

# Pandemic and PILs: A Study on the Approach of the High Courts in India

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**Abstract:** Studies in Public interest Litigation (PIL) in India are predominantly about the Supreme Court's approach in meeting the ends of justice through indigenously evolved jurisdiction. The High Courts as important constitutional bodies are more often than not remain out of detailed discussion. As the High Courts enjoy concurrent jurisdiction with the Supreme Court with regard to PILs, this paper aims to study the pattern of invocation of the jurisdiction at the regional level. It surveys the variety of pleas and consequent action under PIL jurisdiction (or inaction, as the case may be) of different High Courts in India relating to covid crisis and consequential matters. To that end, it undertakes a survey of High Court orders or judgments from April to July, 2020. It seeks to lay bare the extent of demands that are made before the Courts through PIL. What kinds of action were expected from the High Courts during the pandemic? How did different Courts respond to such pleas? Were the directions and level of response homogenous or varied? The paper pursues these questions, and describes the pandemic through the lens of PIL in Indian High Courts. It goes on to argue that the High Courts in India need to take greater cognizance of their orders inter-se especially in PIL matters, as human rights protection through PIL cannot have contradictory voices.

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## A. Introduction

India is no exception to the COVID-19 (hereinafter covid) induced crisis. It has given rise to complex situations affecting the lives and livelihood of the peoples; it has exposed the governments' failure to contain the same in a smooth manner. The people at large have ex-

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pressed dissatisfaction on the decision-making process related to control the adverse impact of the pandemic.<sup>1</sup> The Union and State Governments have imposed prolonged lockdowns in their attempt to contain the spread of the virus. To impose prolonged lockdowns, the State Governments have taken recourse to a colonial-era legislation enacted to prevent the spread of diseases (EDA),<sup>2</sup> superseded by the Union Government's response couched under a relatively new legislation, the Disaster Management Act, 2005 (DMA). In a myriad of ways, sudden lockdowns affecting people's lives and lack of preparedness in governance to tackle an unforeseen situation compromised the enjoyment of rights and raised the expectations from the State. India has witnessed long lines of inter-state migrant workers traveling back to their home states with little food and shelter, often perishing on the streets.<sup>3</sup> The pandemic has also exposed the insufficiency of India's public healthcare system in dealing with such a health crisis. The overall effects of pandemic and handling of the crisis have called forth judicial intervention by invoking the Public Interest Litigation (Hereinafter PIL) jurisdiction of the Higher judiciary, namely, the Supreme Court and the High Courts (Hereinafter HCs). The 'covid legal literature' even by former judges or doyens of the bar is fraught with either lamentation of judicial lethargy or inaction or insufficient intervention from the judiciary, or in some cases praises to some HCs which stepped up to protect the people from the large scale human tragedy or challenges of pandemic life under lockdowns.<sup>4</sup>

The Indian Judiciary in its post-emergency avatar had been engaged in goal-oriented justice delivery or judicial activism to undo the longstanding abysmal condition of human rights in India.<sup>5</sup> It has emerged out of its traditional role of passive umpiring and actively pursued the cause of social justice. To that end, the judiciary had developed various innovative methods. To increase access to justice, the judiciary has diluted the requirement of the parties' standing to litigation; it had even diluted the procedural requirements of adjudica-

- 1 *Amar Patnaik and Anshuman Sharma*, The COVID-19 Crisis: An Opportunity To Invest In Equitable Public Health Systems, *Economic and Political Weekly* 55 (2020); *Puja Changoiwala*, Coronavirus Outbreak : this pandemic threatens to overwhelm India's Health care system, <https://www.firpost.com/health/coronavirus-outbreak-this-pandemic-threatens-to-overwhelm-indias-health-care-system-8296101.htmlv> (Last accessed on 28 February 2021).
- 2 The Epidemic Diseases Act, 1897.
- 3 India Today, Migrant workers' deaths: Govt says it has no data. But didn't people die? Here is a list, <https://www.indiatoday.in/news-analysis/story/migrant-workers-deaths-govt-says-it-has-no-data-but-didn-t-people-die-here-is-a-list-1722087-2020-09-16> (Last accessed on 28 February 2021).
- 4 *Ajit Prakash Shah*, Failing to perform as a constitutional court, <https://www.thehindu.com/opinion/o-p-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece> (Last accessed on 28 February 2021) ; *Fali S. Nariman*, Why a recent Karnataka High Court order is a compulsory reading in covid times, <https://indianexpress.com/article/opinion/columns/migrant-labourers-karnataka-high-court-supreme-lockdown-justice-more-compassionate-6421562/> (Last accessed on 28 February 2021).
- 5 *P.N. Bhagwati*, Judicial Activism and Public Interest litigation, *Columbia Journal of Transnational Law* 23 (1985), p. 566.

tion.<sup>6</sup> Cassels describes the innovative elements of PIL as liberalization of rules of standing, procedural flexibility, expansive interpretation of fundamental rights, remedial flexibility in terms of judicial retention of supervisory functions over Government's compliance.<sup>7</sup> With the dilution of standing and innovative interpretative techniques, the judiciary made it possible to bring forth a whole range of issues hitherto considered non-justiciable. Under ordinary writ jurisdiction, the Court could direct the Government to perform only the duties sanctioned by law, but with PIL, such boundaries no more restrain the Court from issuing directions even for non-statutory duties involving discretion in governance.<sup>8</sup> Thus, with dilution of standing and procedural requirements, the Court threw its doors open for initiation of litigation by people not directly connected to an issue, with no remedies barred due to creative reinvention of textual meaning of constitutional provisions. The journey of PIL in India has gone a long way. It started with zeal for protection of individual rights, which went on to upholding collective rights like environmental protection, and ultimately to issues of governmental accountability.<sup>9</sup> In other words, issues of governance cropping up before the Court are a consequential development of Indian judicial activism experience.

Generally, Studies in PIL predominantly are about the Supreme Court's PIL jurisdiction, with, of course, notable exceptions which deal with the HCs.<sup>10</sup> The HCs as important constitutional bodies are more often than not remain out of discussion. Even studies relating to the judicial activity during the pandemic focus more on the Supreme Court than the HCs. The works regarding judicial monitoring of governmental action during the pandemic have been dealt with in a piecemeal manner. There is a lack of comprehensive study on the nature of petitions that were filed before different HCs during the pandemic as well as the nature of response from the middle tier of the Indian judiciary. Further, as the HCs enjoy concurrent jurisdiction with the Supreme Court with regard to PILs, this paper aims to study the pattern of invocation of the jurisdiction at the regional level. It surveys the variety of pleas and consequent action under PIL jurisdiction (or inaction, as the case may be) of different HCs in India relating to covid crisis and consequential matters during April to July. What kinds of action were expected from the HCs during the pandemic? How did different Courts respond to such pleas? Were the directions and level of response from different HCs homogenous or varied? The paper pursues these questions and evaluates the role of PIL in ensuring an orderly administration of justice during the pandemic. It does not intend to revisit the question whether the judiciary should at all be involved in supervising matters tra-

6 S.P. Gupta v Union of India, AIR 1982 SC 149.

7 *Jamie Cassels*, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?, *American Journal of Comparative Law* 7(3) (1989), p. 498.

8 *S. P. Sathe*, Judicial Activism: The Indian Experience, *Washington University Journal of Law and Policy* 6 (2008), p. 80.

