RESPONDING TO EXECUTIVE UNDER AND OVERREACH: INDIAN SUPREME COURT AND CONSTITUTIONAL ADJUDICATION IN THE PANDEMIC

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Abstract

India is one of the worst-hit countries by the COVID-19 pandemic. The pandemic has led to executive response and litigation in all possible areas. One such area has been constitutional law. This paper analyses how the Indian state reacted to the COVID-19 pandemic. I argue that the response of the Indian state is "executive-dominant," and yet, a mix of "executive underreach" and "executive overreach". Further, while much ink has been spent on the question of the role of a court during an emergency, in a public health emergency, no grand and universal answer to the question of the role of the court can be given. Rather, the analysis should account for several factors, which influences not only how courts will react, but also how quickly they do so. I then argue, based on a reading of the cases of the Supreme Court, that the court's conception of its role during the COVID-19 pandemic was informed by the nature (executive underreach or overreach) and sphere (public health, free speech, labour rights, etc.) of executive action in question. In doing so, focus is placed not just on how the Supreme Court acted, but the larger context of executive action which necessitated the judicial action. By providing a descriptive account of the case law and attempting to draw broader conclusions on the court's role from the account, this article seeks to add to the body of scholarship on democracy and judicial review during the COVID-19 pandemic.

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INTRODUCTION

The COVID-19 pandemic made its way to the Indian shores in January 2020. By July 2021, India was one of the worst-hit countries with the second highest number of reported infections.[1] At the time of writing, almost four lakh Indians have lost their lives to the pandemic according to official figures, although the real death toll is widely accepted to be significantly higher.[2] This article discusses the Indian state's response to the COVID-19 pandemic, particularly with respect to the issues of constitutional law.

Part I of this article discusses the state's response as the first and second waves of the pandemic swept across India. In it, I argue that the response of the Indian state was dominated by the executive, and was a mix of executive underreach and executive overreach. Part II discusses academic theorizations of the role of courts during an emergency, and reviews the decisions of the Indian Supreme Court during the pandemic. Finally, Part III offers broad reflections on the Supreme Court's role and record during this unprecedented crisis. In light of the findings, I conclude that whether the court was deferential and how deferential it was depended on the nature and sphere of the executive action in question.

I. RESPONSE OF THE INDIAN STATE

A. An Executive-Dominant Response

It is by now well documented that the COVD-19 pandemic has presented an opportunity to executive branches of countries across the world to take far-reaching measures without legislative scrutiny.[3] The task of steering countries and their populace to safety against the pandemic has thus been taken up by the executive branch, and with it, a very broad margin of

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[1] Reuters, 'COVID-19 Global Tracker' *Reuters* (1 July 2021) <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/india/> accessed 1 July 2021.

[2] V Sridhar, 'India's Gigantic Death Toll due to COVID-19 is Thrice the Official Numbers' *The Frontline* (Delhi, 4 June 2021) < https://frontline.thehindu.com/cover-story/india-gigantic-death-toll-due-to-covid19-is-thrice-the-official-numbers/article34568364.ece> accessed 1 July 2021.

[3] T. Ginsburg and M. Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020) Virginia Public Law and Legal Theory Research Paper No. 2020-52 <https://ssrn.com/abstract=3608974 or http://dx.doi.org/10.2139/ssrn.3608974> accessed 1 July 2021.

discretion.[4] The response of the Indian state does not buck the trend.[5] The executive-dominant response in India has been enabled by the invocation of two pieces of legislation: *First*, the Epidemic Diseases Act, 1897 ["EDA" hereinafter], which was originally enacted to respond to the bubonic plague,[6] and *second*, the Disaster Management Act, 2005 ["DMA" hereinafter],[7] which was enacted after a series of cyclones in the late 1990s and early 2000s, most notable of them being the 2004 Indian Ocean Tsunami.[8] Section 2(1) of the EDA empowers state governments, if it thinks that ordinary provisions of law are insufficient, to "take measures and by public notice prescribe such temporary regulations to be observed by the public". Section 2(2)(b) empowers state governments to take measures and prescribe regulations for inspection of persons "travelling by railway or otherwise and segregation… of persons suspected by the inspecting officer of being infected with any such disease". Section 3 states that any violations of regulation or orders made under the EDA shall be punishable under Section 188 of the Indian Penal Code (i.e., disobedience to order duly promulgated by public servant). Even before a national lockdown was announced, several states had invoked the power under Section 2 of the Epidemic Diseases Act to issue guidelines.[9]

The DMA, on the other hand, as per its preamble, is "An Act to provide for the effective management of disasters and for matters connected therewith or incidental thereto". Section 2(d) defines the term "disaster" as a "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence," resulting in "substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area". While Chapter II of the

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[4] Elena Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) 8 The Theory and Practice of Legislation 49.
[5] Gautam Bhatia, 'An Executive Emergency: India's Response to Covid-19' (*Verfassungblog*, 13 April 2020), <https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/> accessed 1 July 2021.
[6] Reeta Chowdhari Tremblay and Namitha George, 'India: Federalism, Majoritarian Nationalism, and the Vulnerable and Marginalized' in Victor Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (OUP 2021).
[7] Prashasti Awasthi, 'Centre invokes "Epidemic Act" and "Disaster Management Act" to Prevent Spread of Coronavirus' *Business Line* (Delhi, 12 March 2020) <https://www.thehindubusinessline.com/news/national/centre-invokes-epidemic-act-and-disaster-management-act-to-prevent-spread-of-coronavirus/article31049161.ece> accessed 1 July 2021.
[8] Tremblay and George (n 3).
[9] On 12 March 2020, Delhi's governor issued a notification regarding its new regulations, "The Delhi Epidemic Diseases, COVID-19"; on 13 March, Maharashtra issued "Maharashtra Regulations for Prevention and Containment of Coronavirus Disease"; on 16 March, the West Bengal legislated "West Bengal Epidemic Disease, COVID 19 Regulations".

DMA establishes the National Disaster Management Authority and delineates its scope, powers and responsibilities, Chapter III does so for State Disaster Management Authorities, and Chapter IV does so for the District Disaster Management Authority. Broadly, each chapter addresses composition of the authorities, powers and functions of the National/State/District DMA, the Executive Committees, Advisory Committees, and other sub-committees, the different levels of Disaster Management Plans (National Plan, State Plan, and District Plan), and guidelines for minimum standard of relief to be provided to persons by the DMAs. Crucially, Section 35(1) empowers the central government to take "all such measures as it deems necessary or expedient for the purpose of disaster management," including coordination of activities between all the above authorities, committees, and ministries of the central government. On the 24th March 2020, the central government chose to invoke the DMA to enforce a nation-wide lockdown, notwithstanding little consultation with the states.[10] The *ostensible* reason for a centralised approach, despite multiple state governments issuing guidelines under the EDA, was lack of uniformity and more effective implementation.[11] The national lockdown imposed under the DMA was further extended thrice, eventually ending on the 31st May, 2020,[12] from which point a phased "unlocking" began, eventually culminating in the month of November 2020.

In all, the response to the COVID-19 pandemic has been executive dominant. Cumulatively (under the EDA, DMA and a few other statutes), the executive has passed about a thousand orders, on all possible walks of life, since the beginning of the pandemic.[13] Further, and more importantly, the Indian parliament has not played any role in either examining the measures passed for containing the virus, or seeking accountability from the executive. While several parliaments across the world have shifted to virtual,[14] or hybrid parliament sessions,[15] the

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[10] Sobhana K. Nair, 'PM Should have Consulted State Govts. Before Announcing Lockdown, says Chhattisgarh CM Bhupesh Baghel' *The Hindu* (Delhi, 29 March 2021) <https://www.thehindu.com/news/national/coronavirus-pm-should-have-consulted-state-govts-before-announcing-lockdown-says-chhattisgarh-cm-bhupesh-baghel/article31214191.ece> accessed 1 July 2021.

[11] Home Secretary Ajay Bhalla's memo, DO No. 40/3/2020-DM-1(A), to all secretaries of ministries/departments of the government of India, dated 24 March 2020.

[12] Utpal Bhaskar, 'India to Remain Closed till 3 May, Economy to Open Up Gradually in Lockdown 2.0' *Livemint* (Delhi, 14 April 2020) <https://www.livemint.com/news/india/pm-modi-announces-extension-of-lockdown-till-3-may-11586839412073.html> accessed 1 July 2021.

[13] This is as per a tracker set up by PRS Legislative, which can be accessed here <https://prsindia.org/covid-19/notifications>.

[14] Ryan Tumilty, 'COVID–19 Canada: First 'Virtual Parliament' Brings Accountability with a Few Technical Headaches' *National Post* (29 April, 2020) <https://nationalpost.com/news/politics/covid-19-canadian-politics-

Indian parliament has not done so, with the last session at the end of March, 2020 being adjourned indefinitely.[16] As a result, the Indian executive assumed sweeping powers in the pandemic. The next subsection focuses on how the executive has used such broad powers.

B. Executive Under and Overreach

Given that the core institutional response of the Indian state was almost exclusively executive driven, how does one understand the Indian executive's actions? I argue that the Indian executive both underreached and overreached in its response to the pandemic. While underreach pertained to the scope and efficacy of the measures taken to *control* the pandemic, overreach was exemplified by claiming unchecked power, and imposing broad restrictions on legal rights.

