

Role played by Judiciary in emphasizing Article 21 during the 2nd Wave of COVID-19 Pandemic: A Comparative Study of New Zealand and Brazil

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Abstract: The second wave of the COVID-19 pandemic posed unprecedented challenges worldwide, testing the resilience of legal and healthcare frameworks. This paper explores the pivotal role of the judiciary in upholding fundamental rights, particularly Article 21 of the Indian Constitution, which guarantees the right to life. It examines key judicial interventions in areas such as the migrant labor crisis, oxygen supply, vaccination access, hospital bed availability, essential drug distribution, and compensation for COVID orphans. The study highlights how Public Interest Litigation (PIL) and *Suo Motu* cognizance enabled courts to respond swiftly to governmental inefficiencies and ensure citizens' rights were protected.

Further, this research extends to a comparative analysis of judicial responses in Brazil and New Zealand. While Brazil's Supreme Federal Court (STF) played a critical role in countering executive failures and ensuring scientific temper in governance, New Zealand's judiciary upheld the legality of lockdown measures and vaccination policies, reinforcing the balance between public safety and individual freedoms.

By analyzing these jurisdictions, this paper underscores the judiciary's indispensable role in crisis governance, emphasizing its power to influence policy decisions and safeguard human rights. The findings offer valuable insights into the judiciary's evolving role in disaster management and its ability to create legal precedents for future public health emergencies.

Keywords: *Judiciary, COVID-19, Human Rights, Article 21, Public Interest Litigation, Suo Motu, Pandemic Governance, Comparative Analysis, Brazil, New Zealand.*

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I. INTRODUCTION

During the second wave of the COVID-19 pandemic, the largest democracy in the world faced an overwhelming increase in cases that strained its healthcare system. Those infected struggled to secure hospital beds, and even those fortunate enough to obtain one faced challenges in accessing oxygen and essential medications. For those who succumbed to the virus, dignified cremation became a poignant struggle.

In the midst of this global crisis, India, like other nations, stood out not just for its challenges but also for the resilience of its people, the spirit of humanity, and the commitment of those responsible for upholding the constitution. The judiciary, often seen as the guardian of constitutional values, did not remain a passive observer.

This paper delves into the pivotal role of Public Interest Litigation and *Suo Motu* cognizance in the functioning of the Indian judiciary. Focusing on Article 21 of the Indian Constitution, the research categorizes judgments into seven key areas: Migrant Labour Crisis, Oxygen Supply, Vaccination Access, Bed Availability, Essential Drug Supply, Medical Infrastructure (Urban & Rural), and Compensation for COVID Orphans. It sheds light on the proactive stance of the judiciary in safeguarding rights, emphasizing the timeliness of interventions for practical impact. Additionally, it explores the collaborative efforts between judicial decrees and executive actions, aiming for efficient crisis management.

The study extends beyond national boundaries, offering a comparative analysis with Brazil and New Zealand—representing a developing and developed country, respectively. This research aims to comprehensively analyze the multifaceted role played by the Indian Judiciary during the COVID-19 pandemic, with a particular focus on the constitutional principles encapsulated in Article 21.

II. MIGRANT LABOUR CRISES

To curb the spread of the Covid-19 pandemic, the Indian government enforced a sudden nationwide lockdown without prior public notice, triggering a mass exodus of migrant workers from cities to their hometowns. Approximately 1.14 crore migrant workers migrated since March

25, 2020, facing deprivation of basic necessities such as transportation, jobs, food, and shelter.¹ Despite numerous petitions presented to the Supreme Court, they were initially dismissed based on the solicitor general's assurance of crisis management measures. It took two months of migrant laborers,' to get the Suo Moto cognizance case titled IN RE: PROBLEMS AND MISERIES OF MIGRANT LABOURERS,² acknowledged by the Hon'ble Supreme Court. Article 21 was construed to encompass the right to food, instructing state governments, under this provision, to ensure food security for migrant laborers. High Courts, particularly that of Karnataka, Gujarat,³ and Madras, exhibited proactive roles in addressing the migrant crisis. Notable cases include *Mohammed Arif Jameel v. Union of India*,⁴ where the Karnataka High Court criticized the state's refusal to cover transportation costs, and the Madras High Court's stern rebuke of the governments' lack of coordination in providing relief to jailed migrant workers.⁵ These judicial interventions prompted other High Courts, including Andhra Pradesh, Allahabad, Bombay, and Telangana, to issue similar orders.⁶

