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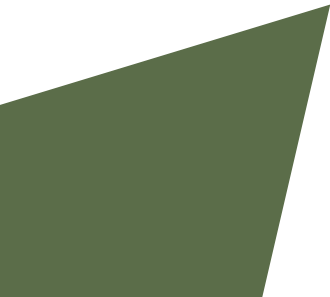
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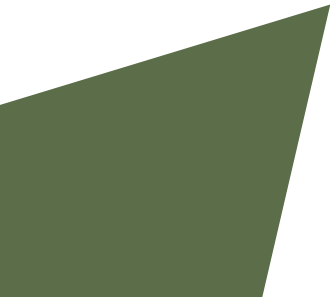
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**PENAL PROVISIONS AND THEIR CHANGING DIMENSIONS DURING
PANDEMIC COVID-19: A COMPARATIVE ANALYSIS**

Akshansh Singh

ABSTRACT

This paper aims to look at the criminal law provisions relating to epidemics and diseases in the Indian Penal Code. Ever since the Coronavirus outbreak, certain provisions of the Indian Penal Code that could not have been imagined to facilitate controlling the spread of the Coronavirus are now being used to bring to justice offenders who either pose a threat to the general public health by breaking rules of government imposed quarantines and lockdowns or threaten the lives and health of healthcare workers through acts or negligence on their part. Such cases include throwing stones on workers, spitting on them, or breaking quarantine and isolation rules to hold large gatherings, and also cases where individuals hide their disease and visit others, therefore jeopardising their health as well. This paper attempts to answer if such cases can be covered under the existent Indian Penal Code and how its provisions can be interpreted to cover such cases; as well as lacunae in the existing law and how to cover them using domestic and international examples.

INTRODUCTION

Since December 2019, the Coronavirus (SARS-CoV2) that originated in China has spread throughout the world. As it spread throughout various regions of the world and the World Health Organisation ultimately declared the Coronavirus spread a pandemic in March 2020.¹ The virus is known to affect the respiratory system of the persons it enters, and can be transmitted from person to person through direct contact.² Naturally, when it started to spread, it was transmitted rapidly across international borders by persons who were travelling to foreign nations.

As precautions, human contact was discouraged and social distancing was suggested by governments worldwide to control the spread of the virus. To further ensure that the virus may not be transmitted on a community scale, the Indian government put in place a lockdown and discouraged people from going out. School and colleges were shut down, offices closed, and all life as we know it came to a standstill from March 25, 2020.

Amidst this crisis started the difficulties of handling people testing positive for the Coronavirus. Cases ranging from gross negligence of a celebrity hiding her positive infection and holding a party³, to abuse of bureaucratic power and escape quarantine⁴, people spitting on and stoning health workers and harassing them in general⁵, and of course the Tablighi Jamaat incident that's made news all over the world.⁶ While individual facts would require surgical application of certain laws, blanket provisions could be put in place as control measures which could be, including but not limited to, fines for people who spit, etc. Such solutions and suggestions will be explored throughout the paper, on what are the best ways to tackle offenders who malignantly or negligently jeopardise public health and safety.

¹ <http://www.euro.who.int/en/health-topics/health-emergencies/Coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>.

² Liu J, Liao X, Qian S et al., *Community transmission of severe acute respiratory syndrome Coronavirus 2*, Shenzhen, China, 2020.

³ <https://www.indiatoday.in/mail-today/story/kanika-kapoor-who-tested-positive-for-Coronavirus-booked-for-negligence-1658037-2020-03-21>

⁴ <https://theprint.in/health/bengals-first-covid-19-patient-evaded-test-for-2-days-while-ias-mother-met-top-officials/383332/>

⁵ <https://www.bbc.com/news/world-asia-india-52151141>

⁶ <https://www.aljazeera.com/news/2020/04/tablighi-jamaat-event-india-worst-Coronavirus-vector-200407052957511.html>

EXISTING CHECKS AND MEASURES, AND LACUNAE IN THE INDIAN PENAL CODE

With respect to the lockdown put in place by the Indian government, Section 188 of the Indian Penal Code can be used to prosecute individuals who break lockdown rules and go out in public unless it is for reasons and purposes stated in the guidelines issued by the Ministry of Home Affairs.⁷ Section 188 of the IPC states –

188. Disobedience to order duly promulgated by public servant.—*Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction;*

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation — It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Illustration - An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this Section.

