

A SOCIO-LEGAL ANALYSIS ON THE WORKING OF THE CONSTITUTION OF INDIA IN TIMES OF COVID-19 PANDEMIC

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Abstract

The coin of this pandemic situation i.e. Covid-19 has both the side of pros & cons. The current scenario emphasised upon the laws related with health issues. When we talk about India, there is no such modern provision or statute to deal with this pandemic. We are dealing with old statute to tackle with current problem. Actually, we are stuck between the subject matter of Union List and State List. Because of this we are only amending our old laws in lieu of making a proper statute to tackle with this pandemic. It is a need of hour to find out a constituent way by which a new law or a statute can be made or a proper power can be delegated to the centre to deal effectively with the current pandemic. It is also a notable point that how the world is dealing with this issue. In this paper author has cited major laws or provision which are being used by government of India to tackle with this pandemic. Author has given the constituent provisions of constitution of India (like- entry 29 in concurrent list upon which centre and state both can legislate & according to the author it is the best way to tackle with current pandemic without amending our constitution) to deal with the current problem eloquently and author has also talked about some effective steps which have been or are being taken by friendly countries to India. At last as conclusion, author given his points/observation which can be the future steps of government of India to tackle with this pandemic telling and also for major health issues in future. We are in great need of such kind of effective steps.

Keywords:

National Executive Committee, Martial Law, Concurrent List, Emergency, Constitution of Republic of South Africa, Basic Law for The Republic of Germany & The Political Constitution of the United Mexican States.

Introduction

Today, the whole world is suffering from a well-known pandemic namely Covid-19 as named by World Health Organization which is primarily known as Corona virus. When we want to tackle it, when have to read the laws related to health. In spite of having many laws we must read what the constitution of India says about it. It is very important to deal this pandemic situation without violating any laws of country. We should understand that, what is the extent on which a state government or centre government can make the laws about it.

Laws Relating to Pandemic in India

When we talk about laws which are related to handle this pandemic, we have to go through pandemic laws. We have Epidemic Diseases Act, 1897 and The Disaster Management Act, 2005 to tackle with this problem. In the month of March of the year 2020, the government of India has invoked above acts. Firstly, Epidemic Disaster Act, 1897 was invoked and after 2 weeks (approx.) the Disaster Management Act, 2005 was invoked. The centre has invoked Epidemic Disease Act 1897, an act to provide for prevention of the spread of 'dangerous epidemic diseases, to combat the novel corona virus in India. This act empowers the police, hospital authorities etc. for the major changes. The act which consist of four sections, aims to provide for the better prevention of the spread of dangerous epidemic diseases."

The centre has also invoked Disaster Management Act, 2005 to deal with the novel orona virus outbreak in the country. It has 79 sections. Disaster Management Act, 2005 has provided the legal and institutional framework for disaster management in India at the national, state and district levels. In the federal polity of India, the primary responsibility of Disaster Management vests with the state government. The central government lays down the plans, policies, guidelines and provides technical, financial and logistical support while the district administration carries out most of the operations in collaboration with central and

state level agencies. By the virtue of section 8 of the Disaster Management Act, 2005 a National Executive Committee (NEC) can be constituted. Union Home Secretary is its ex-officio chairperson. If we talk about the provisions of our Penal Code to tackle the current pandemic, we have mainly three sections to deal with it. These are given below:

1. Section-188: It is talked about disobedience to order duly promulgated by public servant.
2. Section-269: It is talked about negligent act likely to spread infection of disease dangerous to life.
3. Section-270: It is talked about malignant act likely to spread infection of disease dangerous to life.

Constitutional Saying

This is the main area of my writing. In this area I will discuss the constitutional provisions which can be a tool to tackle with the current issue. It is known to all that there are three types of lists are mentioned under the schedule 07 of the constitution of India. According to the entry number 8 of the state list 'Public health, sanitation, hospital and dispensaries are the subject matter of the state upon which only state government can make the law except special conditions. So here I will talk about the conditions on which the centre government can make the laws over state list and the provision on which only centre government can make the law. I will also talk about the role of martial law which can be useful to tackle the current pandemic situation.

