JUDICIAL REVIEW IN TIMES OF CRISIS: EXPLORING CONSTITUTIONAL OBLIGATIONS IN LIGHT OF CORONAVIRUS

A submission to the HM Seervai Essay Competition

INTRODUCTION

On March 31, 2020, Prime Minister Modi addressed a country of 135 crore people and made an announcement that would impact their lives in unimaginable ways. With a notice of just four hours, he announced that the country would be entering into a 21-day lockdown which would entail a near-total ban on movements and activities. The reason for this unprecedented move was the pandemic caused by the coronavirus. As a result, low-income migrant workers across the country were stranded in their city of employment. Many of them began to walk home as they had no means of subsistence and faced financial and other difficulties.[1] Most could not carry enough food and water, and were also unable to procure necessary amounts during their journey.[2] More than 150 migrants lost their lives before reaching their destinations.[3] This was just the tip of the iceberg.

The effect of the pandemic itself coupled with state action that inevitably restricted fundamental rights gave rise to a complex web of questions. For instance, could courts intervene with the policy implemented by the state, in order to uphold fundamental rights while simultaneously respecting the separation of powers? What was the permissible extent of such intervention and what form would it take, especially in a crisis? Would this hamper the state's response to the crisis? These are some of the questions that I will answer in this essay.

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[1] Surbhi Kesar and others, 'Pandemic, informality, and vulnerability:
Impact of COVID-19 on livelihoods in India' (2020) CSE Azim Premji University Working Paper No. 2020-01 <https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2020/06/Kesar_et_al_Pandemic_Informality_Vulnerability.pdf> accessed 6 July 2020

[2] ibid

[3] Anisha Dutta, '198 migrant workers killed in road accidents during lockdown: Report' (*Hindustan Times*, 2 June 2020) <https://www.hindustantimes.com/india-news/198-migrant-workers-killed-in-road-accidents-during-lockdown-report/story-hTWzAWMYn0kyycKw1dyKqL.html> accessed 6 July 2020

In Section I, I argue that the increase in executive power during crises adversely impacts constitutional and democratic values, with 'the state of exception' being utilized to expand power over the citizenry and curtail civil liberties. In Section II, I establish the need for judicial review, not only because it checks executive excess and upholds the rule of law, but also because it provides unique benefits in a crisis. Here, I also resolve the supposed tension between the separation of powers doctrine and judicial review. In Section III, I evaluate the response of courts to the pandemic. In Section IV, I propose a model for judicial review which allows the courts to fulfil their duties while respecting the separation of powers.

I. THE CASE OF THE CREEPING EXECUTIVE

The government refrained from using its emergency powers and instead adopted the 'legislative model'[4] by relying upon various enactments to manage the pandemic. Namely, the central government has made use of the the Disaster Management Act, 2005 ("DMA"), the state governments have invoked the Epidemic Diseases Act, 1897 ("EDA"), and district magistrates / commissioners of police who utilized Section 144 of the CrPC. Foremost was the institution of a national 'lockdown'[5] initiated and maintained through executive decrees issues by the NDMA,[6] and supplanted with measures by the states. Using the broad discretionary powers conferred by these enactments, the government has introduced a series of measures which have raised concerns about the violations of first generation as well as second generation rights.

[4] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 Intl J Constitutional L 210

[5] The term finds no definition in the law and is used colloquially to collectively refer to the restrictions imposed by the central and state governments.

[6] Government of India, Ministry of Home Affairs, Orders dated 24.03.2020, 14.04.2020, 01.05.2020 <https://ndma.gov.in/en/media-public-awareness/ndma-orders-advisories.html>

First generation rights or civil and political rights are considered 'negative rights' because they require the state to refrain from acting in a manner which infringes them.[7] The rights to life, livelihood, freedom of expression, and privacy would be some which are potentially impacted during the pandemic. Second generation rights or economic and social rights are considered 'positive rights' because they require the state to undertake some action to fulfil them.[8] The right to healthcare is a significant second generation right in the present context. On the whole, there is some consensus that the lockdown and the manner in which it was implemented violated citizens' rights to health, food, shelter, livelihood, equality, and non-discrimination in various manners.[9]

The pandemic has ushered in an era of 'rule by executive decree'.[10] The executive has employed what has been termed a 'coercion-backed crisis form of governance'.[11] Although an emergency has not been declared, emergency-like powers are being exercised by the government and emergency measures have been put in place. The primary purpose of such a regime is conservative: to contain the crisis and ensure a quick return to normal democratic and constitutional processes.[12] Quick and proactive action is undeniably required during any crisis. Indeed, this is precisely why the executive is vested with great powers during

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[7] Spasimir Domaradzki et al, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Rev 423

[8] ibid

[9] Bonavero Institute of Human Rights (University of Oxford), *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* (No. 3/2020, 6 May 2020) <www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf> ('Bonavero Report') accessed 10 July 2020

[10] Gautam Bhatia, 'Coronavirus and the Constitution XX: Parliamentary Accountability' (*Indian Constitutional Law and Philosophy*, 1 May 2020) <https://indconlawphil.wordpress.com/2020/05/01/coronavirus-and-the-constitution-xx-parliamentary-accountability/> accessed 6 July 2020

[11] Abhinav Sekhri, 'Learning to Live with Crisis Governance Long after the Coronavirus?' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603202> accessed 10 July 2020

[12] ibid

emergencies. It is prompted by the recognition that the legislature by its very nature cannot respond and adapt to rapid developments on-ground in a speedy and appropriate fashion. Hence, an increase in executive power and discretion is necessary in order to respond effectively to crises.

However, such executive action which imposes restrictions on rights, must be proportionate to the expected benefit to the public,[13] and related to the problems caused during the crisis, at the very least. This is especially because governments often use this 'state of exception' to expand their power over the citizenry.[14] This is evident in India where privacy invading measures such as the tracing of telephone numbers and the Aarogya Setu application are being deployed, which sees invasive data collection, potential data breaches, a lack of clarity on the purposes the data could be used for, etc.[15] Serious doubts also remain about whether the 'lockdown' orders were proportionate to the expected public benefit, with thousands of migrants left stranded. Internationally, the Hungarian and Israeli Prime Ministers have also grossly expanded their political power[16] and Sierra Leone declared a state of emergency despite not recording a single case of coronavirus at the time.[17]

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[13] TRS Allan, 'Rule of Law' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP, 2016) 215

[14] Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005)

[15] Gautam Bhatia, 'Coronavirus and the Constitution – XXI: The Mandatory Imposition of the Aarogya Setu App' (*Indian Constitutional Law and Philosophy*, 2 May 2020) <https://indconlawphil.wordpress.com/2020/05/02/coronavirus-and-the-constitution-xxi-the-mandatory-imposition-of-the-aarogya-setu-app/> accessed 8 July 2020

[16] Benjamin Novak, 'Hungary Moves to End Rule by Decree, but Orban's Powers May Stay' (*The New York Times*, 16 June 2020) <https://www.nytimes.com/2020/06/16/world/europe/hungary-coronavirus-orban.html> accessed 10 July 2020; Gwen Ackerman, 'Netanyahu is downgrading Israeli democracy under cover of coronavirus' (*The Print*, 9 July 2020) <https://theprint.in/world/netanyahu-is-downgrading-israeli-democracy-under-cover-of-coronavirus/457347/> accessed 10 July 2020