Pozen and Scheppele define executive-underreach as "*a national executive branch's wilful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address*".[17] Executive underreach, thus, implies that "a leader sees a significant threat coming, has access to information about what might mitigate or avert it, possesses the legal authority and practical means to set a potentially effective plan in motion, and refuses to pursue such a plan, putting the nation at risk".[18] Executive underreach is therefore both descriptive and normative, since in the face of a national crisis, the executive can and should do all it can to protect its people.[19] Contrasting Hungary's response to the pandemic to those of Brazil and USA, Pozen and Scheppele conclude that the former is a case of executive overreach, while the latter two exemplify

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first-virtual-parliament-brings-accountability-with-a-few-technical-headaches>; Library of Congress, 'European Union: Parliament Temporarily Allows Remote Participation to Avoid Spreading COVID–19' *Library of Congress* (21 April, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-04-21/european-union-parliament-temporarily-allows-remote-participation-to-avoid-spreading-covid-19/>.

[15] Republic of Chile Senate, Protocol for Telematic Operation of Chambers and Commissions in a State of Catastrophe (17 April, 2020), <https://www.senado.cl/acuerdan-protocolo-para-funcionamiento-telematico-de-sala-y-comisiones/senado/2020-04-08/173302.html>; UK Parliament, 'Coronavirus timeline: End of hybrid proceedings in the House of Commons' House of Commons Library (8 September, 2021), <https://commonslibrary.parliament.uk/coronavirus-timeline-end-of-hybrid-proceedings-in-the-house-of-commons/>.

[16] Maansi Verma, 'Parliaments in the Time of the Pandemic' (2020) 55(24) Econ. & Pol. Weekly 14.

[17] David Pozen and Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114(4) Am. J. Int'l. L. 608.

[18] Kim Lane Scheppele & David Pozen, 'Executive Overreach and Underreach in the Pandemic' in Miguel Poiares Maduro & Paul W. Kahn (ed.), *Democracy in Times of Pandemic* (Cambridge University Press, 2020).

[19] Pozen and Scheppele (n 16).

executive underreach. In support of this, they cite Trump's threats to withdraw from WHO in the middle of the pandemic, his peddling of unscientific cures, non-implementation of the Defense Production Act of 1950, and his decision to not order the Centre for Disease Control and Prevention to prioritize COVID-management.[20] In the case of Brazil, they argue that the Brazilian president encouraged anti-lockdown protests, defied lockdown orders of his own executive, threatened to withdraw from WHO, and pushed for premature opening up of economy, among other such actions.[21] Hence, succinctly, *both* inaction (such as non-provision of basic and easily available healthcare and medical gear), and active contributions (withdrawals from WHO, public rallies breaching social distancing norms, etc) to worsening the spread of the virus constitute executive underreach. The actions (and their outcomes) of the Indian executive are not very different from what has been described above. India is, by official numbers, the second worst affected country.[22] It is an open secret that the official numbers are severely under-reported.[23] In some districts in India, the death toll has been reported to be under counted by as many as forty-three times.[24] The indicators – extremely low testing rate in the first wave,[25] hasty imposition and removal of lockdown,[26] lack of preparedness for the second wave in 2021 summer,[27] dire shortage of oxygen and hospital beds[28] – all point to executive underreach. However, that is not all. Holding massive election

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[20] ibid.
[21] ibid.
[22] Billy Perrigo, 'Officially, India Has the World's Second-Worst COVID-19 Outbreak. Unofficially, It's Almost Certainly the Worst' *Time* (14 April 2020) <https://time.com/5954416/india-covid-second-wave/> accessed 1 July 2020.
[23] Jeffrey Gettleman et al., 'As COVID-19 Devastates India, Deaths go Undercounted' *Economic Times* (24 April 2021) <https://economictimes.indiatimes.com/news/india/as-covid-19-devastates-india-deaths-go-undercounted/articleshow/82234586.cms?from=mdr> accessed 1 July 2021.
[24] Saurav Das, 'Death Count In 24 UP Districts 43 Times More Than Official Covid-19 Toll' *Article 14* (21 June 2021) <https://article-14.com/post/untitled-60cf605395758> accessed 1 July 2021.
[25] PTI, 'Covid-19: India's Testing Rate Lower than Other Nations, says WHO Chief Scientist' *Economic Times* (5 August 2020) <https://health.economictimes.indiatimes.com/news/industry/covid-19-indias-testing-rate-lower-than-other-nations-says-who-chief-scientist/77358987> accessed 1 July 2021; Rajit Sengupta, 'More than half of India still not testing enough, data shows' *Down to Earth* (May 23 2021) <https://www.downtoearth.org.in/news/health/covid-19-more-than-half-of-india-still-not-testing-enough-data-shows-77060.
[26] Nair (n 10).
[27] Vineet Bhalla, 'Central Government to Blame for Lack of Preparedness to Tackle Second Covid Wave' *The Leaflet* (20 May 2021) <https://www.theleaflet.in/central-government-to-blame-for-lack-of-preparedness-to-tackle-second-covid-wave/> accessed 1 July 2021; Sumanta Roy and Saurav Bose, 'COVID-19 Second Wave: Putting India first' *Down to Earth* (25 May 2021) <https://www.downtoearth.org.in/blog/health/covid-19-second-wave-putting-india-first-77093 > accessed 1 July 2021.
[28] Janhavee Moole, 'A Nightmare on Repeat - India is Running Out of Oxygen Again' *BBC* (23 April 2021) <https://www.bbc.com/news/uk-56841381> accessed 1 July 2021; Mayank Bhardwaj and Aditya Kalra, 'Dire Need of Beds, Oxygen: India's Capital Under Siege from COVID-19' *Reuters* (18 April 2021)

rallies in the middle of a surging second wave,[29] sanctioning and promoting huge religious gatherings in the "Kumbh Mela",[30] administration of a vaccine without publication of data of phase-III trials, and which still (at the time of writing) lacks the approval from WHO,[31] as well as US and EU regulators,[32] policy of differential pricing of vaccines for states and central government (until June 2021)[33] are not merely examples of underutilisation of legal and administrative resources, but point to the executive itself actively contributing to the worsening of the crisis. Finally, the executive underreach extends to not just public health, but even economic measures during the pandemic, with the economic relief package turning out to be illusory.[34]

While executive underreach may be a novel concept, executive overreach is not. Yet, "commentators rarely take care to specify what they mean by 'executive overreach'".[35] In academic literature, the concept has been invoked in several (related) contexts ranging from the war-against-terrorism,[36] to the administrative state.[37] Daryl Levinson associates executive

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<https://www.reuters.com/world/india/india-under-siege-covid-19-hospitals-overwhelmed-2021-04-18/> accessed 1 July 2021.

[29] Shruti Menon and Jack Goodman, 'India Covid Crisis: Did Election Rallies Help Spread Virus?' *BBC* (29 April 2021) <https://www.bbc.com/news/56858980> accessed 1 July 2021.

[30] Hassan M Kamal, 'Kumbh Mela and Election Rallies: How Two Super Spreader Events have Contributed to India's Massive Second Wave of COVID-19 Cases' *Firstpost* (22 April 2021) <https://www.firstpost.com/india/kumbh-mela-and-election-rallies-how-two-super-spreader-events-have-contributed-to-indias-massive-second-wave-of-covid-19-cases-9539551.html> accessed 1 July; Ruhi Tewari 'Poll Rallies to Kumbh Mela — Modi-Shah's Conscience Must take a Look at Latest Covid Surge' *The Print* (14 April 2021) <https://theprint.in/opinion/politricks/poll-rallies-to-kumbh-mela-modi-shahs-conscience-must-take-a-look-at-latest-covid-surge/639526/> accessed 1 July 2021.

[31] The Wire Staff, 'COVID Vaccines: Without WHO Approval, Covaxin Remains Second Among Equals' *The Wire* (25 May 2021) <https://science.thewire.in/health/covid-vaccines-without-who-approval-covaxin-remains-second-among-equals/> accessed 1 July 2021; Anindita Sanyal, 'Decision On Covaxin Approval By 2nd Week Of August: WHO Chief Scientist' *NDTV* (1 July 2021) <https://www.ndtv.com/india-news/decision-on-covaxin-approval-by-2nd-week-of-august-who-chief-scientist-2477082> accessed 1 July 2021.

[32] Joydeep Bose, 'Why was Bharat Biotech's Covaxin not approved in US? Here's what we know so far' *Hindustan Times* (11 June 2021) <https://economictimes.indiatimes.com/nri/study/students-headed-to-europe-in-a-fix-after-getting-covaxin-shot/articleshow/84086076.cms> accessed 1 July 2021.

[33] It is pertinent to recall that the only justification the state could proffer to differential pricing was spurring private competitors to produce at a higher rate, notwithstanding which, the court observed that it was unconstitutional.

[34] Amit Mudgill, 'Show Me the Money! Analysts Say Illusory Stimulus Leaves Economy, Stocks in Big Trouble' *ET Prime* (19 May 2020), < https://economictimes.indiatimes.com/markets/stocks/news/show-me-the-money-analysts-say-illusory-stimulus-leaves-economy-stocks-in-big-trouble/articleshow/75800613.cms?from=mdr> accessed 1 July 2021.

[35] Pozen and Scheppele (n 16).

[36] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional' (2003) 112 Yale L. J. 1011, 1019.

[37] Cass R Sunstein and Adrian Vermuele, *Law & Leviathan: Redeeming the Administrative State* (HUP, 2020).

overreach to presidential aggrandizement and "sacrifice of rights".[38] Taken thus, several executive measures in the pandemic represent executive overreach. Take for instance the suspension of labour laws in several Indian states. While "Regulation of labour and safety in mines and oilfields" is Entry 55 of the Union List, giving the Union Parliament the legislative competence to make law, Entries 22, 24 and 25 of the Concurrent List also deal with aspects relating to labour. Particularly important is Entry 24, which reads "Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits." Thus, under the constitutional scheme, general regulation of labour welfare is a field where both the union and state legislatures can validly make law. Therefore, a state may either pass its own labour laws for the regulation of labour within that state, or amend specific provisions of central laws in their application to that specific state.

