THE CENTRE OR STATE: WHO SHOULD RESPOND TO BIOLOGICAL DISASTERS?

Tasneem Zakir & Satrajeet Sen[*]

The COVID-19 pandemic obligated governments across the world to adopt measures for containing the spread of the virus while preserving socio-economic stability. The Constitution of India, 1950 ('the Constitution') vests upon the State governments the exclusive authority on all matters relating to public health. Nevertheless, the Central Government spearheaded the response to the COVID-19 outbreak, invoking the provisions of the Disaster Management Act, 2005 ('DM Act'). In this paper, we challenge the authority of the Parliament to regulate biological disasters through the DM Act on the basis that it violates the separation of powers envisaged under the Constitution. Upon a holistic review of all the legislative entries in the Constitution that may confer authority upon the Parliament to legislate on the subject of biological disasters, we conclude that the Parliament did not have the power to legislate upon the said subject. Hence, any matter arising out of biological disasters should be excluded from the scope of the DM Act. However, in the current scenario where both DM Act and the Epidemic Diseases Act, 1897 ('ED Act') apply, we use principles of statutory interpretation to address the conflicting provisions of these two statutes relating to the management of biological disasters. We there by conclude that the ED Act, which accords primacy to the State governments in tackling a biological disaster, should have been applied instead of the DM Act to manage the COVID-19 pandemic. We propose that the DM Act's provisions should be reasonably applied to events within the meaning of 'disaster' under the statute while leaving out the management of biological disasters, which are specifically covered within the scope of the ED Act. This is based on the principle of 'generalia specialibus non derogant' and the rationale that from a constitutional and policy perspective, the State governments are the appropriate authorities to manage biological disasters.

Table of Contents

[*] 5th year and 3rd year students, respectively at the West Bengal National University of Juridical Sciences, Kolkata. The authors are grateful to the Editors of the NUJS Law Review for their constructive feedback and comments on the previous drafts of this article. Errors or omissions, however, if any, are the sole responsibility of the authors. They may be reached at tasneemzakir@nujs.edu and satrajeet219057@nujs.edu for any comments or feedback.

I. INTRODUCTION

The COVID-19 pandemic brought the entire world to a standstill and adversely affected people across borders. During these grave times, the obligation of protecting citizens from the challenges posed by the pandemic and the adoption of vital measures, including the provision of healthcare, food security, unemployment allowances, debt reliefs, among other things, fell upon nation-States. Governments, depending on the extent of the spread of the virus in their territory, the differing needs of their citizenry, and their own governance structure, have responded to the pandemic differently.[1]

The Government of India has been monitoring the virus since January 17, 2020, when it first issued a non-binding travel advisory to discourage

[1] *Western Australia, South Australia to Close Borders in Response to Coronavirus Pandemic*, March 22, 2020, *ABC News*, available at https://www.abc.net.au/news/2020-03-22/wa-sa-set-to-close-borders-amid-coronavirus-fight/12079044 (Last visited on January 3, 2022); Georgia Hitch, *Am I Eligible for the New COVID Payment? How much Cash is the Government Giving Out?*, ABC News, June 3, 2021, available at https://www.abc.net.au/news/2021-06-03/new-temporary-Covid-payment-lockdown-explained/100188242 (Last visited on January 3, 2022); R. Lieber & T.S. Bernard, *Your Money: A Hub for Help during the Coronavirus*, New York Times, July 29, 2021, available at https://www.nytimes.com/article/coronavirus-money-unemployment.html#link-2f8736c0 (Last visited on January 3, 2022); *Germany Sets Example with Aggressive Testing*, Hindustan Times, March 22, 2020, available at https://www.hindustantimes.com/world-news/germany-sets-example-with-aggressive-testing/story-GZ5zqROPBADIUIMfPSJhJI.html (Last visited on January 3, 2022) (various nation-States responded in a varied manner to the rise in COVID-19 cases in their respected countries. While Australian States closed their borders and implemented lockdown measures, the United States of America provided benefits to individuals, who were unemployed, partly employed or those who were unable to work owing to coronavirus-related reasons. Further, Germany conducted aggressive testing during the first wave of COVID-19).

travel to China.[2] Since then, the Government has continued to restrict travel in different ways over a substantial period. From requiring a mandatory quarantine for persons, including Indians travelling to India from China and Hong Kong;[3] to suspending travel visas from countries that were adversely impacted by the virus such as Italy, Iran, United Kingdom, among others;[4] to finally suspending all international flights from March 22, 2020.[5] The Government's initial strategy for protecting Indians from the virus was based on restricting the entry of persons from affected countries. However, as the virus spread across the globe, various countries entered into domestic 'lockdowns',[6] and India followed suit. The Central Government, without any consultation with its federal counterparts,[7] declared a nationwide lockdown from March 25, 2020, for twenty-one days,[8] which was continuously extended until June 2020.[9]

The Central Government declared the nationwide lockdown under §6(2)(i) of the Disaster Management Act, 2005 ('DM Act').[10] It ordered the closure of most establishments, including government offices, industrial and commercial

---

2 Ministry of Health and Family Welfare, Novel Coronavirus Outbreak in China Travel Advisory to Travellers visiting China, January 17, 2020, available at https://www.mohfw.gov.in/pdf/TraveladvisorytotravelersvisitingChina17012020.pdf (Last visited on January 3, 2022).

3 Bureau of Immigration, Ministry of Home Affairs, Advisory: Travel and Visa Restrictions Related to COVID-19, March 3, 2020, available at https://boi.gov.in/content/advisory-travel-and-visa-restrictions-related-COVID-19 (Last visited on January 3, 2022).

4 Ministry of Health and Family Welfare, Additional Travel Advisory for Novel Coronavirus Disease (COVID-19), March 16, 2020, available at https://www.mohfw.gov.in/pdf/TravelAdvisory16thMarch.pdf (Last visited on January 3, 2022).

5 Ministry of Health and Family Welfare, Additional Travel Advisory for Novel Coronavirus Disease (COVID-19), March 19, 2020, available at https://www.mohfw.gov.in/pdf/Traveladvisory.pdf (Last visited on January 3, 2022).

6 Anthony Cuthberston, *France Imposes 15-Day Lockdown and Mobilises 1,00,000 Police to Enforce Restrictions*, The Independent, March 16, 2020, available at https://www.independent.co.uk/news/world/europe/coronavirus-france-lockdown-cases-update-COVID-19-macron-a9405136.html (Last visited on January 3, 2022); *Boris Johnson Orders UK Lockdown to be Enforced by Police*, The Guardian, March 23, 2020, available at https://www.theguardian.com/world/2020/mar/23/boris-johnson-orders-uk-lockdown-to-be-enforced-by-police (Last visited on January 3, 2022); *South Africa to go into 21-day Lockdown on Thursday Night*, The Guardian, March 23, 2020, available at https://www.theguardian.com/world/2020/mar/23/south-africa-to-go-into-21-day-lockdown-on-thursday-night (Last visited on January 3, 2022); Jennifer Calfas et al., *California Orders Lockdown for State's 40 Million Residents*, The Wall Street Journal, March 19, 2020, available at https://www.wsj.com/articles/china-reports-no-new-domestic-coronavirus-infections-for-the-first-time-since-outbreak-started-11584611233 (Last visited on January 3, 2022).

7 *India COVID-19: PM Modi 'did not Consult' before Lockdown*, BBC, March 29, 2020, available at https://www.bbc.com/news/world-asia-india-56561095 (Last visited on January 3, 2022).

8 National Disaster Management Authority, Order No. 1-29/2020- PP (Pt II) (Notified on March 24, 2020).

9 Ministry of Health and Family Welfare, Guidelines for International Arrivals, May 24, 2020, available at https://www.mohfw.gov.in/pdf/Guidelinesforinternationalarrivals.pdf (Last visited on January 3, 2022).

10 Ministry of Home Affairs, Guidelines on the Measures to be Taken by Ministries/Departments of Government of India, State/Union Territory Governments for Containment of COVID-19, March 24, 2020, available at https://www.mohfw.gov.in/pdf/Annexure_MHA.pdf (Last visited on January 3, 2022).

establishments, transport services, educational institutions, places of worship, entertainment avenues, amongst others.[11] Only those establishments which were necessary to ensure the availability of essential goods and services were allowed.[12] Such a nationwide lockdown brought all economic activity in the nation to a standstill for almost three months, which meant that a wide range of businesses could not generate revenues and pay their bills, resulting in widespread unemployment.[13] In addition to the economic losses (the effects of which were felt well beyond those three months), the lockdown also negatively impacted societal and cultural activities and the marginalised communities in particular.[14] The permissibility as well as the viability of imposing such a radical nationwide measures in response to a pandemic needs to be studied closely in the context of India's governance structure.

The Republic of India is a "Union of States",[15] which is an acknowledgement of the significant role of State Governments in the governance setup. Although the Central Government admittedly enjoys comparatively greater powers in this setup, there are certain spheres of operation where State Governments enjoy complete autonomy.[16] In this paper, we argue that the Central Government's imposition of a nationwide lockdown infringed upon powers that are exclusively within the domain of the State Governments, and while powers of the State Governments can be overridden by the Centre under certain circumstances,[17] the COVID-19 crisis does not qualify for any of these exceptions. The most critical infringement was on the power of the State Governments to make decisions regarding "public health, sanitation, hospitals, dispensaries", which are arguably the most important aspects of the management of the COVID-19 crisis.[18] Additionally, the lockdown adversely affected the operation of industries,[19] hospitality workers,[20] and trade

---

11 *Id*.

12 *Id*.

13 *One Year Since COVID-19 Lockdown: India Still Recovering from Unemployment Blow*, The Economic Times, March 24, 2021, available at https://economictimes.indiatimes.com/jobs/one-year-since-COVID-19-lockdown-india-still-recovering-from-unemployment-blow/articleshow/81664834.cms?from=mdr (Last visited on January 3, 2022).

14 S. Chanda & T.V. Sekher, *Disability During COVID-19: Increasing Vulnerability and Regret*, Vol. 55(39), Economic and Political Weekly (2020); M. Dixit & D. Chavan, *Gendering the COVID-19 Pandemic: Women Locked and Down*, Vol. 55(17), Economic and Political Weekly (2020); Economic and Political Weekly Engage, *COVID-19: Examining the Impact of Lockdown in India after One Year*, Economic and Political Weekly Engage, March 24, 2021, available at https://www.epw.in/engage/article/COVID-19-examining-impact-lockdown-india-after-one (Last visited on January 3, 2022).

15 The Constitution of India, 1950, Art. 1.

16 The Constitution of India, 1950, Art. 246(3); K. Damodarasamy Naidu v. State of T.N., (2000) 1 SCC 521, ¶22; T.N. Kalyana Mandapam Assn. v. Union of India, (2004) 5 SCC 632, ¶58.

17 The Constitution of India, 1950, Arts. 249, 250.

18 K. James, *COVID-19 and the Need for Clear Centre-State Roles*, Vidhi Centre for Legal Policy, April 3, 2020, available at https://vidhilegalpolicy.in/2020/04/03/COVID-19-and-the-need-for-clear-centre-state-roles/ (Last visited on January 3, 2022).

19 The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 24 (Industries).

20 The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 31 (Inns and inn-keepers).

and commerce generally,[21] – the decision-making power for which is exclusively within the domain of the State Governments.

According to a press release by the Union Health Ministry in July 2020, about ninety percent of India's COVID positive cases were from eight States/ Union territories ('UTs') only.[22] Thus, is it appropriate for the remaining twenty-eight States/UTs – whose COVID positive cases are few in number – to be bound by similar severe restrictions? This must be considered especially in the context of the economic impact of the absolute restrictions, as the functioning of every State's economy is distinct. If a complete lockdown had not been imposed upon all States, every State could have made an independent assessment of the COVID-19 situation within their jurisdiction. This would have enabled the States to resort to less restrictive measures, whose economic impact would be less adverse than that of the complete lockdowns, while at the same time controlling the spread of the virus to the desired extent.

The Centre not only imposed a national lockdown on all States irrespective of the number of States in their territory, but also acted in a manner to proactively inhibit the capacity of the States to address the pandemic. For instance, the Ministry of Corporate Affairs released a clarification stating that contribution to the PM Cares Fund shall be taken into account in calculating a company's Corporate Social Responsibility expenditure, but contributions made to the 'Chief Minister's Relief Fund' or 'State Relief Fund for COVID-19' shall not enjoy the same benefit.[23] This clarification significantly affected the ability to raise finances for State Governments to enable them to manage the COVID-19 pandemic. The sale of liquor – which is a major source of revenue for the State Governments – was also disallowed by the Centre during the lockdown, which further curbed the ability of the State to secure resources for the pandemic.[24] Most importantly, the Centre failed to consult the States prior to the imposition of the March 25

---

[21] The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 26 (Trade and commerce within the State).

[22] Bindu Shajan, *India Has Lowest Cases, Deaths Per Million Population: Harsh Vardhan*, THE HINDU, July 9, 2020, available at https://www.thehindu.com/news/national/india-has-lowest-cases-deaths-per-million-population-harsh-vardhan/article32029787.ece (Last visited on January 3, 2022); *Coronavirus: 8 States account for 85.5% of Active COVID-19 Case Load,* THE HINDU, June 28, 2020, available at https://www.thehindu.com/news/national/eight-states-contributed-85-of-COVID-19-caseload-87-of-deaths-health-ministry/article31933255.ece (Last visited on January 3, 2022).

[23] Parth Maniktala, *Diluting Federalism in the Fight against COVID-19 Pandemic*, OUTLOOK INDIA, April 27, 2020, available at https://www.outlookindia.com/website/story/opinion-diluting-federalism-in-the-fight-against-coronavirus-pandemic/351586 (Last visited on January 3, 2022).

[24] Srijan Sinha, *Liquor Trade: The Test of Federalism*, BAR AND BENCH, May 2, 2020, available at https://www.barandbench.com/columns/liquor-trade-the-test-of-federalism (Last visited on January 3, 2022); Archana Chaudhury, *Alcohol Fight Shows India's States Battling Modi for Virus Billions*, BLOOMBERG QUINT, April 29, 2020, available at https://www.bloombergquint.com/global-economics/alcohol-spat-shows-india-states-battling-modi-for-virus-billions (Last visited on January 3, 2022).

lockdown, thereby leaving them staggered and unprepared to manage law and order in their State.[25]

As stated above, the Central Government could take such drastic measures because they were permitted to do sounder the DM Act. The DM Act provides expansive powers to the National Disaster Management Authority ('NDMA'),which is comprised of the Prime Minister and the officers of the Central Government.[26] The powers conferred upon the NDMA make it possible to statutorily infringe upon powers that are constitutionally reserved under the legislative and executive domain of the States, which makes the constitutional validity of the DM Act questionable. Thus, the pertinent question is whether the Parliament has the legislative capacity to enact the DM Act, which allows the Central Government to interfere with subjects under the exclusive domain of State Governments and thereby violate the constitutional prerogatives of the latter.

