the Chief Justice on a letter or representation, (c) by an order of the Court to treat a petition as a Public Interest Litigation Petition, (d) by presentation of a petition in the Court, available at <https://main.sci.gov.in/sites/default/files/Supreme%20Court%20Rules%2C%202013.pdf>.

¹⁶⁰ Mihir R, "12 *Suo Moto* Cases Noticed from Media Reports, of 46 [1990-2021]" Supreme Court Observer, 4 June 2021, available at <https://www.scobserver.in/journal/12-suo-moto-cases-noticed-from-media-reports-of-46-1990-2021/>.

to scrutinize executive action and adjudicated on issues including vaccine supply, oxygen supply, provision of essential drugs, among others.¹⁶¹

Writ of Continuing Mandamus: This is a form of adjudication by which a court intentionally retains jurisdiction over a matter, and issues a succession of court orders and directions but keeps it as a live case (*sub judice*), to enable the court to supervise the implementation of its orders. This allows for the litigation to remain ongoing so that the court can monitor compliance through regular hearings. The Government and administrative bodies are asked to submit affidavits with regard to compliance status with justifications for delays and inaction. It is a remedy that may be used, for example, to vindicate economic and social rights, and to remedy executive inaction that is inhibiting the enjoyment of such rights. For instance, in *Bandhua Mukti Morcha*, the Supreme Court made an order giving various directions for identifying, releasing, and rehabilitating bonded labourers, ensuring payment of the minimum wage, the observance of labour laws, and provision of safe drinking water.¹⁶² The Court also set up a monitoring agency to continuously monitor implementation of those directions.

Dialogic Judicial Review: In *Re: Distribution of Essential Supplies and Services During Pandemic* in *Suo Motu Writ Petition (Civil) No.3 of 2021*, the Supreme Court described dialogic review in an order dated 31 May 2021 in the following manner: "This Court is presently assuming a *dialogic jurisdiction where various stakeholders are provided a forum to raise constitutional grievances with respect to the management of the pandemic*. Hence, this Court would, under the auspices of an open court judicial process, *conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny*."¹⁶³ (Emphasis Added).

Prior to this, the Supreme Court in the same case issued an order dated 30 April 2021, holding that: "the jurisdiction exercised in this matter is *merely to facilitate a dialogue of relevant stakeholders, the UOI, the States and this Court...This bounded-deliberative approach is exercised so that the UOI and States can justify the rationale behind their policy approach* which must be bound by the human rights framework which presently implicates the right to life under Article 21 and right to equality under Article 14 of the Constitution."¹⁶⁴

On the Supreme Court's own account, therefore, dialogic review involved judicial processes aimed at:

¹⁶¹ Supreme Court of India, *In Re: Distribution of Essential Supplies and Services During Pandemic*, *Suo Motu Writ Petition (Civil) No.3 of 2021*.

¹⁶² Supreme Court of India, *Bandhua Mukti Morcha vs Union Of India & Others*, (1997), 1997) 10 SCC 549.

¹⁶³ Supreme Court of India, *In Re: Distribution of Essential Supplies and Services During Pandemic*, *Suo Motu Writ Petition (Civil) No.3 of 2021*, Order dated May 31 2021, para 17, available at https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf

¹⁶⁴ Supreme Court of India, *In Re: Distribution of Essential Supplies and Services During Pandemic* in *Suo Motu Writ Petition (Civil) No.3 of 2021*, Order dated May 31 2021, para 5, available at https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf.

1. A court asking for information to be provided by the authorities to allow it to assess whether the authorities policies or actions comply with the State's human rights obligations;
2. If policies are in effect discriminatory or arbitrary, the court can come to a *prima facie* conclusion on the constitutionality of particular measures or policy and engage in dialogue with the authorities requesting or requiring them to make changes to their policies such that they are constitutionally compliant.¹⁶⁵

The Supreme Court and multiple High Courts have engaged some of the above powers and processes in response to COVID-19 in a variety of ways.

In one case in *In Re: Distribution of Essential Supplies and Services During Pandemic*, the Supreme Court engaged in "dialogic" judicial review by asking the Government to provide information that was otherwise not readily available.¹⁶⁶ The Supreme Court took cognizance of the management of the second wave of COVID-19 in India on 22 April 2021 via a *suo moto* writ petition and held its first hearing on 27 April 2021. The court indicated that while it did not seek to "supplant" High Courts and their ongoing processes, the Supreme Court had a complementary role to play in addressing national, systemic, and inter-state issues and identified a framework of issues.¹⁶⁷ On 30 April 2021, the Court issued a detailed order on the issues relating to drug pricing; augmentation and availability of oxygen; oxygen transportation and allocation mechanisms; and availability of vaccines. The Court also took note of the unprecedented situation in India resulting from the second wave and directed the central and state governments to address issues including the supply of oxygen, the enhancement of medical infrastructure, the availability of essential medicines, and COVID-19 vaccination.¹⁶⁸

In respect of COVID-19 vaccines, in particular, the Supreme Court issued a landmark order holding that as COVID-19 vaccines are a public good and that there can be no discrimination between similarly situated classes of persons. The court stressed that "while the Central government will carry the burden of providing free vaccines for the 45 years and above population, the State Governments will discharge the responsibility of the 18 to 44 age group on such commercial terms as they may negotiate."¹⁶⁹

¹⁶⁵ Gautam Bhatia, "Coronavirus and the Constitution – XXXV: Dialogic Judicial Review in the Supreme Court", 28 April 2021, available at <https://indconlawphil.wordpress.com/2021/04/28/coronavirus-and-the-constitution-xxxv-dialogic-judicial-review-in-the-supreme-court/>.

¹⁶⁶ Supreme Court, *In Re: Distribution of Essential Supplies and Services During Pandemic*, *Suo Motu Writ Petition (Civil) No.3 of 2021*.

¹⁶⁷ Supreme Court says it can't be mute spectator in national crisis, doesn't intend to supplant HC cases on COVID-19, PTI, Financial Express, April 27 2021, available at <https://www.financialexpress.com/india-news/sc-says-it-cant-be-mute-spectator-in-national-crisis-doesnt-intend-to-supplant-hc-cases-on-covid-19/2241057/>.