9 Such periodization, often overlapping, can be found in the Supreme Court's own evaluation of PIL. See *State of Uttaranchal v. Balwant Singh Chauhal*, (2010) 3 SCC 402.

10 See *Anuj Bhuwania*, *Courting the People: Public Interest Litigation in Post-Emergency India*, New York 2017.

ditionally earmarked for the executive. Instead, It argues principally that even if governance issues are being brought before the judiciary, there is need for similarity of judicial reactions from the HCs with regard to public grievances of similar nature from different regions of the country. For this, the paper is structured as follows. Section B highlights that how the same issues are being raised before the different HCs during global health crisis. Section C discusses the judicial response to them and analyzes the asymmetrical responses from different HCs. Section D thereafter advocates the need for greater coherence between HC orders even if not from the strict standards of the doctrine of precedent, but from the duty undertaken by the Indian judiciary to promote people's rights and governmental accountability through the PIL. It concludes by stressing the need to develop a judicial approach to ensure coherence response by different HCs in protecting the people's rights and remedying public grievances, as justice cannot speak in opposing voice.

## B. The Nature of Pleas before the Courts

The following discusses the variety of pleas raised before different HCs in India during the pandemic time. It takes help mostly of the reported orders and judgments as available on the legal reporter SCCOnLine. However, in several cases, the respective HC websites as well as newspaper reports have been consulted. For this purpose, in this section the HCs are divided into five geographical zones, in line with the zonal councils' territorial distribution.

### I. Northern Zone:

The Northern zone consists of six HCs, namely Allahabad, Delhi, Himachal Pradesh, Jammu & Kashmir, Uttarakhand and Rajasthan.

#### 1. Protection and amenities to vulnerable sections

One of the principal issues in these HCs was the migrant workers situation, and prayers ranged from workers' welfare, including their transportation and supply of essentials.<sup>11</sup> Punjab & Haryana HC directed food and provision to workers though it held the writ petition was not maintainable as the petitioner - a civil society organization named National Campaign Committee for the Eradication of Bonded Labour - was not a registered body and as such had no *locus standi*.<sup>12</sup> Spraying of disinfectants on a group of migrant returnees also was challenged before the Allahabad HC, though a four-week adjournment meant the mat-

11 Dileep Kumar Mishra v Union of India, PIL (civil) 8058 of 2020 (All HC); National Campaign Committee for the Eradication of Bonded Labour v NCT Delhi, 2020 SCC OnLine Del 595; Subhash Chandan v State of HP ,CWP 1402 of 2020 ( HP HC); Sachidananda Dabral v State of Uttarakhand, WP (PIL)58 of 2020 (Utt HC).

12 Tribune India, Punjab & Haryana HC directs Haryana to supply rations to migrant labourers, <https://www.tribuneindia.com/news/haryana/punjab-haryana-high-court-directs-haryana-to-supply-ratio-n-to-migrant-labourers-93469> (Last accessed on 28 February 2021).

ter was closed for all practical purposes.<sup>13</sup> The Delhi HC sought a report from the Government in a plea to implement Inter-State Migrant Workmen's Act, 1979.<sup>14</sup> Food security and supply of rations are also common, whether for Rohingya settlements in Delhi<sup>15</sup> or for e-coupon holders. Some petitions raised the plight of senior citizens due to lockdown and special measures for their benefit.<sup>16</sup> Delhi HC further refused to interfere concerning rent exemption, financial aid, and other reliefs for marginalized communities like LGBTIQ and sex workers.<sup>17</sup>

## 2. Administrative issues and decisions

Among other issues, the inhuman condition at quarantine centers was dealt with by the HCs of Allahabad,<sup>18</sup> and Uttarakhand.<sup>19</sup> In a comprehensive proceeding with multiple aspects relating to covid such as protection for health workers, movement of people within the two Union Territories, and even respiratory diseases from cotton bluffs, the Jammu & Kashmir HC had directed the Government to consider representation of medical professionals in the Covid management decision-making process.<sup>20</sup> Closure of liquor shops during lockdown had also been the subject matter of some petitions.<sup>21</sup> Prayer against the charging of school fees were also made, to which the Punjab & Haryana HC refused to interfere,<sup>22</sup> but Uttarakhand HC came down heavily upon such overcharging and malpractices to charge fees on the anvil of right to education.<sup>23</sup> The Delhi HC faced a challenge to opening 'non-essential' PSUs, which was curiously heard even after finding technical faults to be done away with the plea and ultimately was rejected. The Rajasthan HC faced petitions praying for ban on

- 13 Prince Lenin v State of UP, 2020 SCCOnLine All 593 ; Much later on 5 November 2020, in a PIL filed by a law student from the authors' institution, the Supreme Court declared spraying of disinfectants on people was unscientific and not backed by any study and directed the Government to come up with necessary directions in that regard. *See* Gursimran Singh Narula v Union of India, 2020 SCCOnline SC 906.
- 14 Shashank S. Mangal v NCT Delhi, 2020 SCCOnline Del 621.
- 15 Fazal Abidali v NCT Delhi, 2020 SCC OnLine Del582.
- 16 Ajit Kumar v UOI, 2020 SCC OnLine Del 563; Shalini Sheoran v. State of Rajasthan , DBCWP 5414 of 2020 (Raj HC).
- 17 2020 SCC OnLine Del 584.
- 18 In Re. PIL 574 of 2020 (All HC).
- 19 WP (PIL)58 of 2020 (Utt HC).
- 20 AzraUsmail v UT of J&K WP (c) PIL 4 and 5 of 2020 (JK HC).
- 21 Ambrosia Foundation v NCT Delhi, 2020 SCC OnLine Del 594; Nikhlesh Katara v UOI, DBCWP 5528 of 2020 (Raj HC).
- 22 Bal Kranti Trust v State of Haryana , 2020 SCCOnLine P&H 663.
- 23 WP (PIL) 59 and 60 of 2020 (Utt HC).

tobacco as a measure against the spread of covid<sup>24</sup> or compensation to different sections of the society.<sup>25</sup>

### 3. Health Issues

Further, petitions regarding the protection of health workers are also common,<sup>26</sup> such as praying for payment of wages to medical professionals on time,<sup>27</sup> the supply of PPE kits to ambulance workers.<sup>28</sup> The prayers ranged from the increase in domestic violence during the lockdown,<sup>29</sup> complaints regarding non-expediting covid test results.<sup>30</sup>

## II. The North Eastern Zone

It consists of the HCs of Gauhati, Manipur, Meghalaya Tripura and Sikkim.

### 1. Administrative decisions and Issues

The Gauhati HC took suo motu cognizance of overcrowding of prisons and a plea relating to the outbreak of covid in prisons.<sup>31</sup> Besides, the State of Nagaland's overall preparedness to deal with the crisis was challenged in *Kikrukhonuo v. State of Nagaland*.<sup>32</sup> Before the Manipur HC, the prayers related to assistance to advocates,<sup>33</sup> exemption from payment of rent in view of a Government of India Order,<sup>34</sup> or improper conditions at quarantine centers.<sup>35</sup> The Meghalaya HC faced petitions relating to effective monitoring of the State's measures to contain the pandemic and address people's plight. It raised various concerns ranging from the opening of shops amid lockdown, overpricing, financial aid to labourers, and the absence of designated covid hospitals in High Court of Meghalaya Bar Association v. State of Meghalaya.<sup>36</sup> Other petitions raised concerns before the Court, such as violation

24 *Rajeev Bansal v State of Rajasthan*, DBCWP 5415 of 2020 (Raj HC).