Additionally, while the Central Government has sourced the legitimacy of its actions to the DM Act, the State Governments have relied on the Epidemic Diseases Act, 1897 ('ED Act') to implement measures in response to the pandemic.[27] The ED Act is very different in its allocation of powers in comparison to the DM Act, and it vests primary powers and responsibilities upon the State Governments in tackling the outbreak of an epidemic.[28] In this regard, assuming that the Parliament possessed the legislative capacity to enact the DM Act, a conflicting mandate exists to tackle the COVID-19 crisis, as the DM Act gives primary powers to the Central Government acting through NDMA, while the ED Act accords the primary powers to the State Governments. Thus, the question arises regarding which statutory framework will apply in case of biological disasters such as COVID-19?

In this paper, we seek to answer both questions raised above. In Part II, we address the constitutionality of the DM Act to the extent that it regulates biological disasters, on the basis that the Parliament lacks the authority to regulate biological disasters as managing 'Public health and sanitation; hospitals and dispensaries',[29] fall within the exclusive domain of the State Governments. We begin with an explanation of the federal system of India and focus on the principles of interpretation evolved by Courts to delineate the legislative powers between the Parliament and State legislatures. We use these principles of interpretation to analyse five legislative entries in the Constitution of India, 1950 ('the Constitution')

[25] BBC, *supra* note 7.

[26] The Disaster Management Act, 2005, §3(2).

[27] Ashok Pradhan, *Covid-19: Odisha Brings Ordinance with Provision of Two Years Jail Term for Violators of Epidemic Regulations*, The Times of India, April 8, 2020, available at https://timesofindia.indiatimes.com/city/bhubaneswar/Covid-19-odisha-brings-ordinance-with-provision-of-two-years-jail-term-for-violators-of-epidemic-regulations/articleshow/75054625.cms (Last visited on January 3, 2022).

[28] The Epidemic Diseases Act, 1897, §2.

[29] The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 6 (Public health and sanitation; hospitals and dispensaries).

from which the Parliament could derive the authority to regulate biological disasters. The five entries from Schedule VII of the Constitution that can provide authority to the Parliament to legislate on biological disasters are as follows:

i. "Social security and social insurance; employment and unemployment" Entry 23 of List III of Schedule VII,

ii. "Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants" Entry 29, List III,

iii. "Port quarantine, including hospitals connected therewith" Entry 28, List I,

iv. "Inter-State quarantine" Entry 81, List I, and

v. Residuary Entry, Entry 97, List 1.

In Part III of the paper, we address the question of the applicable legislation between the ED Act and the DM Act. We begin with an explanation of the scope of the two conflicting legislations and apply tools of statutory interpretation, namely *lex specialis derogat legi generali* ('*lex specialis*'), and *lex posterior derogate legi priori* ('*lex posterior')* to address the conflict. We also delve into two vital issues in relation to the application of the rule of *lex specialis*. *First*, a scenario wherein the general legislation is enacted post the enactment of the special law, like in the present case of the ED Act and the DM Act. *Second*, given that the DM Act contains a *non-obstante* clause, we also take into consideration the crucial role of such clauses in determining the applicable legislation. Further, we critically analyse the rule of *lex posterior*, which provides for the later law to be applicable in case of a conflict with the earlier legislation.

Part IV of this paper offers concluding remarks. We put forth two questions in this paper, *first,* on the constitutional validity of regulating biological disasters under the DM Act, and *second*, the legality of applying the DM Act alongside the ED Act. On the first question, we conclude that the Parliament is incompetent to regulate biological disasters, which renders that portion of the DM Act unconstitutional and liable to be set aside. From a constitutional and policy perspective, the State governments are the appropriate authorities to manage biological disasters. On the second question, applying various vital tools of statutory interpretation, we conclude that the invocation of the provisions of the ED Act over the DM Act would have been the appropriate approach of effectively managing the COVID-19 outbreak in the country since the commencement of the pandemic itself.

II. CONSTITUTIONAL VALIDITY OF REGULATING BIOLOGICAL DISASTERS UNDER THE DISASTER MANAGEMENT ACT, 2005

In this part, we argue that that the inclusion of biological disasters within the scope of the DM Act is opposed to the constitutional distribution of powers between the Centre and the States, as the Parliament does not have the legislative capacity to regulate biological disasters.

Biological disasters refer to infections caused by pathogens and other organisms that can cause loss of life, injury, illness or have other health impacts.[30] Biological disasters can affect human beings, animals and plants, and are referred to as epidemics or pandemics, depending on the extent of their geographical spread.[31] In this paper, we focus on biological disasters that affect humans and can cause loss of life such as COVID-19, Ebola, Zika fever, and the H1N1 virus. Such biological disasters require maintenance of public health, which is best managed at the local level by the field functionaries as they are aware of the ground situation.[32] This is because an expeditious and appropriate response is the essence in case of biological disasters, and the field functionaries being aware of the local circumstances, would be in the best position to provide a timely and effective response – when fully authorised to do so.[33] Due to this fundamental reason public health was included in the list of subjects that the State Government can exclusively legislate upon.[34] However, it has been argued that there are other entries in Schedule VII of the Constitution, which give Parliament the legislative competence to regulate biological disasters.[35] The purpose of this Part is to investigate these arguments and analyse if any other entry can truly be the source of power for the Parliament to legislate upon biological disasters.

---

30 National Disaster Management Authority, *Biological Disasters*, available at https://ndma.gov.in/Man-made-Hazards/Biological (Last visited on January 3, 2022).

31 National Disaster Management Authority, *National Disaster Management Plan*, November 2019, 38, available at https://ndma.gov.in/sites/default/files/PDF/ndmp-2019.pdf (Last visited on January 3, 2022).

32 Devika Biswas v. Union of India, (2016) 10 SCC 726; Second Administrative Reforms Commission, *Crisis Management: From Despair to Hope*, September 2006, 40-44, available at https://darpg.gov.in/sites/default/files/crisis_management3.pdf (Last visited on January 3, 2022).

33 *Id*.

34 Niharika Salar, *India's Institutional Response: The Centre-State Relationship*, National University of Singapore, available at https://law.nus.edu.sg/impact/COVID-19-indias-institutional-response-the-centre-state-relationship (Last visited on January 3, 2022).

35 Goutham Shivshankar, *Debating the Applicability of India's Disaster Management Law to COVID-19*, Admin Law Blog, May 19, 2020, available at https://adminlawblog.org/2020/05/19/goutham-shivshankar-debating-the-applicability-of-indias-disaster-management-law-to-COVID-19/ (Last visited on January 3, 2022); Gautam Bhatia, *An Executive Emergency: India's Response to COVID-19*, Verfassungs Blog, April 13, 2020, available at https://verfassungsblog.de/an-executive-emergency-indias-response-to-COVID-19/ (Last visited on January 3, 2022); Devansh Kaushik, *The Indian Administrative Response to COVID-19*, Admin Law Blog, May 5, 2020, available at https://adminlawblog.org/2020/05/05/devansh-kaushik-the-indian-administrative-response-to-COVID-19/ (Last visited on January 3, 2022).

The significance of the exclusion of biological disasters from the legislative domain of the Parliament is twofold. *First*, as aforementioned, is the fact that ground-level field functionaries are best equipped to tackle health emergencies as they require immediate and efficient support, which can best be given locally. *Second*, since biological disasters are largely transmitted by proximity to an infected person – whether through aerosols or other bodily fluids – the spread of the disease happens territorially. This implies that all territories in a country may not be similarly affected. This happens because subdivisions within a territory are often made on the basis of certain common characteristics such as culture, occupation, way of life, amongst others, which can affect the rate of disease spread. Moreover, factors such as population density and infrastructure within the territory also affect the kind of measures that need to be implemented in relation to a disease. These features distinguish one territorial subdivision from another, because of which different measures must be adopted to manage the spread of the outbreak. However, the DM Act allows the Central Government to unilaterally determine the measures that will apply, which are applicable to all States. It thus adversely affects the socio-economic circumstances of those States where the disease is not widespread. This transpired during the management of COVID-19 by the Centre, where some States having no or very few cases within their territories were put under strict lockdown. This adversely impacted the unaffected States' economy and daily life, even though such strict restrictions were uncalled for within their respective territories.

A concern that may arise when putting forth a regional approach to the management of biological disasters is that neighbouring Sates and regions can be adversely affected by a State that is not taking adequate measures to tackle the health crisis within its territory. However, in this regional approach to management, every State has the right to regulate entry within its territory as well. For instance, persons from Maharashtra travelling to West Bengal or Karnataka were required to furnish a negative RT-PCR report, despite being doubly vaccinated.[36] In any event, in a federal setup, any concerns beyond the State's territorial jurisdiction are the responsibility of the Central Government. Even under the Constitution, for legislative heads such as "inter-State quarantine",[37] and "prevention of the extension from one State to another of infectious or contagious diseases",[38] the Parliament has the power to legislate on these heads. Hence, tackling biological disasters regionally does not affect other States, and addressing them locally ensures that other socio-economic concerns are not discarded either.

---

[36] Joy Sengupta, *COVID-19: Bengal and Karnataka Insist on Negative Tests even if Travellers Vaccinated*, THE TIMES OF INDIA, September 24, 2021, available at https://timesofindia.indiatimes.com/city/pune/bengal-ktaka-insist-on-ve-tests-even-if-travellers-vaxxed/articleshow/86466574.cms (Last visited on January 3, 2022).

[37] The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 81 (inter-State quarantine).

[38] *Id*., Schedule VII, List III, *Concurrent List*, Item 29 (Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants).

Underneath, in the first subpart, we briefly explain the federal setup enshrined in the Constitution. In the second subpart, we consider other entries that may apply in this scenario, and finally, conclude that the Parliament does not have the competency to regulate biological disasters.

A. THE INDIAN FEDERAL STRUCTURE

Federalism is a legal arrangement of governance where power is shared between a unitary government and regional governments.[39] The regional governments, also known as State governments, are responsible for administration in territorial subdivisions on specified subject matters and are entitled to govern independently without the interference of the unitary government on those matters.[40] The unitary government, also known as the Central or Federal Government, is responsible for governance on issues that are common across all territorial subdivisions, and State governments are required to abide by and implement the Central Government's decisions.[41] Federalism is generally seen across all branches of government, and thus, there are State legislatures, State Executives, and Courts within the territory of each federal sub-unit.[42]

In India, the Parliament and the State Legislatures have been given the power to legislate.[43] This power has been distributed in legislative fields enlisted in Schedule VII to the Constitution, which provides for three lists.[44] They are List I or the Union List, List II or the State List, and List III or the Concurrent List. The Union List states the matters on which only the Parliament, which is the Central Legislature, can legislate, and laws made under these matters are binding throughout India, irrespective of State borders.[45] The State List comprises matters on which only the State Legislatures can legislate, and these are binding within the territorial limits of the specific State only.[46] The Concurrent List provides a list of subjects, which are of common interest to both the Union and the State, and thus both entities can legislate on these issues.[47] In case of conflicting legislations on matters in the Concurrent List, the law made by the Parliament shall prevail to the extent of the conflict only.[48] The residuary power to legislate on matters that are not

---

[39] M.P. Jain, Indian Constitutional Law, 690 (Lexis Nexis, 6th ed., 2013); Raoul Berger, Federalism: The Founders' Design (University of Oklahoma, 1987); K.C. Wheare, Federal Government (Oxford University Press, 1949).

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] The Constitution of India, 1950, Art. 245.

[44] *Id*., Art. 246.

[45] *Id*., Art. 246(1).

[46] *Id*., Art. 246(3).

[47] *Id*., Art. 246(2).

[48] D.D. Basu, Shorter Constitution of India, Vol. 2, 1719 (Lexis Nexis, 16th ed., 2021); D. D. Basu, Indian Constitutional Law 1086 (Lexis Nexis, 3rd edn., 2011); Deep Chand v. State of U. P., AIR 1959 SC 648, ¶58; Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45, ¶68; S. Pal & D.K. Sarkar, India's Constitution: Origins and Evolution, Vol.8, 966 (Lexis Nexis, 2019).

in any of these lists has been given to the Parliament.[49] These lists also operate for the division of executive power between the Union and the State Governments.[50]

There are over 200 entries in these three lists combined, because of which various questions involving the interpretation of the entries in these lists and their interrelation have arisen.[51] The Supreme Court resolves such questions by undertaking a twofold exercise, wherein it firstly determines the subject matter of the legislation, and secondly, evaluates which legislature is empowered to regulate on the said subject matter.[52] However, this exercise is more complex than it appears *prima facie*, as often times a legislation covers a subject matter which may not fall within the scope of any entry directly. In such cases, directly resorting to the residuary power of the Parliament to make laws is not appropriate as it dilutes the existing entries. Thus, matters which may not necessarily fall within the direct scope of an entry but can be related ancillary to it must be included, as it helps in giving full effect to the entry.[53] This is especially important because the lists in Schedule VII do not confer the power to legislate but only the fields of legislation, and hence, they should be interpreted broadly.[54] However, while reading in ancillary topics into the written subject matter, an interpreter must be cautious not to overstretch the limits in such a manner that other written entries are overridden.[55] The analysis becomes more complex when a legislation is ancillary related to more than one entry in different lists, which would mean that both the Centre and the State can legislate on them. To account for such concerns, the Supreme Court follows certain rules of interpretation for the entries in the three lists.

The first rule is that of 'colourable legislation', whose purpose is to check for the competency of a legislature to enact a particular law.[56] In this analysis, the motive of the legislature in enacting the law is irrelevant, due to which the question of *mala-fides* or *bona-fides* does not arise. The emphasis is that a legislature cannot do indirectly what it cannot do directly, and thus, this doctrine is best understood as a thumb rule in this interpretive exercise.[57]

The doctrine of 'pith and substance' permits incidental encroachments on subjects on which a legislature cannot make laws if the substance of the law in question relates to a subject matter that is within the stated legislature's

---

[49] The Constitution of India, 1950, Art. 248.

[50] *Id*., Arts. 73, 162.

[51] Jain, *supra* note 39, at 752; Basu, *supra* note 48, at 1073.

[52] India Cement v. State of T.N., (1990) 1 SCC 12, ¶18.

[53] Hindustan Lever v. State of Maharashtra, (2004) 9 SCC 438, ¶34.

[54] R.S. Rekhchand Mohota Spg. & Wvg. Mills v. State of Maharashtra, (1997) 6 SCC 12, ¶9; Prem Chand Jain v. R.K. Chhabra, (1984) 2 SCC 302, ¶12.

[55] Indian Aluminium v. Karnataka Electricity Board, (1992) 3 SCC 580, 599; P.N. Krishna Lal v. Govt. of Kerala, 1995 Supp (2) SCC 187.