Emergency- This is the first option (national emergency) which comes in our mind when we talk about the constituent powers of the centre to tackle the current problem. But, in the current position of our constitution there is no scope of emergency to be imposed to tackle the current pandemic, because the term "internal disturbance" is not mentioned under article 352. But, if this was happened before the 44th amendment, emergency (national emergency) can be imposed to tackle this pandemic. If we talk about state emergency, it cannot be imposed because there is only a single condition that is the situation has arisen in which the government of state cannot be carried on in accordance with the provision of this constitution and the report related to this matter shall be given by the governor of the concern state to the

president of India. If we talk about the enforcement of financial emergency, we need a strong situation which will fall under the conditions to impose the financial emergency under article 360 of the constitution of India.

Apart from the well-known emergency provisions, article 355 which is also come under the part 18th of constitution of India in which all the emergencies are laid down, talks about the term 'internal disturbance'. According to article 355 it shall be the duty of the union to protect every state against external aggression and internal disturbance. It is also a notable point if the central government makes the law to tackle the current problem but the state government fails to comply with, or the give effect to, any directions given in the exercise of the executive power of the union under any of the provisions of this constitution, it shall be lawful for the president to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution.

Power of parliament to legislate upon the subject matter of state list By the use of article 249 which is stated that parliament can legislate with respect to a matter in the state list in the national interest. But, to use of power conferred under article 249, there is condition that is if the council of states has declared by the resolution supported by not less than two-third of the members present and voting that it is necessary or expedient in the national interest that parliament should make laws with respect to any matter enumerated in the state list specified in the resolution.

If proclamation of emergency is in operation- By the use of article 250, parliament can make the laws over state list. According to clause 1 of article 250, notwithstanding anything in this chapter (distribution of legislative powers), parliament shall, while a proclamation of emergency is in operation, have power to the laws for whole or any part of the territory of India with respect to any of the matters enumerated in the state list.

Consent of States- As the heading of article 252 clearly talks about the power of parliament to legislate for two or more states by consent and adoption of such legislation by any other state. It is also mentioned in the concern article if it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which parliament has no power to

make laws for the states except as provided in articles 249 and 250 should be regulated in such states by parliament by law, and if resolutions to that effect are passed by all the houses of the legislature of those states, it shall be lawful for parliament to pass an act or regulating that matter accordingly, and any act so passed shall apply to such states and to any other state by which it is adopted afterwards by resolution passed in that behalf by the house or, where there are two houses, by each of the houses of the legislature of that state.

Martial Law- This is one of the most important points of the writing that is imposition of martial law. As mention under article 34 which is also falls in ambit of part III of the constitution of India that is fundamental right. It is talked about restriction on rights conferred by this part while martial law is in force in any area. According to the concern article notwithstanding anything in the foregoing provisions of this part, parliament may by law indemnify any person in the service of the union or of a state or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area. But it is also a notable point that to impose the martial law central government should has strong will power and the author thinks that in the current scenario it can be imposed after the multi-parties meeting in which most of the political parties will in the favour of concern matter. Author also thinks that martial law cannot be imposed to tackle current pandemic position because it is tougher than herculean task.

Provision in concurrent list- This is the most important point of this writing. As it is known to all that concurrent is open for centre and state both to make laws over the matters which are enumerated in it. But it is also known to all that centre's law is prevailed over state law if the subject matter of both is the same. There is an important subject in concurrent list which is highly related with current pandemic situation that is entry number 29 which states that prevention of extension from one state to another of infectious or contagious diseases or pests affecting men, animals or plants. By this entry parliament has a way to tackle this problem because there is no direct subject matter upon which parliament can legislate. In this current pandemic situation, our executive is struggling with the subject matter upon which it can

legislate to tackle this problem. This is a way by which centre government can do whatever it wants to tackle the current pandemic situation because it can make the laws upon infectious or contagious diseases, without disturbing or overtaking the state's power. These are the six major constituent provisions to tackle the current pandemic situation.

Comparative Analysis

This is also an important point to understand what the other are saying to tackle this problem in their respective country constitutions

South Africa- In South African constitution article 27 which is come under chapter 2 that is bill of rights, ensures health as a fundamental right. It is also a notable point that article 37 of South African constitution talks about the states of emergency which is also come under chapter 2 that is bill of rights. According to article 37 (1), a state of emergency may be declared only in terms of an act of parliament. Further it says that if the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, proclamation of emergency can be declared. But the declaration of emergency is necessary to restore peace and order. By this it is very clear that south African government can make the rules, regulations and laws for the welfare of the people of South Africa in the current pandemic situation without any illegal activity or abuse of power because the constitution of South Africa empowers its government to declare emergency on the ground of natural disaster.