¹⁶⁸ Supreme Court, *In Re: Distribution of Essential Supplies and Services During Pandemic*, *Suo Motu Writ Petition (Civil) No.3 of 2021*, Order dated 30 April 2021, para 3, available at https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_Judgement_30-Apr-2021.pdf.

¹⁶⁹ *Id.*, para 30.

Commenting on the Government's operative COVID-19 vaccine policy at the time, the Court went on to hold that:

"[p]rima facie the rational method of proceeding in a manner consistent with the right to life (which includes the right to health) under Article 21 would be for the Central Government to procure all vaccines and to negotiate the price with vaccine manufacturers ... *we believe that the central government should consider revisiting its current vaccine policy to ensure that it withstands scrutiny of Articles 14 and 21 of the Constitution.*" ¹⁷⁰ (Emphasis Added).

Subsequently, on 6 May 2021, the Supreme Court formed a 12-member national task force to provide a public health response to the pandemic on the basis of a scientific approach. The task force has the mandate to include additional sub-groups in specialized areas or regions for assisting it, before finalizing its recommendations. It is mandated to make recommendations regarding provision of oxygen supply and medicines, plan and adopt measures for responding to any future emergencies related to the pandemic, promote evidence-based research on the pandemic among others. It is mandated to be assisted by the central and state governments as well as ministries in the provision of real-time data.¹⁷¹ According to the Supreme Court's reported oral observations in January 2022, the task force has engaged continuously with the government and many of its suggestions have been accepted by the government.¹⁷²

On 6 May 2021, the Court issued recommendations regarding oxygen supply and availability of essential drugs, increasing medical staff, facilitating audits of oxygen supply, and other issues of management of pandemic.¹⁷³ They had mandated that the Central Government ensure that the Delhi Government receives its adequate quota of oxygen.¹⁷⁴ Previously, on 30 April, the Supreme Court had discussed issues pertaining to production and supply of oxygen, daily supply of oxygen to States and challenges faced in supply chain logistics of oxygen. The Court mandated that emergency buffer stocks of oxygen be created by the Central Government in collaboration with state governments to prevent disruption in supplies. The Court also required real-time updates regarding the supply of oxygen to be shared with the public and mandated planning on augmenting production of oxygen concentrators and increasing in supply of oxygen and containers, as well as the review of any restrictions on inter-state movement of oxygen supply to ensure that movement of oxygen was not hindered.¹⁷⁵

¹⁷⁰ Supra note 175, para 39.

¹⁷¹ Supreme Court, Union of India v. Rakesh Malhotra, SPECIAL LEAVE PETITION (CIVIL) Diary No(s).11622/2021, Order dated 6 May 2021, paras 18-27 available at https://main.sci.gov.in/supremecourt/2021/11622/11622_2021_35_35_27915_Order_06-May-2021.pdf.

¹⁷² "Seek better COVID-19 support via National Task Force: Supreme Court to petitioners", The Hindu, 5 January 2022, available at <https://www.thehindu.com/news/national/seek-better-covid-19-support-via-national-task-force-supreme-court-to-petitioners/article38135075.ece>.

¹⁷³ Supreme Court, Union of India v. Rakesh Malhotra, Special Leave Petition (Civil) Diary No(s).11622/2021, Order dated 6 May 2021, para 3, available at https://main.sci.gov.in/supremecourt/2021/11622/11622_2021_35_35_27915_Order_06-May-2021.pdf.

¹⁷⁴ Id, para 16.

¹⁷⁵ Supra note 175, paras 30-31.

Several high courts also held daily hearings and engaged in dialogic review with state governments during the second wave on a range of issues including the availability and access to oxygen, essential medicines, medical infrastructure such as hospital beds and COVID-19 testing.¹⁷⁶ Several cases of this nature surrounding the right to health and in particular oxygen and medical supplies are discussed below:

The **Delhi High Court** held daily hearings adjudicating hospital pleas on a range of issues, including the need for uninterrupted supply of oxygen; provision of Remdesivir (an anti-viral medication); diversion of oxygen from industrial use to medical use; acute shortage of hospital beds; preventing hoarding of drugs; and administration of vaccines starting 20 April 2021.¹⁷⁷ Often the hearings would take place when oxygen supplies were on the verge of running out in Delhi, and on more than one occasion, there were multiple deaths during or before a hearing due to lack of oxygen supplies. On 21 April 2021, the Delhi High Court continued to hear from the central and state governments regarding access to uninterrupted oxygen of adequate quantity.¹⁷⁸ On 5 May 2021, the Delhi High Court initiated contempt proceedings against two officers of the central government for failure to comply with the Delhi High Court and Supreme Court order regarding supply of oxygen. The Central Government appealed to the Supreme Court against the contempt proceedings on the grounds that the supply of oxygen required of the state was higher than that computed by its expert group; that the government was making a good faith effort to increase oxygen supply; and that there was need for a scientific analysis of the actual needs of oxygen by Delhi.¹⁷⁹ The Supreme Court stayed the contempt order, saying, that it is “prima facie not expedient at this stage to take recourse to the coercive arm of the law by invoking the contempt jurisdiction.” The Court granted an opportunity to the central government to place its plan for oxygen supply to the Court. Nevertheless, it clarified that the Supreme Court would not act as a restraint on High Courts in their efforts to monitor the situation.¹⁸⁰

The **Bombay High Court** held regular hearings on several issues, including supply of Remdesivir and oxygen supply to hospitals, seeking to intervene to ensure uninterrupted oxygen supply to hospitals and directing the Nagpur COVID19 Committee to hold an emergency meeting in this regard. It expressed concern about alleged malpractices by dealers, suppliers and manufacturers and asked authorities to increase frequency of raids and inspections.¹⁸¹ It expressed concern

¹⁷⁶ Akshita Saxena, “How Various High Courts Have Been Monitoring COVID19 Issues In Their Jurisdictions?”, LiveLaw, 23 April 2021, available at <https://www.livelaw.in/top-stories/how-various-high-courts-have-been-monitoring-covid19-issues-in-their-jurisdictions-172973>.