25 *Dasrath Kumar v UOI*, 2020 SCCOnLine Raj 730.

26 *PrakashThakuriya v UOI*, 2020 SCCOnLine Raj 848.

27 *S.K. Rout v MHFWA*, 2020 SCC OnLine Del 575.

28 2020 SCC OnLine HP 564.

29 *AICHRL v UOI*, WP(c) 2973 of 2020( Del HC).

30 *Rakesh Malhotra v NCT Delhi*, 2020 SCC OnLine Del 574.

31 PIL(suomotu) 4 of 2020 (Gau HC).

32 PIL 2 of 2020 (Gau HC).

33 *All Manipur Bar Association v State of Manipur*, 2020 SCCOnLine Mani 97.

34 *R.S. Khawangsing v Union of India*, 2020 SCCOnLine Mani 105.

35 2020 SCCOnLine Mani 150.

36 *Justice S.R. Sen v State of Meghalaya*, PIL 4 of 2020 ( Megh HC).

of home-quarantine orders, data privacy concerns arising out of the State's Corontine app,<sup>37</sup> and a petition relating to availability of burial ground for covid deaths, including an interim prayer against refusal of the same by local authority *Dorbar Shnong*.<sup>38</sup>

## 2. Food Security

Food security and the mismanagement of the public distribution system were concerns before the Manipur HC in *Human Rights Alert v. State of Manipur*.<sup>39</sup> Another petition before this HC pertained to the distribution of ration supply to the *anganwadis*.<sup>40</sup>

From this zone, HCs of Sikkim and Tripura have no reported PIL proceedings relating to the pandemic.

## III. Central Zone

This zone consists of the two HCs of Madhya Pradesh and Chhatisgarh.

### 1. Administrative Issues

The Madhya Pradesh HC received petitions praying for restricting unnecessary movements along with free treatment at private hospitals; prayers were also made for sealing off the borders to enforce lockdown.<sup>41</sup> Another petition prayed against a government notification supposed to make the people aware about stigmatization attached to covid.<sup>42</sup> Various covid relief measures and management issues came before the Chhattisgarh HC, which included disclosing the identity of covid affected, identifying Tablighi Jamaat returnees, and poor covid-related information as issues.<sup>43</sup> State's monitoring of the opening of liquor shops was sought in *Mamta Sharma v. State of Chattisgarh*.<sup>44</sup>

37 *Joanne JTL Lamare v State of Meghalaya*, 2020 SCCOnLine Megh 62. The 'corontine' mobile phone application tracks the movement of persons quarantined from GPS co-ordinates, to see whether they are staying at the designated place or roaming about.

38 PIL 5 of 2020 (Megh HC).

39 *Human Rights Alert v State of Manipur*, 2020 SCCOnLine Mani 98. The Public Distribution System (PDS), one of the largest food supply networks in the world, is India's system of supplying subsidized rations to the poor.

40 *Thokchom Premata v State of Manipur*, 2020 SCCOnLine Mani 124. The *Anganwadi* is a system of rural childrens' day care centres in India, implemented by the Government of India to combat child hunger and malnutrition.

41 2020 SCCOnLine MP 1050.

42 *Nagrik Upobhokta Margdarshak Manch v State of Madhya Pradesh*, WP 7596 of 2020 (PIL) (MP HC).

43 WPPIL 27 of 2020 (Chh HC).

44 2020 SCC OnLineChh 55).

## 2. Health Issues

Other petitions in this region prayed for various reliefs for health workers such as personal accident cover, protective equipment, provision of food and incentives to frontline health workers,<sup>45</sup> compensation for beetle leaf cultivators,<sup>46</sup> protective measures for health workers. Before the Madhya Pradesh HC prayer was made for implementation of SC directive in Parmanand Katara case as to right to health,<sup>47</sup> police protection to health workers, uninterrupted supply of green vegetables, non-shortage of drugs, action against assaults on medical professionals etc, but surprising the petitioner itself expressed satisfaction without pressing the matter further.<sup>48</sup>

Before this region's HCs, the petitions usually met the fate of judicial deference with 'hope and trust' to executive and satisfaction with State responses.

### IV. Western Zone

This consists of the HC of Bombay and Gujrat. The petitions and proceedings in this zone are often comprehensive, in the sense that either the Courts took cognizance of multiple issues at a single proceeding or joined multiple petitions into a single proceeding. Thus, issues are often overlapping and difficult to separate.

#### 1. Administrative decisions and policy issues

The Bombay HC took suo motu cognizance of various news items highlighting different aspects of Covid crisis management and a government policy on a ban on newspaper delivery on the supposed threat of infection spread thereby, vis-a-vis right to information.<sup>49</sup> It took stock of the covid-testing situation in the State<sup>50</sup> and a petition against alleged grievances on burial of covid deadbodies in Pradeep Ghandy v. State of Maharashtra,<sup>51</sup> The Court also entertained petitions challenging the pattern of class ten and twelve standards examinations changed due to lockdown<sup>52</sup> but refused to interfere in petition challenging fees

45 108 Ambulance KarmachariSangh v State of Madhya Pradesh, WP 7532 of 2020.

46 MP Paan Kisaan Avam Vyapari Sangathan v State of Madhya Pradesh, 2020 SCCOnline MP 1257.

47 See Parmanand Katara v Union of India, a landmark decision where the Supreme Court held that the constitutional right to life casts an obligation on the State to preserve life (AIR 1989 SC 2039). It is unclear from the order of the Court as to what specific Supreme Court directive the petitioner sought to be enforced.

48 Mudit Maheshwari v S of MP, WP 7371 of 2020 (PIL) (MP HC).

49 Registrar v State of Maharashtra, SuoMotu PIL (st) 10567 of 2020.

50 C.H. Sharma v State of Maharashtra, 2020 SCC Online Bom 582.

51 LD-VC-46 of 2020 added with PIL (L) 23 of 2020 (Bom HC).

52 ArvindTiwary v UOI, PIL-CJ-LD-VC-18 of 2020 (Bom HC).

demand by private schools on technical ground,<sup>53</sup> or a prayer against online learning Standard Operating Procedure.<sup>54</sup> Even judicial intervention to deploy armed forces for the purpose of maintaining lockdown was prayed for.<sup>55</sup> The Gujrat HC took suo motu cognizance of the *Tablighi Jamaat*<sup>56</sup> 'crisis' and other petitions to turn it into a comprehensive covid management PIL, including a report of police highhandedness to impose lockdown.<sup>57</sup> The same proceeding also took note of the overcharging by private hospitals. It received PILs which sought multiple remedies, such as prayer for non-blockage of road for genuine medical purposes along with door to door ration delivery, unhygienic conditions at and overcharging of fees by private schools.<sup>58</sup> Another petition prayed for procurement by the Government of agricultural produce with support price from the farmers.<sup>59</sup> Because of Government notification being withdrawn, a plea against mandatory production of Aadhaar for rations became infructuous.<sup>60</sup> The Gujrat High Court also strictly disallowed *Rathayatra* during the pandemic and came down heavily on the Government for 'appeasement'.<sup>61</sup>

## 2. Health Issues

The Bombay HC entertained petitions challenging different aspects of Covid management or seeking the Court's intervention about the availability of PPE kits, testing in private laboratories in one comprehensive covid management PIL proceeding in *Jan Swasthya Abhijan v. State of Maharashtra*.<sup>62</sup>

53 *Binu Varghese v State of Maharashtra*, 2020 SCCOnLineBom 721.