[56] State of Kerala v. PUCL, (2009) 8 SCC 46, ¶66; Dharam Dutt v. Union of India, (2004) 1 SCC 712.

[57] Jain, *supra* note 39, at 753.

competence.[58] Here, what must be determined is that the encroachment on another subject matter is truly an incidental one, or nota colourable way of doing indirectly what a legislature cannot do directly.[59] The degree of invasion into the field assigned to the other legislature is a relevant factor to determine its pith and substance, as the legislation in question may advance so far into the sphere of the other legislature, which would show that its true nature and character is not concerned with a matter falling within the domain of the enacting legislature, in which case it will not be valid.[60]

The doctrine of ancillary powers requires that legislative entries should be interpreted liberally in a manner that all ancillary or subsidiary matters reasonably related with the entries be covered within the broad scope of the general provisions.[61] This interpretive approach is legitimate as legislative entries are only fields of legislation and do not refer to the power to legislate, as the power arises out of Article 246 of the Constitution.[62] Thus, every entry must be interpreted broadly to include all matters that are necessary to legislate on the given subject.

The rule of 'harmonious interpretation' requires that every entry in Schedule VII be interpreted in a manner where possible conflicts are avoided and no entry becomes meaningless. This rule is better explained by understanding Article 246 of the Constitution. Article 246(1) of the Constitution confers exclusive power on the Parliament to legislate relating to matters in List I 'notwithstanding' anything in clauses (2) and (3). This is the *non-obstante* clause and its effect is to make the Central power prevail in case the Centre and State powers overlap.[63] The *non-obstante* clause has been further strengthened by clauses (2) and (3) of Article 246. According to Clause (2), notwithstanding anything in clause (3), Parliament is entitled to legislate regarding matters in the Concurrent List, and the State legislatures may legislate in the field subject to Clause (1). Thus, in case of overlapping entries between the Union and the Concurrent Lists, the power of the States is subject to the Union List.[64] However, instead of applying this rule at every overlap, courts attempt to reasonably and practically construe the entries so as to reconcile the conflict and avoid overlapping.[65] This is done by reading and interpreting the relevant entries together and, where necessary, restricting the ambit of the broader entry in favour of the narrower entry so that the latter is not eaten up

---

58 This rule has been borrowed from Canada. For an assessment, *see* Citizens Insurance Co. v. Parsons, (1882) 7 AC 96 (J); Russell v. R., (1882) 7 AC 829; Attorney General for Canada v. Attorney General for British Columbia, 1930 AC 111; Bharat Hydro Power Corporation. v. State of Assam, (2004) 2 SCC 553, ¶18.

59 State of W.B. v. Kesoram Industries, (2004) 10 SCC 201, ¶31.

60 Jain, *supra* note 39, at 776; Basu, *supra* note 48, at 1070.

61 Jilubhai Nanbhai Khachar v. State of Gujarat, 1995 Supp (1) SCC 596, 148.

62 R.S. Rekhchand Mohota Spg. & Wvg. Mills Ltd. v. State of Maharashtra, (1997) 6 SCC 12, ¶9.

63 Jain, *supra* note 39, at 757; Basu, *supra* note 48, at 1074.

64 *Id*.

65 Harakchand Ratanchand Banthia v. Union of India, (1969) 2 SCC 166, ¶6; Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45, ¶¶7, 39, 47.

by the former.[66] Thus, only in cases of inevitable or irreconcilable conflict between the entries in different Lists the rule of 'harmonious interpretation' is not applied, and Parliamentary supremacy in legislation is followed.

The doctrine of 'residuary powers' is premised on the fact that human knowledge is limited, because of which the Constitution makers could not have included every possible legislative field in the lists.[67] To account for this, the Constitution empowers the Parliament to legislate on any subject matter which is not covered by any of the entries.[68] Therefore, before applying this doctrine, it must be examined if the subject matter of the legislation falls under List II or the State List, as the Parliament is anyway allowed to legislate on matters in List 1 or Union List, and List III or Concurrent List.[69]

Although there is a strict division in the legislative fields on which the different federal entities may legislate, there are constitutionally provided exceptions to this federal distribution of powers. Article 249 of the Constitution allows the Parliament to legislate on matters in the State List if the upper house of the Parliament decides through a resolution, that it is in "national interest" to do so. Article 250 of the Constitution requires that the Parliament be the legislative authority when a proclamation of emergency is in place. Further, if we look at the constitutional scheme of Centre-State relations, there is a unitary tilt because of which India has been described as a "quasi-federal" nation.[70] This unitary tilt exists because the Union has the power to alter the territorial boundaries of a State without its consent,[71] and also enjoys supremacy in case of conflicting legislation on matters in the concurrent list[72] as well as for residuary subjects.[73]

However, inspite of this unitary tilt, the power of the State to legislate on entries in the State List is supreme, and is only circumscribed in limited circumstances.[74] For instance, under Article 249 of the Constitution, the resolution allowing the Parliament to legislate on matters in the State List will not be in force for more than one year.[75] Similarly, under Article 250 of the Constitution, the laws made by the Parliament, to the extent of their incompetency to legislate on the subject, shall cease to be in force six months after the expiration of the proc-

---

66 Godfrey Phillips India v. State of U. P., (2005) 2 SCC 515, ¶¶48, 54.

67 Union of India v. H.S. Dhillon, (1971) 2 SCC 779, ¶27.

68 The Constitution of India, 1950, Art. 248(1); The Constitution of India, 1950, Schedule VII, *List I*, Item 97 (Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists).

69 Attorney General for India v. Amratlal Prajivandas, (1994) 5 SCC 54, ¶25; Union of India v. H.S. Dhillon, (1971) 2 SCC 779, ¶¶14, 15.

70 Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶23.3.

71 The Constitution of India, 1950, Art. 3.

72 Deep Chand v. State of U. P., AIR 1959 SC 648, ¶58; Hoechst Pharmaceuticals v. State of Bihar, (1983) 4 SCC 45, ¶68.

73 The Constitution of India, 1950, Art. 248.

74 K. Damodarasamy Naidu v. State of T. N., (2000) 1 SCC 521, ¶22.

75 The Constitution of India, 1950, Art. 249(2).

lamation of emergency.[76] This federal distribution of powers has been held to be a part of the basic structure of the Constitution,[77] and is also in furtherance of the notion of 'cooperative federalism' on the basis of which the Constitution had been enacted.[78] Thus, the unitary tilt in the Constitution does not take away from the strict distribution of legislative and administrative powers in Schedule VII of the Constitution. Interference with the exclusive powers of the State legislatures on matters enlisted in the State List must be strictly considered through constitutionally provided limitations.

B. TRACING THE LEGISLATIVE POWER TO ENACT THE DISASTER MANAGEMENT ACT, 2005

The Parliament enacted the DM Act because there existed a legislative vacuum to tackle disasters in India. Managing disasters requires coordination between different levels of government and different agencies, and a uniform institutional framework that can provide a plan of action and direction for efficient response to a disaster is paramount.[79] It must be noted that disasters envisaged under DM Act are not only biological disasters such asCOVID-19 but also other natural and man-made disasters such as earthquakes, landslides, cyclones, tsunamis, terrorist attacks, nuclear and radiological emergencies, fire hazards, and floods.[80] In light of this, the need to enact DM Act is evident as it is necessary to have a well-prepared framework when disaster strikes. Our argument is restricted to one specific type of disaster: biological disasters, and we argue that their inclusion in the DM Act is unconstitutional. This is because, unlike other disasters that can occur, in biological disasters such as COVID-19, the primary focus is on public health infrastructure, sanitation, hospitals and dispensaries. As this is an entry that falls squarely in the State List, we argue that the inclusion of biological disasters within the scope of the DM Act is unconstitutional.

We iterate that our argument is not that the DM Act in its entirety is unconstitutional but that regulating biological disasters through the DM Act is unconstitutional. The legally appropriate action would be to exclude biological disasters from the scope of the DM Act, which can be done by a judicial reading down of the DM Act, or by the Parliament amending it to exclude biological disasters from its scope.

There is no entry in Schedule VII that relates to disaster management, and therefore, the Parliament sourced the DM Act to Entry 23 of List

[76] *Id*., Art. 250(2).

[77] S. R. Bommai v. Union of India, (1994) 3 SCC 1, ¶64.

[78] Granville Austin, The Constitution of India – Cornerstone of a Nation, 186 (Oxford University Press, 1999); State of Rajasthan v. Union of India, (1977) 3 SCC 592, ¶56.

[79] Second Administrative Reforms Commission, *supra* note 32, at ¶4.1.4.

[80] National Disaster Management Authority, National Disaster Management Plan, November 2019, available at https://ndma.gov.in/sites/default/files/PDF/ndmp-2019.pdf (Last visited on January 3, 2022).

III of Schedule VII: "Social security and social insurance; employment and unemployment".[81] However, by including biological disasters within the scope of the DM Act, the Parliament has legislated on "Public health and sanitation; hospitals and dispensaries", which is Entry 6 of List II, which makes it a subject on which only the State Legislatures can legislate.

Other entries that can be the source of power to legislate biological disasters that have been suggested are the following:[82]

i. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants, Entry 29, List III

ii. Port quarantine, including hospitals connected therewith, Entry 28, List I

iii. Inter-State quarantine, Entry 81, List I

Here, we shall use the interpretive tools discussed above to argue why any of these entries do not allow the Parliament to regulate biological disasters. *Firstly*, we shall analyse whether regulating biological disasters is substantially related to Entry 6 of List II – "Public health and sanitation; hospitals and dispensaries". This question is necessary as the doctrine of pith and substance allows incidental encroachment into another legislature's sphere. Thus, if biological disasters do not substantially relate to Entry 6, then any incidental encroachment on them is justified and will be saved by applying the pith and substance doctrine. *Secondly*, we will study the aforementioned three entries to determine if any of them can support the Parliament's act of legislating on biological disasters. *Thirdly*, we shall look at the residuary power of the Parliament and analyse if that may be invoked.

Before we delve into this analysis, it is pertinent to note that the doctrine of repugnancy, which establishes the supremacy of a Parliamentary legislation over a State legislation when conflicting laws exist, does not apply to this case.[83] This is because the repugnancy doctrine operates on the presumption that both legislatures are competent to enact laws on the said subject matter.[84] However, the primary challenge here is that Parliament is not competent to legislate on biological disasters, which it has done through the DM Act. Therefore, the doctrine of repugnancy is not applicable to this case.

---

[81] Ministry of Home Affairs, REPORT OF THE TASK FORCE: A REVIEW OF THE DISASTER MANAGEMENT ACT, 2005, March 2013, ¶2.4.3, available at https://www.ndmindia.nic.in/images/TaskForce_report_DMact.pdf (Last visited on January 3, 2022).

[82] Goutham Shivshankar, *Debating the Applicability of India's Disaster Management Law to COVID-19*, ADMIN LAW BLOG, May 19, 2020, available at https://adminlawblog.org/2020/05/19/goutham-shivshankar-debating-the-applicability-of-indias-disaster-management-law-to-COVID-19/ (Last visited on January 3, 2022).

[83] The Constitution of India, 1950, Art. 254; ITC Ltd. v. Agricultural Produce Market Committee, (2002) 9 SCC 232, ¶¶4, 5.

[84] *Id*.

1. Biological Disasters and List II, Entry 6 – "Public Health and Sanitation; Hospitals and Dispensaries"

The purpose of this part is to determine if regulating biological disasters substantially relate to the subject matter of "public health and sanitation; hospitals and dispensaries", which is an entry in the State List – a legislative field on which only the State Legislatures can enact laws. The doctrine of pith and substance provides that if a law substantially relates to a particular entry in a list on which a legislature can legislate, any incidental encroachment on another legislature's field of regulation is tolerated.[85] Biological disasters have been regulated under the DM Act, and the legislation's primary purpose is to lay out an action plan for disasters. As disaster management is not mentioned as an entry in any of the lists, the DM Act maybe sourced to a host of entries. However, to establish that biological disasters cannot be regulated by the Parliament, it is first necessary to show that regulating the same, is in pith and substance, about "public health and sanitation, hospitals and dispensaries".

To determine if a legislation substantially relates to a particular entry, the legislation must be

i. studied as a whole, and
ii. its main objects, and
iii. the scope and effect of its provisions should be considered as well.[86]

It may be argued that as the doctrine of pith and substance requires the legislation in question to be considered as a whole, it is the substance of the DM Act that must be looked at, and not biological disasters independently. This makes a difference because it is difficult to establish that the Parliament is incompetent to regulate disaster management, as in addition to entries in the Concurrent List,[87] the residuary power of the Parliament would allow it to legislate on disasters, unless an exclusive power to regulate disasters can be shown in the State List. Apart from Entry 2, which relates to 'public order' and Entry 6 to 'public health…' in the State List, no other entry can provide the power to regulate disaster management. Even for 'public health' and 'public order', their impact on disaster management, in general, is not very high – with the exception of biological disasters – and to that extent, we agree that the Parliament is competent to enact the DM Act.[88] Thus, if we accept the argument that the doctrine of pith and substance requires a legisla-

---

[85] State of W. B. v. Kesoram Industries, (2004) 10 SCC 201, ¶31; See *supra* Part II.A on "The Indian Federal Structure".

[86] Kartar Singh v. State of Punjab, (1994) 3 SCC 569, ¶36.

[87] The Constitution of India, 1950, Schedule VII, List III, *Concurrent List*, Item 20 (Economic and social planning); The Constitution of India, 1950, Schedule VII, List III, *Concurrent List*, Item 23 (Social security and social insurance; employment and unemployment).

[88] We acknowledge that other disasters will have a health aspect to the extent that persons injured or affected would require medical attention. However, the focal response to all disasters is not boosting health infrastructure or providing medications. For instance, in the case of an earthquake, priority would be to remove the debris, or in case of fire to put out the fire. However, in case of

tion to be considered as a whole, it cannot be argued that the DM Act substantially relates to legislative fields which are beyond the competence of the Parliament.

However, the purpose of examining biological disasters separately is not to sidestep the aforementioned issue but to highlight the broad nature of the DM Act in the first place. The DM Act, unlike other legislations that have been subject to a competency challenge, covers a wide field that can trigger different fields of legislation: terrorist attacks,[89] earthquakes,[90] chemical leaks from factories,[91] flyover mishaps,[92] amongst others. Some of these entries, such as leaks from factories and flyover mishaps, vest legislative and enforcement powers upon the State Governments. If a legislature is allowed to legislate on these topics simply by clubbing them and forming a general head such as in the current case, it would amount to allowing the legislature to do indirectly what it cannot do directly. Thereby, it would make it a colourable legislation and act against the constitutionally recognised powers of the States. As a matter of principle, if all that the Parliament needs to do to regulate on matters that are beyond its competence is to club various groups to make a generic entity, the federal distribution of powers will lose their fundamental objective, which cannot and must not be allowed in an interpretive exercise. Hence, although in applying the doctrine of pith and substance in the past, a legislation has been considered as a whole, the same cannot be a prerequisite for these reasons in the present matter.