¹⁷⁷ Delhi High Court, Rakesh Malhotra v. Govt of NCT and Others, 20 April 2021, W.P.(C) 3031/2020.

¹⁷⁸ Delhi High Court, Balaji Medical And Research Centre v. Union of India, W.P.(C) (temp) 5500/2021, 21 April 2021, available at https://www.livelaw.in/pdf_upload/16190301688502021-392229.pdf.

¹⁷⁹ Id, paras 10-18.

¹⁸⁰ Supra note 180, paras 25-27.

¹⁸¹ High Court of Nagpur, Court on its own motion vs. Union of India and Ors. Etc. Suo-Motu P.I.L. No.4 of 2020, 21 April 2020.

about influential persons such movie stars and politicians being able to access medications even when the State Government had run out of stock.¹⁸²

The **Karnataka High Court** held daily hearings on issues of oxygen supply, deaths related to lack of oxygen, provision of emergency supply of oxygen, provision of COVID-19 helplines, and food security. When the Karnataka High Court ordered that the central government supply 1200 tonnes of oxygen to Karnataka, the Central Government challenged this order the Supreme Court. However, the Supreme Court refused to stay the order.¹⁸³

The **Madhya Pradesh High Court** held continuous hearings during the second wave and highlighted that right to life guaranteed under Article 21 includes the right to "good health". Among other actions, it issued directions to the state government to ensure adequate healthcare and medical infrastructure, for:

- ensuring continuous and regular supply of oxygen and Remdesivir to all hospitals treating COVID-19 patients;
- increasing capacity of all hospitals that generally cater to medical needs of middle class/poor persons and person in families living below the poverty line, by providing the necessary equipment; and
- fixing the rates that can be charged by private hospitals, pathological laboratories and diagnostic centres for treatment and tests and other COVID-19 related health goods and services.¹⁸⁴

The **Allahabad High Court** also held regular hearings. In one hearing the Court considered the state of affairs in major cities in Uttar Pradesh and highlighted that in Prayagraj, the amenities available could only provide for the needs of 0.5 percent of the population. It found the Government responsible for the state of affairs observing:¹⁸⁵

"If people die of pandemic in a large number due to paucity of sufficient medical aid it would be the governments to blame which failed to counter the pandemic even after one long year of experience and learning... *In any civilised society if public health system is not able to meet the challenges and people die for want of proper medication, it means there has been no proper development...* Those in the helm of affairs of governance are to be blamed for the present chaotic health problems and more so when there is a democracy..."¹⁸⁶ (Emphasis Added).

¹⁸² Sharmeen Hakim, "Probe How Celebrities, Politicians Got COVID Drugs : Bombay High Court Tells State" LiveLaw, 27 May 2021, available at <https://www.livelaw.in/top-stories/probe-how-celebrities-politicians-got-covid-drugs-bombay-high-court-tells-state-174801>.

¹⁸³ "BREAKING : Centre Moves Supreme Court Challenging Karnataka High Court Direction To Increase Daily Oxygen Quota For Karnataka As 1200 MT" Livelaw News Network, 6 May 2021, available at <https://www.livelaw.in/top-stories/centre-supreme-court-karnataka-high-court-increase-daily-oxygen-quota-173707?infinitescroll=1>.

¹⁸⁴ High Court of Madhya Pradesh, In Reference (Suo Motu) Vs Union Of India And Others et al, W.P. No.8914/2020.

¹⁸⁵ High Court of Allahbad, In-Re Inhuman Condition At Quarantine Centres And For Providing Better Treatment To Corona Positive v. State of UP, PIL 574 of 2020, Order dated 4 May 2021, available at https://www.livelaw.in/pdf_upload/allahabad-hc-covid-392884.pdf

¹⁸⁶ Id, para 5.

The High Court noted that recommendations were needed from influential people to get access to hospital beds, drugs, oxygen cylinders, RT-PCR tests and other services. It further expressed strong displeasure about the state government and election commission proceeding with state elections as well as political rallies, in particular without COVID-19 protocols in place, which resulted in many teachers and government staff being exposed to the COVID-19 and in the deaths of over 135 election officials. Noting the immense pressure on the system and lack of action by the government, it ordered that lockdowns should be initiated in five cities in the state.¹⁸⁷ The Supreme Court later stayed this order and called for a report from the State government on COVID-19 management.¹⁸⁸

The **Bihar High Court** conducted regular hearings during the second wave of COVID-19 pandemic. In hearings on 15 April 2021 and 17 April 2021 it observed that RT-PCR tests were not being conducted at the desired rate. It also made observations regarding shortage of medical facilities like oxygen, Remdesivir and beds in hospitals. Furthermore, it expressed concern that while hospital data presented to it by the state government showed availability of majority of beds, including beds with medical oxygen, patients were being denied admission to hospitals as in reality there was unavailability of hospital beds and severe shortage of oxygen. The Court had, on 15 April 2021, also directed the state government regarding availability of CT-Scan and X-Ray machines and was informed that they would be installed within a month in compliance with Court directions. Finally, the court ordered states are required to "take all possible measures" to ensure that people entering from outside the state are made to undergo a rapid antigen test or are required to show a COVID-19 negative test report.¹⁸⁹ The Court also required that the state government provide relevant information on a dedicated portal and asked the government to submit a report regarding the availability of healthcare workers and available infrastructure at COVID-19 dedicated healthcare centres for hearing the matter on 19 April 2021.¹⁹⁰

In compliance with 15 April Court directions, the Government initiated a system of daily media briefings and held meetings to develop a comprehensive action plan for responding to the second wave of COVID-19. The Government was also considering increasing the number of doctors by requisitioning them from armed forces and, to increase the number of hospital beds in existing hospitals, redirecting hospitals to focus on COVID-19, and to granting more laboratories permission for conducting RT-PCR tests.¹⁹¹

¹⁸⁷ High Court of Allahabad, *In-Re Inhuman Condition At Quarantine Centres And For Providing Better Treatment To Corona Positive v. State of UP*, PIL 574 of 2020, Order dated 19 April 2021, available at https://www.livelaw.in/pdf_upload/covid-allahabad-hc-392109.pdf.