54 2020 SCC OnLineBom 766.

55 PIL-CJ-LD-VC-21 of 2020 (Bom HC).

56 A religious congregation that took place in Delhi around April 2020, which was portrayed in the newsmedia as being solely responsible for the spread of coronavirus, followed by a sort of witch-hunt for the attendees of the congregation. For a discussion on the so called 'crisis' and the politics of communalization during the pandemic, see, Faizan Mustafa, *The Coronavirus Spread and the Criminal Liability of the Tablighi Jamaat*, <https://thewire.in/communalism/coronavirus-criminal-liability-of-tablighi-jamaat> (Last accessed on 28 February 2021).

57 *SuoMotu v State of Gujrat*, PIL 42 of 2020 (Guj HC).

58 *DeepakbhaiMalani v State of Gujrat*, 2020 SCCOnLineGuj 742.

59 2020 SCCOnLine Guj 828.

60 2020 SCCOnLine Guj 700.

61 *Hiteshkumar VittalbhaiChavdavJagannathjiMandir Trust*, 2020 SCC Online Guj 1057.

62 PIL-CJ-LD-VC-21 of 2020 (Bom HC).

### 3. Care and Protection to Vulnerable sections

The Bombay HC entertained petitions regarding protection of migrant workers and their transportation.<sup>63</sup> In its suo motu proceeding, the Gujrat HC also included the plight of workers and poor people during the lockdown.<sup>64</sup>

#### V. Eastern Zone

This zone consists of the HCs of Calcutta, Patna, Jharkhand and Orissa.

##### 1. Care and Protection to Vulnerable Groups

The migrant worker situation in the eastern zone had a different flavor, in so far as prayers related to their return to home states.<sup>65</sup> Issues of ration supply were also raised regarding the supply of essentials to leprosy colonies or transgender persons.<sup>66</sup>

##### 2. Religious Congregation

Several petitions in this region relate to religious congregations vis-a-vis the lockdown. Jharkhand HC faced a petition to allow *Shravani Mela*,<sup>67</sup> while two petitions before Orissa HC sought to restrict such religious gathering, namely the *Rathyatra*.<sup>68</sup>

##### 3. Health and Safety

Health and safety, including compensation for persons deployed to fight covid, the medical staff and policemen were the subject matter of several petitions.<sup>69</sup> Judicial intervention was also sought before Patna HC regarding the condition at quarantine centers.<sup>70</sup> The Jharkhand HC took suo motu cognizance of the availability of PPE kits to health workers.

63 PIL-CJ-LD-VC-11-2020, 2020 SCC OnLineBom 679.

64 SuoMotu v State of Gujrat, PIL 42 of 2020 (Guj HC).

65 Pawan Kumar v State of Bihar, 2020 SCCOnLine Pat 637; 2020 SCCOnLine Jhar 451 ; CITU v. State of WB, WP 5418(w) of 2020 (Cal HC).

66 VeeraYadav v State of Bihar, CWJ 5627 of 2020 (Pat HC).

67 Nishikant Dubey v UOI, WP (PIL) 1753 of 2020.

68 Surendra Panigrahi v State of Orissa, WP(c) 12494 of 2020 (Ori HC).

69 Bijoy Kr. Ragada v State of Orissa, WP (c) 9095 of 2020 (Ori HC); ShivaniKaushik v UOI, 2020 SCCOnLine Pat 605.

70 2020 SCCOnLine Pat 567.

#### 4. Administrative and policy issues

The Calcutta HC took cognizance of a letter informing the Court of the poor conditions of the covid situation in Andaman and Nicobar islands and transformed it into a full-scale monitoring of the Covid situation in the islands<sup>71</sup>. The Jharkhand High Court took suo motu cognizance of the number and data of people quarantined,<sup>72</sup> non-maintenance of lockdown at a hotspot in Ranchi. In a suo motu proceeding, the Patna High Court took cognizance of a viral video portraying a child tugging its dead mother lying at a rail station. The Court expressing shock asked the Government various questions as to the steps taken and welfare of the child. However the Court did not pursue the matter further beyond receiving answers.<sup>73</sup>

#### VI. Southern Zone

It consists of the HCs of Andhra Pradesh, Karnataka, Kerala, Madras, and Telengana. The southern zone shows a very vibrant PIL culture, both in terms of the variety of prayers and aggressiveness of the judiciary to entertain the matters arising out of the lockdown situation.

##### 1. Health Issues

Health and safety of the health workers, including non-availability of PPE kits, non-utilization of rapid antibody testing-kits, have been among the chief concerns of many petitions before these HCs.<sup>74</sup> Another frequent plea had been regarding free testing of covid and various aspects of treatment by private hospitals. Before the Madras HC, cent percent covid testing was sought for persons exempted from lockdown where the Court elaborated upon the issue of misallocation of disaster relief fund among states by the Centre.<sup>75</sup> Before the Telengana HC in this regard, pleas range from utilization of private hospitals to check returnees at the border,<sup>76</sup> free testing at private hospitals<sup>77</sup>, or against cancellation of permission to private hospitals to treat covid cases in the context of the right to health as including right to choose treatment of personal choice.<sup>78</sup>

71 In Re. Covid 19: Relief and Services at Andaman and Nicobar Islands, WP 5324(w) of 2020 (Cal HC).

72 WP (PIL) 1301 of 2020.

73 2020 SCCOnLine Pat 628.

74 WP(PIL) 86 of 2020(AP); Rajen Gothe v State of Karnataka, WP 6686 of 2020 (Kar HC); K. Karuna Sagar v State of Telengana, WP(PIL) 61 of 2020 (Tel HC); WP(PIL) 56 of 2020 (Tel HC); WP (PIL) 59 of 2020 (Tel HC); AP Surya Prakasam v Chief Secy., 2020 SCCOnLine Mad 944.

75 India Awake v State of Karnataka WP 7443 of 2020 (Kar HC).

76 SSR Murthy v UOI, 2020 SCCOnLine TS 341.

77 ThirumalaRao v UOI, 2020 SCCOnLine TS 372.

78 Ganta Kumar Jai v State of Telengana WP (PIL) 75 of 2020 (Tel HC).

## 2. Care and Protection to Vulnerable sections

The southern HCs have also been pro-active concerning the migrant workers' situation. In a commendable manner, the Madras HC issued important guidelines even before the Supreme Court about provision of food, shelters including transportation of workers to nearest shelters for the workers on the road in a PIL filed by a politician.<sup>79</sup> The Karnataka HC in *Mohd Areef Jameel v. State of Karnataka* through different orders, looked into the migrant worker situation including provisions of rations and other necessities, distribution of food to the needy including involvement of NGOs in the process, supply of dry rations as well as subsidizing LPG, transportation of migrant workers to home states in *Shramik Specials*.<sup>80</sup> The Madras HC comprehensively dealt with the migrant worker situation by issuing important directions about their welfare and transporting them back to home states in *S. Thilakraj v State of TN*.<sup>81</sup> The Telengana High Court also entertained petitions regarding the plight of migrant workers and the welfare of people stranded due to lockdown including hostel students, in one of the comprehensive PIL proceedings in *PL Visheshwara Rao v State of Telengana*.<sup>82</sup> Judicial intervention in this region was sought for redress of plight of the transgender population.<sup>83</sup>

## 3. Administrative issues and policy including supply of essential items

The Kerala HC had entertained the issue of inter-state travel for medical needs including inter-state supply of essential items.<sup>84</sup> Prayer for permission to enter the State even without necessary passes was met with positive response from the Court.<sup>85</sup> Some other petitions from this region related to allowing farmers to work in the fields during the lockdown,<sup>86</sup> a challenge to Karnataka State Electricity Board's decision to charge electricity bills based on average monthly consumption,<sup>87</sup> a prayer to take action concerning non-storage of agricultural goods leading to their perishment.<sup>88</sup> Before the Madras HC, some of the PILs filed claims of cure for covid and sought representation before the technical committee formed in this regard.<sup>89</sup> Petitions were also made to reveal Covid patients' identity to enable the peo-

79 WP(PIL) 101 of 2020(AP).

80 WP 6435 of 2020 (Kar HC).

81 2020 SCCOnLine Mad 1024.