III. SUPPLY OF OXYGEN

The oxygen policy in India holds significant implications due to uneven oxygen production across states. While states like Maharashtra, Rajasthan, and Jharkhand produce oxygen, others like Delhi, Goa, and Madhya Pradesh rely on supply from oxygen-producing states. Efficient inter-state coordination for this life-saving resource is crucial, as any hesitation or inefficiency in sharing resources can lead to loss of life. The apex court acknowledged discrepancies between the Center and states, emphasizing that citizens' lives must not be endangered due to disputes over responsibilities. In response to the oxygen deficit, the court mandated the Central Government to address the shortfall promptly, establishing buffer stockpiles and maintaining 24-hour coordination through a virtual control room. Additionally, the Supreme Court instituted a

¹Harsh Mander, 'Migrants Workers, the Lockdown and the Judiciary' (*The India Forum*, 2020) <<https://www.theindiaforum.in/article/migrants-workers-lockdown-and-judiciary>> accessed 8 March 2025

² Suo Motu Writ Petition (Civil) No.6 Of 2020

³*Suo Moto v State of Gujarat* C/WPPIL/42/2020 (Gujarat HC)

⁴ Writ Petition No. 6435/2020 and Writ Petition No. 6671/2020

⁵*AP Suryaprakasam v Superintendent of Police* HCP No 738 of 2020 (Madras HC)

⁶ G.S. Bjpai and Ankit Kaushik, 'Unlocking Justice in the Lockdown' (*The Hindu*, 2020) <<https://www.thehindu.com/opinion/op-ed/unlocking-justice-in-the-lockdown/article31456524.ece>> accessed 8 March 2025

12-member National Task Force to ensure transparent and equitable distribution of liquid medicinal oxygen to states combating COVID-19.⁷

1.1 Delhi High Court on Failure to Supply Oxygen

The Delhi High Court strongly rebuked the central government for not adhering to the Supreme Court's directive to supply 700MT of Liquid Medical Oxygen daily. Using forceful language, the court issued a show-cause notice, questioning why contempt proceedings should not be initiated for non-compliance with the Supreme Court's orders; Beg, Borrow or Steal but deliver.⁸

1.2 Karnataka High Court's order on Centre & Supreme Court Appeal

The Karnataka High Court mandated the daily supply of 1200 MT of oxygen for the residents of Karnataka. In response, the central government appealed urgently to the Supreme Court to set aside this order. The apex court, however, rejected the appeal, affirming the decision and Justice Chandrachud praising the Karnataka High Court's order as an exceptionally well-calibrated and considered exercise of power.⁹

IV. ACCESS TO VACCINATION

Promotion of vaccination stands as a crucial strategy in the battle against the pandemic, with the government actively engaging in campaigns to ensure broad coverage. The Right to Health, an integral aspect of the Right to Life under Article 21, extends to encompass the right to vaccination.¹⁰ The Supreme Court is actively reviewing the constitutionality of coercive vaccination practices, wherein citizens face pressure to receive vaccines under the threat of consequences like job loss or deprivation of basic necessities. Various High Courts have also

⁷ *Union of India v Rakesh Malhotra* [AIR 2021] 9 SCC 241

⁸ Anjali Karmakar, 'Judicial Activism: The Covid-19 Impact' (2021) 7 *Journal on Contemporary Issues of Law* [JCIL] 2 <<https://jcil.lsyndicate.com/wp-content/uploads/2021/04/Judicial-Activism-The-COVID-19-Impact-Anjali-Karmakar.pdf>> accessed 7 March 2025

⁹ Maqbool Ejaz, Akriti Chuabey, and Isa Mohammad Hakim, 'How the Supreme Court and the High Courts Have Dealt with the Worst Migrant Crisis Faced by the Nation' (*Bar and Bench*, 2020) <<https://www.barandbench.com/>> accessed 8 March 2025

¹⁰ S. Sivakumar and G. Kameswari, *Article 21: The Code of Life, Liberty and Dignity in the Indian Constitution* (1st edn, Generic 2020)

intervened against coercive measures, including tying vaccination status to access to essential services, salaries, business operations, and public spaces.