¹⁸⁸ Supreme Court of India, *The State of Uttar Pradesh v. High Court of Judicature at Allahabad*, Special Leave Petition (Civil) Diary No(s). 10862/2021, available at https://main.sci.gov.in/supremecourt/2021/10862/10862_2021_31_11_27753_Order_20-Apr-2021.pdf. See also, "It's A Shame That While Government Knew Of Magnitude Of COVID Second Wave, It Never Planned Things In Advance : Allahabad High Court" Livelaw, 19 April 2021, available at <https://www.livelaw.in/top-stories/allahabad-high-court-uttar-pradesh-lockdown-covid19-second-wave-govt-didnt-plan-172810>.

¹⁸⁹ High Court of Bihar, *Shivani Kaushik v. Union of India, et al*, Civil Writ Jurisdiction Case No.353 of 2021 et al, Order dated 17 April 2021, page 13, available at https://www.livelaw.in/pdf_upload/patna-high-court-covid-management-392146.pdf.

¹⁹⁰ Id.

¹⁹¹ Supra note 190, page 10.

The **Uttarakhand High Court** was informed on 20 April 2021 that, in compliance with its orders on 31 March 2021, the state government had scheduled a meeting for 22 April 2021 and that “important decisions would be taken with regard to tackling of COVID-19 pandemic in the State.”¹⁹² Furthermore, the court was informed that the government was issuing media bulletins with regard to all relevant information in response to courts orders. The Court issued directions for use of mobile vans to ensure testing across the state. It also issued directions regarding increasing the number of facilities for carrying out COVID-19 testing as well as the amount of testing. The Court also issued directions regarding increasing the number of COVID-19 healthcare centers and dedicated hospitals and establishing temporary hospitals, as well as increasing the number of hospital beds, CT scan machines, PPE kits, and anti-viral injections. In addition, it issued directions regarding regulating a popular and busy pilgrimage site, and to prevent overcharging by private hospitals and directing state government to take action against hospitals that overcharged patients. Finally, the Court issued directions regarding publishing a daily media bulletin and asked the state government to provide a report on the above issues by 7 May 2021. It directed the state government to issue a plan regarding pilgrimage sites which provides a procedure for registration of the pilgrims, the number of pilgrims allowed to travel, the accommodation which would be available for the pilgrims, so that they would not become COVID hotspots.¹⁹³

V. ANALYSIS OF INDIAN EXECUTIVE’S RESPONSE TO COVID-19 SECOND WAVE

The measures taken by the Indian executive in response to COVID were often not reasonable or appropriate. Despite some delayed interventions from courts on some issues there was a situation where, in fact, there were insufficient checks on the executive. Although, many courts including the Supreme Court engaged in sometimes beneficial “dialogic judicial review” and initiated some useful *suo moto* petitions after the country was submerged in the second wave, these serve only to highlight the importance of checks on executive conduct, including the use of judicial review and oversight throughout the ongoing pandemic and in advance of waves of COVID-19.

The actions of the Indian executive during and leading up to the second wave must be assessed against the State’s international human rights obligations including those in terms of right to health.

¹⁹² High Court of Uttarakhand, Sachdanand Dabral v Union of India and Others, Writ Petition (PIL) NO. 58 OF 2020 and others, Order dated April 20, 2021, para 3, available at https://images.assettype.com/barandbench/2020-06/6e28557a-e7c9-4c50-9c4c-7281ab2fc5fd/Sachdanand_Dabral_v_Union_of_India_and_others_PIL_58_order.pdf.

¹⁹³ Akshita Saxena, "Ramp Up Testing; Set Up Mobile Vans; Release SoP For Upcoming Char Dham: Uttarakhand High Court Issues Directions To Prevent Spread Of Covid-19", Livelaw, 22 April 2021, available at <https://www.livelaw.in/news-updates/ramp-up-testing-set-up-mobile-vans-release-sop-for-upcoming-char-dham-uttarakhand-high-court-issues-directions-to-prevent-spread-of-covid-19-172963>.

A. STRATEGY

The CESCR has affirmed that to meet its international legal obligations under the ICESCR, States must show they have devised a national public health strategy and plan of action to address the health concerns of the whole population. The plan must be periodically reviewed, participatory and transparent and provide benchmarks on the basis of which it is closely monitored and considers the most disadvantaged and marginalized persons in promulgation of policies.¹⁹⁴

With respect to COVID-19, the Indian State should have developed a transparent and participatory strategy and a plan of action to address the health concerns of the whole population in particular of the disadvantaged population, in relation to the potential second wave of the COVID-19 pandemic.¹⁹⁵ As discussed above, the executive in India has assumed significant powers under DMA and EDA, to determine the actions to be taken to respond to COVID-19 pandemic, without legislative action, including oversight. However, despite extensive powers, the Indian Government did not devise a specific national plan of action for COVID-19, and did not transparently disclose or develop guidelines for plans for combatting COVID-19 second wave in a participatory manner.¹⁹⁶

Various high courts issued orders requiring and/or recommending that state governments take measures to prevent a potential second wave such as the Madras High Court¹⁹⁷ and Delhi High Courts which had asked the government to be on guard regarding new strains.¹⁹⁸ In October 2020, in *suo moto* action the Tripura High Court had exercised continuous *mandamus* and had warned in its order that the "state should not get a false idea that there is a dramatic improvement in the coronavirus spread and that the life should go back to normal. This would be a serious mistake with serious consequences."¹⁹⁹ It passed a detailed order regarding mandatory masks, installation of medical equipment, and testing.²⁰⁰

The manifest absence of an adequate strategy was also evidenced by the absence of key policies necessary to respond to COVID-19. In its order on April 30 2021, the Supreme Court recognized that there was no national policy for hospital admission, observing that:

¹⁹⁴ Supra note 11, paras 43(f), 53-56.