82 WP (PIL) 59 of 2020 (Tel HC).

83 *VyjayantiVasanta v State of Telengana*, WP(PIL) 74 of 2020 (Tel HC).

84 *Kerala HC Advocates Association v State of Kerala* WP (TMP) 2 of 2020(Ker HC).

85 *Harish Vasudevan v State of Kerala* WP (c) 9840 of 2020 (Ker HC).

86 *Chennupati v UOI*, 2020 SCCOnLine AP 83.

87 *PC Rao v State of Karnataka*, WP 6686 of 2020 (2020SCCOnLineKar 440).

88 *G. Rajesh v State of TN*, 2020 SCCOnLine Mad 943.

89 WP 7451 of 2020; WP 7422 of 2020 ( Kar HC).

ple to self-quarantine,<sup>90</sup> against opening of liquor shops so that people remain non-alcoholic,<sup>91</sup> or for supply of rations even without ration cards,<sup>92</sup> even a prayer to curb salaries of government employees in lockdown.<sup>93</sup> Judicial intervention was also sought against assistance to advocates being limited to those below ten years of practice,<sup>94</sup> or the plight of journalists.<sup>95</sup>

### C. The Judicial Response

The range of issues that came before the judiciary connected to the pandemic is vast and points out the tremendous presence of the Indian judiciary in the country's governance. Therefore, the present section scrutinizes the judicial response to the prayers and how different HCs responded to such prayers and issues. It reveals asymmetrical approach adopted by the HCs in dealing with the issues of same or similar nature. Different HCs reacted differently, whether concerning procedural aspects of handling the cases or about the issues themselves, especially on the issues related to violation of human rights.

#### I. *Contradictory stands*

##### 1. Health issues

The majority of PILs in different HCs raised concerns of health management. The Gujarat HC in a suo motu petition detailed on covid treatment in Private Hospitals in context of right to health, clarifying that financial capacity should not come in the way of getting treated as right to health is a fundamental right. If a patient is referred from a state-run hospital to a private one, pre-deposit cannot be charged, unless the person goes to a private hospital on the first instance.<sup>96</sup> The Karnataka HC sought reports from both the Centre and the State regarding Covid treatment at private hospitals and overcharging inter alia.<sup>97</sup> The Orissa HC sought answers from the Government regarding the allocation of budget for procurement of equipment and steps taken to provide these to hospitals, list of health workers, and steps taken by private hospitals.<sup>98</sup> The Bombay HC in *Citizens Forum for Equality v. State of Maharashtra*<sup>99</sup> identified the right to health to be both a negative and positive duty of the

90 K Narayanan v Chief Secy, 2020 SCCOnLine Mad 974.

91 2020 SCCOnline Mad 976.

92 2020 SCC OnLine Mad 900.

93 2020 SCCOnLine Mad 972.

94 Rapolu Bhaskar v State of Telengana, WP(PIL) 89 of 2020 (Tel HC).

95 Rapolu v State of Telengana, WP (PIL) 88 of 2020 (Tel HC).

96 SuoMotu v State of Gujrat, PIL 42 of 2020 (order dated May 29, Guj HC).

97 S. Jimraj Milton v Union of India, 2020 SCCOnLine Mad 1149.

98 Bijay Kumar Raagada v State of Orissa, WP (c) 9095 of 2020 (Ori HC).

99 LD-VC-PIL-20 of 2020, 2020 SCC OnLineBom 695.

State. The Court found that by invocation of Disaster Management Act 2005 and Epidemic Diseases Act 1897, the Centre and state governments respectively have undertaken positive obligation under Article 47 of the Constitution as to public health. Further, the Court opined that denial of testing to 'frontline workers' including policemen on the ground of expenditure was a 'ridiculous' idea, contemptuous of Article 21. Again, in *Jan Swasthya Abhijan v. State of Maharashtra* the Bombay HC presented a set of suggestions to the executive/legislature for their consideration. The suggestions included a drive for robust testing, the development of a wholesome strategy for treating both Covid and non-Covid patients, encouraging innovations for development of Covid vaccines, and most importantly, larger budgetary allocation towards public health.<sup>100</sup> The Telengana HC in *Sameer Ahmad v. State of Telengana* held that first, the State must take care of the needs of people subject to financial capacity and was expected to strategize the availability of food items. Secondly, concerning availability issue of PPEs, Government hospitals in Hyderabad were asked to report their situation.<sup>101</sup> In *PL Visheshwara Rao v. State of Telengana* by a common order the Court expressed dissatisfaction about Government's compliance with its orders which ranged from availability of kits to doctors.<sup>102</sup> Proper quarantining, the welfare of migrant workers, hostel students were directed, and the Court even went on to the extent of threatening the State with contempt. The Guwahati HC sought report as to preparedness from the State while issuing six limited directions such as, setting up of at least two functional testing labs within 10 days, provision of PPEs and ventilators, availability of ambulance and trained personnel for covid treatment, to ensure that the two designated covid hospitals of Kohima and Dimapur are fully equipped.<sup>103</sup> The Jharkhand HC sought answers from the Government about the availability of PPE and testing kits, data of people migrating in and out of the State, whether they are properly screened, and the number of people quarantined.<sup>104</sup> The Court opined the State should approach the Centre for more testing kits and other equipment.<sup>105</sup> The Kerala HC held that restrictions imposed on inter-state travel, even for medical purposes, were violations of the right to free movement and the right to life of people.<sup>106</sup> The Meghalaya HC identified preparedness of the State to be an area of deep concern, and issued directions to ensuring testing, assistance to patients, sensitization of public as well as maintenance of guidelines for dead body burial, as the Court opined that state action to ameliorate the conditions of the people was imperative.<sup>107</sup> Directions about the protection

100 PIL-CJ-LD-VC-21 of 2020, 2020 SCC OnLineBom 713.

101 WP(PIL) 56 of 2020 (Tel HC).

102 WP (PIL) 59 of 2020 (Tel HC).

103 PIL 2 of 2020 ( Gau HC).

104 WP (PIL) 1301 of 2020, order dated 3.04.2020 (Pat HC).

105 Ibid, order dated 7.04.2020.

106 Kerala High Court Advocates' Association v. State of Kerala, WP (TMP) 2 of 2020(Ker HC).

107 High Court of Meghalaya Bar Association v. State of Meghalaya PIL 4 of 2020 ( Meg HC).

of health workers also were issued by the Jammu & Kashmir HC.<sup>108</sup> However, in similar pleas ranging from the availability of PPE kits to the respective States' overall preparedness regarding health situation, other HCs such as Madhya Pradesh, or Rajasthan expressed satisfaction and praise for the Government.