However, as decided in *Bharat Raut v State*⁸, mere disobedience of an order of a public servant is not punishable and that the disobedience must lead to the consequences narrated in the Section.

Going by the ingredients of Section 188, the second part requires that the disobedience must “cause danger to human life, health or safety...”, for a person to be booked under this Section. Meaning that, for a person to be convicted under Section 188 in this context, they must have been tested positive for Coronavirus and broken the rules of lockdown imposed by the Central

⁷ No.40-3/2020-DM-I (A) Government of India Ministry of Home Affairs, mha.gov.in/sites/default/files/PR_Consolidated%20Guideline%20of%20MHA_28032020%20%281%29_1.PDF

⁸ *Bharat Raut v State*, AIR 1953 Pat 376

Government. As for persons who are not tested positive for Coronavirus, it is submitted that they cannot be held liable under Section 188 of the IPC since they cannot cause danger to human life, health, or safety, which is a necessary ingredient of this Section.

A point of contention therefore arises, regarding the lockdown and freedom of movement of the people under article 19 of the Constitution. With regards to the IPC, the people who have not tested positive for the Coronavirus, if they so choose to disobey the lockdown, cannot be booked under Section 188 for reasons mentioned above. In such a case, parties may choose to sue the State for an infringement of their freedom under article 19(1)(d)⁹ of the Constitution.

While the lockdown restrictions are necessary to reduce the spread of the Coronavirus infection, it is submitted that a law that punishes free movement of the public is a dangerous instrument in the hands of the State, which can be used to severely curb the freedom of movement of the citizens at the discretion of the government; and such a law would not only be a step in the wrong direction, but would violate the basic structure of the Constitution as well. Uninfected persons, who do not pose any threat to public health or safety cannot, therefore, be penalised under the garb of the same by using Section 188.

As far as the lockdown itself is considered, in a common law country, a law is necessary which makes such a lockdown legal. A restriction on the movements of the people on this scale and for this long brings to a halt all activities economic, social, political, etc., And while article 19(5) of the Constitution allows for reasonable restrictions on the freedom of movement provided for in article 19(1)(d), criminal action against healthy individuals cannot be justified under the IPC.

Section 604 of the Model State Emergency Health Powers Act of the United States –

Section 604. Isolation and quarantine.

(a) Authorization. During the public health emergency, the public health authority may isolate [consistent with the definition of “isolation” in Section 103(h)] or quarantine [consistent with the definition of quarantine in Section 103(o)] an individual or groups of individuals. This includes individuals or groups who have not been vaccinated, treated, tested, or examined pursuant to Sections 602 and 603. The public health authority may also establish and maintain places of isolation and quarantine, and set rules and make orders. Failure to obey these rules, orders, or provisions shall constitute a misdemeanor.

⁹ 19. Protection of certain rights regarding freedom of speech etc. (1) All citizens shall have the right (d) to move freely throughout the territory.

Here we see a specific provision of a legislation that ought to deal with cases relating to public health issues. The provision mentioned above provides for the isolation of individuals or groups of individuals and includes “individuals or groups who have not been vaccinated, treated, tested, or examined...”, providing the State the authority to impose such lockdowns as the one operating in India since March 2020.

Section 51 of the Disaster Management Act states –

51. Punishment for obstruction, etc. *Whoever, without reasonable cause—*

(a) obstructs any officer or employee of the Central Government or the State Government, or a person authorised by the National Authority or State Authority or District Authority in the discharge of his functions under this Act; or

(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both; and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years.

“Disaster” is defined under Section 2 (d) as – “Disaster” means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results 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.

These provisions, coupled with Section 2 of the Epidemic Diseases Act, 1897¹⁰ is more suited and equipped to enable the government in prosecuting persons who break quarantine rule and disobey

¹⁰ 2. Power to take special measures and prescribe regulations as to dangerous epidemic disease.—(1) When at any time the [State Government] is satisfied that [the State] or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the [State Government], if [it] thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as [it] shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed. (2) In particular and without prejudice to the generality of the foregoing provisions, the [State Government] may take measures and prescribe regulations for—

(b) the inspection of persons travelling by railway or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of persons suspected by the inspecting officer of being infected with any such disease.

government orders. However, persons violating Section 2 are to be penalised under Section 188 of the IPC.¹¹ This penalty is coupled with the caveat that no legal proceedings can lie against persons who do or intend to do anything in good faith. Section 52 of the IPC states that nothing that is done without due care and caution is said to be done with good faith. Going by this definition, persons who ignore the government’s lockdown warnings can still be penalised by Section 3 of the Act if they do not act reasonably in violating the lockdown imposed by the government. Meaning that, for example, a person who goes out of their house during lockdown period, intending to buy essential food items, can be said to have acted in good faith while disobeying the government’s order. What is “reasonable” is subject to scrutiny and debate in every individual case. However, the liability of Section 3 of the Epidemic Disease Act is the same as that of Section 188 of the IPC. As it has been stated above, Section 188 does not possess the power to punish individuals who are uninfected or have reason to believe that they are uninfected since they do not fulfil the ingredients of Section 188, and cannot be enforced on such individuals.