To determine if a biological disaster substantively relates to Entry 6 of List II, which is "public health and sanitation; hospitals and dispensaries", the terms used in Entry 6 must be defined. The most relevant phrase in Entry 6 is 'public health', which has been defined as the "science of protecting the safety and improving the health of communities through education, policy-making and research for disease and injury prevention".[93] Undoubtedly, maintaining public health includes broader goals such as prevention, increasing access to healthcare, monitoring the health status of communities, building a medical workforce, among other

biological disasters, the focal response is to boost public health infrastructure, ensure widespread availability of medicines and vaccines, and providing smooth and swift access to medical care.

89 The Constitution of India, 1950, Schedule VII, List I, *Union List*, Items 1, 2, 4, 5.

90 *Id*., Schedule VII, List II, *State List*, Item 1 (Public order).

91 *Id*., Schedule VII, List III, *Concurrent List*, Item 36 (Factories).

92 *Id*., Schedule VII, List II, *State List*, Item 13 (Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles); *21 Dead as Kolkata Flyover Collapses*, THE HINDU, March 31, 2016, available at https://www.thehindu.com/news/cities/kolkata/flyover-collapses-in-kolkata/article8417691.ece (Last visited on January 3, 2022); *One dead, Several Injured in Kolkata Bridge Collapse; Mamata Announces Probe*, THE TIMES OF INDIA, September 4, 2018, available at https://timesofindia.indiatimes.com/city/kolkata/one-dead-several-injured-in-kolkata-bridge-collapse-mamata-announces-probe/articleshow/65676680.cms (Last visited on January 3, 2022).

93 The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 6 (Public health and sanitation; hospitals and dispensaries).

things. But the focal objective of public health is to provide medical attention when a disease has arisen and minimise the spread of the disease.[94]

Arguments have been raised about distinguishing between prevention and treatment of disease, but it has been accepted that treatment of disease is a part of public health objectives.[95] In cases of biological disasters such as the COVID-19 pandemic, the public health response is similar to what it will be in the case of novel disease outbreaks, and will include prevention as well as treatment of the disease. It must be appreciated that for novel disease outbreaks, prevention becomes as important as treatment since appropriate methods of treatment are unknown or insufficient. Some may argue that measures such as lockdowns, closure of public areas and halting transportation facilities cannot be categorised as 'public health' measures. However, so long as the primary objective behind such measures is the maintenance of public health and in response to biological disasters, they would be encompassed within this entry as health is the driving force behind such measures. Therefore, distinctions between prevention and cure, and an argument that the former is not a part of public health functions, is fallacious.[96] This is more so true in the context of India, which is a welfare State,[97] and is thereby duty-bound to improve public health by the "creation and the sustaining of conditions congenial to good health".[98] It can be concluded that the treatment and prevention of COVID-19fall under the rubric of 'public health' under Entry 6 of List II. Thus, State Governments are exclusively empowered not only to legislate on such public health issues but also to exercise exclusive executive powers for the same.[99]

Upon establishing that the management of the COVID-19 pandemic substantially relates to 'public health', it is evident that the regulation of biological disasters within the scope of the DM Act is not just an incidental encroachment, and thus, cannot be saved by the operation of the doctrine of pith and substance. It follows that the State Government is the primary authority that can legislate and take decisions on biological disasters. The Parliament and the Central Government can intervene only to the extent that is constitutionally permissible, which is in 'inter-State matters' and 'port quarantine' when infectious diseases occur.[100] Having established that the regulation of biological disasters is substantially related to

---

94 National Aids Trust v. National Health Service Commissioning Board (NHS England), 2016 EWHC 2005, ¶¶38, 53.

95 *Id*., ¶¶46, 47.

96 *Id*., ¶52.

97 The Constitution of India, 1950, Art. 38.

98 Vincent Panikurlangara v. Union of India, (1987) 2 SCC 165, ¶16; The Constitution of India, 1950, Art. 47.

99 The Constitution of India, 1950, Art. 162.

100 The Constitution of India, 1950, Schedule VII, List III, *Concurrent List*, Item 29 (Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 81 (Inter-State quarantine); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 28 (Port quarantine, including hospitals connected therewith).

public health, in the following portion, we analyse other entries to which the Parliament's power to regulate biological disasters may be sourced.

2. Biological Disasters and Legislative Entries on Prevention of Spread of Disease Inter-State

Upon an analysis of the entries in Schedule VII, we note that there are three entries that may further relate to the management of biological disasters and vest certain powers upon the Central Government for this purpose. They are,

i. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants, Entry 29, List III,

ii. Inter-State quarantine, Entry 81, List I, and

iii. Port quarantine, including hospitals connected therewith, Entry 28, List I.

We shall be considering Entry 29, List III and Entry 81, List 1 collectively because of the similarity between them, to the extent that both consider measures that affect more than one State. Entry 28 List 1, which relates to port quarantine, shall be considered independently.

In a federal setup, the Central Government has a crucial coordinative role to play in situations that affect more than one State.[101] In this light, it is logical to allocate responsibilities to the Centre to ensure the prevention of the spread of infectious biological diseases from one State to another. The same holds true for responsibilities that arise out of Entry 81, List 1, i.e., inter-State quarantine. However, what needs to be remembered is that this does not give decision making power to the Centre on all aspects of biological infectious disease as both the aforementioned entries are concerned with "inter-State" affairs and not "intra-State affairs". But the DM Act, through its structure, has conferred upon the Central Government overarching powers covering all aspects of disaster management, and consequently, on all aspects of biological disasters as well, which has made the Centre the supreme authority on matters of 'public health' despite it being a State List subject.

§3 of the DM Act requires the establishment of the NDMA, whose *ex-officio* chairperson is the Prime Minister. The Prime Minister is also responsible

[101] Jain, *supra* note 39, at Part V (this is also evident from analysing List I of Schedule VII of the Constitution where various responsibilities of the Union are on inter-State matters. For instance, *see* The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 42 (Inter-State trade and commerce); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 56 (Regulation and development of inter-State rivers and river valleys…public interest); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 81 (Inter-State migration; inter-State quarantine).

for appointing the other members of the NDMA. Therefore, it is in effect the Central Government that constitutes the NDMA.

§6(2)(i) of DM Act permits the NDMA to "take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary" (emphasis added). A literal reading of this provision shows that the Central Government has *carte blanche* powers to take whatever actions it deems fit, without any rules, guidelines or supervision. Orders pertaining to lockdowns and their regulation in the first wave of the COVID-19 pandemic were issued under this provision.[102] This directly interfered with the right of State Governments to decide on what measures to pursue the prevention and control of a biological disaster, which is a public health concern. However, the interference of the Central Government was not restricted to 'public health' only. In fact, the orders issued by the NDMA prohibited and/or regulated vehicular movement which falls under the State List;[103] prohibited the operation of all forms of entertainment parks, theatres, bars, sport complexes, all of which fall under the State List;[104] regulated burials and cremations, which is also the duty of the State;[105] controlled markets, hotels, restaurants, inns – all of which fall under State powers.[106] It is worth noting that if one were to scroll through the entries in List II of Schedule VII, the lockdown rules affected almost every entry in this List.

It may be argued that the unexpected nature of the pandemic warranted such restrictions, and we do not contest that these measures may be useful in certain circumstances. Our argument is that the implementation of these measures is the constitutional prerogative of State Governments. The constitutional scheme was such that decisions on local issues that required consideration of the ground reality, were to be made by the State Government, and the Centre by regulating biological disasters entirely under the scope of the DM Act has blatantly contravened this scheme of things envisaged under our Constitution.[107] The effect of this is extensive economic loss and damage, at no added advantage to public health.[108] Only eight to nine States contributed to ninety percent of India's caseload

---

[102] National Disaster Management Authority, Order No. 1-29/2020- PP (Pt II) (Notified on March 24, 2020).

[103] The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 13 (Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles).

[104] *Id*., Schedule VII, List II, *State List*, Item 33 (Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, entertainments and amusements).

[105] *Id*., Schedule VII, List II, *State List*, Item 10 (Burials and burial grounds; cremations and cremation grounds).

[106] *Id*., Schedule VII, List II, *State List*, Item 28 (Markets and fairs); *Id*., Schedule VII, List II, *State List*, Item 31 (Inns and inn-keepers).

[107] Second Administrative Reforms Commission, *supra* note 32, at 34.

[108] T. Kanitkar, *The COVID-19 Lockdown in India: Impacts on the Economy and Power Sector*, Vol. 2, Global Transitions, 150 (2020); M. Nicola et al., The Socio-Economic Implications of the Coronavirus Pandemic (COVID-19): A Review, Vol.78, International Journal of Surgery, 185

in the first few months of the pandemic,[109] yet, the remaining around twenty States were subjected to the same severe lockdown restrictions, which were unnecessary at that stage for these States. State governments are better placed to monitor the spread of the coronavirus in their territory and order appropriate restrictions, which need not be a total lockdown as imposed by the Central Government. Such restrictions can be in the form of measures such as strict social distancing and use of face coverings, operation of trade and commerce at reduced capacity, shutting down certain zones or areas in situations of case clusters, among other lesser restrictive alternatives that would have achieved the health objective and had a lesser economic impact.[110]

An argument in favour of the Central Government's actions would be that centralised management in uncertain times is more effective as there is an accumulation of resources and personnel. However, India is a country that follows the rule of law which has been enshrined in its Constitution.[111] In its seventy-three years post-independence, despite having faced other biological disasters,[112] the legislative body of India has chosen against changing the scheme of powers in relation to biological disasters in the Constitution. In fact, within the span of seventy-three years, public health bills to tackle such biological disasters have sought to be introduced four times – but have failed for various reasons.[113] It is

(2020); The Economist, How to Assess the Costs and Benefits of Lockdowns, July 3, 2021, available at https://www.economist.com/finance-and-economics/2021/07/01/how-to-assess-the-costs-and-benefits-of-lockdowns (Last visited on January 3, 2022).

[109] *Seven States Account for Nearly 90% of 16,738 Cases Reported Today*, Scroll.in, February 25, 2021, available at https://scroll.in/latest/987857/coronavirus-india-registers-16738-new-cases-nearly-22-higher-than-Wednesday (Last visited on January 3, 2022); Sushmi Dey, *80% COVID Cases from 5 States, 60% from 5 Cities: Govt*, THE TIMES OF INDIA, May, 23, 2020, available at https://timesofindia.indiatimes.com/india/80-COVID-cases-from-5-states-60-from-5-cities-govt/articleshow/75907372.cms (Last visited on January 3, 2022); *Coronavirus: 8 States Account for 85.5% of Active COVID-19 Case Load*, THE HINDU, June 28, 2020, available at https://www.thehindu.com/news/national/eight-states-contributed-85-of-COVID-19-caseload-87-of-deaths-health-ministry/article31933255.ece (Last visited on January 3, 2022).

[110] R. Chowdhury et al., *Lifting the Lockdown: What are the Options for Low and Middle-Income Countries*, June 2020, available at https://www.researchgate.net/publication/342135379_Lifting_the_lockdown_what_are_the_options_for_low_and_middle-income_countries (Last visited on January 3, 2022).

[111] Som Raj v. State of Haryana, (1990) 2 SCC 653, ¶5.

[112] World Health Organisation, *Nipah Virus Disease – India*, available at https://www.who.int/emergencies/disease-outbreak-news/item/nipah-virus-disease---india (Last visited on January 3, 2022); G.R. Pallipparambil, *The Surat Plague and its Aftermath*, MONTANA STATE UNIVERSITY, available at https://www.montana.edu/historybug/yersiniaessays/godshen.html (Last visited on January 3, 2022); University of Minnesota: Centre for Infectious Disease Research and Policy, INDIA REPORTS NEW H5N1 OUTBREAK, December 1, 2008, available at https://www.cidrap.umn.edu/news-perspective/2008/12/india-reports-new-h5n1-outbreak (Last visited on January 3, 2022) (the performance of the responding agencies has been adequate in the epidemics but could be improved upon to meet bigger challenges); National Disaster Management Authority Government of India, *National Disaster Management Guidelines: Management of Biological Disasters*, July 2008, available at https://ndma.gov.in/sites/default/files/PDF/Guidelines/biological_disasters.pdf (Last visited on January 3, 2022).

[113] These bills were introduced in the Parliament in 1955, 1987, 2009, and 2017, *see* Shankar Adewal, *Why This is the Right Time for a Public Health Care Bill-2020 in India*, EXPRESS HEALTHCARE,

pertinent to note that one of the reasons for the failure of these bills is grounded in the objection by various States, as these bills encroached upon legislative fields reserved for them.[114] This highlights that constitutionally, the power to manage public health matters lies with the State Government. Although policy reasons may exist for advocating that the Centre spearhead the management of such situations, so long as the Constitution is not amended, the State Government must continue to be at the forefront of these matters. Thus, Centre's actions under§6(2)(i) of the DM Act are unconstitutional, because the Parliament is not competent to regulate biological disasters.

Some other provisions of the DM Act are also noteworthy.§18(2)(b) of DM Act specifically requires the State Disaster Management Authorities ('SDMA') to lay disaster management plans according to the guidelines of the NDMA. It is pertinent to note that just like the NDMA is a Central Government body, the SDMA is a State Government body.[115] The effect of §18 then is that of subduing the decision-making power of the State Government to the Centre, on an issue which the Constitution has specifically earmarked for the State Government. In a similar thread, §23(2) of DM Act makes the State plan for disaster management, which is to be formulated by the SDMA, specifically subject to the national plan for disaster management formulated by the NDMA. This shows that the States' decision-making powers have been limited on an issue within their competence, and their role is reduced to implementing the decisions.

It should be noted that much like §6(2)(i), which allows the NDMA to take "such other measures…as it may consider necessary", similar powers are not allocated to the SDMA. This is evidence that the decision-making power on biological disasters rests with the NDMA and the Central Government, even on matters in which the exclusive competence lies with the State Government. Some may contest that actions of the NDMA are not necessarily that of the Central Government, as the former may be operating independently. We, however, opine that this contention is misplaced as both the NDMA and the Central Government are headed by the Prime Minister.[116] However, even if we accept this argument, §35 of DM Act removes all doubts about our primary contention.§35 allows the Central Government (and not NDMA) to "take all such measures as it deems nec-

---

September 4, 2020, available at https://www.expresshealthcare.in/news/why-this-is-the-right-time-for-a-public-health-bill-2020-in-india/424502/ (Last visited on January 3, 2022).