During the pandemic, as many as nine states – all governed by the BJP or BJP majority alliances – relaxed labour laws.[39] These are Uttar Pradesh,[40] Madhya Pradesh,[41] Gujarat,[42] Rajasthan,[43] Haryana,[44] Uttarakhand,[45] Himachal Pradesh,[46] Assam,[47] and Goa. The suspension of labour laws extended to all factories, except in the state of Rajasthan where it extended to factories which were producing essential goods, and Uttarakhand, where it

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[38] Daryl J. Levinson, 'Rights and Votes' (2012) 121 Yale L. J. 1302.

[39] For overview, *see:* Anya Bharat Ram, 'Relation of labour laws across states' *PRS India* (12 May 2020) <https://www.prsindia.org/theprsblog/relaxation-labour-laws-across-states> accessed 1 July 2021.

[40] Ashima Obhan & Bhambi Bhalla, 'India: Suspension Of Labour Laws Amidst Covid-19' (*Mondaq*, 18 May 2020) <https://www.mondaq.com/india/employment-and-workforce-wellbeing/935398/suspension-of-labour-laws-amidst-covid-19> accessed July 1 2021.

[41] The Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020 (Ind), text of the Ordinance: <https://prsindia.org/files/covid19/notifications/4980.MP%20Labour%20Laws%20(Amendment)%20Ordinance%202020_May06.PDF>.

[42] Notification, Labour and Employment Department No. GHR/2020/56/FAC/142020/346/M3, text of the notification: <https://prsindia.org/files/covid19/notifications/3373.GJ_Lockdown_Relaxations_Factories_Apr%2017.pdf>.

[43] Order F3(15) Legal/F8-B/2020/188 dated 11.04.2020, text of the order: <https://prsindia.org/files/covid19/notifications/RJ_Increase_Working_Hours_Factories_Apr%2011.pdf>.

[44] Notification No. 2/17/2020-2Lab, dated 29.04.2020, Labour Department, Haryana Government, text of the notification: <https://prsindia.org/files/covid19/notifications/5154.HR_working_hours_apr_29.pdf>.

[45] Text of the Notification: <https://prsindia.org/files/covid19/notifications/5185.UK_factories%20Notification__5_May,_2020.pdf>.

[46] Notification Shram (A)4-3/2017, dated 21.04.2020, Labour & Employment Department, Himachal Pradesh government, text of the notification: <https://prsindia.org/files/covid19/notifications/4997.HP_factories_rules_apr_21.pdf>.

[47] Notification dated 8.05.2020, Labour Welfare Department, Government of Assam, text of the notification: <https://labour.assam.gov.in/sites/default/files/swf_utility_folder/departments/iof_labour_uneecopscloud_com_oid_76/menu/document/notification_8th_may_2020.pdf>.

applied to factories and continuous process industries which are permitted to run by the government. The notifications and Ordinances lasted for two to three months in all states, and had made changes to maximum permitted weekly and daily work, and overtime pay, among other protective measures. The Uttar Pradesh notification, which was the most controversial of all, increased work hours to twelve hours a day, but was subsequently withdrawn.[48] Such a blanket de-recognition of rights, especially in a pandemic which severely affected Indian labourers,[49] undoubtedly constitutes executive overreach. Another example is that of initiating criminal proceedings against journalists. A report notes that by as early as June 2020, as many as fifty five journalists had to face some form of criminal action or threats due to their reportage.[50] By the end of July 2020, dozens were even arrested.[51] Suppression of speech and journalistic freedom only worsened with time, especially during the second wave in the summer of 2021, when criminal charges were even filed against citizens for speaking to the press.[52] These actions are a gross violation of right to free speech and expression, guaranteed under Article 19(1)(a) of the Constitution. Furthermore, the "mandatory" requirement for all citizens to install the phone-application "Aarogya Setu" with no anchoring legislation[53] and despite the privacy concerns,[54] along with the controversial "private" PM

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[48] Yogima Seth Sharma, 'Uttar Pradesh Govt Withdraws Controversial Order of 12-hour Shifts for Workers in Industrial Units' *Economic Times* (16 May 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/uttar-pradesh-govt-withdraws-controversial-order-of-12-hour-shifts-for-workers-in-industrial-units/articleshow/75772375.cms?from=mdr> accessed July 1 2021.

[49] The Hindu Data Team, '96% Migrant Workers did not get Rations from the Government, 90% did not Receive Wages During Lockdown: Survey' *The Hindu* (20 April 2020) <https://www.thehindu.com/data/data-96-migrant-workers-did-not-get-rations-from-the-government-90-did-not-receive-wages-during-lockdown-survey/article31384413.ece> accessed 1 July 2021.

[50] The Wire Staff, '55 Indian Journalists Arrested, Booked, Threatened for Reporting on COVID-19: Report' *The Wire* (16 June 2020) <https://thewire.in/media/covid-19-journalists-arrested-booked-report> accessed 1 July 2021.

[51] Daniz Raza, 'India Arrests Dozens of Journalists in Clampdown on Critics of Covid-19 Response' *The Guardian* (31 July 2020) <https://www.theguardian.com/global-development/2020/jul/31/india-arrests-50-journalists-in-clampdown-on-critics-of-covid-19-response> accessed 1 July 2021.

[52] The Wire Staff, 'COVID-19: FIR Against UP Villagers Who Complained of Poor Medical Facilities to Media' *The Wire* (18 May 2021) <https://thewire.in/government/covid-19-fir-up-mewla-gopalgarh-complained-poor-medical-facilities-media-neem-tree> accessed 1 July 2021.

[53] Gautam Bhatia, 'Coronavirus and the Constitution – XXI: The Mandatory Imposition of the Aarogya Setu App' (IndConLawPhil, 2 May 2020) < https://indconlawphil.wordpress.com/2020/05/02/coronavirus-and-the-constitution-xxi-the-mandatory-imposition-of-the-aarogya-setu-app/> accessed 1 July 2021.

[54] Meryl Sebastian, 'Aarogya Setu's 6 Major Privacy Issues Explained' *Huffpost India* (5 December, 2020) < https://www.huffpost.com/archive/in/entry/aarogya-setu-app-privacy-issues_in_5eb26c9fc5b66d3bfcddd82f> accessed 1 July 2021.

Relief Cares fund, used to source more than a billion dollars for COVID-relief,[55] being claimed by the Prime Minister's Office as exempt[56] from the ambit of the Right to Information Act, 2005, are other prominent examples of gross executive overreach.

Therefore, the Indian executive's response to the COVID-19 pandemic is both underreaching and overreaching. The Indian example thus shows that an executive can underreach and overreach simultaneously, and that politically strong executives can consider underreach to be a possible option, despite blatant overreach. The response of the apex constitutional court is examined in the next section.

II. PANDEMIC JURISPRUDENCE OF THE SUPREME COURT

In the first sub-section, I discuss the existing literature on the role of a court during an emergency or crisis. While several theories have been floated, there is a lack of coherent understanding of the court's role, especially during a public health emergency such as COVID-19. In the second subsection, I analyse the decisions of the Supreme Court, and attempt to situate its jurisprudence within larger theoretical frameworks outlined in the first sub-section.

It is important to note that this paper only analyses decisions of the Indian Supreme Court till the end of June, 2021. Further, while both the High Courts (under Article 226) and the Supreme Court (under Article 32) exercise writ jurisdiction to examine violations of rights under the Indian Constitution, this paper is restricted to analysing the decisions of the Supreme Court. This is a limitation of the article. The Indian Supreme Court, one of the busiest in the world, hears hundreds of legal matters a day. Almost all legal issues, especially those pertaining to constitutional law,[57] find their way to the Supreme Court. Thus, the following study aims to understand patterns of pandemic-induced adjudication in the

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[55] Anoo Bhuyan and Prachi Salve, 'PM CARES Received At Least $1.27 Bn in Donations--Enough To Fund Over 21.5 Mn COVID-19 Tests' *India Spend* (1 October, 2020) <https://www.indiaspend.com/pm-cares-received-at-least-1-27-bn-in-donations-enough-to-fund-over-21-5-mn-covid-19-tests/> accessed 1 July 2021.

[56] Akanska Kumar, 'Modi's office says PM Cares Fund isn't Covered by RTI Act. His IT Ministry Seems to Disagree' *Newslaundry* (26 October, 2020) < https://www.newslaundry.com/2020/10/26/modis-office-says-pm-cares-fund-isnt-covered-by-rti-act-his-it-ministry-seems-to-disagree> accessed July 1 2021.

[57] Amal Sethi, 'Taking the Constitution Away from the Supreme Court' 33 National Law School of India Review (Forthcoming 2021). A draft of the paper can be accessed here: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812918>.

Supreme Court, and extract lessons for future on adjudication in emergencies – pandemic related or otherwise.