¹⁹⁵ See International Commission of Jurists, "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" September 2020, available at <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

¹⁹⁶ In May 2021, a Lancet editorial said that the government gave the impression that India had "beaten Covid-19" despite Indian Council of Medical Research study showing that only 21% of the population had been exposed to the viral infection. See "India's COVID-19 Emergency", Editorial, Volume 397, Issue 10286, The Lancet, May 8, 2021, available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01052-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01052-7/fulltext).

¹⁹⁷ Madras High Court, Court on its Own Motion, WP No. 20299 of 2020, Order dated 6 January 2021, available at https://www.livelaw.in/pdf_upload/pdf_upload-387121.pdf.

¹⁹⁸ High Court of Delhi, Rakesh Malhotra v. Govt of NCT of India and Others, Order dated 23 December 2020, available at https://www.livelaw.in/pdf_upload/pdf_upload-386356.pdf.

¹⁹⁹ High Court of Tripura, Court on its own motion, W.P. (C) (PIL) No.09/2020, p 6, available at https://www.livelaw.in/pdf_upload/pdf_upload-382554.pdf.

²⁰⁰ Id, pp 2-5.

"[d]iffering standards for admission in different hospitals across the nation leads to chaos and uncertainty. The situation cannot brook any delay. Accordingly, we direct the Central Government to frame a policy in this regard..".²⁰¹

Similarly, in its orders on April 30 and May 31, the Supreme Court issued landmark orders regarding the vaccine policy adopted by the Central Government questioning its validity stating prima facie that it would "result in a detriment to the right to public health which is an integral element of Article 21 of the Constitution", recommending revision "to ensure that it withstands the scrutiny of Articles 14 and Article 21 of the Constitution".²⁰² The Central Government on 7 June 2021 altered its vaccination policy accordingly, which reflects the impact of the Supreme Court orders.²⁰³

Furthermore, at the state government level, in a number of cases discussed above, such as from Bihar and Uttarakhand, it was only upon the orders of high courts that the state government held meetings to develop a specific comprehensive action plan for responding to the second wave of COVID-19. However, despite expert warnings and warnings issued by courts or during court proceedings, there was no specific, comprehensive national or state level plan to respond to the second wave of COVID-19. Instead, central and state governments chose to regulate and respond to the pandemic in an ad hoc fashion through executive decrees.²⁰⁴

The courts themselves also did not always act to secure arguably necessary measures such as the restriction on mass gatherings. The Gujarat High Court and Allahabad High Court banned religious processions in July 2020²⁰⁵ and August 2020 respectively.²⁰⁶ However, in January 2021 the Uttarakhand High Court, while expressing concern about a proposed mass festival attracting millions, Kumbh Mela, and which later became a super spreader event, did not impose any restrictions, instead asking only that SOPs be issued.²⁰⁷ Similarly, while the

²⁰¹ Supra note 175, para 23.

²⁰² Id, para 39.

²⁰³ Ministry of Health and Family Welfare, Revised Guidelines for implementation of National COVID Vaccination Program, 2021, available at <https://www.mohfw.gov.in/pdf/RevisedVaccinationGuidelines.pdf>.

²⁰⁴ National Disaster Management Plan, 2019, National Disaster Management Authority, Government of India, November 2019, available at <https://www.thehinducentre.com/the-arena/current-issues/article32504959.ece/binary/ndmp-2019.pdf>. Notably, in 2021, the Supreme Court held that India's national plan 2019 can be supplemented by the issuance of guidelines on issues of hospital admission and access to essential drugs and vaccines in response to COVID-19. The Indian Government submitted affidavits to the Supreme Court on April 23 and April 29 detailing the medical infrastructure available for COVID-19 and the steps it had taken for preparedness for COVID19 including regarding hospital beds and oxygen supply and by writing to state governments to require them to prepare themselves for the second wave, Supreme Court, In Re: Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition (Civil) No.3 of 2021, Order dated 30 April, paras 14-15.

²⁰⁵ Gujarat High Court, Hiteshkumar Vittalbhai Chavda v. Shri Jagannathji Mandir Trust, C/WPIL/90/2020, Order Dated 7 July 2020, available at <https://indiankanoon.org/doc/53582802/>.

²⁰⁶ Allahbad High Court, Roshan Khan et al v. State of UP et al, PIL No 840/2020, Order dated 29 August 2020, available at https://www.livelaw.in/pdf_upload/pdf_upload-380642.pdf.

²⁰⁷ Telangana High Court, Court on its own motion, Order dated 11 January 2021 available at https://www.livelaw.in/pdf_upload/kumbh-mela-uttarakhand-387299.pdf; See Purushottam Anand

Supreme Court initially prohibited²⁰⁸ the proposed mass religious procession in Odisha, it later reversed its order and gave permission with modifications. These included closure of entry points into the town of the carriage of procession, imposition of curfew during the time of procession, restriction on the number of people who would pull the chariot during the procession.²⁰⁹

B. MAXIMUM USE OF RESOURCES

CESCR's statement on COVID-19 and ESCR makes it clear that States must "devote their maximum available resources to the full realization of all economic, social and cultural rights, including the right to health".²¹⁰ This point is also supported by the Indian Supreme Court's pronouncement in *State of Punjab & Ors. v. Ram Lubhaya Bagga* that the state needs to give healthcare priority and provide sufficient resources as well as highly trained staff. In the context of COVID-19, the CESCR has emphasized that States must "make every effort to mobilize the necessary resources to combat COVID-19" which it acknowledges requires an "extraordinary mobilization of resources" from States.²¹¹

As the COVID-19 pandemic has made abundantly clear, oxygen supply is a critical resource that must be procured and managed if healthcare facilities and workers are to be able to effectively provide health services to those infected with COVID-19. In terms of reports cited above, at least 629 patients died due to oxygen shortage in 110 hospitals in India between April 6 and May 19. At least 60 people died due to oxygen shortage across hospitals in the country, with 46 of these deaths reported from Sir Ganga Ram Hospital and Jaipur Golden Hospital in Delhi.²¹²

India lacked oxygen supply and transportation and cryogenic tankers needed to transport oxygen from producing states to those where it was needed. There were inter-state disputes which resulted in blockages on transportation of oxygen supply. Often the shipments of oxygen cylinders and concentrators provided by other countries were stuck in customs which created delays in reaching dire patients.²¹³ In addition to oxygen supply shortage, it severely lacked medical infrastructure including ventilators and ICU beds, oxygen cylinders and concentrators, COVID-19 essential drugs such as Remdesivir, adequate testing

et al, "From the Kumbh to Ramzan, Contrasting Court Orders in COVID Times" The Wire, 18 April 2021, available at

<https://thewire.in/law/from-the-kumbh-to-ramzan-contrasting-court-orders-in-covid-times>.