[114] *Id*.; K.K. Gowd et al., *COVID-19 and the Legislative Response in India: The Need for a Comprehensive Health Care Law*, Wiley Online, March 21, 2021, available at https://onlinelibrary.wiley.com/doi/10.1002/pa.2669 (Last visited on January 3, 2022); Manish Tewari, *India's Fight against Health Emergencies: In Search of a Legal Architecture*, ORF Online, 4 March 2020, available at https://www.orfonline.org/wp-content/uploads/2020/03/ORF_Issue_Brief_349_Health-Legal_NEW-08_April.pdf (Last visited on January 3, 2022); Manish Tewari, *The Legal Hole in Battling COVID-19*, Hindustan Times, March 19, 2020, available at https://www.hindustantimes.com/analysis/the-legal-hole-in-battling-COVID-19/story-s0VFHssIu68N0loHs5LgDI.html (Last visited on January 3, 2022).

[115] The Disaster Management Act, 2005, §14.

[116] *Id*., §3.

essary or expedient for the purpose of disaster management". In other statutes, provisions generally give the relevant government the authority to take all actions which are necessary for the implementation of the Act.[117] However, in the case of §35, the power is broader because it is given for "disaster management" and not the implementation of the DM Act.

A literal reading of §35 makes it clear that the Centre has blanket powers to act in matters of biological emergencies too, thereby interfering in matters that are exclusively reserved for the State Government. In contrast, if we study §38 of DM Act, it requires the State Governments to "take all measures specified in the guidelines laid down by the National Authority and such further measures as it deems necessary or expedient, for the purpose of disaster management" (emphasis added). This means that the State Government can provide for greater restrictions or measures than those that are recommended by the NDMA but cannot contravene the guidelines laid down by the NDMA. This directly affects the concern of States where measures that are recommended by the NDMA may not be proportionate or necessary in relation to the extent of a biological emergency in a State. However, State Governments, despite having the exclusive constitutional mandate to tackle matters in relation to public health, cannot decide what level of protection they wish to pursue in their jurisdiction. Thus, the DM Act directly violates the constitutional scheme in relation to biological emergencies.

At this point, it is necessary to closely examine the other two entries that were briefly discussed above, "Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants, Entry 29, List III" and "inter-State quarantine, Entry 81, List I". We established that management of biological disasters would relate to "public health, hospitals and sanitation" under Entry 6, List II. If we consider Entry 81 List I and Entry 6 List II – both of these will apply to the management of biological disasters. However, on both, different legislative bodies, i.e. the Parliament and State legislatures, enjoy exclusive legislative power. Then how would one determine what part of biological disasters must the Parliament/Centre manage and what must be left to the State Legislatures/Governments?

The doctrine of harmonious interpretation requires that conflicting entries must be sought to be reconciled, and only when they are absolutely irreconcilable that the State List entry will be superseded by the Union List entry. Here in, the only way to reconcile both entries without making the power of the State Legislatures redundant is to permit the Parliament to regulate biological disasters only when it affects more than one State. Even considering the Union List Entry 81 and the Concurrent List Entry 29, a plain textual reading also reveals that the

[117] *See* The Foreign Contribution (Regulation) Act, 2010, §46; The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, §22; The Employees' State Insurance Act, 1948, §99A; The Protection of Children from Sexual Offences Act, 2012, §46; The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §30.

matters within the Centre's powers are for inter-State issues. However, as discussed above, the powers that the Centre and the NDMA enjoy under the DM Act are not restricted to inter-State affairs only, but are broad-based open-ended powers that can, and in fact, were utilised during the COVID-19 pandemic to control matters within every State as well.

A similar constitutional issue from which we can draw inferences has occurred in the case of regulation of co-operative societies. The power to regulate co-operative societies is solely with the State Governments, as it has been specifically excluded from the Union List.[118] However, the Supreme Court has read these entries to only exclude the power of intra-State regulation from the Centre, but inter-State regulation of co-operative societies is within their realm.[119] This means that in relation to multi-State co-operative societies with objects not confined to one State, the legislative power would be that of the Centre. A recent judgment by the Supreme Court on this issue helps us determine where to draw the line between inter-State and intra-State matters.

In *Union of India* v. *Rajendra N. Shah*, the 97th constitutional amendment, which introduced provisions to regulate co-operative societies, was challenged on the grounds that the amendment significantly restricted the power of the State Government.[120] The amendment provided that State laws on co-operative societies must follow the principles of voluntary formation, democratic member control, member economic participation and autonomous functioning; provide for reservation for women on society boards; provide co-options for members from fields of banking, management or finance on boards; must provide specific election periods for the society board; minimum qualifications for auditors of the society board; set our offences in relation to co-operative societies and punishments for them; dates for financial returns, among other things.[121] The Supreme Court unanimously struck down the amendment in July 2021, holding that "the exclusive

---

[118] Entry 32 of List II – "Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies" – gives exclusive power to the State Government to regulate cooperative societies, and the regulation of cooperatives has expressly been excluded from the power of the Parliament in Entry 43, List 1 – "Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies". However, Entry 44 List I– "Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities" – which is wider than Entry 43 in that it is not limited to trading corporations and deals corporations with objects not confined to one State. Hence, because of Entry 44, regulation of multi-State co-operative societies is within the scope of the powers of the Centre. This is a logical fallout of the principle of federalism as a State Government's laws cannot operate outside its territory, and making an enterprise abide by two States' laws merely because they are a large enterprise is very burdensome and against the efficient functioning.

[119] Apex Cooperative Bank of Urban Bank of Maharashtra & Goa v. Maharashtra State Cooperative Bank, (2003) 11 SCC 66, ¶25; Thalappalam Service Cooperative Bank v. State of Kerala, (2013) 16 SCC 82, ¶26; Union of India v. Rajendra N. Shah, 2021 SCC Online SC 474, ¶¶23-26.

[120] Union of India v. Rajendra N. Shah, 2021 SCC Online SC 474.

[121] *Id*., ¶67.

legislative power that is contained in Entry 32 List II has been significantly and substantially impacted in that such exclusive power is now subjected to a large number of curtailments".[122]

In case of public health situations such as biological disasters, the Constitution through Entry 81 List I and Entry 29 List III specifically allows the intervention of the Centre on inter-State matters in case of infectious diseases requiring quarantine. Hence, like in the case of co-operative societies, the question of inter-State and intra-State matters arises here as well. In cooperative societies, requiring State legislation to follow guidelines of the Centre in law-making was held to be significant and substantial interference.

For biological disasters, the NDMA has published a detailed guide on the Management of Biological Disasters ('the Guide')which the States are bound to follow by virtue of §6(2)(d) and §18(2)(b) of the DM Act.[123] Even though this guide acknowledges that the State Government has the power to regulate public health,[124] like the DM Act,[125] it reiterates that State actions must comply with the National Plan.[126] The Guide also clearly states that the National Crisis Management Committee and National Executive Committee shall coordinate responses to biological disasters.[127] It explains in depth the chain of command, control and coordination in case of disasters, and requires that the Integrated Disease Surveillance Systems be used for detecting early warning signals.[128] The Guide goes into great depth to layout guidelines, states the kind of pharmaceutical and non-pharmaceutical interventions that must be utilised, important buildings that must be protected, measures that must be taken for preparedness, training and education, research and development, critical infrastructure, hospital emergency plans, stockpiling, amongst others.[129] In effect, what is left for the State Governments to do is only to implement these guidelines, and the power of decision-making has been taken away from them. As the Supreme Court held in the case of co-operative societies, such detailed guidelines on matters which are within the exclusive power of the State amount to significant interference, and such kind of intervention is not inter-State only.

Entry 28, List 1, "Port quarantine, including hospitals connected therewith", has also been argued as an entry to which the power to regulate

---

[122] *Id*., ¶68.

[123] National Disaster Management Authority, *National Disaster Management Guidelines: Management of Biological Disasters*, July, 2008, available at https://ndma.gov.in/sites/default/files/PDF/Guidelines/biological_disasters.pdf (Last visited on January 3, 2022).

[124] *Id*., 36.

[125] The Disaster Management Act, 2005, §22(1).

[126] National Disaster Management Authority, *supra* note 123, at 36.

[127] *Id*.

[128] *Id*.

[129] *Id*.

biological disasters may be sourced.[130] However, the scope of the entry is very clear – it pertains to decision-making on quarantining on ports. It is likely that this has been given to the Centre because ports often see vehicles from world-wide destinations, and enforcing restrictions requires consideration of diplomatic relations, which is best managed by the Centre. This entry cannot be stretched to mean quarantine in other circumstances as it is a very specific entry, and thus, it definitely cannot give the power to manage every aspect of biological disasters.

3. Biological Disasters and List I, Entry 97

Entry 97, List I is a codification of the doctrine of residuary powers. The primary rule for the application of this doctrine is that the subject matter of the legislation must not be sourced to any other entry in Schedule VII.[131] However, as demonstrated above,[132] regulating biological disasters is primarily about "public health", which is an entry in the State List. Therefore, the precondition for the invocation of residuary powers has not been fulfilled in the present matter.

C. CONCLUSION

The purpose of this part was to analyse whether the Parliament is competent to legislate upon the management of biological disasters, which it has done through the DM Act. The Parliament relied on Entry 23, List III "Social security and social insurance; employment and unemployment", to enact the DM Act. However, it is self-evident that all aspects of disaster management cannot be sourced to this entry.[133] Other entries that have been suggested to be the source of the Parliament's power are either restricted in terms of subject matter – like quarantining on ports, or in terms of geographical breadth – like inter-State matters. The fact remains that neither of these entries can legitimise detailed regulations on the management of a biological disease that is linked to public health, a List II entry on which only the State Governments can legislate and regulate.

Biological disasters require substantial knowledge of ground level situations and micromanagement, which cannot be done effectively by a Central Government. This is clearly evidenced in the Government's management of the COVID-19pandemic, where a nationwide lockdown had a devastating impact on the economic conditions of various States, despite the case counts in several States not being severe enough to merit a complete national lockdown with severe

---

[130] G. Shivshankar, *Debating the Applicability of India's Disaster Management Law to COVID-19*, Admin Law Blog, May 19, 2020, available at https://adminlawblog.org/2020/05/19/goutham-shivshankar-debating-the-applicability-of-indias-disaster-management-law-to-COVID-19/ (Last visited on January 3, 2022).

[131] Union of India v. H.S. Dhillon, (1971) 2 SCC 779, ¶15; Attorney General for India v. Amratlal Prajivandas, (1994) 5 SCC 54.

[132] See *supra* Part II.B.1 on "Biological Disasters and List II, Entry 6, 'Public Health and Sanitation: Hospitals and Dispensaries'".

[133] Second Administrative Reforms Commission, *supra* note 32, at ¶4.1.2.

restrictions within the territory of each State. States were not even consulted before the Centre imposed a lockdown because of a biological disaster, wherein ideally, the State governments must be taking the lead within their respective territories.

The important consideration here is that the Centre's actions were legitimate as per the DM Act, which confers a broad range of powers upon the Centre to take whatever measures necessary in case of management of biological disasters. This made a competency analysis imperative to determine if the Parliament is indeed empowered under the constitutional scheme to regulate biological disasters through such a legislation. We answer this question in the negative. However, as a constitutional amendment or judicial intervention has not taken place on this issue yet, in the next part, we consider the current legislative scenario for biological disasters, where there are two conflicting legislations on the same subject matter.

III. INTERPLAY BETWEEN THE EPIDEMIC DISEASES ACT, 1897, AND THE DISASTER MANAGEMENT ACT, 2005

The ED Act is a colonial legislation which lays down the law for the management of an epidemic, and clearly delineates the roles of the Central and State Government for the same.[134] According to the framework envisaged by the ED Act, State governments have the primary responsibility for managing an epidemic outbreak and restricting its spread,[135] while the Centre has limited powers to formulate regulations for inspection of buses, trains, ships, aircrafts leaving or arriving at an airport or land port.[136] The distribution of powers in the ED Act is in line with the constitutional distribution of powers where fighting an epidemic or a biological disaster is the primary responsibility of the State Government, whereas the Central Government is responsible for controlling the inter-State spread of disease and quarantining at ports.

In contrast, the DM Act confers upon the Central Government the dominant role in managing a biological disaster. It requires the State Government to follow the directions of the NDMA and the Central Government in the management of a disaster.[137] The DM Act also allows the Central Government to issue directions to any authority in India to assist in disaster management,[138] but the powers of the State government in this regard are circumscribed by directions of the Centre.[139] Thus, the Centre is responsible for the management of disasters

[134] The Epidemic Diseases Act, 1897, §2A *inserted vide* The Epidemic Diseases (Amendment) Ordinance, 2020 (w.e.f. April 22, 2020).

[135] *Id*., §2.

[136] *Id*., §2A *inserted vide* The Epidemic Diseases (Amendment) Ordinance, 2020 (w.e.f. April 22, 2020).

[137] *Id*., §39.

[138] *Id*., §§35, 62.

[139] *Id*., §39.

under the DM Act, but the ED Act requires that State Governments play a dominant role in the management of a biological disaster. The DM Act is thus in conflict with the ED Act, and the ED Act, which is the earlier legislation, has not been repealed.[140]

Some may argue that these legislations are not in conflict because the scope of the DM Act and ED Act is distinct, since the former applies to disasters (albeit including biological disasters) while the latter is restricted to epidemics, i.e. local outbreaks. This argument may be based upon the rationale that the Centre is better placed to manage larger outbreaks that extend beyond one State, while State Governments are appropriate for managing local outbreaks. However, this argument is erroneous because the scope of the DM Act is not restricted to 'national outbreaks' but include outbreaks "in any area"[141] and "part of the country" affected by a disaster.[142] This means that there will be an overlap of these legislations in a localised outbreak as well. But even in case of national outbreaks spread across several States, as discussed earlier, the respective State Governments will be better placed to manage the outbreak within their jurisdiction –as biological disasters require knowledge of ground realities in each State. Thus, these legislations are in conflict with each other. In this part, we discuss the tools of statutory interpretation such as *lex specialis*, and *lex posterior* to address this conflict.

A. THE CONFLICTING LEGISLATIONS AND THE RULE OF LEX SPECIALIS

When two or more legislations apply to the same factual scenario and provide conflicting directions, the rule of *lex specialis* is used to determine the applicable law.[143] The rationale of this principle is that when the Parliament enacts a legislation in respect of a specific subject, it intends that the special legislation would govern the situation as opposed to general legislation.[144] The Supreme Court has applied the rule of *lex specialis* in numerous cases.[145] In *Chairman,*

[140] Press Release, Ministry of Health and Family Welfare, Government of India, March 11, 2020, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=200106#:~:text=Prime%20Minister%2C%20a%20high%20level,19)%2C%20in%20the%20country (Last visited on January 3, 2022); The Epidemic Diseases (Amendment) Ordinance, 2020.

[141] The Disaster Management Act, 2005, §2(d).

[142] *Id*., §2(a).