A. Judicial Review and Emergencies

Much ink has been spent on the question of judicial review in emergencies. Academic literature has debated what courts can and cannot, and should and should not do, during emergencies. While a comprehensive survey of literature is too ambitious to be undertaken here, three broad models emerge as possible options for constitutional courts during emergencies.[58] First is the *business-as-usual* model.[59] As the name suggests, this model argues that judicial review should not be any different during emergencies. The same standard of judicial review during emergencies, if anything, should be *more rigorous*, since it is during emergencies that rights are most threatened and abridged.[60] In the specific context of the COVID-19 pandemic, it has been argued that the Irish courts have adopted the business-as-usual model, continuing to apply "the generic legal tools of procedural and substantive administrative and constitutional law with their typical cautious, but not supine, attitude to reviewing political branch action".[61] On the other hand, the *deference* model argues that during emergencies, courts should defer to the executive.[62] This model recognises that the executive is better suited to take judgements and decisions on constitutional trade-offs induced by the emergency due to its resources, power, and flexibility.[63] The more extreme argument from the *deference* model argues that the executive can act beyond and extra-legally during emergencies if required, with no judicial review.[64] While the model relies

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[58] The following analysis can be found in: Gilad Abiri and Sebastián Guidi, 'The Pandemic Constitution' (2021) 59 Columbia Journal of Transnational Law (forthcoming) 9-15; For a thorough literature review, see Amal Sethi, 'Judging Under Extreme Conditions: A Court's Role During a National Crisis' (2021) 2 Keele Law Review 5-11; Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William and Mary Bill of Rights Journal 341-348.
[59] Gross (n 36).
[60] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Mich. L. Rev. 2567.
[61] Conor Cassey, 'Business as Usual? Irish Courts, The Constitution, and Covid 19' (2021) Percorsi Constituzionali/ Constitutional Paths (forthcoming) 1.
[62] Samuel Issacharoff and Richard H. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime, (2004) 5 Theoretical Inquiries 4.
[63] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, vol. 4 (OUP, 2007).
[64] Gross (n 36); Mark Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) Wis. L. Rev. 273, 306.

on the reassertion of constitutional norms once the emergency comes to an end,[65] it is unclear when such a reassertion of constitutional norms should commence and how sweeping it should be. Indeed "we are (still) post 9/11 (even) now".[66] The third model is that of *emergency constitutionalism*, the middle ground between the above two models.[67] The argument under this model is that though judicial review as in the normal times is not desirable (practically and theoretically), *certain principles* and *institutional* features both can and should be protected by courts during emergencies. In the specific context of the polity of USA, Ackerman proposes to achieve this through an institutional rearrangement (delegation of congressional power to the President, which with time requires higher and higher supermajority margins) immediately after a terror attack, and *temporarily* recognising the "very real loss of fundamental rights" which can, in the "middle run" be protected more aggressively than they might [be] otherwise".[68] The immediate institutional rearrangement reassures public that the next terror attack would be prevented, and thus could lead to the acceptance of a staunch defence of rights in the middle run. While there are numerous critics of Ackerman's proposal,[69] the important takeaway for the current purposes is that emergency constitutionalism seeks to strike a middle-ground between complete deference on the one hand, and complete non-recognition of executive-primacy on the other hand. Rather, the overarching goal is to "tailor constitutional responses to the exigencies of particular types of emergencies,"[70] and to facilitate "continued faithful adherence to the principle of the rule of law and fundamental democratic values while at the same time providing the state with adequate measures"[71] to respond to the emergency. In this vein, other scholars too have argued for an intermediate role of the court, moving from one pole to another, attempting to protect rights, while ensuring executive discretion. Federico Fabbrini, for instance, argues that courts move from a stage of complete restraint to full and assertive review, with an intermediate stage of pragmatism and manifest-error review, which helps the court make the

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[65] Gross (n 36); Posner and Vermeule (n 63).
[66] Kim Lane Scheppele, 'We Are All Post-9/11 Now' (2006) 75 Fordham L. Rev. 607; Frank Gardner, 'Will the 'War on Terror' ever end?' *BBC* (24th June 2020) <https://www.bbc.com/news/world53156096> accessed 1st July 2021.
[67] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in The Age of Terrorism* (Yale University Press 2006) 7.
[68] ibid, 114.
[69] David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 Yale L. Jour. 1773.
[70] Abiri and Guidi (n 58).
[71] Ackerman (n 67) 89.

shift.[72] Sandra Fredman argues that the role of the court is to foster dialogue with the political branches and elicit explanations for their actions.[73]

All in all, there seem to be differing accounts of what a court ought to do during an emergency. However, fundamentally, Sethi argues that it is impossible to make a case for a single normative theory of the court's role during an emergency.[74] This is especially the case in the context of the COVID-19 pandemic, since courts all across the world lacked a coherent understanding of their role during a public health emergency.[75]

B. Examining the Supreme Court Jurisprudence

At the outset, it has to be noted that the pandemic also affected the functioning of physical courts in India. As the pandemic reached Indian shores, the Supreme Court issued new operating procedures.[76] The Court announced that it would only take up "urgent" matters and limited the numbers of persons in courtrooms. By mid-March 2020, the Court began hearing urgent matters through video conferencing too. A few weeks later, the Court began hearing "short category matters, death penalty matters and matters related to family law."[77] And by July, video-conferencing for constitution-bench matters was underway as well.[78] The Court thus had to quickly embrace technological change to adapt to the crisis.

From March 2020 to July 2021, the Court heard thousands of matters on all areas of law, directly or indirectly connected to the pandemic. Even if one were to limit oneself to constitutional law, the court adjudicated on healthcare, labour rights, prisoner's rights, free speech and expression, and religious freedom among other areas of constitutional law. The

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[72] Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2010) 28 Yearbook Eur. L. 664. Fabbrini's point, however, seems descriptive rather than normative.
[73] Sandra Fredman, *Comparative Human Rights* (OUP, 2018) 79-114.
[74] Sethi, 'Judging Under Extreme Conditions: A Court's Role During a National Crisis' (n 58).
[75] Abiri and Guidi (n 58) 2.
[76] Standard Operating Procedure for Ld. Advocate/Litigant-in-person for Attending Urgent Hearing of a Matter Through Video Conferencing, text of the SOP: <https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/483/SOP_032020.pdf>.
[77] Supreme Court Observer Editorial Team, 'COVID Coverage: Court's Functioning' (*SCC Observer*, 1 May 2021) <https://www.scobserver.in/the-desk/covid-coverage-court-s-functioning? accessed 1 July 2021.
[78] Abraham Thomas, 'Supreme Court holds First 'Virtual' Constitution Bench Hearing' *Hindustan Times* (15 July 2020) <https://www.hindustantimes.com/india-news/supreme-court-holds-first-virtual-constitution-bench-hearing/story-6OIJDbbzpliujLFjz1z3mI.html> accessed 1 July 2021.

nature of the pandemic and its widespread impact has meant constitutional litigation in diverse areas. A comprehensive survey of *all* judgements and orders, united only by the common thread of the pandemic but scattered otherwise, is practically not feasible.

In the previous section, I argued that the Indian state's response to COVID-19 consisted elements of both executive underreach and overreach. I argued that the executive had significantly underreached in matters of public health and economy, and that it had overreached in matters of rights, such as by suspending protections under labour law, restricting right to free speech and expression of media and citizens under Article 19(1)(a), and obstructing rights-based transparency challenges. In this section, I attempt to analyse how the Court reacts to such under and overreach. Cases have thus been categorised on the basis how the executive acted. In matters of both underreach and overreach, I attempt to examine the standard of review, and the basis of such a standard, if any, that the court has adopted.

A preliminary caveat applies: it is by now abundantly clear that mechanisms which seek executive-accountability have *systematically* been undermined by the Indian government since 2014.[79] The COVID-19 pandemic has thus only furthered the democratic-deconsolidation. In this process, the Supreme Court has not been an exception.[80] While Khaitan writes of the executive capturing the Court, there has – to my knowledge – been no single comprehensive academic study of the decline of constitutional adjudication since 2014. Bhatia, however, has constantly written about *judicial evasion* by the court.[81] The annual posts,[82] and those examining the term of the last few chief justices,[83] have constantly

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[79] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14 Law & Ethics of Human Rights 49-95.
[80] ibid, 73-77.
[81] Gautam Bhatia, 'Judicial Evasion and the Electoral Bonds Case' (*Indconlawphil*, 13 April 2019), <https://indconlawphil.wordpress.com/2019/04/13/judicial-evasion-and-the-electoral-bonds-case/> accessed 1 July 2021; Gautam Bhatia, 'The (Continuing) Doctrine of Judicial Evasion in the Aadhaar Case' (*Indconlawphil*, 9 May 2017) <https://indconlawphil.wordpress.com/2017/05/09/the-continuing-doctrine-of-judicial-evasion-in-the-aadhaar-case/> accessed 1 July 2021; For all other posts on the topic, refer here: <https://indconlawphil.wordpress.com/?s=judicial+evasion>.
[82] The posts can be accessed here: < https://indconlawphil.wordpress.com/?s=ICLP+turns+8>.
[83] Gautam Bhatia, 'Evasion, Hypocrisy, and Duplicity: The Legacy of Chief Justice Bobde' (*Indconlawphil*, 23 April 2021) <https://indconlawphil.wordpress.com/2021/04/23/evasion-hypocrisy-and-duplicity-the-legacy-of-chief-justice-bobde/> accessed 1 July 2021; Gautam Bhatia, '"A little brief authority": Chief Justice Ranjan Gogoi and the Rise of the Executive Court' (*Indconlawphil*, 17 November 2019) <https://indconlawphil.wordpress.com/2019/11/17/a-little-brief-authority-chief-justice-ranjan-gogoi-and-the-rise-of-the-executive-court/> accessed 1 July 2021; Gautam Bhatia, 'Ends Without Means, Outcomes Without Reasons: A Look Back at Dipak Misra and the Constitution' (*Indconlawphil*, 1 October 2018)

reminded us of the state of constitutional adjudication in the Supreme Court. While examining this in any level of detail is beyond the scope of this article, it is important to note that constitutional adjudication relating to the pandemic has happened (and is happening) alongside systemic judicial evasion, suppression of *habeas corpus* petitions, and extreme deference to the executive.[84]

For the purpose of analysis, and as argued above, cases dealing with public health and economy/commerce form one category, where the court responds to executive underreach. The other category of cases involves matters of rights,[85] where the court responds to executive overreach.

i. Judicial Response to Executive Underreach

The court adjudicated on both the areas of executive underreach identified above – economy/commerce, and public health.

After the onset of the second wave, the Court was faced with two cases related to economic measures by the Indian state during the pandemic: *Small Scale Industrial Manufacturers Association v. Union of India*,[86] and *Vishal Tiwari v. Union of India*.[87] In the former case, the

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<https://indconlawphil.wordpress.com/2018/10/01/ends-without-means-outcomes-without-reasons-a-look-back-at-dipak-misra-and-the-constitution/> accessed 1 July 2021.

