

The COVID pandemic: Time to ‘ramp-up’ India’s conflict of law rules in matters of tort? (by Kashish Jaitley, Niharika Kuchhal and Saloni Khanderia)

Research demonstrates that the permanent income loss for the Asia-Pacific region, including India, from the impact of COVID-19 to be \$620 billion as of March 24, 2020. It is undeniable that the pandemic has not only resulted in the loss of human health and life but has also adversely affected the Indian economy. A United Nations labour report states that the Coronavirus has impacted tens of millions of informal sector workers as of 8th April 2020, and is predicted to put around 2 billion more people at risk. The Indian economy has been severely hit since most of the Indian population consists of daily wage workers. On 24th March 2020, the Prime Minister invoked his powers under Sec.6(2)(i) of the National Disaster Management Act, 2005, to enforce a lockdown for an initial period of 21 days in the country with effect from 25th March 2020. The “total” lockdown has now been extended until 3 May 2020 and, will be treated under *force majeure* as per the Government order. The current scenario where India is put under what is reported to be the “world’s most stringent lockdown” (also referred to as Lockdown 2.0) has forced millions of persons out of work, with the hardest hit being the poor, including the daily wage earners and migrant workers. Besides, airports, private clinics and most other shops providing daily essentials have shut.

Drawing from the situation in other countries, India reflected on its own capacity to prevent pandemic considering the resources available in the country. This is a country of 1.3 billion people and the healthcare system in place is very fragile. The latest National Health Profile 2019, released in October 2019, shows India’s public expenditure on health has been less than 1.3% of the GDP for many years. The investment in public healthcare is one of the lowest in the world as the country is more driven towards private investment in healthcare. This will result in human cost because the treatment cost, which involves vaccines, tests and

medical facilities, will be more than what most of the population will be able to afford. Looking at the lack of accessibility and affordability to medical care the Prime Minister has announced a public charitable trust under the name of 'Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund' (PM CARES Fund)' with the Prime Minister as the Chairman of the trust. In face of such a high-risk situation, the WHO Country Office for India is working closely with the Ministry of Health and Family Welfare (MoHFW) to strengthen surveillance, build the capacity of the health system and optimize the 'window of opportunity' created by mandatory physical distancing in India. Even though such rampant measures have been taken, India is still not fully equipped to deal with a full-scale pandemic.

The outbreak and the consequent Government decision have resulted in an overwhelming financial/economic loss to the Indian population. People have been banned from leaving homes and supply to all 'non-essential' commodities has been cut-off to prevent a further spread of the deadly virus, which originated in Wuhan, China. The recent times additionally witnessed the Indian Government's order to blacklist the 960 foreigners who participated in the Tablighi Jamaat Meetings as they became a key source for the spread of Coronavirus in India. These foreigners violated the terms of their tourist visas by attending an Islamic congregation at the Nizamuddin Market in New Delhi in March. The foreigners were found in different states all over the country and as on 2nd April, 245 COVID-19 cases and about 12 deaths in the country were found to have links with the Tablighi Jamaat Meeting.

Recently, citizens of the United States filed a class-action suit filed against the Chinese Government for damages suffered as a result of "incalculable harm" done to the plaintiffs. Whether the near future will see a similar class-action suit by Indian citizens against the Chinese Government and the 960 Tablighi Jamaat foreigners, remains to be seen.

Under India's conflict of law rules, which remain uncoded, an Indian court can assume jurisdiction by being the place where the cause of action – in this case, the tort occurred. Sections 9 and 86 of the Code of Civil Procedure 1908 empowers the courts in India to try all suits, which result in damage caused by negligence, including those initiated by Indian citizens against foreign entities. At the same time, India lacks any coherent mechanism to identify the applicable law that will govern damages arising from such transnational torts. Rigidly following

the common law principles, India continues to hold fast to the traditional principle of 'double actionability' – a rule, which has long been discarded by all other common law jurisdictions including Australia and Canada.

Under the present rules, the plaintiff(s) suing before an Indian court will have to prove that the act of the Chinese government in concealing the nature of the virus and failing to take appropriate steps to contain it, was actionable under the Chinese and Indian law – upon which, the suit will be governed concurrently by the Chinese and the Indian law of tort.

Under the Indian law of torts, the plaintiffs will need to prove a breach in a duty of care on the part of the Chinese government and the Tablighi Jamaat attendees who were foreign nationals, which caused the tort of negligence. The Indian law of torts is based on the principles of Common Law as iterated in *Rajkot Municipal Corpn. v. Manjulben Jayantilal Nakum* (1992 ACJ 792). According to the common law principles as evolved by the House of Lords, negligence signifies failure in executing a degree of care which should have been exercised by the doer. The essentials for establishing negligence under the Indian law may be summarized as follows. Firstly, that the defendant owed a “legal” duty of care towards the plaintiff. Secondly, that there was a breach of this duty; and thirdly, that the plaintiff experienced damage (including economic loss) as a result of such breach by the defendant.

In the international realm, China's 'duty of care' towards India and its citizens may be traced through the relevant provisions of the International Covenant on Economic, Social and Cultural Rights and the International Health Regulations of 2005. Under Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights, the Chinese government was under a duty to take measures for the “(t)he prevention, treatment and control of epidemic, endemic, occupational and other diseases” for nationals and non-nationals alike. However, this provision does not extend to economic loss. In particular, China's duty of care towards non-nationals may be recognised under the International Health Regulations of 2005 as well. As per Article 6 of the IHR, China was required to notify the WHO of the “events which may constitute a public health emergency of international concern within its territory”. Hence, China owed a legal duty of care towards its non-nationals. This legal duty towards the non-nationals can further be extended to infer as a duty towards other countries and their nationals.

Since China failed to notify the World Health Organisation according to the International Health Regulations of 2005 within sufficient time despite the given indications towards the public health concern, it has negligently breached its duty of care towards the rest of the world. Dr. Li Wenliang was the first to create awareness and intimate the Chinese Government about the hazardous virus. Instead of adopting effective measures, the Chinese Government reprimanded the scientist. This is depictive of the negligent conduct of the Chinese Government.

On the other hand, the legal duty of care of the 960 foreigners can be established under section 14 of the Foreigners Act, 1946 insofar they had partaken in a religious activity which violates the terms of their tourist visas. Besides, sections 6(2)(i) and 10(2)(l) of the Disaster Management Act, 2005 will also be applicable due to their failure to adhere to social distancing guidelines issued by the government in wake of the COVID-19 outbreak.

At the same time, having regard to the present principles of the Indian conflict of law, no claim before an Indian court for damages in relation to the outbreak will sustain unless the plaintiffs are simultaneously able to prove negligence on the part of the Chinese government and/or under *each of the laws* of tort of 960 Tablighi Jamaat attendees. Suits initiated in relation to the pandemic in India could, therefore, act as a revolutionary moment for India to ramp-up its conflict of law principles – especially in matters arising from cross-border torts.

That said, the spread of COVID -19 has undoubtedly been one of the most challenging times for the judiciary in all the countries. Countries like the Netherlands and Germany have proven its judiciary to be effective and efficient during the times of crisis by adapting to the digital mode in adjudicating disputes. In the largest democracy of the world, India, the judiciary has always remained under challenge due to the overwhelming number of litigation matters approaching courts every day.

The humongous load of backlog along with current lockdown had come as a huge blow and stir to the judicial system in India. The Supreme Court has, thus, decided that vital matters before it would be conducting video conferencing. The digitalisation of the judiciary has been a huge respite especially in the case of granting bails and avoiding overcrowding of the prison to control the spread of the virus. All other smaller courts (including the High Court are shut during the lockdown).