²⁰⁸ Akshita Saxena, "BREAKING 'Hope God Will Allow Rath Yatra Next Year': Supreme Court Refuses To Allow Rath Yatras In Odisha In Places Other Puri Jagannath Temple", LiveLaw, 6 July 2021, available at https://www.livelaw.in/top-stories/supreme-court-refuses-to-allow-rath-yatras-in-odisha-in-places-other-puri-jagannath-temple-176939?infinite_scroll=1.

²⁰⁹ Supreme Court of India, *Odisha Vikas Parishad v. UOI*, WP 571/2020, pages 6-8, available at https://www.livelaw.in/pdf_upload/pdf_upload-376844.pdf.

²¹⁰ Supra note 22, para 14.

²¹¹ Supra note 22, paras 14 and 25.

²¹² Aditi Priya et al, "The truth about oxygen deaths during Covid second wave", Indian Express, July 7 2021, available at <https://indianexpress.com/article/opinion/columns/covid-second-wave-oxygen-death-coronavirus-cases-7392219/>.

²¹³ "Oxygen Concentrators Stuck in Customs, Says Hospital; Delhi HC Seeks Details From Centre", 3 May 2021, The Wire, available at <https://thewire.in/law/oxygen-concentrators-stuck-in-customs-says-hospital-delhi-hc-seeks-details-from-centre>.

facilities, CT Scan and X-Ray machines and even adequate funeral facilities. These are all critical resources that must be put to effective use in order to combat a pandemic such as COVID-19. In their absence, families, hospital administrators and even patients themselves were reaching out on social media and to courts for enabling access to oxygen and medications.²¹⁴

Overall, therefore, the Government appears to have failed to maximize or make maximum use of its available resources to address the health crisis. It has also not provided a coordination mechanism to respond to COVID-19 in a way that effectively manages the distribution of critical health-related resources including oxygen.

Beginning in April 2021, the Government started passing orders under the Disaster Management Act to: increase capacity of medical infrastructure and coordinate its supply including supply of oxygen²¹⁵ and essential medications such as Remdesivir; and increase personnel and hospital beds. These responses were, however, overdue and delayed and it remains unclear whether they were successful, because by 15 May 2021, COVID-19 transmissions had already started dropping.

The emblematic High Court and the Supreme Court cases reviewed in this briefing paper illustrates that Courts were, at times, proactively involved in reviewing state policy and measures to ensure compliance with human rights standards, including in relation to ensuring access to and transport and diversion of scarce oxygen supplies.

Thus, while the executive failed in fulfilling its international legal obligation to make maximum use of its available resources, the judiciary did conduct dialogic review of state policy towards ensuring maximum use, management and diversion of resources such as oxygen which provided some succor to hospitals as well as those suffering from COVID-19.

C. EQUITABLE ACCESS TO HEALTH FACILITIES, GOODS AND SERVICES

The CESCR prescribed to States that COVID-19 must be combatted in the “most equitable manner possible” so as to “avoid imposing a further economic burden on these marginalized groups” and explicitly indicates that allocation of resources should therefore “prioritize the special needs of these groups”.²¹⁶

The CESCR stressed that failure to take measures to reduce the inequitable distribution of health facilities, goods and services amounts to a violation of the duty to fulfil right to health.²¹⁷ In addition, the CESCR noted that States must “adopt appropriate regulatory measures to ensure that health-care resources in both the public and the private sectors are mobilized and shared among the whole

²¹⁴ Pages 18-23 of this briefing paper.

²¹⁵ Kamaljit Kaur Sindhu, “MHA invokes Disaster Management Act to ensure unobstructed inter-state movement of medical oxygen”, India Today, April 22, 2021, available at <https://www.indiatoday.in/coronavirus-outbreak/story/covid-wave-corona-oxygen-supply-chain-mha-invokes-disaster-management-act-1793907-2021-04-22>.

²¹⁶ Supra note 22, para 14.

²¹⁷ Supra note 11, para 52.

population to ensure a comprehensive, coordinated health-care response to the crisis".²¹⁸ This makes it clear that the ICESCR requires the mobilization and use all available resources – whether public or private – towards efforts to combat COVID-19 and realize the right to health.

States have a duty to prevent third parties from interfering with the enjoyment of ESCR wherein the State has a duty of due diligence to ensure that there is no discrimination in access to essential facilities through actions such as control and regulation of products and services by private actors relating to ESCR.

In India, during the second wave, essential goods and services such as oxygen cylinders, hospital beds, life-saving drugs were not readily available, due to severe shortage of supplies. As a result, often only those in privileged positions, typically, those with socio-economic resources were able to access these essential facilities. In addition, most of the essential goods and facilities needed were available only from private actors who reportedly engaged in practices such as hoarding, black-marketing and charging high prices for essential drugs, hospital beds, and oxygen supply.

The Federation of All India Medical Association wrote a letter to Prime Minister Modi on 12 April 2021 raising concerns about priority being given to politicians and their party workers in hospitals for hospital beds and ICU beds, even over healthcare workers.²¹⁹ The Resident Doctors' Association of AIIMS Bhubaneswar, Odisha similarly alleged that all life support or ICU facilities were being provided for VIPs, politicians and their party workers, even when some of these cases could have been treated with isolation only. They also complained about being forced to visit politicians' homes to provide healthcare, bypassing the systems put in place, even while their services were desperately needed in hospitals.²²⁰

This situation was highlighted by the Allahbad Court which noted that "VIP" recommendations are needed to access medications and oxygen.²²¹ Similarly, the Delhi High Court during a hearing in a public interest litigation wanted to know how political officials were able to procure oxygen and COVID-19 medications in large quantities, while others were unable to do so. The Court found that such hoarding and distribution of crucial COVID-19 medicines by political leaders should be discontinued and it should be surrendered to the state for use by government hospitals.²²²

²¹⁸ Supra note 22, para 13.