[84] In his latest annual review on August 1, 2021, Bhatia has this to say about the supreme court: "I suppose it is unsurprising that the tone of those posts has grown steadily bleaker and more pessimistic. As another year comes around, I find that I have very little to say: as far as civil rights and State impunity is concerned, nothing much has changed from the last time around, nor are there any significant indications that anything will change in the near future. Indeed, for the reasons that I outlined in the seventh-anniversary post, "A Constitutionalism Without A Court", I find myself writing less frequently about the Court(s), and with minimal enthusiasm. To analyse "normal" judgments about – say – the Delhi legislative assembly's summons to Facebook, in the normal course of things, as if everything was normal, while those jailed for 3+ years without trial in the Bhima Koregaon case are repeatedly denied bail by the same judicial system, creates a contradiction that I find increasingly difficult to overcome." Gautam Bhatia, 'ICLP Turns 8 || What Dreams May Come' (Indconlawphil (1 August 2021), <https://indconlawphil.wordpress.com/2021/08/01/iclp-turns-8-what-dreams-may-come/>, accessed 2 August 2021.

[85] This is, of course, not to say that healthcare is not a legal right. While the exact contours of such a right are debatable, it is difficult to argue that right to healthcare is not a part of right to life under Article 21. Indeed, the supreme court has stated so in several cases. However, for the purpose of categorization and analysis, matters of healthcare have been analysed separately, due to their importance in a public health emergency, and the extent of executive underreach in the response of the state to the COVID-19 pandemic. For a survey of right to healthcare cases of the supreme court, *see* Sharanjeet Parmar and Namita Wahi, Citizens, 'Courts and Right to Health: Between Promise and Progress', in Alicia Ely Yamin and Siri Gloppen (ed.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (HUP, 2011).

[86] 2021 SCC OnLine SC 246.

[87] 2021 SCC OnLine SC 423.

petitioners prayed that the court direct the government to grant economic relief packages on account of the second wave, including extension of moratorium, waiver of interest, sector specific reliefs etc. In the latter case, the petitioner's prayer was similar but narrower: to direct the government to take measures to redress the financial stress and hardships faced specifically by borrowers due to the pandemic. However, in both these cases, the court noted that the provision of any financial relief packages is a policy matter within the (exclusive) domain of the executive, and hence it is for the executive to decide upon them. Accordingly, it refused to interfere and grant any relief. It is clear that the Court chose to defer to the executive in this area. However, this is not so for healthcare.

Cases relating to healthcare formed a significant part of the Court's pandemic adjudication. A model of judicial deference in adjudication on public health and healthcare, being a socio-economic right, and especially in a pandemic, would not be surprising. However, as I shall attempt to argue below, that has not been the case, especially with the onset of the second wave, or rather, the executive underreach that brought about the second wave.

In the first wave, the court passed a few important orders, including an order stating that COVID-19 tests in private labs should, similar to government-run labs, be free of cost.[88] A few days later, in *Sachin Jain v. Union of India*,[89] the order was modified to the extent that only those under the Ayushman Bharat health policy are eligible for free testing. However, the constitutional question is whether a blanket right to free testing *for all* flows from articles

[88] Shashank Deo Sudhi v. Union of India, (2020) 5 SCC 132. This order drew sharp reactions, mostly since the court did not clarify that the costs incurred by private labs would have to be reimbursed for by the government. For analysis of the order and the arguments for and against its tenability, see: Gautam Bhatia, 'Coronavirus and the Constitution – XI: The Supreme Court's Free Testing Order' (*Indconlawphil*, 9 April 2020) <https://indconlawphil.wordpress.com/2020/04/09/coronavirus-and-the-constitution-xi-the-supreme-courts-free-testing-order/> accessed 1 July 2021 [Bhatia defends the order, presuming that costs incurred by private labs will be reimbursed, and responds to counter-arguments]; Bastian Steuwer & Thulasi K. Raj, 'Coronavirus and the Constitution – XII: The Supreme Court's Free Testing Order – A Response (1)' (*Indconlawphil*, 9 April 2020) <https://indconlawphil.wordpress.com/2020/04/09/coronavirus-and-the-constitution-xii-the-supreme-courts-free-testing-order-a-response-1-guest-post/> accessed 1 July 2021; Goutham Shivshankar, 'Coronavirus and the Constitution – XIII: The Supreme Court's Free Testing Order – A Response (2)' (*Indconlawphil*, 10 April 2020) <https://indconlawphil.wordpress.com/2020/04/10/coronavirus-and-the-constitution-xii-the-supreme-courts-free-testing-order-a-response-2-guest-post/> accessed 1 July 2021; Gautam Bhatia, 'Coronavirus and the Constitution – XVII: The Supreme Court's Free Testing Order – Some Concluding Remarks' (Indconlawphil, 11 April 2020) <https://indconlawphil.wordpress.com/2020/04/11/coronavirus-and-the-constitution-xvii-the-supreme-courts-free-testing-order-some-concluding-remarks/> accessed 1 July 2021.

[89] Sachin Jain v. Union of India, 2020 SCC OnLine SC 1085.

14 and 21 of the Constitution. While the Court initially suggested that it does, it walked back on its order only a few days later.

The most pertinent case on healthcare, in the context of the Court responding to executive underreach is that of *In Re: Distribution of Essential Supplies and Services during the Pandemic* ["Essential Supplies"]. With the onset of the second wave, there was a total collapse of healthcare infrastructure, resulting in, at its peak, about five lakh (five hundred thousand) cases in one day.[90] A severe shortage of oxygen resulted in thousands of death.[91] Several state high courts had taken *suo motu* cognisance and began to pass prompt orders on allocation of oxygen, availability of ICU beds, and supply of essential medicines, among other such issues.[92] On 22nd April, a three judge bench headed by Chief Justice Bobde took *suo motu* cognisance of the matter, stating "a certain amount of panic *has been generated* and people have invoked the jurisdiction of several High Courts…The High Courts have passed certain orders *which may have the effect of accelerating and prioritising the services to a certain set of people and slowing down the availability of these resources to certain other groups* whether the groups are local, regional or otherwise".[93] After stating so, without reference to any high court orders,[94] the Court issued notice to all states to submit affidavits explaining the state of supply of oxygen and essential drugs, vaccination, and the declaration of lockdown. The necessity of this was widely questioned,[95] with a fear that the high courts will be barred from hearing these pressing and important matters. Between the second and the third order under this matter, Chief Justice Bobde retired. The matter was now heard by a

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[90] Krishna N. Das and Ankur Banerjee, 'India's COVID Death Rate Hit Record in June after Calls for Better Data' *Reuters* (6 July 2021) <https://www.reuters.com/world/india/indias-covid-death-rate-hit-record-june-after-calls-better-data-2021-07-06/> accessed 1 July 2021.
[91] Moole (n 28); Bhardwaj and Kalra (n 28).
[92] Umang Poddar and Nikhil Iyer, 'As Supreme Court Sat Out The Pandemic, High Courts Filled The Gaps' *Article-14* (3 may 2021) <https://www.article-14.com/post/as-supreme-court-sat-out-the-pandemic-high-courts-filled-the-gaps> accessed 1 July 2021; Scroll Staff, 'From Anti-viral drugs to Oxygen: How High Courts Responded to Covid-19 Second Wave' *Scroll* (23 April 2021) <https://scroll.in/article/993008/from-antiviral-drugs-to-oxygen-supply-how-high-courts-have-responded-to-the-covid-19-second-wave> accessed July 1 2021.
[93] 2021 SCC OnLine SC 339.
[94] Gautam Bhatia, 'Evasion, Hypocrisy, and Duplicity: The Legacy of Chief Justice Bobde' (n 83).
[95] Shrutisagar Yamunan, 'Why India May be Better off if High Courts hear Covid-19 Cases Instead of Supreme Court' *Scroll* (27 April 2021) <https://scroll.in/article/993356/why-india-may-be-better-off-if-high-courts-hear-covid-19-cases-instead-of-supreme-court> accessed 1 July 2021; Special Correspondent, 'Supreme Court's Move on COVID-19 Cases is Wrong: Congress' *The Hindu* (New Delhi, 23 April 2021) <https://www.thehindu.com/news/national/congress-hits-out-at-supreme-courts-intervention-on-covid-19-management/article34390830.ece> accessed 1 July 2021.

bench headed by Justice DY Chandrachud. In the third order,[96] the court made it clear that high courts shall continue to adjudicate and should not be restrained as they had a more "robust understanding of ground realities". The jurisdiction of the court, it was clarified, is *complementary* and will only extend to matters *beyond state boundaries*.