The legislature has defined “disaster” in the Disaster Management Act, 2005 in a very open-ended and vague manner, with the requisites being –

- i. Catastrophe, mishap, calamity, or grave occurrence;
- ii. Natural or man-made;
- iii. Caused by accident or negligence;
- iv. Results in substantial loss of human life; or
- v. Damage to, or destruction of, environment or property;
- vi. Beyond the coping capacity of that community.

Putting the current SARS-CoV-2 epidemic to test, it is submitted that for the epidemic to be considered a “disaster” as defined by the Disaster Management Act, 2005, it must at least have caused a substantial amount of deaths, since the act uses the word “results”, signifying that loss to

¹¹ Section 3, Epidemic Diseases Act, 1897.

life must already have happened for a calamity or an occurrence to be termed as a disaster under this Act. Meaning that, if the Coronavirus had not caused sufficient deaths, it could not have been termed as a disaster, and any authority conferred upon the government under this Act to take sufficient measures cannot be implemented without the necessary prerequisite – a disaster. It is therefore submitted that the Disaster Management Act, 2005 is only effective in later stages of the epidemic when sufficient time has passed and the ordeal can be termed as a “disaster”. Therefore, any punishment under Section 51 cannot be meted out if there do not exist sufficient grounds to call an ordeal a disaster.

Section 269 of the IPC states –

269. Negligent act likely to spread infection of disease dangerous to life.—*Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.*

Under this Section, persons can be booked for any negligent or unlawful act, which can spread the infection of a disease such as the Coronavirus. Taking up the case of Kanika Kapoor¹², the singer flew from abroad, and tested positive for Coronavirus came in contact with various people at the parties. As claimed by the singer herself, when she flew from London, she had yet not developed any symptoms and immediately contacted the authorities when she noticed flu-like symptoms.¹³ By then, she had already come in contact with a lot of people. The FIR filed against her contains charges on Sections 269, 270, and 188 of the IPC.

Section 270 of the IPC states –

270. Malignant act likely to spread infection of disease dangerous to life. *Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

¹² *Supra* note 3

¹³ [news18.com/news/movies/singer-kanika-kapoor-confirms-she-tested-positive-for-Coronavirus-issues-official-statement-2544261.html](https://www.news18.com/news/movies/singer-kanika-kapoor-confirms-she-tested-positive-for-Coronavirus-issues-official-statement-2544261.html)

Both, Sections 269 and 270 require that the negligent or malignant act of a person respectively, must be done with the knowledge that such act is likely to spread infection of a disease dangerous to human life. Whereas, in Kanika Kapoor's case, she had no knowledge of the fact that she was infected by the Coronavirus as her screening at the airport did not produce any anomalies, and her symptoms had not emerged. And therefore, she had no grounds to believe that she any act on her part might spread the Coronavirus. In fact, according to her own testimony, she herself contacted the authorities once her symptoms set in.¹⁴

As about Section 188, the basic prerequisite is the disobedience of a public order. However, according to the singer, she had not been advised anything by the authorities¹⁵, and therefore Section 188 could not be enforced in this case. It is submitted that, for Kanika Kapoor, the defence of Section 79 would be available to the singer as she had no means of knowing that she had been infected, and was not bound by any law that made her movements illegal.

TABLIGHI JAMAAT: NEGLIGENCE, CONSPIRACY, OR CULPABLE HOMICIDE?

The Jamaat organised its religious congregation from 13-15 March, 2020 in Nizamuddin area of the NCT of Delhi. It is not clear how many people actually attended the event, but attendees included those visiting from abroad as well as other states within India. The religious head responsible for holding the event, despite the spread of the Coronavirus, Maulana Saad Kandhalvi has had FIRs registered against him and seven others under Section 3 of Epidemic Diseases Act, 1897 and Sections 269, 270, read with Section 120B of the IPC, 1860. Moreover, Maulana Saad was booked under Section 304 of the IPC.