²¹⁹ Aneesha Bedi, "Doctors' association calls out VIP culture in govt hospitals for Covid testing in letter to Modi" The Print, 13 April 2021, available at <https://theprint.in/india/doctors-association-calls-out-vip-culture-in-govt-hospitals-for-covid-testing-in-letter-to-modi/639192/>.

²²⁰ "AIIMS-BBSR against 'VIP culture' in govt hospitals during Covid" The Statesmen, 15 April 2021, available at <https://www.thestatesman.com/cities/bhubaneshwar/aiims-bbsr-against-vip-culture-in-govt-hospitals-during-covid-1502962869.html>.

²²¹ Akshita Saxena, "'No One Should Die For Want Of Oxygen': Allahabad High Court Issues Directions For Uninterrupted Supply", Livelaw, 27 April 2021, available at <https://www.livelaw.in/news-updates/allahabad-high-court-issues-directions-for-uninterrupted-supply-of-oxygen-no-one-should-die-for-want-of-oxygen-173225>.

²²² "PIL on hoarding: Delhi Police question Youth Cong chief BV Srinivas", Hindustan Times, 15 May, 2021, available at <https://www.hindustantimes.com/cities/delhi-news/pil-on-hoarding-delhi-police-question-youth-cong-chief-bv-srinivas-101621017241213.html>.

The Bombay High Court too raised concerns about how movie-stars and politicians were able to access drugs when the State Government had run out of stock.²²³

Courts fulfilled their duty to address inequity of access to hospital beds and drugs as well as black-marketing through various orders. One example is the Supreme Court order requiring the Central Government to pass a national policy on hospital admissions, while others include court orders regarding keeping a daily check on stock of medications with all pharmacies. However, judicial responses were not consistent in this regard. For example, when a PIL filed in the Supreme Court regarding the "deplorable VIP culture" in relation to the allocation of beds to COVID-19 patients, the Court responded orally during a hearing to say that the allocation of beds was best left to hospitals and it could not interfere with such discretion. The Court reportedly indicated that for a certain "category" of patients such as "the Prime Minister of India or the President, you have to keep a bed reserved for him in a hospital".²²⁴

Moreover, the executive failed to comply with its immediate responsibility to ensure equitable distribution of health facilities and services evidencing an inability to conduct effective control over private actors but also because influential persons such as political actors, party workers and their peers were able to access preferential healthcare in dire circumstances.

D. RIGHT TO INFORMATION

States carry an immediate obligation to provide access to information concerning the health problems in the community, including methods of preventing and controlling them.²²⁵ Thus, the international law obligation to respect the right to health requires Indian Government to not censor, withhold or intentionally misrepresent "health related information". The authorities must not prevent people's participation in all "health-related matters".²²⁶

On 23 April 2021, the Indian Ministry of Electronics and Information Technology asked Twitter and Facebook to take down posts critical of the government's handling of the pandemic which referred to shortage of supplies, hospital beds, mass cremations and gathering of crowds in accordance with Section 69A of the Information Technology Act. Section 69A of the Act states that the Central Government can, in the interests of "public order" or "security of the State", direct that public access be blocked to "any information generated, transmitted, received, stored or hosted in any computer resource."²²⁷ Twitter took down 52

²²³ Sharmeen Hakim, "Probe How Celebrities, Politicians Got COVID Drugs : Bombay High Court Tells State" LiveLaw, 27 May 2021, available at <https://www.livelaw.in/top-stories/probe-how-celebrities-politicians-got-covid-drugs-bombay-high-court-tells-state-174801>.

²²⁴ "Have To Reserve Beds For PM, President, Says Court On Plea For Transparency", PTI, NDTV, 21 May, 2021, available at <https://www.ndtv.com/india-news/delhi-high-court-on-plea-for-transparency-have-to-reserve-beds-for-pm-president-2446678>.

²²⁵ Supra note 11, para 44(d).

²²⁶ Supra note 11, para 34.

²²⁷ Ashish Aryan, "IT ministry asks social media cos to remove more posts, alleges content 'spreading misinformation' about Covid-19", Indian Express, 25 April 2021, available at

tweets based on government orders.²²⁸ Facebook too took down several posts and did not provide information about actions taken under the Information Technology Act, as Rule 16 of Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 mandates that strict confidentiality be maintained around the issuance of blocking orders.²²⁹ Even a Right to Information application filed by an RTI activist regarding details about the government's actions in this regard was denied by the government based on national security exemption in the Right to Information Act.²³⁰ In addition to preventing access to crucial information necessary to ensure the protection of the right to health, the Indian State's actions violated their international obligations to ensure freedom of expression and information.²³¹

The Chief Minister of Uttar Pradesh asserted that individuals were spreading rumours of oxygen shortage and warned of invoking National Security Act against such posts, threatening to seize their property,²³² eventually filing a case against a man for appealing for oxygen on social media, which was later dismissed.²³³ The Uttar Pradesh state government also charged a director of a private hospital in Lucknow for "falsely" claiming oxygen shortage accusing the hospital of making a false claim (S. 52, Disaster Management Act) as well obstructing an officer in discharge of his functions (S. 51, Disaster Management Act), and disobeying the order of a public servant (S. 188, IPC). The hospital was granted interim protection by the court.²³⁴

The Minister of State, Health and Family Welfare, Central Government on 20 July 2021, in response to a question in the Upper House of Parliament, stated that "no deaths due to lack of oxygen has been specifically reported" by states and union

<https://indianexpress.com/article/india/it-ministry-asks-social-media-cos-to-remove-more-posts-alleges-content-spreading-misinformation-about-covid-7288374/>.