[17] -- 'Despite no COVID-19 cases, Sierra Leone declares 12-month state of emergency' (*CGTN Africa*, 25 March 2020) <https://africa.cgtn.com/2020/03/25/despite-no-covid-19-cases-sierra-leone-declares-12-month-state-of-emergency/> accessed 10 July 2020

With an increase in governmental powers is a concomitant increase in the curtailment of civil liberties as the cost of curtailing liberties is much lower (for both the government and the citizens) at such times.[18] This is illustrated by a study which found that persons of all political leanings in USA were willing to sacrifice their civil liberties in order to contain the present pandemic, even if it involved unconstitutional state action.[19] In India, the freedom of speech is being grossly restricted: the police registered an FIR against a news website for reporting facts related to the pandemic[20] and has targeted private citizens who were critical of the state's management of the pandemic.[21] Further, the central government has used the cover of the pandemic to make politically motivated arrests, which have been widely criticized as being authoritarian, inhumane, and unjustified.[22]

Further, the increase in executive power during crises has long been used to target minorities or vulnerable classes – in USA, a racially discriminatory policy allowed for the unjust

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[18] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale LJ 1011

[19] Mila Versteeg, 'Red and Blue America Agree That Now Is the Time to Violate the Constitution' (*The Atlantic*, 25 March 2020) <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-america-constitution/608665/> accessed 10 July 2020; Also see, Christian Bjornskov, 'The State of the Emergency Bias' (*Verfassungsblog*, 19 April 2020) <https://verfassungsblog.de/the-state-of-emergency-virus/> accessed 10 July 2020

[20] Ritika Jain, 'India Widens Media Curbs in Covid-19 Pandemic' (*Article 14*, 3 April 2020) <https://www.article-14.com/post/india-widens-curbs-on-media-during-covid-19-pandemic> accessed 7 July 2020

[21] -- 'Calcutta HC Slams Detention of Doctor Who Tweeted on Insufficient Protective Gear' (*The Wire*, 2 April 2020) <https://thewire.in/rights/coronavirus-doctor-detained-calcutta-hc> accessed 7 July 2020; Srinivasa Rao, 'Vizag cops thrash suspended doctor, tie his hands and drag him on road for allegedly creating nuisance' (*Hindustan Times*, 17 May 2020) <https://www.hindustantimes.com/india-news/vizag-cops-thrash-suspended-doctor-tie-his-hands-and-drag-him-on-road-for-allegedly-creating-nuisance/story-PKkAzUstZwSq7oY5b1tPrJ.html> accessed 7 July 2020

[22] Harsh Mander and Amritanshu Verma, 'Following authoritarian regimes around the world, India is using Covid-19 pandemic to crush dissent' (*Scroll*, 15 May 2020) <https://scroll.in/article/961431/delhi-police-is-making-arbitrary-arrests-and-crushing-dissent-under-the-cloak-of-lockdown> accessed 7 July 2020; -- 'India: Crackdown on Dissent Continues During Covid-19' (*Amnesty International*, 20 April 2020) <https://www.amnesty.org/en/documents/asa20/2174/2020/en/> accessed 7 July 2020

internment of thousands of Japanese-Americans during World War II.[23] India witnessed the targeting of Muslims as being responsible for the spread of coronavirus.[24] Of particular concern were numerous states' amendments to labour laws, removing vital protections to workers in order to 'promote economic growth' – these have also been argued to be unconstitutional.[25]

State conduct during an emergency also pushes the envelope of our understanding of normalcy and creates precedent for acceptable state action in a future crisis.[26] The atmosphere of fear that inevitably manifests at such a time and the political exploitation of that fear normalize legal structures and practices which were previously considered exceptional.[27] Diverse events show, for instance, that the Indian government has historically used its extraordinary powers in a 'prolonged and indiscriminate' fashion in order to shift the *status quo ante* and normalize the exercise of such powers.[28] The SARS epidemic, too, previously resulted in a similar normalization of emergency powers across jurisdictions.[29] The fact that governments become used to the convenience of emergency powers and are

[23] *Korematsu v. United States* 323 U.S. 214 (1944) [United States Supreme Court]. It is another matter altogether that the judiciary upheld this racially discriminatory policy

[24] Joanna Slater, 'As the world looks for coronavirus scapegoats, Muslims are blamed in India' (*Washington Post*, 23 April 2020) <https://www.washingtonpost.com/world/asia_pacific/as-world-looks-for-coronavirus-scapegoats-india-pins-blame-on-muslims/2020/04/22/3cb43430-7f3f-11ea-84c2-0792d8591911_story.html> accessed 11 July 2020

[25] Justice Gopala Gowda, 'Labour law amendments unconstitutional' (*Indian Express*, 20 June 2020) <https://www.newindianexpress.com/opinions/2020/jun/20/dilution-of-labour-laws-is-unconstitutional-2158931.html> accessed 8 July 2020

[26] Oren Gross, 'Emergency Powers in the Time of Coronavirus … And Beyond' (*Just Security*, 8 May 2020) <https://www.justsecurity.org/70029/emergency-powers-in-the-time-of-coronaand-beyond/> accessed 8 July 2020

[27] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018)

[28] Sekhri (n 11)

[29] Institute for Bioethics, Health Policy and Law (University of Louisville School of Medicine), *Quarantine and Isolation: Lessons Learned from SARS* (2003) <https://biotech.law.lsu.edu/blaw/cdc/SARS_REPORT.pdf> accessed 10 July 2020

gradually less willing to give them up is also of concern.[30] Hence, executive 'creep' over time poses a grave threat to constitutional democracy and its accompanying values in the long run. It dominates over the other two branches of government as well as poses a risk to individual freedoms.

II. JUDICIAL REVIEW: RULE OF LAW, SEPARATION OF POWERS, AND CRISES

In this section, I demonstrate the two-fold value of judicial review. I first demonstrate that it is essential to upholding the rule of law (and ensuring the separation of powers), and then establish the value of the judiciary's role in times of crisis. I also respond to detractors of judicial review during crises and show that their arguments are not applicable to the present situation.

(II.1) Judicial Review as Upholding Rule of Law

One of the core tenets of constitutionalism is the restriction of the powers of the state.[31] This is accomplished through the rule of law and the separation of powers.[32] Additionally, some form of judicial review is necessary to constitutionalism.[33] This section will set out what the rule of law means in India, how the doctrine of separation of powers is and should be conceptualized, and how judicial review fits with these concepts. This section will answer whether judicial review contributes to the corrosion of rule of law, or whether it preserves it.