From the third to the fifth order, it is clear that the Court adopted the business-as-usual model, posing several questions to the executive. In the third order, the Court asked the central government to clarify the projected requirement, rate and method of vaccination, procurement of other vaccinations (apart from Covaxin and Covishield), and finally, the basis of differential pricing. In the fourth order,[97] the Court examined the central government's policy on medial infrastructure, allocation of oxygen, vaccines and vaccine pricing. After doing so, it passed recommendations on the need for a national policy on hospital admissions, centre-state cooperation in allocation of oxygen, import of medical oxygen, supply of essential drugs, etc. Importantly, after examining the central government's rationale for differential pricing (which was to create incentives for private vaccine manufacturers to increase production of vaccines), the Court also made a *prima facie* observation that the differential pricing policy, and the mode procurement of vaccines is violative of articles 14 and 21 of the Constitution, on the ground that the price is beyond affordability and thus to the serious detriment of several citizens. Thus, the court noted that the "central government should consider revisiting its current vaccine policy". Finally, the Court made three important observations: *first*, the Court suggested compulsory licensing under sections 66, 92, and 100 of the Patents Act, 1970 to augment domestic production.[98] *Second*, the Court cautioned governments against restricting spread of information related to the virus. This was particularly important, given the practice of initiating criminal action against citizens, for speaking to the press, and journalists for covering the government's handling of the virus.[99] *Third*, the Court suggested that the government must impose a ban on social gatherings.[100] In the fifth order, the Court addressed the "*digital divide*" caused by the CoWin portal, which is

[96] 2021 SCC OnLine SC 372.
[97] 2021 SCC OnLine SC 355.
[98] The Patents Act, s 66, 92, 100.
[99] The Wire Staff, 'COVID-19: FIR Against UP Villagers Who Complained of Poor Medical Facilities to Media' *The Wire* (18 May 2021) <https://thewire.in/government/covid-19-fir-up-mewla-gopalgarh-complained-poor-medical-facilities-media-neem-tree> accessed 1 July 2021.
[100] It is pertinent to recall that the government itself was holding election campaign rallies in the middle of the second wave.

the mode to book vaccination slots.[101] Citing empirical studies and data from government surveys, the Court notes that there is a huge disparity between urban and rural India, in access to internet and infrastructure necessary to book a vaccination slot. Resultantly, "a significant population of this country between the ages of 18-44 years would be unable to meet its target of universal immunization owing to such a digital divide". The Court also noted that the impact of this policy would be to make vaccinations harder for those from the marginalised communities. Finally, the Court ordered the central government to place on record any further steps taken to curb the virus, and other modalities of the vaccination drive, along with a national policy on hospital-admissions within two weeks (from April 30th).

The same bench continued this enquiry in *Union of India v Rakesh Malhotra*.[102] Two orders were passed under this matter, which were regarding lack of oxygen in Delhi. In the first order, the Court ordered the central government to produce a comprehensive plan "indicating the manner in which the direction for the allocation of 700 MT of Liquid Medical Oxygen [LMO] to Delhi shall be complied with". The Court also stated that the plan shall include sources of supply, method of transportation, and other logistical aspects. In the second order, examining the plan submitted by the government, the Court noted that "except for a bare assertion that an increase of 210 MT to Delhi would result in a corresponding reduction to other States, *no material* has been produced on the record by the Union of India." Thus, the Court again ordered daily allocation of 700 MT of LMO to Delhi.

It is amply clear from the above analysis that there was no deference accorded to the executive. From the third order in *Essential Supplies*, to *Union of India v Rakesh Malhotra*, the Court asked the central government to produce justification for all measures in issue. From allocation of oxygen, to pricing of vaccines, to mode of booking vaccination – all traditionally regarded as matters where the judiciary should respect the trade-offs made by the executive – the Court questions policies, records observations, suggests changes and most

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[101] Shruti Dhapola, 'India's Covid-19 Vaccine Rollout Strategy has a Digital Gap; Here are Those Struggling to Plug it' *Indian Express* (Chandigarh, 2 June 2021) <https://indianexpress.com/article/technology/tech-news-technology/india-covid-19-cowin-portal-vaccine-rollout-strategy-has-a-digital-gap-those-trying-to-fix-it-7338250/> accessed 1 July 2021; Manjesh Rana, 'Explained: How Digital Divide Impacts Young India's Covid-19 Vaccination Chances' *Indian Express* (New Delhi, June 7 2021) <https://indianexpress.com/article/explained/how-the-digital-divide-impacts-young-indias-vaccination-chances-7347012/> accessed 1 July 2021.

[102] 2021 SCC OnLine SC 391; 2021 SCC OnLine SC 375.

importantly, continuously demands justifications. About a week from the passing of the fifth order in *Essential Supplies*, the central government announced free vaccinations for all citizens above eighteen years of age, with the central government taking over procurement, moving away from the previous policy examined and noted as unconstitutional by the Supreme Court.[103] Thus, the major shift from the initial order in *Essential Supplies*, and thus in healthcare adjudication in general, to the subsequent orders lies in the Court clearly delineating its jurisdiction as complementary to the high courts, and examining the matter with a rights-based focus. The third, fourth, and fifth orders, in addition to Union of India v. Rakesh Malhotra (all given by benches headed by Justice Chandrachud), place the government-policy vis-à-vis fundamental rights, and conceptualise this analysis as the purpose behind the matter, rather than merely addressing "generated panic" or supervising high court orders.

The difference between the first two orders, and the third and subsequent orders is stark. The "Court" shifts its stance from stating that *suo motu* jurisdiction *had* to be exercised to address the "generated panic" by the ostensibly inconsistent high court orders, to stating that the Supreme Court jurisdiction will only extend to matters over which the high courts do not have jurisdiction in the first place. This, to be clear, is a huge shift. In a *suo motu* petition, there is no petitioner who moves the court. Thus, the justification for exercising jurisdiction is important, and goes to the very root of the matter, for if not for such a justification, the case should not exist in the first place. However, despite the complete *volte face* (for the better), and the importance of the justification, there is no explicable reason behind the shift, besides that of the change in the bench. Further, the approach of the Court also resulted in a favourable change in government policy. This exemplifies the potential of court-induced change, through rights-based review of government policy, in the specific context of public health. While such an argument does not by the very fact extend to other aspects of a pandemic/emergency (such as national security), the limited point here is that the Indian example does show that lack of judicial deference in healthcare – a crucial part of managing a public health emergency – can potentially bring about favourable results, when responding to an underreaching executive.

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[103] The Wire Staff, 'Free Vaccine for 18+, States Don't Need to Buy Shots': PM Announces Partial Rollback of Earlier Policy' *The Wire* (7 June 2021) <https://thewire.in/politics/narendra-modi-address-free-vaccine-state-procurement-centre-vaccination-policy> accessed 1 July 2021.

This conclusion is bolstered by a reading of the set of orders that the Court passed on rights of prisoners and juvenile convicts during the pandemic, and *suo motu* petition on welfare schemes such as the mid-day meal. In *Re: Contagion in COVID-19 Prisons*,[104] the Court noted the dangers of the pandemic spreading into prisons, and directed the formation of prison readiness and response plans and the constitution of a high-powered committee in each state/union territory to determine which class of prisoners can be released on parole or interim bail and for what period of time. In its subsequent orders, the Court was forced to issue more directions for matters that ideally should have been obvious from the initial direction itself, such as non-release of COVID-19 positive prisoners and transportation arrangements for released prisoners. Later, the Court also extended its directions to all correctional homes, detention centres and protection homes. From herein, the case become dormant until further directions by the Court in the second wave. In the second wave, the court passed additional orders directing strict control and restraint at the time of arrest itself, automatic release of prisoners who had been released during the first wave, and transparency on the part of state governments on occupancy rate in jails.

In *Re: Contagion of COVID-19 in Children Protection Homes*,[105] the Court issued several directions to the government, and bodies under the statutory framework of the Juvenile Justice (Care and Protection of Children) Act, 2015. These directions included preventive as well as reactive guidelines to combat COVID-19, such as proper monitoring, social distancing, disinfection and hygiene, psychological well-being of the children etc.[106] In subsequent orders, the Court has called for more details on the government schemes, and issued interim directions containing step by step instructions for the government, viz., identification, establishing immediate contact, determining whether the child's guardian is able and willing to take care, ensuring continuance of education etc. Further, in *Dipika Jagatram Sahani v. Union of India*,[107] the Court dealt with problems caused by closure of anganwadi centres during the pandemic. While the Court did not provide any interim directions despite the hearings going on for five months, it directly came out with a detailed

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[104] 2020 SCC OnLine SC 344; 2020 SCC OnLine SC 356; 2020 SCC OnLine SC 365; 2021 SCC OnLine SC 376.
[105] (2020) 15 SCC 280; (2020) 15 SCC 289.
[106] Immediately thereafter, in Rishad Murtaza v. Union of India (2020) 15 SCC 288, the court directed the government to consider adopting the aforementioned directions to *nari niketans* if it found feasible to do so.
[107] 2020 SCC OnLine SC 1070; (2021) 2 SCC 740.

judgment in January 2021. During the pandemic, this judgment is one of the few that contains detailed discussion on states' positive obligations to fulfil people's right to a dignified and healthy life guaranteed under Article 21 of the Constitution in a real and meaningful sense. Ultimately, after detailed consideration of the governments' submissions, the Court directed the reopening of all anganwadi centres outside containment zones unless the state disaster management authority cited specific reasons against such reopening.

Finally, in *Dr. Ashwani Kumar v. Union of India*,[108] the petitioner moved an application in a pre-existing writ petition praying for directions for the welfare of senior citizens during the pandemic. The Court provided the reliefs prayed for by passing several directions such as priority for senior citizens in government and private hospitals, proper sanitisation of old age homes, protective equipment for old age home caregivers, and adequate access to masks etc. Along with passing these directions, the Court also directed state governments to submit affidavits detailing measures taken for senior citizen welfare.

Overall, it is seen that the Court has passed the directions for the protection of prisoners, children, senior citizens, and beneficiaries of anganwadi centres. It is obvious that these measures should have, in the first place, been taken by the executive. Hence, in mandating these measures, basic as they are, the Court was responding to underreach and has not deferred to the executive.

ii. Judicial Response to Executive Overreach

The identified areas of overreach were labour rights, free speech and expression, and transparency. Each of these was adjudicated upon by the Supreme Court.