[143] U.P. SEB v. Hari Shankar Jain, (1978) 4 SCC 16, ¶8 ('U.P. State Electricity'); Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18, ¶¶32, 37; Thiruvalluvar Transport Corpn. v. Consumer Protection Council, (1995) 2 SCC 479, ¶6 ('Consumer Protection Council'); J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170, ¶¶11, 12; Krishi Upaj Mandi Samiti v. Shiv Shakti Khansari Udyog, (2012) 9 SCC 368, ¶¶20, 22; Telefonaktiebolaget Lm Ericsson v. CCI, 2016 SCC OnLine Del 1951 : 2016 Comp LR 497 ('Ericsson'); W.F. Craies, Craies on Statute law, 184 (Sweet and Maxwell, 8th edn., 2004); P. St. J. Langan, Maxwell on the Interpretation of Statutes, 169 (Lexis Nexis, 12th ed., 2010).

[144] *Id*.

[145] U.P. State Electricity, *supra* note 143, at ¶8; Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18, ¶¶32, 37; Consumer Protection Council, *supra* note 143; J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170, ¶¶11, 12; Krishi Upaj Mandi Samiti, Narsingpur

Thiruvalluvar Transport Corpn. v. *Consumer Protection Council*, the Supreme Court was considering whether a claim for compensation with respect to motor vehicle accidents would be decided under the Consumer Protection Act, 1986 ('CP Act') or the Motor Vehicles Act, 1988 ('MV Act').[146] The Court noted that the claims for compensation under both legislations could not be permitted simultaneously, and compensation could be granted under only one legislation.[147] Upon a holistic view of the laws and circumstances, the Court noted that the MV Act is a special legislation for adjudication of compensation claims on motor vehicle accidents, and the CP Act is a general legislation concerned with the protection of consumers' interest generally.[148] Hence, a claim for compensation in relation to a motor vehicle accident would fall exclusively under the MV Act since the Court was of the opinion that "the general law must yield to the special law", and thus, the MV Act must apply to the given case.[149]

In *Sharat Babu Digumarti* v. *State (NCT of Delhi)* ('Sharat Babu'),[150] the accused was alleged of publishing obscene material in electronic form. The Supreme Court, upon an examination of the provisions of the Indian Penal Code, 1860 ('IPC') as well as the Information Technology Act, 2000 ('IT Act') held that the IT Act was a special law regarding offences concerning "publishing and transmitting obscene material in electronic form", and therefore it would prevail over the general law, i.e. IPC.[151] Subsequently, a two-judge bench of the Bombay High Court in the case of *Gagan Harsh Sharma* v. *State of Maharashtra* ('Gagan Harsh Sharma'),[152] relied on the Supreme Court's reasoning in Sharat Babu to hold that the IT Act being a special enactment covering various aspects of electronic data and computer systems, the provisions under the said legislation would be applicable,[153] and charges cannot be framed under the IPC in respect of matters involving the use of computer systems in software theft.[154]

In the context of COVID-19,which is a biological disaster, the DM Act can be accurately described as a general legislation because the scope of the DM Act is broad and includes any disaster arising from either natural or man-made causes, leading to loss of life or human suffering.[155] The DM Act was enacted in the backdrop of several disasters and natural calamities, ranging from the 1999 Odisha Super Cyclone to the 2001 Gujarat Earthquake that caused tremendous

v. Shiv Shakti Khansari Udyog, (2012) 9 SCC 368, ¶¶20, 22; Ericsson, *supra* note 143; Craies, *supra* note 143; Langan, *supra* note 143.

146 Consumer Protection Council, *supra* note 143, at ¶1.

147 *Id*., ¶6.

148 *Id*.

149 *Id*.; Ericsson, *supra* note 143, at ¶175.

150 Sharat Babu Digumarti v. State, (NCT of Delhi), (2017) 2 SCC 18.

151 *Id*., ¶¶32, 37.

152 Gagan Harsh Sharma v. State of Maharashtra, 2018 SCC Online Bom 13046.

153 The Information Technology Act, 2000, §§ 43, 66.

154 Gagan Harsh Sharma v. State of Maharashtra, 2018 SCC Online Bom 13046, ¶28.

155 The Disaster Management Act, 2005, §2(d).

devastation and havoc.[156] The Centre constituted the J.C. Pant Committee on disaster management, which recommended the development of an effective disaster management policy and an improvement in the pre-existing mechanisms for hazard mitigation.[157] Subsequently, the Working Group on Disaster Management submitted a report to the Prime Minister in 2003 and recommended the formulation of a comprehensive National Disaster Management Policy,[158] and finally, in 2005, the Parliament enacted and notified the DM Act. Thus, the DM Act was enacted, taking into consideration all calamities that had taken place in the recent past, with a view to reform the loopholes in the existing framework on disaster management in the country, and thus, its purpose was not to essentially regulate public health-related crisis exclusively.

On the other hand, the ED Act is a special legislation aimed at managing and restricting the spread of an epidemic outbreak. During the late 1890s, the bubonic plague that had taken root in Bombay was spreading drastically and infecting millions of people across India. As a result, on January 28, 1897, Sir John Wood burn tabled the ED Bill before the Council of the Governor General of India, with the objective of establishing a regulatory framework in respect of the adoption of vital measures for the efficient management of an epidemic disease outbreak.[159] Although the law was enacted in 1897, it had been applied to prevent the spread of several disease outbreaks such as malaria, cholera, swine flu and dengue in independent India.[160]

Upon an application of the *lex specialis* rule, it is evident that the ED Act is the special legislation in case of biological disasters. Furthermore, for biological disasters, it should be applied as it is in consonance with the constitutional distribution of powers as well.[161] However, there are two issues on the application of the *lex specialis* rule that merit further consideration. *First*, a situation when the

[156] Ministry of Agriculture, Government of India, The Report of High-Powered Committee on Disaster Management, 45 (October 8, 2001).

[157] *Id*., 70; The National Disaster Management Authority, *Evolution of NDMA*, available at https://ndma.gov.in/about-us/introduction (Last visited on January 3, 2022).

[158] Dr. Vijay Kumar, Structured Approach to Disaster Management, 16 (Laxmi Book, 2018).

[159] Shyamlal Yadav, *When Bubonic Plague Led to Country's Epidemic Diseases Act*, The Indian Express, May 7, 2020, available at https://indianexpress.com/article/explained/epidemic-disease-act-amended-coronavirus-pandemic-bubonic-plague-healthcare-workers-6397400/ (Last visited on January 3, 2022).

[160] D. Arnold, *Cholera and Colonialism in British India*, Vol.113,Past & Present, 118 (1986); Md. Z.M. Nomani & R. Parveen, *Contextualizing Epidemic Diseases (Amendment) Ordinance, 2020 in Epidemic-Pandemic Syndrome of COVID-19 in India*, Vol. 11(8), Systemic Reviews in Pharmacy, 156 (2020).

[161] See *supra* Part III on "Interplay Between the Epidemics Diseases Act, 1897, and the Disaster Management Act, 2005"; The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 6 (Public health and sanitation; hospitals and dispensaries); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 28 (Port quarantine including hospitals connected therewith); The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 81 (Inter-State quarantine); The Constitution of India, 1950, Schedule VII, List III, *Concurrent List*, Item 29 (Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants).

general law is enacted after the special law, which means that the Parliament is aware of a special law on the subject matter yet enacts another legislation that can apply to it. Is the subsequent general law then evidence of the intent of Parliament to be the applicable law on the issue? However, if that is the case, why was not the earlier special law repealed? We address this in the subsequent portion. The *second* nuance relates to the role of *non-obstante* clauses in determining the speciality versus generality of a law. Both issues have been considered in-depth underneath.

1. An Earlier Special Law Versus a Later General Law

The application of the *lex specialis* rule is straightforward when the special legislation is enacted after the general legislation. But when the special law is the earlier legislation, and the general law is enacted after the special law – like in this particular case – the application of the *lex specialis* rule becomes complicated. This is because one may argue that the Parliament, in enacting the later law, intended to over-ride the earlier law. While this is a legitimate concern, it should be remembered that if the earlier special law was intended to be over-ridden, that could have been done explicitly by repealing the earlier statute. Further, as demonstrated underneath, of ten times, the earlier special law has been applied instead of a later general law, and the circumstances in which this is done exist in this case too.

In *Paradip Port Trust* v. *Their Workmen*, an industrial dispute was raised by a trade union comprised representatives of workmen who had been terminated from service at Paradip Port Trust.[162] As per §36(4) of the Industrial Disputes Act, 1947 ('ID Act'), a legal practitioner cannot represent a party before a Labour Court, Tribunal or National Tribunal without the consent of the opposite party.[163] The trade union, taking recourse to this provision, objected to the representation of the Paradip Port Trust by an advocate and refused to consent to the representation.[164] The Port Trust argued that a subsequent legislation, namely, the Advocates Act, 1961 ('AD Act'), provides that every advocate is entitled as a right to practice in all courts and before any tribunal.[165] The Supreme Court, after close consideration, concluded that the ID Act was a special legislation enacted with a clear objective of promoting labour welfare and contains provisions specifically in relation to the settlement of industrial disputes. Therefore, it held that the ID Act would prevail over the AD Act, which is general legislation concerning the code and conduct of advocates, albeit including their rights and obligations in general.[166] Although the ID Act was enacted earlier than the AD Act, the rule of *lex specialis* was utilised in this case and the earlier special law, that is, the ID Act applied.

---

[162] Paradip Port Trust v. Workmen, (1977) 2 SCC 339 ('Paradip Port Trust').
[163] The Industrial Disputes Act, 1947, §36(4).
[164] Paradip Port Trust, *supra* note 162, at ¶3.
[165] The Advocates Act, 1961, §30.
[166] Paradip Port Trust, *supra* note 162, at ¶24.

The Supreme Court also addressed this question in *Krishi Upaj Mandi Samiti* v. *Shiv Shakti Khansari Udyog*.[167] This case concerned transactions involving the purchase of sugarcane by factories, and the issue was whether the MP Krishi Upaj Mandi Adhniyam, 1972 ('Krishi Upaj Mandi Act') would apply, or the MP Sugarcane (Regulation of Supply and Purchase) Act, 1958 ('MP Sugarcane Act') would apply – as both these legislations could be applied to the facts and circumstances. The Krishi Upaj Mandi Act was the later legislation and addressed the regulation of the purchase and sale of agricultural produce in general. In contrast, the MP Sugarcane Act was the earlier legislation specifically addressing issues relating to the production and supply of sugarcane by cane-growers to factories. Even here, the Supreme Court held that the earlier special law, the MP Sugarcane Act, would apply over the later general law, i.e. the Krishi Upaj Mandi Act.[168]

This shows that earlier special laws cannot be disregarded only because of a later general law on the issue, and the intent of the Parliament in enacting the later general law must be considered. The Delhi High Court has followed this approach in *Telefonaktiebolaget Lm Ericsson* v. *CCI* ('Ericsson').[169] Here, there was a complaint on the abuse of patent rights, against which legal remedy could be sought under the Patent Act, 1970 ('Patent Act'), as well as the Competition Act, 2002 (Competition Act). The Delhi High Court held the Patent Act to be applicable because even though the Competition Act could apply to the facts and circumstances, the object and purpose of the Competition Act was different.

Through these cases, the principle that can be deduced on when an earlier special law would apply instead of a later general law is that the intent of the Parliament in passing the later general law needs to be considered. If the intent was to cover other subject-matters which may incidentally cover the subject matter of the earlier special law as well, courts have comfortably allowed the application of the earlier special law. This is because the later general law was enacted with the intent of regulating a generic subject matter and not the subject matter of the earlier special law specifically, and the later general law applies to the subject matter incidentally. This was evidently the case with the MP Sugarcane Act and the Krishi Upaj Mandi Act, where the latter was enacted to cover agricultural products generally, but the former was specific to sugarcanes.

In the current case, the DM Act was not passed with the specific objective of regulating biological disasters, but with the objective of regulating all disasters in general, whereas the ED Act was enacted in 1897 with the goal of specifically regulating and restricting the spread of an epidemic outbreak.[170] Although the DM Act applies incidentally to the subject matter of biological disasters, leg-

[167] Krishi Upaj Mandi Samiti v. Shiv Shakti Khansari Udyog, (2012) 9 SCC 368.
[168] *Id*., ¶¶20, 22.
[169] Ericsson, *supra* note 143, at ¶175.
[170] See *supra* Part III.A on "The Conflicting Legislations and the Doctrine of *Lex Specialis*".

islating upon it was not the focus of the Parliament at the time of the enactment of the DM Act, and the subject matter came to be included only because of an over-inclusive definition of "disaster" in the DM Act. If the later general legislation is not passed with the intent of overriding the earlier general legislation, the earlier special law continues to prevail and apply.

Some may argue *in contra* that the Parliament intended that the later general law, i.e. the DM Act, apply to biological disasters instead of the ED Act by relying on the Guide, which was published by the NDMA in 2008.[171] But such an argument would require that the ED Act is not applicable anymore and is passively repealed. This is untrue since, during the COVID-19 pandemic, the Central Government itself has affirmed the applicability of the ED Act by persuading States to utilise it.[172] Hence, we are embroiled in a situation where two conflicting laws exist, and the earlier law was clearly not intended to be repealed by the Parliament. But the later general law has been utilised by the Central Government to regulate the subject matter covered by the earlier special law.

Thus, we argue that the Parliament's intent was not to override the earlier special law but to legislate on the generic subject matter of disaster management through the later general law. In this situation, the Central Government has utilised the broad definition of "disaster" under the DM Act to apply it to the COVID-19 pandemic, which is an unprecedented crisis.[173] As we moved through the pandemic, we also saw the Central Government refrain from utilising the extreme provisions of the DM Act, which make it mandatory for States to obey the Centre and instead defer to the State Government.[174] However, the fact remains that the DM Act should not have been utilised in the manner that it was in the initial period of the pandemic because there existed a special law on the issue which accorded power and responsibility of responding to the State Governments. This would have been the appropriate manner of managing the pandemic as per the laws of the land.

---

[171] National Disaster Management Authority, *National Disaster Management Guidelines: Management of Biological Disasters*, July 2008, available at https://ndma.gov.in/sites/default/files/PDF/Guidelines/biological_disasters.pdf (Last visited on January 3, 2022).

[172] Press Release, MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA, March 11, 2020, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=200106#:~:text=Prime%20Minister%2C%20a%20high%20level,19)%2C%20in%20the%20country (Last visited on January 3, 2022) (while the Centre allowed the ED Act to apply, the DM Act continued to be in existence and empowered Centre to regulate the conduct of States in the management of the pandemic).

[173] The Disaster Management Act, 2005, §2(d).

[174] Anulekha Ray, *Most CMs ask PM Modi for Autonomy to Decide Lockdown Strategy Post 17 May*, LIVEMINT, May 11, 2020, available at https://www.livemint.com/news/india/coronavirus-live-updates-narendra-modi-to-discuss-lockdown-exit-plan-with-cms-today-meet/amp-11589186870906.html (Last visited on January 3, 2022); *Satark & Savdhaan: PM Modi Calls for Caution at Review Meet Amid Omicron Alarm*, HINDUSTAN TIMES, December 23, 2021, available at https://www.hindustantimes.com/india-news/pm-modi-chairs-COVID-review-meeting-as-omicron-spreads-alarm-101640267985128.html (Last visited on January 3, 2022).