(II.1.a) Contextualizing Judicial Review and the Rule of Law

[30] Sekhri (n 11), Gross, 'Chaos and Rules' (n 18)
[31] John Alder, *Constitutional and Administrative Law* (3rd edn, Macmillan 1999)
[32] ibid
[33] John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (OUP 1991) 33

The rule of law is a basic feature of the Indian Constitution.[34] There is heated disagreement on the exact meaning of 'rule of law' and no consensus has been arrived at regarding its exact content.[35] Dicey famously defined it as proscribing the exercise of arbitrary power, equal subjection of all persons to the law, and a lack of special courts.[36] Today, there is broad agreement that the rule of law requires a check on executive power.[37] The difference of opinion is with respect to the content of the law: A formal conception of the rule of law is concerned with preventing the arbitrary exercise of powers by the state and is indifferent to the substance or content of the law.[38] It is said to exist as long as there is conformity to publicly declared, prospective, general rules.[39] This is also known as the 'thin' version of the rule of law.[40]

The 'thick' version is a more substantive account – it is concerned with the content of the law and requires the protection of individual rights (in addition to a check on executive power).[41] As per the thick version, the values of human dignity and individual liberty are essential to a full comprehension of the rule of law.[42] There must exist a respect for constitutional rights and those exercising discretion must adhere to the limits of legitimate government.[43]

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[34] *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299

[35] Richard Fallon Jr., 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 Columbia L Rev 1, 7; Brian Tamanaha, 'The Rule of Law for Everyone?' (2002) 55 Current Legal Problems 97, 101

[36] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915) 120

[37] Arthur Goodhart, 'The Rule of Law and Absolute Sovereignty' (1958) 106 University of Pennsylvania L Rev 943, 955; Hans Kletcatsky, 'Reflections on the Rule of Law and in Particular on the Legality of Administrative Action' (1963) 4 Journal of the International Commission of Jurists 209

[38] Allan, 'Rule of Law' (n 13)

[39] ibid

[40] Ryan Alford, *Permanent State of Emergency* (McGill-Queen's University Press 2017) 21

[41] Allan, 'Rule of Law' (n 13)

[42] ibid

[43] ibid 215

Significantly, protecting non-derogable rights from the executive even during crises is seen as the 'normative core of the rule of law'.[44]

Unlike many other countries, the Indian Constitution clearly establishes judicial review as a part of India's constitutional framework.[45] In fact, Article 13 casts a constitutional duty upon judges, to interpret the Constitution and declare any law violating it to be unconstitutional.[46] This is a formidable power and is notably a feature of strong-form judicial review.[47] Additionally, Article 32(2) empowers the Supreme Court to issue any of the five writs mentioned in order to enforce the fundamental rights in Part III.[48] The significance which the framers attributed to this power is made clear by Dr. Ambedkar's description of it as "an article without which this Constitution would be a nullity" and as being the "very soul of the Constitution".[49] Judicial review of executive action was later held to be an essential aspect of the rule of law[50] and judicial review generally was held to be a basic feature of the Constitution.[51]

From these articles, there is a strong case to be made that the Constitution reflects an understanding of the thick conception of the rule of law. The deep commitment to fundamental rights is evident from the extent of the power handed to the courts. The "overall pro-dignity profiles of normative apparatus" of Part III of the Constitution has been said to be remarkable.[52] The Supreme Court's interpretation of Part III rights is also consistent with the

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[44] Alford (n 40) 19. Also see, Bonavero Report (n 9)
[45] Constitution of India 1949, arts 13, 32, 131-136, 143, and 226
[46] MP Jain, *Indian Constitutional Law* (LexisNexis 2018)
[47] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) 21
[48] Constitution of India 1949, Article 32(2)
[49] Constitutional Assembly Debates, Vol 7, p 953
[50] *Bacchan Singh v State of Punjab* AIR 1982 SC 1325
[51] *Sampath Kumar v Union of India* (1987) 1 SCC 124
[52] Upendra Baxi, 'The Place of Dignity in the Indian Constitution' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014)

thick of rule of law, with dignity held to be a part of the basic structure of the Constitution[53] and Article 21 (codifying the right to life and liberty) given an expansive interpretation.[54] Even if the Constitution's allegiance to a thick conception of rule of law is disputed, it is undeniable that it provides for judicial review of executive action and allows for a check of executive excess.

The question of judicial review has, however, not been without controversy, even setting aside the specific issues that arise in the context of a crisis. Many allege that the Indian judiciary violates the doctrine of separation of powers by issuing directions which amount to judicial legislation.[55] This is consequently thought by some to be a failure of key rule of law principles.[56] The term 'judicial activism' has become popular in India, with respect to 'activist judges.'[57] In some cases, the courts have framed extensive guidelines to be followed and this has been criticized as the courts stepping into the legislature's domain.[58] What, then, is the scope of permissible judicial review in India? How can the courts fulfil their constitutional duty and act as a check on executive overreach while not violating the separation of powers doctrine?

(II.1.b) Understanding the Separation of Powers Doctrine

[53] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225
[54] PP Craig and SL Deshpande, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9 Oxford J Legal Stud 356
[55] Pratap Bhanu Metha, 'The Rise of Judicial Sovereignty' (2007) 18 Journal of Democracy 70
[56] ibid
[57] Madhav Khosla, 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' (2009) 32 Hastings Intl & Comp L Rev 55
[58] See, for instance, *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *DK Basu v State of West Bengal* (1997) 1 SCC 416; *Nilabati Behera v State of Orissa* AIR 1993 SC 1960

'The pure doctrine of separation of powers' dominates the general understanding of the concept.[59] As per this conception, the government must be divided into three divisions: the executive, the legislature, and the judiciary. Each branch has separate members as well as functions; there must be no overlap between the members of each branch, and the functions of one branch must not encroach upon another.[60] A strict separation of each branch's function is thought to be essential. This understanding of the separation of powers has been contested by those who contend that this is not descriptive of reality.[61]

It is not descriptive as each branch inevitably performs the functions of the other. The judiciary, in interpreting law, is also said to be making it (to a certain extent, at the very least).[62] It also exercises the power of review over the other branches' actions. With the introduction of Public Interest Litigation and the infamous continuing mandamus, the distinction between the judiciary and the executive further eroded.[63] The executive carries out a major legislative function by drafting delegated legislation and promulgating ordinances. Further, administrative bodies routinely exercise judicial functions in the course of their duty. The legislature may choose to respond to the judiciary's decisions by amending the law or passing new legislations, thereby taking over at least some portion of the adjudicative function. It also holds the power to impeach judges, which is certainly an adjudicative function. There is also some overlap between the members of the legislature and the executive in India. The Constitution does not specifically provide for it and its provisions do

[59] MJC Vile, *Constitutionalism and the Separation of Powers* (OUP, 1967) 13; Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP, 2016)
[60] ibid; DJ Galligan, *Discretionary Powers* (Clarendon Press, 1986) 228
[61] Kavanagh (n 59)
[62] ibid; Lord Reid, 'The Judge as Lawmaker' (1972) 12 Journal of Public Teachers of Law 22
[63] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2016)

not reflect the pure understanding either.[64] The orthodox understanding is not desirable as a normative idea either because it would be practically impossible for these institutions to function without interacting with or accounting for each other. Hence, the 'pure doctrine of separation of powers' does not exist in practice.