The pandemic has marked a tumultuous time for the domain of labour law, right from the onset of the migrant crisis, to en-masse relaxation and even suspension of labour laws. The Supreme Court's first labour law judgment during the pandemic came in light of India's first labour crisis in the pandemic: the migrant crisis. In *Alakh Alok Srivastava v. Union of India*,[109] two advocates filed a public interest litigation praying for directions to be passed to provide food, water, shelter etc. to migrant workers walking thousands of kilometres home

[108] 2020 SCC OnLine SC 620.
[109] (2018) 17 SCC 291.

post the announcement of an overnight lockdown. In response to the notice in this petition, the government filed a status report and made oral submissions before the court highlighting the various measures taken. In its judgment, the Court cited extensively from this status report, which it accepted at face value, to note "*we are satisfied with the steps taken by the Union of India for preventing the spread of corona virus at this stage*." It then went on to make minor observations about treating migrants in humane manner, and ensuing they have access to "*trained counsellors and/or community group leaders belonging to all faiths*" to help their mental health. Significantly, the Court accepted the government's submission that the migrant crisis was triggered by fake news and then went on to make the following much-criticised observation:

"In particular, we expect the Media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated. A daily bulletin by the Government of India through all media avenues including social media and forums to clear the doubts of people would be made active within a period of 24 hours as submitted by the Solicitor General of India. We do not intend to interfere with the free discussion about the pandemic, but direct the media refer to and publish the official version about the developments."

About a month post this judgment, in *Jagdeep S. Chhokar & Anr. v. Union of India*,[110] the petitioner prayed that the government make appropriate transport arrangements for those migrant workers who wished to go home. The Court accordingly asked the government to place on record the protocol, if any, for inter-state movement of migrant workers. The government cited two executive orders to claim that all necessary and appropriate steps are being taken. Interestingly, with regard to ticket fair for the transport, the government submitted, "*no such statement can be made as to what amount is being taken from the migrant workers*." Yet again, the court took the government's submissions at face value and disposed the petition on grounds that the relief had already been substantially granted, without making any observations about the ticket fair taken from the workers. In this manner,

[110] 2020 SCC OnLine SC 435; 2020 SCC OnLine SC 404.

the Supreme Court's initial labour judgments set a tempo of judicial deference,[111] which gradually diminished over subsequent judgments, more so in the second wave.

The first dent to the tempo of deference was the case of *In re Problems and Miseries of Migrant Labourers*,[112] which was a *suo moto* writ petition taken up by the Court on the basis of newspaper reports, letters and representations highlighting the continued plight of migrant workers well into the lockdown. Specifically, the Court observed, "*Although the Government of India and the State Governments have taken measures yet there have been inadequacies and certain lapses. We are of the view that effective concentrated efforts are required to redeem the situation.*" This marked the beginning of a long proceeding during which the Court heard submissions of the centre, several states, and over 75 interveners, and passed periodic orders over the duration of several months, even extending to the second wave.

A reading of the orders passed in the first wave makes it clear that the court was cognizant of the urgency of the situation: it issued its first set of interim direction within 2 days, set strict deadlines for implementation of its directions and affidavit submissions, and strongly questioned state governments, particular Maharashtra, for delays. This continued till July 2020, post which the matter become dormant with the subsiding of the first wave.[113] In this manner, the Court's orders in this case in the first wave itself set the stage for departure from its initial deferential standpoint.

Subsequent case laws built upon this departure. The beginning of these cases was *Ficus Pax Private Limited & Ors. v. Union of India and Ors.*,[114] wherein private employers invoked articles 14, 19(1)(g) and 21 of the Constitution to challenge the vires of government orders mandating them to pay full wages to their workers during lockdown despite closure of their establishments. However, the impugned order was withdrawn during the pendency of the suit. Resultantly, the Court was left to adjudicate only upon the payment of wages for the 50-odd days the orders were in operation. The matter regarding the vires of the orders is still

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[111] Anuj Bhuwania, 'The Curious Absence of Law in Migrant Workers' Cases' *Article 14* (16 June 2020) <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases> accessed 1 July 2021.
[112] 2021 SCC OnLine SC 398; (2020) 7 SCC 181; (2020) 7 SCC 226; 2020 SCC OnLine SC 618; 2020 SCC OnLine SC 613; 2020 SCC OnLine SC 1196
[113] It again became active in the second wave, which will be dealt with below.
[114] (2020) 4 SCC 810.

pending as on date. However, in its interim order, the court noted, "*the lockdown measures enforced by the Government of India under the Disaster Management Act, 2005, had equally adverse effect on the employers as well as on employees…. a balance has to be struck between these two competitive claims.*" Subsequently, it effectively nullified the effect of the impugned orders by directing that *first,* employers shall be protected against any coercive action; and *second,* employers and employees shall be permitted to enter into settlements regarding wages without regard to the impugned order. In this manner, the non-deference worked against the workers.

The next two decisions at least partially favoured the workers. In *Gujarat Mazdoor Sabha & Anr. v. State of Gujarat,*[115] the petitioners challenged a Gujarat government notification exempting factories from observing some of their obligations towards workers under the Factories Act, 1948 on account of the pandemic. This notification had been issued under section 5 of the act which permitted the government to exempt any factory or any class of factories from complying with any or all provisions of the act in the event of a "public emergency". In a landmark judgment, the court struck down the impugned notification on grounds that the pandemic and its resultant financial exigencies did not constitute a "public emergency" under the act. Specifically, it noted, "*A blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalize on the pandemic to force an already worn-down class of society, into the chains of servitude*."

Subsequently, the case of *State of Andhra Pradesh & Anr. v. Dinavahi Lakshmi Kameswari*[116] arose in response to the Andhra Pradesh Government's decision to withhold salaries, honoraria and pensions of its employees on account of financial stress caused due to the pandemic. Previously, the Andhra Pradesh High Court had directed the government to pay the employees' dues forthwith along with interest at 12% per annum. Now, the government approached the Court solely challenging the award of interest. In its judgment, the Court repeatedly noted that the High Court's direction for the payment of the salaries is unexceptionable, and directed the government to implement it expeditiously. However, it

[115] (2020) 10 SCC 459.
[116] 2021 SCC OnLine SC 237; 2020 SCC OnLine SC 1166.

reduced the interest payable to 6% per annum on grounds that such interest cannot be used to penalise the government. Overall, this judgment shows that the government cannot cite pandemic related financial problems to deny the payment of salaries to its employees. This was the court's last decision before the second wave.

In the second wave, the Court has heard just one labour law related case, the previously dormant *In re Problems and Miseries of Migrant Labourers* case. The onset of the second wave made the Court consider this case with renewed seriousness. In the two substantive orders that have been passed to date, the Court has issued interim directions to the government to provide dry ration without demanding an identity card, organise community kitchens, ensure adequate transport arrangements, and ensure that the registration of all migrant workers is complete so that they can benefit better from welfare schemes. One can thus conclude that the Court moved away from its initial position of deference to a more engaged role of *examining*, rather than merely *accepting*, the claims of the state vis-à-vis rights of the workers.

If in labour rights, the court moved away from an original position of deference, no such clear position can be evinced from the cases on free speech and expression. Several matters involving the right to speech and expression under Article 19(1)(a) of the Constitution came before the Court. These cases arose due to various implications of the pandemic, and state action in response to the pandemic. In two such cases, the Court, instead of adjudicating constitutional issues, tried to broker solutions by creating commissions. First, in *Foundation of Media Professionals v. Union Territory of Jammu and Kashmir*,[117] the petitioners prayed for quashing of orders which restricted internet services in Jammu and Kashmir to only 2G broadband. The petitioners laid particular emphasis on the importance of internet for healthcare during the pandemic. Further, the petitioner also argued that the blanket restriction covering all parts of the union territory violated the proportionality standard, which was recognised in *Anuradha Bhasin v. Union of India*.[118] The state responded by arguing that the restrictions were necessary for national security, and combating militancy. The court accepted that the petitioners' arguments would have merited consideration under ordinary

[117] (2020) 5 SCC 746.
[118] (2020) 3 SCC 637.

circumstances. However, citing the "compelling circumstances of cross border terrorism," the Court deferred to the blanket ban of 4G broadband in all parts of the union territory. While stating that the Court needs to balance the competing interests of right bearers and the existing law and order situation, the Court does not engage with the arguments of the petitioner on the *effect* of the restrictions on healthcare and education during a pandemic. Thus, while ostensibly adjudicating in the framework of balancing, the Court in reality does not. Instead, it constitutes a "Special Committee" headed by the Secretary of the union ministry of home affairs, and other members of the executive, to determine the necessity of the restrictions.

Second, in *Rakesh Vaishnav v. Union of India*,[119] there were batches of petitions clubbed into a single matter: petitions which challenged the constitutionality of the "farm laws,"[120] petitions filed by individuals praying that the protests against the farm laws be prohibited on grounds of the pandemic, and (strangely) petitions filed for the enforcement of the farm laws. The Court stayed the operation of the farm laws. However, it does so, on the ground that staying the operation of laws would "assuage the hurt feelings of the farmers" and give them confidence while negotiating with the government. No precedent is cited for 'assuaging hurt feelings' being a ground of staying parliamentary law. Further, by the cases that the court itself cites, *prima facie* finding of unconstitutionality is a pre-requisite for staying parliamentary law. However, no such finding is recorded in the order. Instead, the Court constituted a committee of experts to hear the parties involved and submit a report to the Court. Thus, in both the cases, the Court does not engage in constitutional adjudication through analysis of legal arguments and reasoning. Rather, the Court passes the buck to a committee.

The other set of cases involving the right to expression are concerned with media-reportage of the pandemic, and in one instance, reportage of court proceedings. In the three cases related to media reportage, the court consistently upholds the right of press, and grants protection to journalists against coercive state action. In all these cases, the Court first grants

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[119] (2021) 1 SCC 590.