In a self-initiated PIL, the Meghalaya High Court¹¹ emphasized that Article 21 incorporates the right to health care, embracing vaccination as a fundamental right. However, it cautioned against imposing vaccination forcibly, deeming it a violation of fundamental rights. Building on this stance, the Guwahati High Court declared Mizoram's Standard of Procedure, restricting unvaccinated individuals, as violative of constitutional articles 14, 19, and 21.¹² The court argued against discrimination toward unvaccinated individuals without evidence that vaccinated persons cannot transmit the virus, underscoring the necessity for fair treatment in adhering to COVID-appropriate behavior.

Concerning the second vaccine dose, the Madras High Court emphasized its obligatory administration on specified dates to prevent a violation of Article 21 and mitigate resource wastage.

V. AVAILABILITY OF BEDS

"Gaining admission into a hospital with a bed is one of the biggest challenges being faced by most individuals during this second wave of the COVID-19 pandemic"

-Supreme Court of India in In Re: Distribution of Essential Supplies and Services during Pandemic.

The Supreme Court highlighted the immense challenges citizens faced during the pandemic when dealing with varied protocols set by different countries, states, and municipal governments for conducting business. The disparity in admission criteria among hospitals across the nation led to confusion and insecurity. Consequently, the apex court issued guidelines aimed at ensuring patients could secure beds in hospitals nationwide, emphasizing the central theme of consolidation and a centralized policy. The court addressed arbitrary admission policies, specifically noting cases in Gujarat¹³ where hospitals refused COVID-19 cases and denied beds to patients arriving in non-government ambulances. It emphasized that such flawed policies

¹¹ Registrar General, High Court of Meghalaya v State of Meghalaya [AIR 2021] MANU/SC/0365

¹² M.P. Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018)

¹³ *Suo Motu v The State of Gujarat* [AIR 2020] MANU/GJ/0350

should not be allowed nationally. The court also addressed issues related to identification proof for admission, the need for a COVID-19 test, utilization of privately purchased resources, the necessity for a centralized data control center, and the reservation of beds for COVID-19 patients. Various high courts, including those of Madhya Pradesh¹⁴, Himachal Pradesh¹⁵, Telangana, and Andhra Pradesh, expressed similar concerns and issued directions to address these issues.

VI. SUPPLY OF ESSENTIAL DRUGS

Regarding the supply of essential drugs, the court noted the prescription of drugs like Favipiravir, Ivermectin, Enoxaparin, Methylprednisolone, Paracetamol, and Hydroxy-chloroquine by doctors, not aligning with the National Clinical Management Protocol for COVID-19. This discrepancy may pose future issues in stocking and availability. The court suggested either aligning doctors' prescriptions with the National Clinical Management Protocol or amending the protocol to include these drugs. Additionally, the court shed light on and recommended a reevaluation of specific sections of the Patents Act, Drugs and Cosmetics Act, 1940, and Drug Price Control Order, 2013, by the Central Government. The advice emphasized applying rules in the best interest of the people, such as capping drugs not yet included in the National Clinical Management Protocol or increasing production. Addressing black marketing concerns for drugs like Remdesivir, Tocilizumab, Oxygen, and Ambulances, the court ordered the Central Government to take action against hoarding and profiteering, urging the creation of a grievance redressal portal for public concerns.