There is considerable disagreement about what exactly the doctrine does and should entail,[65] and consequently, different countries have different systems in place to ensure the separation of powers.[66] However, it is generally agreed that the value animating the doctrine is one that seeks to prevent the concentration of power with any one institution.[67] The purpose of this doctrine is to create branches of government which are distinct from the executive and to which it will be accountable.[68] This ensures governmental efficiency as well as a check on the abuse of power.[69] Judicial review, then, is a manifestation of this value which seeks to prevent the supremacy of one institution over the others. It performs the important function of checking the executive when it acts in excess of its mandate and also ensures that constitutional rights are upheld. Rights without remedies are no rights at all[70] – the courts ensure that the rights of people are not illusory by granting appropriate remedies. Judicial review ensures the supremacy of the Constitution as opposed to the supremacy of a particular institution. Hence, it is not antithetical to the separation of powers or the rule of law but is essential to ensure their existence.[71] It is, of course, undeniable that much of the criticism

[64] PM Bakshi, 'Separation of Powers in India' (1956) 42 American Bar Association Journal 552
[65] NW Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge LJ 59
[66] Shashank Krishna, 'Separation of Powers in the Indian Constitution & Why the Supreme Court was Right in Intervening in the "Jharkhand" Imbroglio' (2006) 18 Student Bar Rev 13
[67] Jon Michaels, 'An Enduring, Evolving Separation of Powers' (2015) 115 Columbia L Rev 515
[68] Timothy Endicott, *Administrative Law* (2nd edn, OUP 2011) 15
[69] Kavanagh (n 59)
[70] Compare with the decision in *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521 where the court held that fundamental rights existed, but no remedy was available to enforce them.
[71] Krishna (n 66)

directed at the courts for being 'activist' is not unfounded – courts too must act with caution with respect to the remedies they grant.[72]

(II.2) The Need for Judicial Review in Times of Crisis

What, then, is the solution to the problem of a creeping executive in a time of crisis? Four principles are of assistance: first, legislative oversight of the executive must be present; second, exceptional measures must be limited to those which are strictly necessary; third, a 'sunset clause' which indicates the temporal limits of the executive's extraordinary powers is required; fourth, judicial oversight of the executive must also be present.[73]

The first requirement is not fulfilled in India. Neither the DMA nor the EDA contain a requirement to ensure legislative oversight over executive action. This is in stark contrast with other crises powers when the Constitution permits the government to either declare an emergency or pass an ordinance. If either of these paths is chosen, the legislature is required to ratify the government's action, thereby ensuring periodic, if minimal, legislative oversight even in times of crises.[74] The lack of a similar requirement in the DMA and the EDA make it possible for the executive to evade parliamentary accountability.[75] The third requirement also remains unfulfilled as neither enactment places a temporal limit on the exercise of exceptional powers.

The second requirement can be met in two ways. First, the authorizing statute in question can contain limits or provide guidelines on the use of executive power and / or courts determine

[72] See Section IV below
[73] Tom Ginsburg and Mila Versteeg, 'States of Emergencies: Part II' (*Harvard Law Review Blog*, 20 April 2020) <https://blog.harvardlawreview.org/states-of-emergencies-part-ii/> accessed 10 July 2020
[74] Bhatia (n 10)
[75] Karan Gupta, 'Cracks in India's Constitutional Framework: Structural Implications of the Response to Covid-19 on Indian Constitutionalism' (*Verfassungsblog*, 28 April 2020) <https://verfassungsblog.de/cracks-in-indias-constitutional-framework/> accessed 10 July 2020

which measures are strictly necessary. Notably, neither of the statutes in question contain any restrictions on the executive. To the contrary, they confer very broad discretion on it. Section 35(1) of the DMA enjoins the centre to "take all such measures as it deems necessary or expedient for the purpose of disaster management."[76] Similarly, the EDA does not not define a dangerous epidemic disease but allows state governments to "take such measures … as it shall deem necessary" to combat one.[77] It provides no further guidance on the limits of these measures – the state's understanding of necessity prevails. Hence, the enactments themselves do not limit exceptional measures to those which are strictly necessary.

The second path is for the judiciary to ensure that exceptional measures are limited to those which are strictly necessary. This is possible in India because it has chosen the 'legislative model' of responding to the pandemic, through the DMA and the EDA, which do not bar judicial review.[78] Fundamental rights may not be derogated from (unlike when an emergency has been formally declared).

The sole option that remains as a bulwark against executive overreach and the erosion of democratic values, then, is the judiciary. Judicial review will ensure that constitutional rights are not undermined without cause. In addition to checking executive excess, the judiciary also legitimizes state action by reviewing it. Constitutional and democratic legitimacy is derived not only from electoral accountability, but also through judicial review. Judicial review is not merely suitable but is in fact necessary to ensure that such legitimacy exists.[79] It

[76] Disaster Management Act 2005, s 35(1)
[77] Epidemic Diseases Act 1897, s 2
[78] Indeed, the 'legislative model' of responding to an emergency requires that ordinary judicial review remain in place. Ferejohn and Pasquino (n 4)
[79] Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 Eur JL Studies 1

ensures that the executive is accountable to the public.[80] This understanding of judicial review gains greater significance in light of the fact that the judiciary is the only institution which is obligated to entertain claims of rights violations. Both the executive and the legislature can (and often do) disregard any complaints from citizens, especially if they lack socio-political power.[81] Courts are, therefore, the 'only forum realistically available' for most people subject to emergency measures.[82]

Besides, the judiciary's decisions crystallize as precedent, which governments follow. They can therefore 'exert control over the next emergency' further enhancing the importance of its role.[83] For instance, a decision upholding the right to privacy in the context of a crisis would be applicable in future crises as well. Judicial review also serves the function of 'the refinement of broad constitutional commands into essentially regulatory codes of conduct.'[84] In other words, the judiciary's decisions while adjudicating individual claims or reviewing particular policies concerned with constitutional rights clarifies the nature, scope, and applicability of these broadly worded rights and helps guide future state action. Finally, judicial review generally forces governments to explain the purpose of their action and how the restriction in question relates to their purpose.[85] It compels them to rationalise their actions and refrain from relying on non-deterministic factors.

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[80] Eduardo Jordão and Susan Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review' (2014) 66 Administrative L Rev 1

[81] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Michigan L Rev 2565, 2592

[82] ibid

[83] ibid 2576

[84] Pamela Karlan, 'The Paradoxical Structure of Constitutional Litigation' (2007) 75 Fordham L Rev 1913, 1915

[85] Lindsay Wiley and Steve Vladeck, 'COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis' (*Harvard Law Review Blog*, 9 April 2020) <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/> accessed 11 July 2020

Perhaps a combination of some or all of these advantages prompts international recognition of the judiciary's role during emergencies, as well as an insistence on courts being open.[86] One must also not lose sight of the fact that even well-meaning actors may unintentionally overstep the bounds of necessity and judicial review will assist them as well. In these ways, courts perform many useful functions by carrying out judicial review, which results in increased transparency and accountability, better regulation of government action and a check on executive overreach with a consequent protection of civil liberties.