## 2. Migrant workers and Vulnerable sections

Another critical aspect, the migrant worker situation, brought forth unequal reaction from the Courts. While in Calcutta HC, the petition suffered from multiple adjournments either due to poor connectivity or without assignment of any reason,<sup>109</sup> the Allahabad HC merely directed compliance with the Supreme Court's directives.<sup>110</sup> Regarding return of migrant workers to their home states and their transportation by Shramik specials, the Bombay HC refused to interfere with the Supreme Court's directive in that regard yet sought for report as to how the workers' plight had been addressed in view of regional needs.<sup>111</sup> The Karnataka HC issued detailed guidelines after categorizing the workers into three based on who wants to return, stay or have shelter, and directed proper sheltering and distribution of rations. It came down heavily on the State for dissatisfactory work. Similarly, the Madras HC had asked for Shelter to accommodate the migrant workers before their transportation to home states, registration process for Shramik trains in local languages, and better coordination between State Government and Railways in that regard.<sup>112</sup> Andhra Pradesh HC had directed setting up of shelters for workers on foot and for their welfare.<sup>113</sup> The Telengana HC had asked the State to report its policies on the migrant situation, though later accepted the Government's submission that nobody was on the road anymore.<sup>114</sup> Further, the Court directed ascertainment of the number of workers and the provision of shelters for them. The Court stated it is the duty of the State to look after them. The State was to co-ordinate with both railways and neighbour states regarding the movement of the workers, and the Court elucidated how transport was to be arranged. The State was also directed to evolve comprehensive policy regarding the situation.<sup>115</sup> The Uttarakhand HC also took a bold stand about migrant workers. Apart from necessary provisions, the Court held that the State must provide free transport to the workers who wish to go back.<sup>116</sup> On the other hand, the Punjab & Haryana HC questioned the petitioner's standing as an unregistered body though directed

108 Ibid, order dated 8 June 2020.

109 WP 5418(w) of 2020 (Cal HC).

110 PIL (civil) 8058 of 2020 (All HC), 2020 SCC Online All 617.

111 PIL-CJ-LD-VC-11-2020, 2020 SCC OnLineBom 679.

112 2020 SCCOnLine Mad 1024.

113 WP(PIL) 101 of 2020(AP).

114 2020 SCCOnLine TS 341.

115 WP (PIL) 103 of 2020 (Tel HC).

116 WP (PIL)58 of 2020 (Utt HC).

provision of food and essentials.<sup>117</sup> With regard to migrant workers, several HCs had reacted before the Supreme Court, while some only directed follow up of the Supreme Court's orders.

### 3. Supply of Essentials

Another vital matter that frequently has cropped up is the availability of essential items, including food security, either for the workers or for distressed population. The Calcutta HC had found satisfactory work from the respondent's affidavit in pleas against PDS management.<sup>118</sup> Delhi HC refused to interfere in a petition concerning non-supply of rations in Rohingya Colonies. On another occasion, the same Court directed action on the complaint of non-supply of rations even after issuance of e-coupons.<sup>119</sup> Gujarat HC observed that the poor and the downtrodden are afraid of starvation more than Covid and asked the State to develop modalities to address these concerns.<sup>120</sup> Again detailed intervention is found in Karnataka where the State Government was directed to develop plans to implement food security. Apart from dry rations, the Government was asked to quantify the rations and consider subsidizing LPG to cook them.<sup>121</sup> The Telengana HC held it is the duty of the State to take care of the needs of people subject to financial capacity and was expected to strategize availability of food items.<sup>122</sup> The Kerala HC declared that restrictions on the supply of essential goods were violations of Articles 301-304.<sup>123</sup> The Manipur HC had launched an investigation into allegations of corruption in the Public Distribution System. The Court directed identification of households eligible to receive rations district-wise addressing the grievances unearthed by the PIL, also directed strict compliance with the different provisions of the National Food Security Act, 2013 regarding transparency in public distribution system.<sup>124</sup> On a similar petition regarding food security, upon the grievance that *Anganwadi* centres were not receiving supplies so that they could not provide free meals the Manipur HC directed prompt action.<sup>125</sup>

117 Tribune India, Punjab & Haryana HC directs Haryana to supply rations to migrant labourers, <https://www.tribuneindia.com/news/haryana/punjab-haryana-high-court-directs-haryana-to-supply-ration-to-migrant-labourers-93469> (Last accessed on 28 February 2021).

118 Sukhranjan Dey v. State of West Bengal, WP 5426(w) of 2020, (order dated 24.06.2020, Cal HC).

119 Shabnam v NCT Delhi, WP(c) 3205 of 2020 (Del HC).

120 SuoMotu v State of Gujrat, PIL 42 of 2020 (order dated May 11, Guj HC).

121 Mohd.Areef Jameel v UOI, WP 6435 of 2020 (Kar HC).

122 WP(PIL) 56 of 2020 (Tel HC).

123 WP (TMP) 2 of 2020 (Ker HC).

124 Human Rights Alert v. State of Manipur, 2020 SCCOnLine Mani 98.

125 ThokchomPremlata v. State of Manipur, 2020 SCCOnLine Mani 124.

#### 4. Business and Administrative decisions

Frequently pleas against administrative action/inaction have cropped up before the courts. Regarding the decision to open or not open businesses (Liquor shops, for example), the HCs have mostly opined that the same belongs to the domain of executive policymaking and refrained from intervening,<sup>126</sup> but the Madras HC issued guidelines on how the sale of liquor was to be conducted by encouraging digital payment.<sup>127</sup> The HCs also refrained from intervening – at least in the first instance - into prayers for assistance to advocates during the pandemic,<sup>128</sup> though the Manipur HC had directed the State Bar Association to release funds for the same.<sup>129</sup>

#### 5. Religious issues

Another frequent plea had been regarding religious gatherings during the lockdown. The Gujrat HC was vehemently opposed to the *Rathayatra* festival, accusing the state government of 'appeasement'.<sup>130</sup> The Orissa HC left the decision to prohibit the Rathayatra for the state government.<sup>131</sup> The Jharkhand HC upheld the state government's ban on Shravani Mela, a religious fair, and remained opposed to public participation in the process.<sup>132</sup> On the other hand, the Allahabad HC refused to intervene on a plea to open Mosques for a limited time to offer prayers during the *Id-ul-Fitr*,<sup>133</sup> but held apprehensions of violation of social distancing protocols at *Bhoomi Pujan* gathering at Ayodhya to be without foundations.<sup>134</sup>

### II. Clubbing of issues in PILs

The most common strategy of different HCs in different zones was to tag multiple issues together and turn a proceeding into comprehensive pandemic-related proceedings. The matters were brought before the Courts by various petitions, which the courts proceeded to deal with comprehensively, or some of the courts took suo motu cognizance of issues.

126 See *Ambrosia Foundation v. NCT Delhi*, (2020 SCCOnline Del 594); *Mamta Sharma v. State of Chattisgarh* (2020 SCCOnline Chh 55); *Sandhya Prabhu v. State of Karnataka* (WP 6671 of 2020, Kar HC).

127 *B. Ramkumar v. Chief Secy.*, 2020 SCCOnline Mad 977).