Section 120B of the IPC provides punishment for criminal conspiracy. Criminal conspiracy is defined under Section 120A as –

120A. Definition of criminal conspiracy - *When two or more persons agree to do, or cause to be done,*

(1) an illegal act, or

¹⁴ *Ibid.*

¹⁵ *Ibid.*

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation — It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

In *Shushil Suri v. Central Bureau of Investigation*¹⁶, the Supreme Court held that the essential ingredient of the offence of “criminal conspiracy” is the agreement to commit an offence. Mere proof of such an agreement is sufficient to establish criminal conspiracy.

It is submitted that there is no evidence whatsoever that Maulana Saad had conspired the spread of the Coronavirus. What is more plausible is a blind faith in religion, which is a trend that has been seen not only in India but also in other countries recently.^{[17][18]}

Moreover, the fact cannot be ignored that not only had Maulana Saad informed the authorities to get the premises of the mosque evacuated, but also that of the 1500 people eventually evacuated on March 30th and 31st many were victims themselves, not perpetrators or culprits. Many of them got infected and some even died.¹⁹ It is submitted that the most likely conclusion as to why Maulana Saad did not decide against holding the congregation is rooted in blind religious faith and ignorance of any threat posed by the Coronavirus, and therefore in holding this particular religious congregation, he may not have done anything with a guilty intention or *mens rea* but he did act negligently. It is therefore, further argued, that his liability must be decided under Section 269 of the IPC.

Another charge against Maulana Saad has been that of culpable homicide defined under Section 299 of the IPC –

299. Culpable homicide.—*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

The charge of culpable homicide against Maulana Saad is a tricky territory not explored earlier in criminal law. For an act to be deemed as culpable homicide, what is necessary is that death must be caused, (i) either with the intention of causing death, (ii) with the intention of causing bodily

¹⁶ *Sushil Suri v. Central Bureau of Investigation*, AIR 2011 SC 1713.

¹⁷ <https://www.dw.com/en/Coronavirus-and-islam-pakistani-clerics-refuse-to-shut-down-mosques/a-52969639>.

¹⁸ <https://www.reuters.com/article/us-health-Coronavirus-easter-usa/some-defiant-u-s-churches-plan-easter-services-ignoring-public-health-guidelines-idUSKCN21S10Y>.

¹⁹ <https://thewire.in/communalism/Coronavirus-criminal-liability-of-tablighi-jamaat>.

injury that is likely to cause death, or (iii) with the knowledge that the act committed is likely to cause death. Upon a prima facie perusal of the act, it becomes clear that intention to cause death cannot be established in this case, nor can it be said that Maulana Saad has caused any bodily injury that would result in the death of someone. However, knowledge postulates a state of conscious awareness of certain facts in which human mind remains inactive.²⁰ It cannot be said that Maulana Saad did not possess the knowledge of the ongoing calamity. It is submitted that Maulana Saad might or might not be charged with the offence of culpable homicide, depending on whether or not his defence on the lack of knowledge of whether or not any attendees of the congregation were infected stands in the court. Since the fact that people from abroad who brought in the virus from abroad must have been screened at the airports cannot also be ignored, it stands to be decided what was the responsibility of Central authorities in this case.

SPITTING, STONING, ET AL.

It is submitted that with regards to infected persons spitting on healthcare workers, Section 270 of the IPC is an effective provision, along with heavy fines (ranging from anywhere between 1-5 lakh rupees) as implemented in other countries.²¹ Stoning and other forms of assaults and harassment of healthcare workers can also be efficiently dealt with through relevant Sections of the IPC.

CONCLUSION

Perhaps the biggest point of contention and change required is a legal backing of the lockdown measures imposed in India, for which the IPC or any other law is lacking, with respect to uninfected persons. The Epidemic Diseases Act, 1897 is an archaic act that does not have the sufficient reinforcement to curb public movement effectively without putting a damper on the freedoms of the people and abuse of state power. Overall, the pandemic has offered new challenges to the penal laws, which would need to be supplemented with new laws or amendments within the existing laws.

²⁰ PSA PILLAI, CRIMINAL LAW 654 (K L Vibhute 14ed., Lexis Nexis 2019).

²¹<https://www.abc.net.au/news/2020-04-09/fines-for-spitting-coughing-in-nsw-Coronavirus-lockdown/12138086>