There are many who argue that the costs of judicial review of executive action during emergencies outweigh the assorted benefits outlined above. They either argue that judicial review should be suspended during crises, or that special deference to the executive is warranted. In responding to these claims, it is vital to note at the very outset that pandemics are starkly different from "usual" emergencies, which generally refer to security threats. The most common refrain against judicial review is that during times of war (or during the persistence of similar threats to a nation's security), the state is not at liberty to reveal the information it has gathered as this may impede efforts of protecting against the threat.[87] Judges are forced to make their decision based on incomplete information and this may lead to undesirable or incorrect outcomes. This is certainly not the case during a pandemic wherein increased transparency will not handicap the state's ability to fight the disease. Consequently, judicial review during the pandemic will not lead to undesirable or incorrect outcomes as judges have all the information they require. Indeed, the infamous

Arguments against judicial review during times of crises are based on the assumption that the crisis in question will be finite and will soon allow a return to the 'regular' modes of

[86] Bonavero Report (n 9); UNGA, 'Independence of judges and lawyers: Note by the Secretary-General' (2008) UN Doc A/63/271

[87] Gross, 'Chaos and Rules' (n 18)

functioning.[88] This assumption stands defeated with respect to the current situation. The pandemic is here to stay for the foreseeable future and has even been termed 'the new normal'.[89] Detractors also contend that 'ordinary' judicial review and the standards applied in 'ordinary' times will be too harsh and hinder the government's ability to effectively manage the pandemic.[90] This argument holds no water as state action will be upheld if it is justified with respect to the particular circumstances in which it is taken.[91] This is exemplified by a recent order of the Gujarat High Court which accepted and upheld the state government's position on many issues related to pandemic-management, after subjecting it to review.[92] Moreover, the proportionality standard of review (which accounts for the purpose of a measure, its suitability, necessity and a balance between its costs and benefits) is flexible and allows for different outcomes based on the context in which it is applied (discussed in detail below[93]). Judicial review is therefore not unsuited to emergencies or crises.

Another concern is that judges are not experts – state response to the pandemic accounts for a variety of concerns in myriad fields including epidemiology, bioethics, economics, and so

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[88] Lindsay Wiley and Steve Vladeck, 'Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review' (2020) 133 Harvard L Rev F (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585629#>

[89] See, for instance, -- 'Bengaluru unlocks to the 'new normal'' (*The Hindu*, 8 June 2020) <https://www.thehindu.com/news/cities/bangalore/bengaluru-unlocks-to-the-new-normal/article31776882.ece> accessed 11 July 2020; Suresh Kumar, 'Pandemic has ushered in the new normal' (*Tribune*, 6 July 2020) <www.tribuneindia.com/news/comment/pandemic-has-ushered-in-the-new-normal-109118>

[90] Wiley and Vladeck, 'The Case Against 'Suspending' Judicial Review' (n 88)

[91] ibid

[92] Gujarat High Court, Order dated 23 May 2020 in WP(PIL) No. 42/2020; Also see Gautam Bhatia, 'Coronavirus and the Constitution – XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts' (*Indian Constitutional Law and Philosophy*, 24 May 2020) <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/> accessed 11 July 2020

[93] See Section IV.1 below

on.[94] Not being experts, they are not suited to take decisions on these matters and should defer to the executive. This argument ignores the fact that the executive is not comprised of experts either. It too relies on external assistance from qualified persons before taking decisions.[95] This can easily be produced in court along with the executive's reasoning for enacting a particular policy.[96] If the relevant legal standard is met, judges will uphold executive action. Further, judges routinely adjudicate matters in which they have little to no expertise – this does not hamper their ability to determine legal validity. Hence, respect for public health does not necessitate an overly deferential judiciary.[97] To the contrary, respect for this core value demands that courts take public health seriously by scrutinizing whether state action is actually geared towards protecting it.[98]

The final argument against judicial review in crises is that courts are simply ineffective at carrying out their constitutional mandate.[99] That courts often defer to the executive during emergencies is true.[100] However, this neither precludes the possibility of them ever fulfilling their constitutional responsibility nor is it useful in answering the normative question of whether courts should be conducting judicial review. Ecuador's Constitutional Court, for instance, has garnered praise for upholding citizens' rights during the pandemic while not

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[94] Bastian Steuwer and Thulasi Raj, 'Coronavirus and the Constitution – XII: The Supreme Court's Free Testing Order – A Response (1)' (*Indian Constitutional Law and Philosophy*, 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 11 July 2020

[95] Ilya Somin, 'The Case for "Regular" Judicial Review of Coronavirus Emergency Policies' (*The Volokh Conspiracy*, 15 April 2020) <https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/> accessed 11 July 2020

[96] ibid

[97] Wendy Parmet, 'Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law' (2019) 9 Wake Forest Journal of Law and Policy 1, 30

[98] ibid

[99] Gross, 'Chaos and Rules' (n 18); Cole (n 81) [Note, however, that Gross and Cole speak of crises involving threats to national security]

[100] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 3; Arthur Miller, 'Constitutional Law: Crisis Government Becomes the Norm' (1978) 39 Ohio State LJ 736

encroaching upon the executive's domain,[101] as have many High Courts in India.[102] Hence, the possibility of the desirable and right outcome being reached cannot easily be discounted. For all these reasons, judicial review can and should be conducted even during emergencies and arguments in favour of suspending it fail when examined closely.

This discussion would be incomplete without mentioning the infamous case *ADM Jabalpur v Shivkant Shukla*[103] where the Supreme Court ruled that fundamental rights including Article 21 could be suspended during an emergency and it would be powerless to issue a writ enforcing rights.[104] This has generally been regarded as one of the darkest moments in the Supreme Court's history and was recently overruled in *K.S. Puttaswamy v Union of India.*[105] Whether the value underlying this case (one of great deference to the executive in times of crisis) still persists in another matter altogether, and is considered in the following section.

III. EVALUATING THE JUDICIARY'S RESPONSE TO THE PANDEMIC

Having thus established that courts are bound to, and should, undertake some form of judicial review even in times of crisis, let us now turn to the question of whether they have done so in practice. A few orders have been chosen as being illustrative of the general trend. The Odisha High Court's response to an unofficial ban on the use of vehicles instituted by the local police, relaxing the ban, is a useful example to begin with.[106] Despite the state contending that there was no necessity for vehicles as it had deployed vans to deliver essential items to

[101] Gustavo Prieto, 'How Ecuador's Constitutional Court is Keeping the Executive Accountable During the Pandemic' (*Verfassungsblog*, 24 April 2020) <https://verfassungsblog.de/how-ecuadors-constitutional-court-is-keeping-the-executive-accountable-during-the-pandemic/> accessed 12 July 2020

[102] See Section III below

[103] (1976) 2 SCC 521

[104] ibid

[105] AIR 2017 SC 4161

[106] Odisha High Court, Order dated 9 April 2020 in WP(C) No. 9095/2020 (Odisha High Court Order)

the people,[107] the court did not accept these submissions at face value. It required the government to satisfy the court as to the existence of these measures before modifying its order and partly reinstituting the ban.[108]

Notably, it relaxed the ban in its first order because its cost outweighed the expected benefit to the public (a sort of proportionality analysis).[109] What is of particular significance here is that the court subjected the state to some rigour in reviewing its actions and accounted for the experiences of the people (as opposed to the on-paper schemes meant for them) while passing its orders. It also accounted for the disproportionate impact that the ban would have on certain vulnerable classes: the elderly, pregnant women, and the differently abled.[110] This is a welcome and nuanced approach to the assessment of rights violations. The court also performed the function of limiting the executive's emergency powers to measures that are strictly necessary.