128 *In Re. Assistance to the Needy Advocates and Advocates' Clerks* (PIL 569 of 2020, All HC); *Mahesh Sharma v. Cabinet Secy.* (2020 SCCOnline Raj 733).

129 2020 SCCOnline Mani 97.

130 *HiteshKumar v. Jagannathji Mandir Trust*, 2020 SCCOnline Guj 1057.

131 *Surendra Panigrahi v. State of Orissa*, WP (c) 12494 of 2020 (Ori HC).

132 *Nishikant Dubey v. UOI*, WP (PIL) 1753 of 2020 (Jhar HC).

133 *Shahid Ali Siddiqui v State of UP*, PIL (c) 579 of 2020 (All HC).

134 *Saket Gokhale v. Ram Janmabhoomi Tirth Khetre*, 2020 SCCOnline All 887.

The Allahabad HC, for example, took suo motu cognizance of an email from an Advocate complaining of mismanagement in quarantine centres and subsequently turned towards an entirely different issue, that of proper notification of people – migrant worker or otherwise - coming in the State after lockdown. It directed the State to collect proper information regarding the same, including a general direction for the people to report any incoming person who may have slipped in.<sup>135</sup> The Gujrat HC directed the Centre and State to exchange proper data in sealed covers regarding the Tablighi Jamaat attendees in a suo motu proceeding,<sup>136</sup> thereafter tagged other petitions regarding the pandemic with it to turn it into a comprehensive proceeding overlooking various aspects of managing the crisis. Similarly, the Jharkhand HC transformed a suo motu proceeding regarding non-maintenance of lockdown into extensive supervision of efforts of the State to combat the pandemic.<sup>137</sup> The Calcutta HC took suo motu cognizance of a letter from an Advocate alleging grim affairs of lockdown management at the Andaman-Nicobar islands, including the lack of relief measures and proceeded to supervise the overall administration of the islands during pandemic including poor internet connectivity therein.<sup>138</sup>

The other technique is to combine multiple petitions into one comprehensive proceeding, often tagging some more issues that the respective Court opined to be important. Such comprehensive PILs can be seen before the HCs of the southern zone, western zone, north-eastern zone, but not in the northern zone. Barring the Jammu and Kashmir HC<sup>139</sup> and Uttarakhnad HC,<sup>140</sup> such comprehensive PILs can seldom be found in the northern zone or Central zone. Even in the eastern zone such practice is scarce.

The strategy to club the issues had presented an opportunity to pass comprehensive order on wide range of issues that arose during the pandemic. Impliedly it also adds to efficient transaction cost in litigation, as instead of multiple proceedings, it is a one-stop approach for the grievances raised. Whereas this practice may seem good to deal with all things together, in reality, this only increases confusion as to the judicial nature of the proceedings and how the Court is deciding priorities in dealing with the issues. Thus, the whole procedure becomes a juggernaut that can roll in any direction possible, since the Court takes cognizance of issues that are not reflected in the initial petition. Part of this is also the practice of petitioners before some HCs to present a catalog of demands before the Court praying for general judicial supervision rather than raising questions of specific violation of legal rights.<sup>141</sup>

135 In re, PIL 574 of 2020 (All HC, order dated May 14).

136 *Suo Motu v. State of Gujrat*, PIL 42 of 2020 (Guj HC).

137 2020 SCCOnline Jhar 364.

138 WP 5324(w) of 2020 (Cal HC).

139 *Azra Usmail v UT of J&K*, WP (c) PIL 4 and 5 of 2020 (J&K HC).

140 *Sachidananda Dabral v UOI*, WP(PIL)58 of 2020 (Utt HC).

141 The same is most prominently seen in the North eastern zone- the petitioners often being the respective Advocates' Associations.

### III. *Non-Statutory remedies to 'Hope and Trusts'*

Similar to the problem of not being bound by the set of issues presented, the orders and directions most often are not based on any statutory provisions of constitutional logic. Since the prayers or issues does not necessarily reflect rights-violation duality, instead put forth general demands of supervision of the state of affairs from the judiciary. One of the crucial aspects of the handling of PILs by the Courts is the lack of directions based on statutes or legal provisions. It appears that the Courts did not draw the strength from the statutes or constitutional provisions to pass orders in the matters of the plight of migrant workers and the right to health. On the other hand, most of the petitions merely brought forth the issues before the Court for general intervention, rather than raising questions of specific violation of legal rights. The absence of legal remedy in most of the orders regarding the migrant worker situation transforms the PIL from a process to have remedies against violation of rights to the level of judicial charity.<sup>142</sup>

Consequently, the judicial approach towards State action also becomes one of indulgence. Judicial reasoning takes a step back and the Court is more concerned with the most convenient solution for governance. The HCs during the pandemic manifest this nature of PIL, and an increased insistence of placing 'hope and trust' in the executive or the need to provide 'elbow rooms' can be seen from the judiciary.<sup>143</sup> For example, while dismissing a petition challenging the opening of non-essential public service undertakings (PSUs), the Delhi HC commented that hyper-legalist interpretation of government notifications would be misconceived, and interference from the judiciary should be minimum during the pandemic.<sup>144</sup> In a petition praying for the supply of PPE kits to health workers police personnel, the Madhya Pradesh HC hoped and trusted that the Government would 'leave no stones unturned' in dealing with the issues in question.<sup>145</sup> Again, some other HCs acknowledged the existence of crisis, yet stressed that there was no Emergency in the legal sense. The Bombay HC commented that asking the State to dot every 'i's during the pandemic may be unjustified, yet the same cannot be used as a defence against the public duty of taking care of the people.<sup>146</sup> The Orissa HC took note of the police's large number of vehicle seizures during lockdown. The Court held that there should not be a total ban without proper guidelines but ultimately hoped and trusted that the Government would take a humanitarian ap-

142 *Anuj Bhuwania*, The Curious Absence of Law in Migrant Workers' Cases, <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases> (Last accessed on 28 February 2021).

143 *Akshay Sharma v. UOI*, WP (PIL) 61 of 2020 (Utt HC).

144 *Anil Agarwal v Union of India*, 2020 SCCOnline Del 576.

145 *Tarun Vanot v State of MP*, 2020 SCCOnline MP 1050.

146 *Jan Swasthya Abhijan v State of Maharashtra*, PIL-CJ-LD-VC-21 of 2020 (Bom HC).

proach.<sup>147</sup> The Patna HC held that lack of revenue could not be an excuse in a welfare state, especially when no constitutionally sanctioned financial emergency was in place.<sup>148</sup>

#### D. Conciliating High Court orders and judgments

An overview of covid-related PILs in different HCs reveals contradictions in the judicial response levels and, more importantly, the urgency to protect people's interests. The judicial retention of jurisdiction over cases by passing frequent orders instead of final judgments significantly increases the power of the Courts, a phenomena which Upendra Baxi had famously described as 'creeping jurisdiction'.<sup>149</sup> The mismatch here is the extent - the varying use of this power by Different HCs. While some HCs had more 'hope and trust' in executive wisdom and satisfaction about government steps, some others have doggedly pursued the interests of the people and often expressed doubts about the government version of things. Difference in regional context and needs may require passing of orders with local hues. But difference in the levels of response creates uncertainty about possible judicial reaction. To illustrate, the same petitioner, an organization named National Campaign Committee for the Eradication of Bonded Labour had its petition dismissed before the Punjab & Haryana HC on ground of lack of locus standi, while the Delhi HC had no problem with its standing as a PIL litigant.<sup>150</sup>