Germany- Article 91¹ empowers the central government to impose the internal emergency. According to article 91 (1), in order to avert any imminent danger to the existence or to the free democratic basic order of the federation or a state, internal emergency can be imposed.

Fiji- Chapter 14 of the constitution of Fiji deals with the emergency power of the state. According to clause 3(a) of section 187², if the life of state is threatened and the exigencies of the situation are such that they cannot be dealt with effectively without derogating from the bill of rights, centre can impose the emergency to tackle the concern problem. It is notable point in the reference of Fiji that many jurists of Fiji are belonged to India.

Mexico- Article 29 of the constitution of Mexico is talked about emergency. Article 29 provides the possibility of suspension of rights in case of invasion, grave breach of the peace, or any other which puts society in grave danger or conflict. By the article 29 the central government of Mexico can impose the emergency and make the laws without disturbing its basic norms to control the current pandemic situation and this was also done by the Mexican government in the current pandemic.

Serbia- It is a very famous country of Europe. The proposed text of the constitution of Serbia was officially adopted on 8 November 2006. Serbia is a unitary state which recognises local self-government. Article 200¹ of Serbian constitution is talked about state of emergency. According to article 200, when the survival of the state or its citizen is threatened by a public danger, the national assembly shall proclaim the state of emergency. The key point of above statement is survival. It is a very broad and vague term in reference to emergency but in this globalize world where media is playing a very big role to avoid the arbitrariness the government, it can't be considered as a vague term but it is notable point on the eye of the author concern media house should not be the state owned media house.

The purpose of these examples is that these countries are also federal countries and they controlled the pandemic situation by making laws without disturbing their basic norms of federalism but in the sense of India federalism and separation of power is became a hurdle to tackle the current situation because health is mentioned in state list and centre is not able to make laws over state list except some conditions like emergency, states consent etc. Currently Indian infrastructure is struggling because of a solid law which can be applicable in the whole country and we all aware that Epidemic Diseases Act, 1897 and The Disaster Management Act, 2005 are not enough to tackle the current situation and we need a solid law. By the above examples we can understand that we have to change our laws specially, emergency laws and health laws and parliament should introduce a new amendment to tackle this current problem because it is a very serious issue which cannot be taken too lightly.

Conclusion

By the above observation we can say that we have to change our emergency laws or health laws to tackle this kind of problem. The author has emphasised on point of alteration of emergency laws because as we all know that health is the subject matter of state and the laws on health are varied state to state. By the prior statement author wants to say that there is not uniformity in the very serious issue that is health. If we seriously want to tackle this problem and give uniformity to the concern laws, we have only two options basically. These options are given below

Changes in the seventh schedule- Entry number 8 of state list which talks about public health, sanitation, hospital and dispensaries' is the subject matter of state list. This subject matter should be gone to the union list by which centre can make laws over it without disturbing the basic structure the constitution of India. By this, uniformity would be come in the laws which are related to health. But it seems tougher than herculean task or we can say that it is an impossible task. This alteration will need state ratification because this alteration would be made in seventh schedule and according to article 368 clause (2) sub clause (e); if an amendment is proposed to change the seventh schedule, it will need state ratification to get its validity. That is why author has considered it as an impossible task and emphasised to change the emergency laws in lieu of it.

Changes in emergency laws- It is easier than above one because it does not require any state ratification. If an amendment is proposed (related to the alteration of emergency laws) in parliament, it needs only two-third majority to be passed. But any specific term is not mentioned under article 352 by which an emergency can be imposed. So, there is a great need of an amendment in article 352. There are several bad moments which are related to emergency but currently we have media and many more social platforms by which government cannot use this power with arbitrariness. According to the author this step is herculean task but government has to do it because above one is impossible. There are so many countries (author has already given some examples of the countries) in the world which have emergency laws related to health and they are the finest example of democratic countries. At last author wants to say if it will be happened, it will be the beginning of utopianism which will become the bed-rock of Indian federation.