Similarly, the other High Courts have generally carried out their role in a similarly upstanding fashion (with a few exceptions). To mention a few, the Kerala High Court refused to permit the government to deduct state employees' salaries in the absence of a law to that effect.[111] It held that the state did not have the power to do so under the DMA and the EDA.[112] It also formulated strict data sharing guidelines with respect to a company enlisted by the government to manage pandemic-related information.[113] The Madras High Court directed the state to provide migrant workers with food, shelter, and medical facilities 'on a

[107] Amlan Mishra, 'Coronavirus and the Constitution – XV: The Odisha High Court on the Ban on Vehicles' (*Indian Constitutional Law and Philosophy*, 11 April 2020) <https://indconlawphil.wordpress.com/2020/04/11/coronavirus-and-the-constitution-xv-the-odisha-high-court-on-the-ban-on-vehicles-guest-post/> accessed 12 July 2020

[108] ibid

[109] Odisha High Court Order (n 106)

[110] Mishra (n 107)

[111] Kerala High Court, Order dated 28 April 2020 in WP(C)TMP No. 182/2020

[112] ibid

[113] Kerala High Court (Ernakulam), Order dated 24 April 2020 in WP(C)Temp No. 84/2020

war footing basis' and file reports as to compliance.[114] The Gujarat High Court has also required the state government to justify its policies regarding a range of issues, and has passed orders modifying some of them based on the reasons provided.[115] It has also passed orders enforcing fundamental rights, where required.[116]

Hence, the High Courts have by and large been conducting judicial review and upholding fundamental rights. Perhaps more important than their conclusions is the process adopted to reach them: The High Courts have scrutinized the states' positions and have not adopted an unduly deferential attitude towards the executive. They have conducted 'interpretative accommodation'[117] by accounting for the special concerns birthed by the pandemic, hence allowing states the flexibility needed to battle a crisis while continuing to uphold rights. Thus, the High Courts' response to the pandemic is conducive to preserving the rule of law.

Turning now to the Supreme Court whose decisions are in stark contrast with those of the High Courts. One of the most pressing issues which have come before courts during the pandemic is that of the impact of the 'lockdown' on migrant workers' rights. As thousands of them were constrained to undertake journeys spanning hundreds of kilometres (and on foot, no less), multiple petitions were filed before various high courts and the Supreme Court to varying effect. In late March, the Supreme Court declined to direct the government to provide food and shelter to these workers.[118] In doing so, it accepted a 'Status Report' filed by the union at face value – the 'Status Report' presented details of various schemes purportedly meant to ensure workers' welfare. No effort was made to determine whether these schemes were of any use in mitigating the particular problems caused by the lockdown.

[114] Madras High Court, Order dated 3 June 2020 in HCP No. 738/2020
[115] Bhatia (n 92)
[116] ibid
[117] Gross 'Chaos and Rules' (n 18)
[118] Supreme Court of India, Order dated 31 March 2020 in WP(C) No. 468/2020

Further, a statement made by the Solicitor-General denying that even a single person was walking home as on the day of the order was accepted at face value despite being categorically false.[119] The court also ordered the media to publish the "official version" of events regarding the pandemic and blamed "fake news" for the migrant exodus. This has been argued to be compelled speech, violating Art. 19(1)(a).[120]

The apex court has also stayed favourable orders by the Allahabad and Kerala High Courts, briefly deferring recovery proceedings under certain enactments in light of the pandemic.[121] The reason for the stay was that the government was cognizant of pandemic-related problems and would evolve a suitable mechanism to tackle it. The basis for this conclusion was yet again an oral assurance made by the Solicitor-General.[122]

In a petition seeking payment of wages to migrant workers, the Chief Justice asked why migrant workers needed wages if they were being provided meals, and stated that it would not "supplant" the government's wisdom for its own.[123] In a strange turn of events, the court ended up doing exactly that: the central government directed industries to pay their workers for the duration of the lockdown.[124] In a challenge to this order, the court effectively removed

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[119] See, for instance, Tanushree Venkatraman, 'In long walk back home, migrants battle hunger, scourge of Covid-19' (*Hindustan Times*, 16 May 2020) < https://www.hindustantimes.com/india-news/in-long-walk-back-home-migrants-battle-hunger-scourge-of-disease/story-TizRfUz69osJQ0Uqmm6jZN.html> accessed 6 July 2020 (reporting even months after the Supreme Court's order that migrants were walking home)

[120] Akanksha Saxena, 'Coronavirus and the Constitution – VIII: A Critique of the Supreme Court's Migrants Order' (*Indian Constitutional Law and Philosophy*, 4 April 2020) <https://indconlawphil.wordpress.com/2020/04/04/coronavirus-and-the-constitution-viii-a-critique-of-the-supreme-courts-migrants-order-guest-post/> accessed 12 July 2020

[121] Supreme Court of India, Order dated 20 March 2020 in SLP(C) No. 10669/2020

[122] ibid

[123] -- 'If meals are given…: Supreme Court's query' (*Telegraph*, 7 April 2020) <https://www.telegraphindia.com/india/if-meals-are-given-why-do-they-require-wages-supreme-courts-query-during-coronavirus-lockdown/cid/1762977> accessed 12 July 2020

[124] Government of India, Ministry of Home Affairs, Order dated 29.03.2020

the relief granted to workers by the state.[125] Further, where it has indeed passed orders based on the rights of the people, it has reversed its own position in an incomprehensible fashion[126] or has done too little too late.[127] Admittedly, there are a few cases where the court has applied legal standards of review and has granted relief accordingly,[128] but these form the exception and not the rule.

It is therefore evident that the Supreme Court has by and large demonstrated a remarkable level of deference to the executive. It has failed to apply legal standards to the issues before it and has chosen to accept the state's version without subjecting it to any scrutiny. In so doing, it has abandoned its constitutional role of carrying out judicial review and ensuring that the executive does not reign supreme, while protecting fundamental rights. The legal community has also remarked on this renouncement of its duties.[129]

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[125] Supreme Court of India, Order dated 12 June 2020 in WP(C) No. 10583/2020; Gautam Bhatia, 'Coronavirus and the Constitution XXXII: Payment of Wages and Judicial Evasion in a Pandemic' (*Indian Constitutional Law and Philosophy*, 12 June 2020) <https://indconlawphil.wordpress.com/2020/06/12/coronavirus-and-the-constitution-xxxii-judicial-evasion-in-a-pandemic/> accessed 12 July 2020

[126] Gautam Bhatia, 'Coronavirus and the Constitution – XVIII: Models of Accountability' (*Indian Constitutional Law and Philosophy*, 16 April 2020) <https://indconlawphil.wordpress.com/2020/04/16/coronavirus-and-the-constitution-xviii-models-of-accountability/> accessed 12 July 2020