2. The Role of Non-Obstante Clauses in Determining the Applicability of Special Law

The issue of *non-obstante* clauses is pertinent to our discussion as the DM Act has a *non-obstante* clause with an overriding effect.[175] A *non-obstante* clause isused to determine the precedence of a legislation when other statutes can apply to the subject matter governed by the law.[176] A *non-obstante* clause generally gives overriding effect in case of conflicting provisions in other statutes, and thus, can be understood as an indication of the parliamentary intent on the *lex specialis*.[177] In *Ashwini Kumar Ghose* v. *Arabinda Bose*, the Supreme Court held that in interpreting a*non-obstante* clause, the enacting part of the legislation must be studied first on the basis of a fair construction of the words used.[178] If the enacting part of the legislation is in conflict with the existing laws, then the *non-obstante* clause should be understood as setting aside anything inconsistent contained in the relevant existing laws.[179]

In the Ericsson case discussed above, the Delhi High Court held the Patents Act as the special law and applicable despite a *non-obstante* clause in the Competition Act. The Patents Act contains provisions for the exercise and enforcement of patent rights, as well as redressal in case of abuse of those rights, while the Competition Act aims to avoid abuse of dominance in addition to "concentration of market power in general".[180] Although the *non-obstante* clause contained in the Competition Act expressly states that its provisions "shall have effect notwithstanding anything inconsistent therewith contained in any other law",[181] the Court held that the clause must be read in the context of the entire statute and the mischief it sought to remedy.[182] In the Competition Act, the primary mischief aimed to be curtailed was unfair competition, and thus, the *non-obstante* clause would apply to statutes with the same objective.[183] Thus, a *non-obstante* clause cannot be read to "whittle down" the full scope of any other law, and a special law cannot be overridden simply due to the presence of a *non-obstante* clause in a particular legislation. This is indeed a well-settled principle.[184]

In Ericsson, notwithstanding the *non-obstante* clause in the Competition Act, the Delhi High Court held that the Patents Act being a special law would prevail in the concerned facts and circumstances, and in doing so, it relied

---

[175] The Disaster Management Act, 2005, §72.

[176] Justice G.P. Singh, Principles of Statutory Interpretation, 406 (Lexis Nexis, 14th ed., 2016); Ashwini Kumar Ghose v. Arabinda Bose, (1952) 2 SCC 237.

[177] *Id*.

[178] Ashwini Kumar Ghose v. Arabinda Bose, (1952) 2 SCC 237, 376.

[179] *Id*.

[180] Ericsson, *supra* note 143, at ¶144.

[181] The Competition Act, 2002, §60.

[182] Ericsson, *supra* note 143, at ¶149.

[183] *Id*.

[184] R.S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, ¶23; Singh, *supra* note 176, at 406.

on the Supreme Court's decision in *Damji Valji Shah* v. *LIC* ('Damji Shah').[185] In Damji Shah, the Court considered whether the provisions of the Life Insurance Corporation Act, 1956 ('LIC Act') would prevail over those of the Companies Act, 1956 ('Companies Act') despite a*non-obstante* clause in the latter. The Companies Act expressly provided that the Company Court would exercise jurisdiction over any suit or claim, which may arise against a company in the course of its winding up "notwithstanding anything contained in any other law".[186] Utilising this, it was argued that the *non-obstante* clause in the Companies Act would result in the applicability of the same over other laws. However, the Supreme Court held that the LIC Act being a special law in the given situation, would prevail over the Companies Act, and the tribunal constituted under the LIC Act would exercise the jurisdiction to entertain a claim of LIC against the erstwhile life insurance companies despite the *non-obstante* clause in the Companies Act.[187]

In our case, the DM Act also has a *non-obstante* clause that gives the legislation an overriding effect, even though the ED Act is a special legislation on biological disasters.[188] The primary reason for the DM Act being enacted was the absence of legislation for the management of different disasters – whether natural, such as earthquakes, landslides, cyclones, or man-made disasters such as acts of terrorism, arson, biological and chemical weapons. If we apply the Supreme Court's reasoning in Damji Valji Shah as well as the Delhi High Court's holding in Ericsson, it can be stated that the object and purpose of the ED Act and DM Act, although overlapping, is distinct. The ED Act contains provisions for the management of dangerous epidemic diseases, as well as measures relating to the protection of health care professionals from "acts of violence" during these diseases. But the DM Act contains provisions concerning the management of disasters in general, which are of very different natures and thus, the DM Act is also broad and open-ended to accommodate the different types of disasters.

Although the *non-obstante* clause contained in the DM Act expressly provides that the provisions of the Act would be applicable notwithstanding anything inconsistent in any other law,[189] the clause must be read in the context of the entire statute as a whole. A contextual reading of the provisions can arguably lead to the conclusion that the DM Act seeks to remedy the uncoordinated response of the country to disasters. However, it cannot lead to the 'whittling down' of all other laws, especially a law containing provisions related directly to the management and prevention of the spread of epidemic diseases as enshrined in the ED Act, which assumes special importance in the course of combatting and managing the adverse COVID-19 circumstances in the country. Hence, the presence of the *non-obstante* clause in the DM Act would not by itself be the sole consideration

[185] Damji Valji Shah v. LIC, AIR 1966 SC 135.
[186] The Companies Act, 1956, §446(2).
[187] Damji Valji Shah v. LIC, AIR 1966 SC 135, ¶21; Ericsson, *supra* note 143, at ¶150.
[188] The Disaster Management Act, 2005, §72.
[189] The Competition Act, 2002, §60.

for invoking and applying the provisions of the DM Act during the COVID-19 pandemic, ignoring the special law, i.e. the ED Act in the present scenario.

Furthermore, the applicability of either of two conflicting legislations in a given situation, in the presence of a *non-obstante* clause, should be ascertained after giving special consideration to the purpose and policy underlying the laws and the language used.[190] In *Sarwan Singh* v. *Kasturi Lal* ('Sarwan Singh'), the Supreme Court was considering whether the Slum Areas Act, 1956 ('Slum Areas Act') or the Delhi Rent Control Act, 1958 ('Delhi Rent Control Act') would be applicable.[191] The Slum Areas Act provided that proceedings for eviction of tenants can be taken only with the permission of the competent authority, notwithstanding anything contained in any other law.[192] On the other hand, the Delhi Rent Control Act provides that a landlord is entitled to recover immediate possession of any premises let out by him to tenants without a Court order if the latter is required to vacate the said residential premises allotted to him by the Central Government or any local authority.[193] The Supreme Court held that in case of conflicting legislations, a determination must be made after considering the purpose and policy of both laws.[194] The purpose of the Delhi Rent Control Act was to allow for immediate possession in case of lands allotted by the government, and the purpose would be defeated if the provisions of the Slum Areas Act requiring mandatory permission of the competent authority would prevail over the former. Thus, the Supreme Court considered the public policy behind the laws and allowed the Delhi Rent Control Act to apply, despite a*non-obstante* clause in the Slum Areas Act.[195]

An analysis of the two conflicting laws in relation to biological disasters reveal that they conflict primarily with respect to the administrative hierarchy devised under each for disaster management. The DM Act creates a top-down model of disaster management in the country by vesting powers concerning the planning and execution of disaster management policies to the NDMA, which formulates disaster management policies and coordinates the enforcement of the same. The National Executive Committee ('NEC') constituted under the DM Act seeks to ensure the implementation of the policies and "compliance of directions issued by the Central Government for the purpose of disaster management in the country".[196] The concern with such a framework as contained in the DM Act lies in the fact that State Governments are no longer the final authority for formulating disaster management policies in their jurisdiction, and their role is restricted to the implementation of these policies.

---

[190] Sarwan Singh v. Kasturi Lal, (1977) 1 SCC 750 ('Sarwan Singh'); Kumaon Motor Owner's Union v. State of U.P., AIR 1966 SC 785; Ashoka Mktg. Ltd. v. Punjab National Bank, (1990) 4 SCC 406.

[191] Sarwan Singh, *supra* note 190.

[192] The Slum Areas (Improvement and Clearance) Act, 1956, §19.

[193] The Delhi Rent Control Act, 1958, §14A.

[194] Sarwan Singh, *supra* note 190, at ¶20.

[195] *Id*.; Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18, ¶28.

[196] The Disaster Management Act, 2005, §10(1).

The complications surrounding the framework envisaged under the DM Act becomes clear if we study the huge disparity in the number of cases across States during COVID-19. During the lockdown imposed in March 2020, five States, namely, Maharashtra, Gujarat, Delhi, Madhya Pradesh, and Jammu and Kashmir, witnessed an alarming growth of COVID-19 cases at a much higher rate compared to the rest of the country (the growth rate was more than fifteen percent in each State).[197] Similarly, in the course of the second wave, five States, including Maharashtra and Karnataka, accounted for 80.17 percent of the total active cases in the country as of March 29, 2021.[198] Seven States cumulatively accounted for 81.79 percent of the total deaths in India due to COVID-19 during the second wave.[199] Further, from a public health perspective, there is a wide gap in various States in India in the context of the presence and adequacy of the necessary health infrastructure that is required to combat biological diseases.[200] This implies that every State needs measures based on their need and *status quo*, and a one-size-fits all approach is not beneficial. It is imperative to understand that it would appear highly erroneous to simply look at the COVID-19 situation in India from the lens of the rise in cases in the entire country at large and remain ignorant of the immensely disproportionate nature of the positivity rate of the cases and the deaths in the respective States, as well as the local conditions prevalent in those specific States across the country.

Under the DM Act, States are bound to mandatorily comply with the guidelines issued by the NEC and the Central Government.[201] This has led to the role of front-end functionaries being diminished considerably. For instance, during the course of the COVID-19 management, the Central Government divided districts of the country into three zones depending on the number of cases, namely, green, red and orange, and shared them with the States on a weekly basis.[202] In the notification dated May 1, 2020, the Centre explicitly disallowed the States and the UTs from lowering the classification of any district that is included in the list of red zone and orange zone districts, which were made by the Centre.[203] In this context, the local functionaries, i.e. the individuals who are primarily well-aware of the field situation, were barred from modifying and lowering the classification of red

---

[197] Kapil Ghosh et al., *Inter-State Transmission Potential and Vulnerability of COVID-19 in India*, SCIENCE DIRECT, October, 2020, available at https://www.sciencedirect.com/science/article/pii/S259006172030051X?via%3Dihub (Last visited on January 3, 2022).

[198] *8 States Account for over 84% of India's Fresh COVID-19 Cases*, THE HINDU, March 29, 2021, available at https://www.thehindu.com/news/national/8-states-account-for-over-84-of-indias-fresh-COVID-19-cases/article34188803.ece (Last visited on January 3, 2022).

[199] *Id*.

[200] L. Lingam & R.S. Sapkal, *COVID-19, Physical Distancing and Social Inequalities: Are We all Really in this Together?*, Vol. 2(2), THE INTERNATIONAL JOURNAL OF COMMUNITY AND SOCIAL DEVELOPMENT, 173 (2020); S. Maity et al., *Interstate Disparities in the Performances in Combatting COVID-19 in India: Efficiency Estimates Across States*, Vol. 20, BMC PUBLIC HEALTH (2020).

[201] The Disaster Management Act, 2005, §39.

[202] Ministry of Home Affairs, New Guidelines to be taken for Containment of COVID-19, Order No. 40-3/2020-DM-I (A), (May 1, 2020), ¶2.

[203] *Id*.

and orange zone districts even if that was the appropriate thing to do, and were strictly required to abide by the directions of the Centre. Furthermore, Clause 14 of the aforementioned notification also prohibited the State Governments and UTs from diluting any other guidelines issued by the Centre under the DM Act in any manner and instead manded them to strictly enforce the same.[204] This clearly demonstrates that the active involvement of the front-end functionaries of the State and UTs was impacted adversely in the management of the pandemic in the respective regions, in spite of the evident disparity in the case count in the region.

The reluctance on the part of the Centre to permit the local functionaries to have an active voice in the management of the COVID-19 crisis in their specific areas, and dilute certain guidelines which they find appropriate in the specific context and circumstances, is highly questionable and, in fact, problematic during the course of a public health crisis, that impacted various States of the country in a disproportionate manner. Moreover, subsequently, at a later point of time, when the COVID-19 situation had comparatively improved in the country, the Central Government mandated the State Governments to take measures for restricting the spread of the disease in their respective States, provided that they strictly comply with the existing guidelines issued by the NEC as per the recommendations of the NDMA.[205]

It must be noted that in case of any crisis, notably biological pandemics, State Governments and local functionaries who are aware of the immediate field situation are in the best possible position to provide an effective response and formulate policies for the management of the situation in the concerned State. This responsibility of adopting policies for controlling the outbreak and spread thereof within a State is vested on the respective State government by the ED Act. Therefore, considering the object and policy underlying the ED Act, the management of the COVID-19 pandemic would have been ideal in the case State Governments were empowered to adopt policies by giving special consideration to the COVID-19 situation in their respective States. Hence, notwithstanding the *non-obstante* clause in the DM Act, the application of the ED Act should have been the correct approach owing to policy considerations, which need to be taken into account during the interpretation of the *non-obstante* clauses.

B. THE CONFLICTING LEGISLATIONS AND THE RULE OF LEX POSTERIOR

Another rule of interpretation that may apply to our situation is *lex posterior*, which provides for the later law to be applicable when it comes into conflict with an earlier law. The rationale of the *lex posterior* rule is that because it is the latest legislation on the subject matter by the Parliament, it evidences the

[204] *Id*., ¶14.

[205] Ministry of Home Affairs, NDMA Guidelines on Lockdown, NW/RK/PK/DDD/318 (September 15, 2020).

true intent of how the subject matter was to be governed.[206] In the case of *LIC* v. *D. J. Bahadur*, Justice A.D. Koshal asserted and applied this particular rule.[207] The case concerned an industrial dispute between LIC and its employees, and one of the questions before the Court was whether the LIC Actor the ID Act would apply. The majority of the Supreme Court, speaking through Justice V.R. Krishna Iyer and Justice R.S. Pathak, held that the ID Act was *lex specialis* to the LIC Act as the latter's main objective was to nationalise LIC and provided for regulations on incidental issues like promotion and employment.[208] On the contrary, the ID Act was enacted specifically for the adjudication and resolution of industrial disputes, and was thereby the special legislation in the particular case.[209]

However, Justice Koshal, in his dissent, opined that a later general law would prevail over an earlier special law as the Parliament has the right to abrogate an earlier special law with a later general law.[210] According to Justice Koshal, in the case of a conflict between two statutes in a particular situation, the general rule to be followed is that the later legislation abrogates the earlier one.[211] The discussion pertaining to this general rule and the exception to it becomes quite relevant in the context of COVID-19, considering the existence of a posterior general legislation, namely the DM Act, that was enacted post the ED Act.