[120] The phrase 'farm laws' is used to collectively refer to three enactments by the Parliament: (1) Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; (2) Essential Commodities (Amendment) Act, 2020; and (3) Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020.

interim protection to the petitioner by prohibiting coercive state action, and then proceeds to adjudicate on whether the FIR is to be quashed. In *M/S Aamoda Broadcasting Company Private Limited & Anr v. The State of Andhra Pradesh*,[121] two media houses filed Article 32 petitions praying for quashing FIRs which have been registered for sedition, promoting enmity between different groups, inciting commission of offences under Sections 124, 153A, and 505 read with 120B of the Indian Penal Code ["IPC"]. The allegation was that these channels broadcasted a program in which a member of parliament criticised the government of the state. While stating that the sections of the IPC require interpretation to determine whether the offences have been made out, the Court granted interim protection by prohibiting the state from taking any coercive measures till the trial proceeds.[122]

In *Arnab Goswami v. State of Maharashtra*,[123] the court first granted interim protection to the petitioner.[124] Subsequently, the question of whether the multiple FIRs are to be quashed came before the Court. Following precedents,[125] the Court stated that multiplicity of FIRs on the same or related set of actions amounts to abuse of process and harassing the accused, and thus, quashed all FIRs except the first one filed in the place of the commission of the offence. In doing so, the Court also underscored the importance of the right to speech and expression in Article 19(1)(a), and noted that successive FIRs impinge upon the exercise of the right, and thus violate Article 19(1)(a). In *Vinod Dua v. Union of India*, an FIR was registered for sedition, public nuisance, defamation, and incitement under Sections 124A, 268, 501 and 505 of the IPC. The petitioner prayed for quashing of the FIRs under an Article 32 petition. The Court, relying on precedents such as the *Arnab Goswami* case, quashed the FIRs. The Court, relying on *Kedar Nath v. State of Bihar*,[126] reasons that mere critical comments passed on the handling of the pandemic cannot constitute sedition under the IPC. Further, the court found that no offence is made out under the other sections mentioned in the FIR. Thus, the court quashed *all* FIRs in this case. Crucially, this remedy goes one step beyond that of *Arnab Goswami*, since even the original FIR was quashed in this case. In *Arnab Goswami*, only the *subsequent* FIRs were quashed as they constituted an abuse of process. Justifying the power

[121] 2021 SCC OnLine SC 407.
[122] At the time of writing, the matter was still pending.
[123] (2020) 14 SCC 12.
[124] 2020 SCC OnLine SC 450; (2020) 14 SCC 51.
[125] TT Anthony v. State of Kerala (2001) 6 SCC 181.
[126] AIR 1962 SC 955.

of the court to quash even the original FIR under Article 32, the Court relied upon the case of *State of Haryana v. Bhajan Lal* for the grounds on which FIRs could be quashed, along with citing other instances in the past where FIRs were quashed under Article 32.[127]

Finally, in *Chief Election Commissioner v. Vijayabhasker*,[128] the petitioner filed an appeal against an oral observation made by the Madras High Court, praying for a directive that media report only what is a part of the written judicial order. While hearing a case, the Madras HC had stated that the Election Commission was "singularly responsible for the second wave of COVID-19," and must be charged for murder. Rejecting the prayer, the Court stated that citizens have a right under Article 19(1)(a) to know what transpires in a judicial proceeding, and that the legal system is founded on public faith for which transparency is essential. Further, the Court also noted that unless proceedings are live streamed, lack of recorded oral proceedings might continue to raise issues as the instant one. Finally, the Court's observations regarding importance of dissemination of news in *Essential Supplies* also merit a mention in this category.

All in all, the Court's record in matters of speech and expression is chequered at best. In politically sensitive cases, such as internet in Jammu and Kashmir and constitutionality of (and protests against) the farm laws, the Court does not engage in any rigorous precedent-based legal analysis and examination of arguments, choosing to delegate adjudication to committees, one of which consisted of the executive itself. Further, the Court's orders favouring the media, progressive as they are, must be viewed in the larger context of the Court's recent jurisprudence of delayed, or lack of, adjudication in *habeus corpus* cases,[129] and denial of bail under the Unlawful Activities Prevention Act, 1967.[130]

The third area of overreach was transparency, specifically regarding the PM Cares fund, which was claimed to be exempt from Section 12(h) of the Right to Information Act, 2005 by

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[127] Rini Johar v. State of Madhya Pradesh (2016) 11 SCC 703; Priya Prakash Varrier v. State of Telangana (2019) 12 SCC 432; Laxmibai Chandaragi B. v. State of Karnataka, (2021) 3 SCC 360; Mahendra Singh Dhoni v. Yerraguntla Shyamsundar, (2017) 7 SCC 760.

[128] 2021 SCC OnLine SC 364.

[129] AG Noorani, 'Habeus Corpus Law: A Sorry Decline' *Frontline* (25 October 2019) < https://frontline.thehindu.com/cover-story/a-sorry-decline/article29604480.ece> accessed 1 July 2021.

[130] Apurva Vishwanath, 'Reading Section 43D(5): How it Sets the Bar for Bail so High under UAPA' *Indian Express* (New Delhi, 9 July 2021) <https://indianexpress.com/article/explained/section-43d5-how-it-sets-the-bar-for-bail-so-high-under-uapa-7390673/> accessed 1 July 2021.

the Prime Ministers' Office.[131] In *Centre for Public Interest Litigation v. Union of India*,[132] the petitioner prayed for a transfer of all funds from the unaudited PM Cares Fund,[133] to the National Disaster Relief Fund (NDRF) under Section 46 of the DMA, which is audited by the Comptroller and Auditor General [CAG], an independent constitutional institution under Article 148 of the Constitution. The Court stated that the PM Cares Fund is a separate public fund, not a government fund, and thus does not hamper the operation of the NDRF under Section 46 of the DMA. Agreeing with the central government that "financial planning is in the domain of the Central Government," the Court dismissed the petition without ordering for any relief. A fund of the size of PM Cares Fund with the specific purpose of combating a public health emergency should be subject to audit by the independent office of the CAG. While this context could have informed the analysis of the Court, it simply deferred to the executive citing "financial planning".

All in all, the court was initially deferential in matters of labour rights before moving away from such a deferential position. On the other hand, in cases of right to free speech and expression, and transparency, the Court by and large defers to the executive.

III. ANALYSING THE RESPONSE OF THE SUPREME COURT

How, then, do we understand the record of the Supreme Court during the COVID-19 pandemic? While the Court completely deferred to the executive in cases involving economic matters, that was not the case with public health, especially in the second wave. In labour rights, the Court gradually moved away from deference to reviewing the government's claims, though that was not the case in matters of free speech and transparency.

The limited point that the above analysis suggests is that in a pandemic, constitutional courts can gradually move away from the position of deference to one of full rights-based review.[134] This is especially true in cases of public health and healthcare, which are the primary axes of

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[131] Scroll Staff, 'PM-CARES "controlled by government", but Doesn't Come under RTI Act, says Centre in New Response' *Scroll* (25 December 2020) <https://scroll.in/latest/982310/pm-cares-controlled-by-government-but-doesnt-come-under-rti-act-says-centre-in-new-response> accessed 1 July 2021.
[132] 2020 SCC OnLine SC 652.
[133] BBC Team, 'Coronavirus: Secrecy Surrounds India PM Narendra Modi's '$1bn' Covid-19 Fund' *BBC* (30 June 2020), < https://www.bbc.com/news/world-asia-india-53151308> accessed 1 July 2021.
[134] Abiri & and Guidi (n 58) 56.

constitutional litigation in a pandemic. The cases on public health thus support Abiri and Guidi's argument of "gradual reintroduction of rights-based revision". Abiri and Guidi posit three reasons for such a reintroduction: *first*, with time, the executive loses its primacy as legislatures and courts become more familiar with the pandemic; *second*, with time the negative effects of emergency measures taken by the executive need to be checked from becoming the constitutional norm; *third*, as the pandemic slows down, restrictive measures taken to deal with the pandemic need different forms of legitimation and judicial review could be one such form.[135] The unique point that I seek to make is, *first*, that such a shift away from deference to gradual reintroduction of rights-based review could be easier to justify in the context of executive underreach, rather than overreach. This is so since courts are pushed into acting promptly when faced with imminent loss of life and little executive action to prevent it. *Second*, the time taken to shift away from deference to rights-based review depends on the extent of underreach. To be clear, the Indian executive *massively* underreached and worsened the COVID-19 situation, especially during the second wave, resulting in India being one of the worst-hit countries by the pandemic. The impact of the virus had been unprecedented globally.[136] Understood in this context, the quick shift from deference to rights-based review was not only unsurprising, but also necessary.

However, the above analysis also suggests that the ability of courts, though crucial in extreme (life-threatening) situations, is still limited in several others. While courts can respond to executive underreach by demanding answers and passing directions, case law shows that the courts have been hesitant to do the same in matters where rights are restricted and curtailed by executive overreach. Other mechanisms to enforce executive accountability, including civil society, thus have to step up to ensure right to free speech, transparency and other such rights are protected in a pandemic.

Therefore, the role of the court, i.e., whether a court should defer to the executive in a pandemic or conduct business as usual, depends on the nature (executive underreach or overreach) and sphere (public health, free speech, labour rights, etc) of executive action in question, and its extent. In a public health emergency, no grand and universal answer to the

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[135] ibid.

[136] Smriti Mallapaty, India's Massive COVID Surge Puzzles Scientists, *Nature* (21 April 2021), <https://www.nature.com/articles/d41586-021-01059-y>.

question of the role of the court can be given. Rather, the analysis should account for several factors adverted to above, which influence not only how courts will react, but also how quickly they do so.

CONCLUSION

This article attempts to study the case law of the Indian Supreme Court during the COVID-19 pandemic. By providing a descriptive account of the case law and attempting to draw broader conclusions on the court's role from the account, this article seeks to add to the body of scholarship on courts, democracy, judicial review, and the pandemic. In doing so, focus is placed not just on how courts have acted, but the larger context of executive action which necessitated the judicial action in the first place.