[127] The Supreme Court did not pass an order as to who will bear the train fare for migrant workers, despite ordering that they must be transported, and adjourned the matter to the second week of July: Debayan Roy, 'Our order is very clear that all stranded migrants need to be transported within 15 days: Supreme Court in Suo Motu COVID-19 Migrants case' (*Bar and Bench*, 19 June 2020) <https://www.barandbench.com/news/litigation/our-order-is-very-clear-that-all-stranded-migrants-need-to-be-transported-within-15-days-supreme-court-in-suo-motu-covid-19-migrants-case> accessed 12 July 2020

[128] See, for instance, -- 'Top Court Refuses To Accept Maharashtra's Claim On Migrant Workers Issue' (*NDTV*, 9 July 2020) <https://www.ndtv.com/india-news/supreme-court-refuses-to-accept-maharashtras-claim-on-migrant-workers-issue-amid-lockdown-2259896> accessed 12 July 2020; -- 'SC Issues Directions For Ensuring PPEs, Police Protection To Health Workers Treating COVID-19' (*LiveLaw*, 8 April 2020) <https://www.livelaw.in/top-stories/sc-issues-directions-for-ensuring-ppes-police-protection-to-health-workers-treating-covid-19-154976> accessed 12 July 2020

[129] Navroz Seervai, 'Are We Condemned to Repeat History?' (*Leaflet*, 25 June 2020) <https://theleaflet.in/are-we-condemned-to-repeat-history/> accessed 12 July 2020; AP Shah, 'Failing

In doing this, the Supreme Court has created what Dyzenhaus terms 'legal grey holes',[130] which are in stark contrast with the High Courts' application of interpretative accommodation. Legal grey holes are spaces where there are 'some legal constraints on executive action … but the constraints are so insubstantial that they pretty well permit government to do as it pleases.'[131] They harm the rule of law more than 'black holes' because they create an appearance of the rule of law and legality.[132] The periodic hearings and the orders passed by the court do exactly this. They harm the rule of law, rather than preserve it. The argument is not the courts should take over the role of the executive and frame policy but rather that they should hold it accountable for its policies and ensure that they are not in excess of what is required. As demonstrated in the previous section, this would secure the existence of the separation of powers and consequently, the rule of law.

IV. STRONG-FORM AND WEAK-FORM REVIEW: THE PATH AHEAD

In this section, I argue that courts should perform strong-form judicial review with respect to first generation rights as they are required by the Constitution to do so. They should adopt weak-form judicial review with respect to second generation rights so as to not violate the separation of powers. Although this distinction between first generation and second generation rights has been understood in rights theory as being artificial, I nonetheless adopt it while discussing the scope of judicial review. This is because first generation rights are justiciable in India whereas second generation rights are not. This has a direct bearing on the authority of courts and the separation of powers doctrine.

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to perform as a constitutional court' (*The Hindu*, 25 May 2020) <https://www.thehindu.com/opinion/op-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece> accessed 12 July 2020; Sekhri (n 11)

[130] Dyzenhaus, *The Constitution of Law* (n 100) 42

[131] ibid

[132] ibid

(IV.1) A Case for Strong-Form Review for First Generation Rights

First generation rights or civil and political rights are considered 'negative rights' because they require the state to refrain from acting in a manner which infringes them.[133] Part III of the Constitution codifies these rights, and Article 13 casts a constitutional duty upon judges, to interpret the Constitution and declare any law violating them to be unconstitutional.[134] Additionally, Article 32(2) empowers the Supreme Court to issue writs in order to enforce these fundamental rights.[135] This is indicative of strong-form judicial review, where the interpretation of the Constitution by courts is final even if the legislature has an equally reasonable interpretation.[136] Hence, the Constitution requires courts in India to perform strong-form judicial review with respect to first generation rights. In the context of the pandemic, this would involve the right to life and livelihood, the right to movement, and the right to privacy – all of which have arguably been violated by state action.

I submit that the most appropriate standard of review during the pandemic is proportionality review. The proportionality standard has four prongs: first, the impugned state action must be to achieve a proper purpose; second, the measure must be rationally connected to the purpose or be suitable to achieving it; third, it must be the least restrictive alternative to achieve the purpose; fourth, there must be proportionality *stricto sensu*, or a balance between the costs and benefits of the measure.[137] Although the Supreme Court has been referring to the 'proportionality test' for decades now, it has not consistently applied it in this form.[138] In fact, the test was articulated in this form in *Modern Dental College and Research Centre* v *State of*

[133] Domaradzki (n 7)
[134] MP Jain (n 46)
[135] Constitution of India 1949, Article 32(2)
[136] Tushnet (n); Kavanagh (n 59)
[137] Aharon Barak, *Constitutional Rights and Their Limits* (CUP 2012) 3
[138] Chintan Chandrachud, 'Proportionality, Judicial Reasoning and the Indian Supreme Court' (2017) 1 Anti-Discrimination L Rev 87

Madhya Pradesh.[139] The Supreme Court has usually applied *Wednesbury* reasonableness while determining whether restrictions on rights are justified, despite having stated that it was applying the proportionality test.[140] It did, however, account for 'proportionality type concerns'.[141] In other words, the court's reasoning would permit one, some, or even all of the four prongs mentioned above but it did not mandate any of them. In adjudicating rights violations related to the pandemic, the court must necessarily apply the version of the test with all four prongs.

The proportionality test is best suited to holding the executive accountable because its very structure requires the 'justification of an act in terms of public reason.'[142] This is especially important because crises are prone to ideological reasoning – at such a time, expressing any doubt about the suitability of a state measure is characterized as weakness.[143] Times of war frequently witness ideological reasoning. Indeed, the pandemic has given rise to war rhetoric which has resulted in precisely this line of thought.[144] The proportionality test can help counter ideological reasoning by preventing the legitimization of otherwise objectionable state acts. The second and third prongs are particularly useful in this endeavour.

Further, proportionality review is preferable to the reasonableness standard because it allows for flexibility while ensuring that undue deference is not present.[145] It also ensures that judges do not miss important factors which merit consideration, unlike the reasonableness

[139] (2016) 7 SCC 353
[140] Prateek Jalan and Ritin Rai, 'Review of Administrative Action' in Sujit Choudhury et al (eds), *Oxford Handbook of the Indian Constitution* (OUP 2016)
[141] Chandrachud (n 138)
[142] Kumm (n 79); Also see, Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 American Journal of Comparative Law 463
[143] Kumm (n 79)
[144] Vasudev Kamath, 'If We're at 'War' With the New Coronavirus, We're Doing It Wrong' (*The Wire*, 15 April 2020) <https://thewire.in/government/coronavirus-language-war-masculinity-climate-change-rights> accessed 12 July 2020
[145] Chandrachud (n 138)

standard.[146] This in turn ensures that they will give reasoned orders and perhaps even change their decision to reflect a better outcome, based on the test.[147] Proportionality review will not permit courts to accept the state's assurances at face value, as each prong of the test will need to be fulfilled. Reasonableness, in contrast, allows for vast governmental discretion as an act must only be one of many reasonable available.[148] Moreover, in the process of justifying its measure in terms of the four pronged test, the state may itself decide to change its policy. It may also gauge its subsequent policies by this standard (before a challenge is even mounted), knowing that it will be required to justify itself by it.