The doctrine of precedent is one of the cardinal principles of the common law model of judicial systems, which basically means adherence to settled principles of law. A hierarchy of courts characterizes the Indian judicial system, the Supreme Court being the Apex Court tasked with the duty of declaring binding law, and the HCs, the middle tier of the system being bound by the Supreme Court's declarations. The doctrine of binding precedent is a cardinal feature of Indian judicial system.<sup>151</sup> The binding nature of precedents promotes certainty and consistency in judicial decisions and enables an organic development of law, and consequently, provides assurance to the individual as to the consequences of daily transactions.<sup>152</sup> As per the Indian Supreme Court's own words, consistency is the cornerstone of administration of justice (Let the law be consistent), which creates confidence in the system.<sup>153</sup> Article 141 gives constitutional status to the doctrine and declares that Supreme Court's declaration of law is to be binding on all subordinate authorities in India. Within a judgment, only the *ratio decidendi* or the principle of decision forms binding precedent, not the *obiter dicta* or passing remarks/ opinions. It is only the principle of deci-

147 Bijay Kumar Ragada v State of Orissa, WP (c) 9095 of 2020 (Ori HC).

148 Shivani kaushik v UOI, 2020 SCCOnline Pat 605.

149 Upendra Baxi, Taking Suffering Seriously : Social Action Litigation in the Supreme Court of India, Third World Legal Studies 4 (1985), p. 122.

150 2020 SCCOnline Del 595.

151 *MP Jain*, Indian Constitutional Law, New Delhi 2016, p. 286.

152 Union of India v Raghbir Singh AIR 1989 SC 1933.

153 State of Andhra Pradesh v AP Jaiswal, (2001) 1 SCC 748.

sion that forms a precedent, not the conclusion.<sup>154</sup> However, the Supreme Court has consistently held that even its *obiter* is binding.<sup>155</sup> The Supreme Court's *obiter* has clear persuasive value before the Supreme Court itself.<sup>156</sup>

The general rule regarding HC decisions inter se is that they are not bound by each other's declarations and parallel HC rulings may have persuasive value for each other.<sup>157</sup> It is settled principle of law that if there is conflicting views rendered by the different HCs, the view taken by the jurisdictional HC is binding in the jurisdictional area of the respective HC. Precedents can be formed only out of final judgments and they must have reasoned orders. Mere direction passed by the Court without consideration of the legal position cannot be a precedent.<sup>158</sup> Orders in PIL are seldom based on legal reasoning, more so in pandemic like situations where the judiciary is called for general supervision over governmental action. So it would be difficult to contemplate consistency in line of traditional doctrine of binding precedent. However, there could be a situation when the material facts in a judgment of one HC can be heavily relied upon by another HC. If the Supreme Court's *obiter dicta* have clear persuasive value before itself, it is possible to argue for a greater persuasive value and greater cognizance of the HC orders inter se. More so, because through PIL jurisdiction, the judiciary attempts to uphold the rights of the people against executive action/inaction.

There should be a cogent reason and complete dissimilarity in the material facts to deviate from the decision of a HC by another one. Considering the nature of dispute that arose during the pandemic across all the HCs, it was desirable that the impending matters before one HC should have followed - at least taken cognizance of - the direction/guidelines related to the protection of the rights or mitigating the sufferings of the poor people which was issued by the other HCs. So far as the PILs are concerned, the constitutional courts are called forth to act as watchdogs over the executive/legislature, rather than judicial decision makers. The position of the constitutional courts with respect to protection of fundamental rights has been declared by the Supreme Court thus,

'While interpreting fundamental rights, the Constitutional Courts should remember that whenever an occasion arises, the Courts have to adopt a liberal approach with the object to infuse lively spirit and vigour so that the fundamental rights do not suffer. When we say so, it may not be understood that while interpreting fundamental rights, the Constitutional Courts should altogether depart from the doctrine of precedents but it is the obligation of

154 Mumbai Kamgar Sabha v. Abdulbhai, AIR 1976 SC 1455.

155 Municipal Committee, Amritsar v. Hazara Singh, (1975) 1 SCC 794; Peerless General Finance and Investment v. Commr. Of Income tax, 2019 SCCOnline 851.

156 Oriental Insurance v. Meena Variyal, (2007) 5 SCC 428.

157 Valiamma Champaka Pillai v. Sivathanu Pillai, AIR 1979 SC 1937; Commissioner of Income Tax v. Thana Electricity Supply Ltd., 1993 SCCOnline Bom 591.

158 Vishnu Dutt Sharma v Manju Sharma (2009) 6 SCC 379.

the Constitutional Courts to act as sentinel on the qui vive to ardently guard the fundamental rights of individuals bestowed upon by the Constitution....'<sup>159</sup>

So, the Courts are called for to act as the sentinel on the qui vive in PILs where violation of rights is routinely complained of. The varied response from different HCs during pandemic raises the question can a public grievance arising from executive action or inaction be remedied in one State and not in another? To illustrate, while several HCs took suo motu cognizance of the suffering of the migrant workers, The Punjab and Haryana HC chose not to entertain such a petition on ground of locus standi. Protecting fundamental rights as well as statutory rights of citizens, or keeping executive power either in check or enforcing public duties thus demand greater consistency between the reactions of different HCs, more so in pandemic like situations where executive action or inaction affects greater number of people. The HCs thus need to take greater cognizance of each other's stance.

### **E. Conclusion: Can justice have opposing voices?**

The paper describes the variety of pleas raised before the HCs relating to covid. The range and extent of pleas point out the tremendous importance of Indian judiciary in public life, and the expectation from the Court to step in for better handling of the measures adopted by the Government during the pandemic. The judiciary at the level of HCs, as it has been pointed out in the paper, have tried to address the concerns in myriad ways. What makes the understanding of PILs in HCs interesting is the diversity of reactions themselves. All the HCs in India function under the same provision of the constitution, armed with the same writ powers as are available with the Supreme Court, yet some HCs have lived up to the expectation from an avowedly activist judiciary, while the others have basically deferred responsibility, with the increasing placement of 'hope and trust' in the executive to do its duties leaving 'no stones unturned'.<sup>160</sup> The Courts have increasingly become more prone to believing the Government reports though some HCs did not follow suit and expressed dissatisfaction. It is high time that the Courts start cognizing the judgments of other HCs even though it may not be binding, and require adding of local hues. There is the need for better co-ordination between the HC judgments and orders even if it is only in PIL jurisdictions. If access to justice is the cornerstone of rights, it requires even reaction from the middle tier of the judiciary as well. Further, the HCs may be expected to be more aggressive in their PIL jurisdictions when larger public interest is involved. This can mean reduced rush to the Supreme Court with public grievances under Article 32, and more reliance and faith in Article 226 powers of the HCs. The easing of burden from the Apex Court will certainly make access to justice a reality than rhetoric for litigants. If the technicalities related to the principle of *stare decisis* - that parallel HC orders and judgments are non-binding inter se – are causing a bottleneck, then there is need to display judicial creativity to evolve a mechanism

159 Kalpana Mehta v Union of India (2018) 7 SCC 1.

160 TarunVanot v State of MP, 2020 SCCOnLine MP 1050.

in the larger interest of the realisation of rights. Also, such judicially evolved mechanism would serve a larger interest of assuring consistency in the approach of the HCs in the absence of binding precedent from the highest court of the country.