VII. COMPENSATION TO COVID ORPHANS

The COVID-19 pandemic has left numerous children without the love and care of their parents, transforming their childhood into a distressing ordeal. The term "COVID orphans" is coined for those children who have lost one or both parents to the virus. Writ petitions such as *Reepak Kansal v. Union of India*¹⁶ and *Gaurav Kumar Bansal v. Union of India*¹⁷ were initiated to

¹⁴ *Re Suo Motu v Union of India* [AIR2021] MANU/MP/0402

¹⁵ *Himachal Pradesh High Court vide Court on its Own Motion and Ors v State of H.P. and Ors* [2021] MANU/HP/1132

¹⁶ *Reepak Kansal v Union of India*, Writ Petition (Civil) No. 554 of 2021

¹⁷ *Gaurav Kumar Bansal v Union of India*, Writ Petition, Writ Petition (Civil) No 539 of 2021

compel Central/State Governments to grant ex gratia compensation to the families of those who succumbed to COVID-19. In this case, the Supreme Court emphasized that providing financial assistance is not solely a legal obligation but also a constitutional one, as it directly impacts the right to life.

VIII. COMPARITIVE CASE STUDY ON BRAZIL JUDICIARY

President Jair Bolsonaro faced criticism for his handling of the COVID-19 pandemic, with accusations of downplaying the virus and undermining control measures. The Supremo Tribunal Federal (STF) in Brazil played a pivotal role in addressing the executive's flawed response and navigating the ensuing public health and human rights crises.

1.1 Inter-Government Disputes:

Article 24 XII¹⁸ of the Brazilian Constitution designates health-related legislation as concurrent competence for all levels of government. Since March 2020, the STF has resolved conflicts between central and regional governments, especially regarding their competence to act on health rights and issue normative measures like lockdowns. The STF's discretionary decision-making powers have allowed it to redefine its position in relation to other branches of government and the public.

1.2 Assumption of Disputes of National Importance – Mandatory Vaccination:

The STF has proactively addressed dormant litigation and anticipated issues, such as mandatory vaccination, reshaping the political landscape.¹⁹ Despite President Bolsonaro's opposition to a specific vaccine, the STF ruled in favor of mandatory COVID-19 vaccination, emphasizing that no one can be forcibly immunized by the government. This parallels the stance of the Supreme Court of India, which refused to suspend compulsory vaccination requirements.²⁰

¹⁸ Constitution of the Federative Republic of Brazil 1988, art 24

¹⁹ João Biehl, Lucas E. A. Prates, and Joseph J. Amon, 'Supreme Court v. Necropolitics: The Chaotic Judicialization of COVID-19 in Brazil' (2021) *Health and Human Rights Journal* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8233022>> accessed 8 March 2025

1.3 Mandating Scientific Temperament in Government Decisions:

The STF was asked to suspend a presidential order centralizing power over transportation, limiting municipal preventive measures. The court upheld states' and municipalities' authority to enact pandemic-control measures, emphasizing the importance of scientifically sound decisions in future actions.

1.4 Federal Government Overriding Local Policies Against COVID-19:

The federal government, sued by the Brazilian Bar Association for non-compliance with COVID-19 measures, was prohibited by the STF from overriding state, municipal, and federal district regulations. The STF concurred with the Bar Association's argument that local policies could not be overridden by the federal government in managing the pandemic.

IX. COMPARATIVE CASE STUDY ON NEW ZEALAND

New Zealand's response to the COVID-19 pandemic has been widely acclaimed for its effectiveness under the leadership of Prime Minister Jacinda Ardern, a supportive Cabinet, and coordinated efforts by citizens. Notably, the judiciary played a crucial role in affirming the legality of lockdown measures and the COVID-19 Public Health Response (Vaccinations) Order, 2021.