Notably, critiques of this standard decry it for not characterizing 'rights as trumps'.[149] This conception prioritizes rights over other considerations, and is hence incompatible with the fourth prong of the test.[150] This critique does not hold much water during a crisis for two reasons: first, the proposed four-pronged version has been previously articulated and forms a part of the law. This makes it easier for courts to begin to apply it as opposed to fashioning a relatively newer standard. Second, and more importantly, the flexibility that proportionality review provides is especially useful during a pandemic when it may not be practically possible to characterize rights as trumps. It properly accounts for the value of public safety.

This approach does not violate the separation of powers doctrine as the judiciary does not legislate or decide what policy to adopt. It merely tests whether the policy adopted is constitutional and provides remedies accordingly. This is explicitly permitted by Articles 13 and 32 of the Constitution. Hence, proportionality review is the most appropriate test while testing whether the infringement of a right is warranted.

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[146] ibid
[147] ibid
[148] ibid
[149] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2010) 7 Intl J Constitutional L 468
[150] ibid

(IV.2) A Case for Weak-Form Review of Second Generation Rights

Second generation rights or economic and social rights are considered 'positive rights' because they require the state to undertake some action to fulfil them.[151] Part IV of the Constitution codifies these rights; they are non-justiciable but act as guidelines to be followed by the state. Over the years, the Supreme Court has held that social rights are justiciable but has failed to adopt a test which defines the scope of these rights.[152] There are two approaches to defining the scope of social rights. The first is the commonly adopted 'minimum core', wherein people have a right to 'minimum essential levels' of food, clothing, shelter, healthcare, etc.[153] This approach provides for individualized remedies. The second approach has been conceptualized by the South African Constitutional Court. It is that of 'reasonableness' wherein a 'a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately.'[154] This standard requires considerable judicial deference and does not grant individualized relief.[155] It is seen as a type of weak-form review.

The Supreme Court has adopted neither of these approaches to adjudicating social rights. Instead, it has adopted the 'conditional social rights' approach where the violation of a right is conditional upon state action.[156] This transcends the paradigm occupied by the minimum core and reasonableness approaches, and is a distinct model altogether.[157] In this model, social rights are not protected unless the state has already acted upon them (i.e. undertaken an

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[151] Domaradzki (n 7)
[152] Madhav Khosla, 'Making social rights conditional: Lessons from India' (2010) 8 Intl J Constitutional L 739
[153] Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113
[154] *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169
[155] Khosla (n 152)
[156] ibid
[157] ibid

obligation in the form of a policy or scheme) and failed to implement them or has implemented them inappropriately (i.e. failed to fulfil obligation previously undertaken).[158] Individualized review is possible here, but is predicated on the presence of a pre-existing government scheme.

It is inadvisable for the courts to continue with the 'conditional social rights' approach during a pandemic as the absence of government schemes to tackle specific issues would effectively mean that the right in question does not exist. Instead, it would be useful if the court settled upon a definitive standard for adjudicating social rights. The minimum core approach would require courts to grant injunctive relief in each individual case it hears, which may not be suited to a pandemic which is characterized by resource constraints. This would also involve directing the state on its expenditure, which is a matter of policy.

The reasonableness approach is far more suited to a pandemic as it recognizes the constraints on the state. It queries whether the course of action chosen by the state is 'capable of facilitating the realization of the right'[159] and refrains from directly supervising policy. For these reasons, it would not violate the separation of powers doctrine either. Hence, regardless of the approach taken in usual times, the pandemic demands a definition of the scope of social rights. The reasonableness test is most appropriate in this context.

(IV.3) Refashioning the Separation of Powers Doctrine

As discussed previously, the pure doctrine of separation of powers is not realistic. Judicial review, however, must still respect this doctrine. What, then, would a more tenable understanding of this principle look like? Kavanagh reimagines the separation of powers as a

[158] ibid
[159] *Grootboom* (n 154)

'coordinated institutional effort in the joint enterprise of governing.'[160] She admits that this may seem jarring because the pure doctrine dominates our understanding of separation of powers. However, this is a more realistic version which accounts for independence as well as inter-dependence of the branches.[161] Inter-institutional comity is a key idea of this reconceptualization; it is the respect that each branch of the state (judiciary, legislature, executive) owes to the other.[162] It involves a 'leeway requirement' and a 'mutual support requirement.'[163] Proportionality review as well as the reasonableness standard are congruent with this idea of inter-institutional comity.

The leeway requirement necessitates that each branch give the others leeway to carry out their own functions. It requires each branch to respect jurisdictional boundaries and exercise self-restraint by recognizing that another branch is better suited to carry out a particular task.[164] In the context of the present issue, if the courts find that the lockdown orders unduly violated migrant workers' right to movement, they could fulfil the leeway requirement by ordering the government to ensure that the workers reached their destinations within a specified deadline. But, and this is crucial, courts would refrain from passing orders as to the exact manner in which this was to be executed. The government could re-start trains or provide buses or allow private operators to re-open by setting flat rates, for instance. This question of policy would be independently determined as it saw fit. Similarly, with respect to social rights such as the right to healthcare, the courts would respect the state's policies on how to achieve this right (upon applying the reasonableness standard). The government could decide to subsidize healthcare, or provide it free of cost at government hospitals or reimburse private hospitals, amongst other options.

[160] Kavanagh (n 59)
[161] ibid
[162] ibid
[163] ibid
[164] ibid

The mutual support requirement necessitates that each branch of government actively support the decisions taken by the other branches.[165] This support may be expressed either by implementing those decisions or by interpreting them in a *bona fide* fashion, in a manner which respects the underlying substantive values articulated.[166] In the context of judicial review, the executive would be required to implement the judiciary's decisions in a *bona fide* fashion. It is my submission that if it fails to do so, the judiciary may once again step in and this time, issue more specific directions. Resuming the previous example, if the government failed to ensure that the migrant workers reached home within the stipulated deadline, the judiciary would be justified in directing it to, say, briefly re-open train lines for this specific purpose. In fact, a total lack of enforcement by the executive is why some judges have felt constrained to issue the continuing mandamus in the past.[167] If the judiciary did not act in this fashion, the rights that it upheld would be useless. A right which is unenforced is no right at all.

CONCLUSION

I have demonstrated that executive overreach can result in grave damage to the constitutional fabric of our democracy and to the various rights and liberties we hold dear. If this is to be prevented, the judiciary must exercise its power of judicial review. The Constitution of India permits the judiciary to exercise strong-form review with respect to civil and political rights. The judiciary can exercise weak-form review in matters of socio-economic rights. This must be done using the proportionality and reasonableness standards respectively so as to ensure the separation of powers. Judicial review has unique value during a crisis but unfortunately,

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[165] ibid

[166] ibid

[167] -- 'On Drawing the Line: LSPR in Conversation with Hon'ble Justice A.K. Sikri' (*Law School Policy Review*, 15 August 2018) <https://lawschoolpolicyreview.com/2018/08/15/drawing-the-line-lspr-in-conversation-with-honble-justice-a-k-sikri/> accessed 12 July 2020

the Supreme Court has failed to deliver and has abjured its constitutional duty. The High Courts on the other hand have provided glowing examples of upholding fundamental rights and acting as a check on the executive, while preserving the rule of law.