²²⁸ "On Centre's request, Twitter takes down 52 tweets criticising India's handling of pandemic: Report", Scroll, 24 April 2021, available at

<https://scroll.in/latest/993205/on-centres-request-twitter-takes-down-52-tweets-criticising-indias-handling-of-pandemic-report>.

²²⁹ Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, Rule 16: Requests and complaints to be confidential, available at <https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blocking%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf>.

²³⁰ "Covid-19: Centre denies RTI request seeking details on Twitter's move to block posts critical of BJP" Scroll, 27 May 2021, available at <https://scroll.in/latest/995904/covid-19-centre-denies-rti-request-seeking-details-on-twitters-move-to-block-posts-critical-of-bjp>

²³¹ See International Commission of Jurists, "Living Like People Who Die Slowly:

The Need for Right to Health Compliant COVID-19 Responses" September 2020, pages 105-111, available at <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

²³² Omar Rashid, "Oxygen shortage | Seize property of those spreading rumours: Yogi Adityanath" The Hindu, April 25, 2021, available at <https://www.thehindu.com/news/national/other-states/seize-property-of-those-spreading-rumours-up-cm/article34404518.ece>.

²³³ The Wire Staff, "Youth Sought Oxygen for Grandfather via Tweet, UP Police File Criminal Case Against Him" The Wire, 28 April 2021, available at <https://thewire.in/government/amethi-up-police-arfa-khanum-sherwani-oxygen-smriti-irani>.

²³⁴ Omar Rashid, "Coronavirus-Lucknow hospital booked for 'false' oxygen shortage notice", The Hindu, May 6, 2021, available at <https://www.thehindu.com/news/national/other-states/covid-19-hospital-booked-for-false-oxygen-shortage-notice-in-lucknow/article34499335.ece>.

territories.²³⁵ Shortly thereafter, many other state governments also claimed that there had been no deaths due to lack of oxygen supply in their respective jurisdictions.²³⁶ However, the Delhi Health Minister denied the Central Government's claim stating that the Central Government did not collect data on oxygen related deaths and clarified that there were numerous deaths caused due to lack of oxygen in Delhi.²³⁷

The Supreme Court on 30 April 2021, while not prohibiting the removal of tweets critical of the government, expressed concern about individuals who were using social media platforms to seek help being targeted with threats for prosecution and asked the Central and State governments to cease all such "threats of prosecution and arrest to citizens". The Court further directed the Directors General of Police to ensure compliance with their 30 April 2021 order across the ranks of the police force stating that it would use its contempt jurisdiction in case their order to cease threats of prosecution and arrest was not complied with.²³⁸ In addition, the Court highlighted the importance of sharing of information in the interest of the "larger democratic nature of our nation," saying that the COVID-19 pandemic may become a worse tragedy otherwise and that sharing information helps develop a "collective public memory" of the pandemic.²³⁹

Thus, the central government used S. 69A, Information Technology Act to censor information critical of its handling of the pandemic, on the basis of it being against "public order."²⁴⁰ In addition, the Uttar Pradesh state government threatened to prosecute individuals and hospitals for falsely claiming oxygen shortage. The Supreme Court in its 30 April 2021 order helped to the limited extent of preventing criminalization and threats of criminalization of individuals and hospitals for appealing for help on social media.²⁴¹

VI. RECOMMENDATIONS

In order to ensure compliance with its obligations in terms of international human rights law and to ensure effective preparation for and response to future waves of the COVID-19 pandemic the Indian authorities should:

1. Develop and implement a specific and time-bound plan and strategy, with clarity on roles and responsibilities of the executive to ensure the full

²³⁵ Rajya Sabha, Unstarred Question No. 243, Shri KC Venugopal, Acute Shortage of Oxygen During Second Wave of Pandemic, 20 July 2021 available at <https://pqars.nic.in/annex/254/AU243.pdf>.

²³⁶ "States join Centre in saying no one died due to oxygen shortage: Who said what", India Today, July 21, 2020, available at <https://www.indiatoday.in/coronavirus-outbreak/story/states-join-centre-in-saying-no-one-died-due-to-oxygen-shortage-who-said-what-1830965-2021-07-21>.

²³⁷ "False to say no one died due to oxygen shortage: Delhi Health Minister" Business Standard, 21 July 2021, available at https://www.business-standard.com/article/current-affairs/false-to-say-no-one-died-due-to-oxygen-shortage-delhi-health-minister-121072100699_1.html.

²³⁸ Supra note 175, para 71.

²³⁹ Supra note 175, para 64.

²⁴⁰ Information Technology Act, Section 69A.

²⁴¹ Supra note 175, para 61.

realization of India's international human rights obligations including those required under the ICESCR in terms of the right to health.

2. Review and amend the Epidemic Disease Act and Disaster Management Act to bring in time limitations clauses and provide for effective legislative review and oversight over executive measures implemented pursuant to these laws. The review and amendment of the EDA and DMA should be aimed more broadly at ensuring consistency of Indian law with the principles of international human rights law applicable to any limitations, restrictions and derogations from human rights.
3. Take extraordinary measures to maximize and make full and effective use of the maximum available resources, including financial, human, technological resources, to prepare for and respond to subsequent waves of COVID-19 pandemic and other future epidemic diseases.
4. Urgently undertake an audit of the ready availability of oxygen supply and other COVID-19 essential health facilities throughout the country and publicise the findings of this audit widely.
5. Ensure the effective regulation and accountability of private sector actors including private hospitals to ensure their adherence to the corporate responsibility to respect human rights, including by desisting completely from practices such as overcharging individuals for healthcare goods and services and black-marketing or hoarding medical goods and supplies.
6. Ensure that updated information about COVID-19 is publicly available on a continuous basis during, before and after subsequent waves of infection. Such information should include information regarding rate of infection and COVID-19 related deaths as well as the availability of healthcare facilities, services and goods among others.
7. Review and revise laws such as S. 69A, Information Technology Act that allow censorship and/or prosecution for expressing an opinion or sharing information on social media on overbroad grounds such as threat to public order or national security. Such review and revision should be undertaken with the aim of bringing the law in line with both India's constitutional law framework and Indian's international human rights obligations to freedom of expression and information.

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