1.1 Legality of the Lockdown:

In the *Borrowdale v. Director General of Health*²¹ case, the legality of the initial COVID-19 response was challenged, focusing on public announcements, orders by the Director-General, and the definition of "essential services."²² The High Court of New Zealand ruled that only the first ground was sustainable, finding that certain aspects of Order 1 were justified but unlawful. This decision did not impact the subsequent restrictions after Order 2 came into effect, ultimately affirming the necessity and lawfulness of the lockdown to curb the spread of the virus.²³

²¹ *Borrowdale v Director-General of Health* [2020] NZHC 2090

²² Winny Annalies, 'In New Zealand, A Response to Be Proud of' (Johns Hopkins Bloomberg School of Public Health 2021) <<https://www.globalhealthnow.org/2021-04/new-zealand-response-be-proud>> accessed 7 March 2025

²³ Tim Wells, 'New Zealand High Court Finds COVID-19 Lockdown Measures to Be Justified Under Human Rights Law (but Partially Unlawful on Other Grounds)' (2020) *Human Rights Law Centre* <<https://www.hrlc.org.au/human-rights-case-summaries/2020/8/19/new-zealand-high-court-finds-covid-19->

In contrast, India already had legal provisions for imposing lockdowns, and the courts focused on addressing the consequences such as the migrant crisis, essential supplies shortage, wages, and COVID orphans.

1.2 Legality of COVID-19 Public Health Response (Vaccinations) Order, 2021:

In the *GF v. Minister of COVID-19 Response & Ors.*²⁴ case, the legality of the vaccinations order was challenged, arguing it was ultra vires and irrational concerning unvaccinated employees. The High Court of New Zealand declared the order not ultra vires and reasoned it was not irrational as it did not force vaccination and was supported by data. In India, several High Courts addressed coercive vaccination, declaring it illegal and incompatible with the concept of universal vaccination.

1.3 Role of Public Policy:

In the *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health & Ors*²⁵ case, an injunction was sought to halt the supply of Pfizer's COVID-19 Vaccine, alleging it went beyond permissible groups under the Medicines Act, 1981. The High Court acknowledged the possibility of a valid case but refrained from using discretionary powers due to public policy considerations. The unique circumstances of COVID-19 necessitated prioritizing public immunity over potential legal breaches. Despite the refusal of remedies, the Medicines Act was subsequently amended to allow temporary consent for such roll-outs.

New Zealand's success in battling COVID-19 is attributed to a robust government, proactive judiciary, and favorable conditions. In India, resource constraints and the status as a developing country presented different challenges.²⁶

X. CONCLUSION

[lockdown-measures-to-be-justified-under-human-rights-law-but-partially-unlawful-on-other-grounds](#)> accessed 8 March 2025

²⁴ *GF v Minister of COVID-19 Response & Ors* [2021] NZHC 2526

²⁵ *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health & Ors* [2021] NZHC 1107

²⁶ Wiley Lindsay and Steve Vladeck, 'COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis' (2020) *Harvard Law Review* <<https://harvardlawreview.org/blog/2020/04/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/>> accessed 8 March 2025

During the devastating second wave of the COVID-19 pandemic, the Supreme Court (SC) and various High Courts (HCs) in India took an active and interventionist approach to uphold the fundamental rights of citizens, particularly emphasizing Article 21 of the Indian Constitution, which guarantees the right to life. With the healthcare system overwhelmed and governmental response often falling short, the judiciary stepped in to address critical issues such as the shortage of oxygen supplies, hospital beds, essential medicines, and equitable vaccine distribution. Through a series of landmark rulings, the courts not only provided immediate relief to affected individuals but also reinforced the constitutional mandate of protecting human life and dignity. This study examines key judicial interventions during the crisis, illustrating how courts played a crucial role in safeguarding public health and ensuring government accountability.

Additionally, this research undertakes a comparative analysis of judicial pronouncements across various High Courts, revealing a unified and unwavering commitment to the principles enshrined in Article 21. The judiciary's proactive stance not only provided real-time solutions but also set significant legal precedents that future courts can reference when dealing with emergencies that impact fundamental rights. These rulings serve as guiding frameworks for ensuring access to healthcare, fair allocation of resources, and government responsibility in times of crisis. By analyzing these judicial interventions, the study highlights the evolving role of the judiciary as a protector of constitutional rights, particularly during unprecedented public health emergencies.