The Parliament has the authority to modify or repeal legislations, and the provisions of an earlier Act may be revoked in certain instances by a subsequent Act either by the usage of express language or from implication. However, it is settled law that a prior special legislation is not readily held to be impliedly repealed by subsequent general legislation.[212] The special enactment deals with a part of the subject that is covered by the general law. Therefore, generally, in such a situation, courts attempt to reasonably harmonise the two laws in a manner that both can be given effect to, and the special law can be construed as an exception or qualification of the general law.[213] Justice Farewell in *Re Chance* expressly held that it is the duty of courts if possible to give effect to both the legislations harmoniously and "not to effect an implied repeal of the earlier legislation".[214] Further, it is crucial to note that when the Parliament has enacted an earlier law in relation to

[206] LIC v. D.J. Bahadur, (1981) 1 SCC 315 ('Life Insurance Corporation of India'); Ashoka Mktg. Ltd. v. Punjab National Bank, (1990) 4 SCC 406, ¶50; Sikkim Manipal University v. State of Sikkim, 2014 SCC OnLine Sikk 189, ¶12; Air India Ltd. v. Tej Shoe Exporters (P) Ltd., 2013 SCC OnLine Del 3749, ¶9.

[207] Life Insurance Corporation of India, *supra* note 206.

[208] *Id*., ¶¶50-53.

[209] *Id*.

[210] *Id*., ¶111.

[211] *Id*.

[212] Barker v. Edgar, 1898 AC 748, 754; Eileen Louise Nicolle v. John Winter Nicolle, (1922) 1 AC 284, 290; Municipal Council v. T.J. Joseph, AIR 1963 SC 1561, 1565; Paradip Port Trust v. Workmen, (1977) 2 SCC 339; R.S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, ¶29; U.P. State Electricity, *supra* note 143; Sanwarmal Kejriwal v. Vishwa Coop. Housing Society Ltd., (1990) 2 SCC 288, ¶22; SINGH, *supra* note 176, at 741.

[213] *Id*.

[214] Chance, In re, 1936 Ch 266.

a particular subject unambiguously, there is always a presumption that a general principle laid down in a subsequent enactment should not "rip up what the earlier legislation had provided for one of the cases individually", unless a clear intention to the contrary is specifically declared.[215]

In this context, we must take into consideration the maxim "*generalia specialibus non derogant*", which was explained in the case of *Mary Seward* v. *Owner of the Vera Cruz* ('Mary Seward'),[216] and applied in several judgements by the Supreme Court of India.[217] In Mary Seward, the Court held that where there are general words in a posterior legislation capable of a practical application without extending them to subjects which have already been dealt specifically by an earlier legislation, the provisions of the earlier special enactment should not be held to be indirectly repealed or derogated merely by the usage of general words.[218] In this case, the question under consideration was whether the Admiralty Court Act, 1871 ('Admiralty Court Act') that gave jurisdiction over claims for damage done by a ship also gave jurisdiction to the court over claims for loss of life, that would have otherwise come under the Fatal Accidents Act, 1976 ('Fatal Accidents Act'). The Court applied the principle of *generalia specialibus non derogant*, and held that the general legislation in the form of the Admiralty Court Act did not exclude the applicability of the Fatal Accidents Act, that specifically encompassed claims over the loss of life within its ambit. Hence, by applying this principle, the Admiralty Court Act would apply over claims for damage done by a ship, whereas the Fatal Accidents Act would apply with respect to claims for loss of life.[219]

A three-judge bench of the Supreme Court applied this principle in *U. P. State Electricity Board* v. *Hari Shankar Jain* ('U.P. State Electricity'), while determining whether the Industrial Establishments (Standing Orders) Act, 1946 ('Standing Orders Act') or the Electricity Supply Act, 1948 ('Electricity Supply Act') would apply.[220] The Supreme Court opined that the Electricity Supply Act was a general legislation enacted post the Standing Orders Act, and aimed to provide for the efficient production and supply of electricity. Only one of the provisions of the Electricity Supply Act, i.e. §79(c) dealt with regulating conditions of service of the board's employees incidentally. The legislation's primary focus was to regulate the development and supply of electricity and not to regulate conditions of service of employees of the Electricity Board. On the other hand, the earlier legislation, the Standing Orders Act was the special legislation, aimed specifically to regulate the conditions of service of workers in industrial establishments. Hence, the Supreme Court observed that the procedure for the regulation of ser-

[215] Life Insurance Corporation of India, *supra* note 206, at ¶112; Langan, *supra* note 143, at 450.

[216] Mary Seward v. Owner of the Vera Cruz, (1884) 10 AC 59.

[217] R. S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, ¶11; U. P. State Electricity, *supra* note 143, at ¶7; Life Insurance Corporation of India, *supra* note 206, at ¶54; Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18, ¶29.

[218] Mary Seward v. Owner of the Vera Cruz, (1884) 10 AC 59, 68.

[219] *Id*.

[220] U.P. State Electricity, *supra* note 143.

vice of workers laid down in the special legislation, namely the Standing Orders Act should not be held to be repealed merely by an incidental provision in the general legislation on electricity supply, i.e. the Electricity Supply Act.[221] Thus, the Court held that the provisions of the Standing Orders Act would prevail over §9(c) of the Electricity Supply Act in matters to which the Standing Orders Act applies, notwithstanding that the Electricity Supply Act was enacted subsequent to the Standing Orders Act.[222]

Further, in *Deccan Merchants Cooperative Bank* v. *Dali Chand Jugraj Jain* ('Deccan Merchants'),[223] the Supreme Court applied the principle of *generalia specialibus non derogant* in determining whether the Bombay Rents, Hotels & Lodging House Rates Control Act, 1947 ('Rent Act') or the Maharashtra Cooperative Societies Act, 1960 ('Societies Act') would be applicable. On a close analysis of the concerned laws, the Supreme Court held that the Rent Act was special legislation concerned with providing protection to tenants, whereas the Societies Act was general legislation in this context dealing with the business of the society.[224] Despite the fact that the Societies Act was enacted subsequent to the Rent Act, the Supreme Court was of the opinion that the two enactments should be harmonised by applying the provisions of the Rent Act rather than those of the Societies Act in case of matters specifically within the scope of the Rent Act– thereby upholding the principle of *generalia specialibus non derogant*.[225]

In the context of the COVID-19, the application of the principle *generalia specialibus non derogant* plays a critical role in understanding the applicability of the ED Act to manage the pandemic in a systematic manner in accordance with the constitutional distribution of powers. It may be argued, in the lines of the rule of *lex posterior*, that the DM Act was enacted post the enactment of the ED Act, and therefore, portrayed the latest intent of the Parliament – thereby justifying the invocation of the DM Act to manage biological disasters like the current pandemic. Further, the Parliament has the authority to repeal an earlier special law by using express language in a later legislation or by means of implication. However, *firstly*, the DM Act makes no express reference to the repeal or modification of the ED Act. *Secondly*, the pronouncements of the Supreme Court in this regard indicate that courts generally do not prefer a presumption in favour of an implied repeal of an earlier special law by subsequent general legislation unless an intention to the contrary is declared.

Based on the language of the DM Act, it cannot be said with conviction that the DM Act sought to repeal the provisions of the ED Act. Moreover, the Epidemic Diseases (Amendment) Ordinance, 2020 ('the Ordinance') was

---

[221] *Id*., ¶9.
[222] *Id*., ¶¶6, 9.
[223] Deccan Merchants Cooperative Bank Ltd. v. Dalichand Jugraj Jain, AIR 1969 SC 1320.
[224] *Id*.
[225] *Id*., ¶36; Sanwarmal Kejriwal v. Vishwa Coop. Housing Society Ltd., (1990) 2 SCC 288, ¶¶21, 22.

promulgated on April 22, 2020, amidst the pandemic. This Ordinance led to the introduction of certain definitional clauses such as acts of violence and healthcare service personnel that were missing from the ED Act and some regulations concerning the protection of healthcare service professionals from acts of violence.[226] The fact that the ED Act was amended amidst the pandemic despite the DM Act being in force clearly reveals that there was no intention on the part of the Parliament to repeal the ED Act after enacting the DM Act in 2005.

In addition to the invocation of the DM Act, the Cabinet Secretary, in a meeting with representations of various Ministries on March 11, 2020, decided that all States and UTs should be advised to invoke §2 of the ED Act for adopting measures in relation to efficient management and prevention of the spread of the virus.[227] This particular direction in relation to the invocation of the ED Act also strengthens the claim that the ED Act was very much in force and was not repealed by virtue of the enactment of the DM Act. Moreover, in a large number of its judgements, as discussed above, the Supreme Court has attempted to harmonise the special and general legislations and give effect to both of them by applying the principle of *generalia specialibus non derogant*.[228] The provisions of the DM Act are capable of reasonable application to cover only general cases within the meaning of "disaster" as provided under the statute, leaving out the management of epidemics in particular, which already fall within the specific scope of the ED Act. Hence, in light of the aforesaid, considering the classification of COVID-19 as a pandemic and, therefore, its inclusion within the ambit of the ED Act, it can be said that the application of the ED Act over the provisions of the DM Act would have been the appropriate manner of managing the pandemic situation in accordance with the rule of *generalia specialibus non derogant*, and the federal distribution of powers as enshrined in the Constitution.

IV. CONCLUSION

The COVID-19 pandemic is a public health crisis that has crippled various nation-States across the world, wherein the constant struggle has been to draw a balance between saving lives versus returning to normalcy. As COVID-19 is transmitted through aerosols, governments have adopted different ways of restricting the spread of the virus. These include measures such as the use of face coverings, social distancing, division of countries into different lists on the basis of the threat posed and restricting travel, partial lockdowns, and complete lockdowns.

---

[226] The Epidemic Diseases Act, 1897, §2B *inserted vide* The Epidemic Diseases (Amendment) Ordinance, 2020 (w.e.f. April 22, 2020).

[227] Press Release, Ministry of Health and Family Welfare, Government of India, March 11, 2020, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=200106#:~:text=Prime%20Minister%2C%20a%20high%20level,19)%2C%20in%20the%20country (Last visited on January 3, 2022).

[228] R.S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, ¶11; U. P. State Electricity, *supra* note 143, at ¶7; Life Insurance Corporation of India, *supra* note 206, at ¶54; Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18, ¶29.

In India, two legislations have been utilised by the Centre and the State to manage COVID-19: the DM Act and the ED Act. Both legislations conflict on the mode of administrative hierarchy envisaged to manage biological disasters. While the ED Act requires the State Government to be the focal point in tackling epidemics and biological disasters within their jurisdiction, the DM Act requires the Central Government to be the focal point for managing disasters in any area of the country. This creates a fundamental conflict in terms of decision-making when a biological disaster strikes.

Pertinently, as per the constitutional distribution of powers between the Central Government and the State Governments with respect to legislation and execution, the Legislative Assembly and the State Governments have the primary responsibility for managing a "public health" crisis. Yet, by utilising the DM Act, the Central Government has been at the forefront of the management of the pandemic. The fact remains that the DM Act allows the Centre to take such a lead in the face of disasters, and therefore, the first question that we ask is whether the Parliament was competent to enact the DM Act, to the extent that it regulates biological disasters? The term disaster management is very broad and includes manmade and natural disasters such as floods, cyclones, earthquakes, tsunamis, nuclear and radiological emergencies, and terrorist attacks. We clarify that we do not contest the ability of the Parliament to enact the DM Act *in toto*, but only challenge the regulation of biological disasters through it – because the management of "public health" is explicitly a power of the State Government under the Constitution.

We concluded that the Parliament is incompetent to legislate on biological disasters because none of the entries in List I or List III of Schedule VII to the Constitution can give power to the Centre to manage the biological disasters. The remotely related entries such as "inter-State quarantine" or "prevention of extension of infectious diseases…from one State to another" are restricted in nature and can accord power only on inter-State aspects of biological disasters. However, the DM Act, and the manner in which the Centre has utilised it during the COVID-19 pandemic makes it clear that the Centre's actions were not only limited to inter-State matters, but also were a micro management of the entire situation. Moreover, even the doctrine of harmonious interpretation along with the doctrine of residuary powers requires that the entries in different lists be interpreted harmoniously. Therefore, the entry allocating powers to the Parliament/ Centre on inter-State matters cannot be read to subsume intra-State management too, as public health is a State List subject.

In any event, as the ED Act and the DM Act are both in force, it becomes imperative to address the conflict between both these laws using the tools of interpretation such as *lex specialis* and *lex posterior*. On undertaking a critical analysis of the said legislations, we came to a conclusion that the ED Act is a special law in the context of management of an epidemic disease outbreak, whereas

the DM Act is a more general legislation, which pertains to the management of all types of disasters, including natural as well as manmade within its broad scope. In this context, applying the rule of *lex specialis*, we conclude that the ED Act, being a special legislation, should have prevailed over the provisions of the DM Act from the initial phase of the pandemic itself. Even the *non-obstante* clause in the DM Act does not change this conclusion since a clause in itself is insufficient to imply the repeal of all existing laws in the field, particularly a special legislation like the ED Act that is focussed on the management of biological disasters such as COVID-19.

We have also taken into account certain vital public policy considerations, which are necessary to be assessed while determining the applicability of either of the two conflicting laws in the presence of a *non-obstante* clause. State Governments and local functionaries would be in a much better position to frame effective policies in response to any form of crises, especially biological disease outbreaks, in view of having specific knowledge with respect to the ground realities prevailing in the concerned States. Therefore, the ED Act accords a dominant role to the State governments to control the spread of an outbreak within the States and empowers the Centre to manage only the inter-State spread of the disease. Hence, the invocation of the provisions of the ED Act in preference to those of the DM Act would have been a more appropriate and desirable approach to managing the COVID-19 outbreak in consonance with the constitutional scheme of distribution of powers.

The alternative contention justifying the invocation of the DM Act to deal with the COVID-19 crisis by applying the rule of *lex posterior* in view of the DM Act having been enacted post the ED Act, and thus, being indicative of the latest intention of the law-makers has also been addressed. We have taken recourse to the principle of *generalia specialibus non derogant*, whereby courts attempt at harmonising and giving effect to both the special and general enactments. Hence, applying this principle, we recommended that the DM Act provisions should cover situations that fall within the general scope of 'disaster' enshrined in the said legislation. Further, we also recommend that the DM Act specifically exclude the management of biological disease outbreaks, which remain within the scope of a pre-existing special law, i.e. the ED Act, that focuses primarily on epidemics and public health crises. We, therefore, conclude that the adoption of measures invoking the ED Act, which includes the COVID-19 outbreak within its scope, in preference to those under the DM Act, would have more apt in effectively handling the pandemic situation and, at the same time, would have been in accordance with the true spirit of federalism embedded in our Constitution.