

## THE LEGALITY OF STATE RESPONSE TO COVID-19 PANDEMIC AND THE IMPLICATIONS WITHIN AND ACROSS NATIONAL BORDERS

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### ABSTRACT

*States have imposed various measures in response to COVID-19 pandemic outbreak, justifying them on wider public interest grounds. However, the implications of the related measures domestically and across borders, as well as the question of legality of the imposed measures, are yet to be fully assessed. While states are forced to take measures, intricate questions like whether they enjoy unfettered freedom or there exist any limitations and therefore should be accountable for their actions continue to arise. The sources imposing limitations on state powers could emanate from domestic or international laws and the state actions in response to COVID-19 should stand the test of legality in order to ensure that the confidence of the society on the state mechanisms handling crisis situations continue to strengthen. However, the pertinent legal standards based on which, the state actions could be assessed may not be sensitive to the needs arising from a global pandemic situation of this unprecedented magnitude and calamity. Under such circumstances, the onus of undertaking of a balanced assessment of the state measures is crucial for scholarly works as well as formal tribunals and courts that could be called upon to pronounce the legality of the state action. The findings of the paper identify the implications of national responses to COVID-19 pandemic domestically and beyond national borders and highlight the sources for determining the legality of the state actions. The findings reveal the need for taking a socio-legal approach in appraising the state action and accentuate the relevance of such an approach. The paper introduces typical state responses to COVID-19 briefly and analyses some its consequences. The paper examines the impact of state action or inaction upon the rights of different segments of the society and identifies relevant national and international legal standards to assess the legality. The paper addresses the implications of the state actions on international trade and commerce and analyses the role of relevant international norms and institutions in determining the legality. The calls for the need to take a socio-legal approach in assessing the legality of state actions in response to COVID-19 pandemic outbreak.*

Key words: State Response, Public Health, Individual Rights, Trade Barriers, Legality, Socio-legal Theory.

### INTRODUCTION

When COVID-19 global pandemic struck with an unprecedented speed of contagion and scale of devastation, many national governments had to act spontaneously without much thought about the rationality and efficacy of the measures they chose to introduce. As the effects of the pandemic starting to wane out, the measures introduced will be increasingly subjected to scrutiny. Various concerns regarding the actions or inactions of the state have emerged including its adverse implications upon health, human rights and economic aspects within and across the borders of individual nations. When the rationality of the introduced measures is subjected to a debate, national governments tend to defend their actions based on the justification of scientific uncertainty and the need for a precautionary approach. Under such circumstances, should the states be allowed to determine their own course of action or should the states' powers be limited, and their actions be accountable and assessed are some of the important issues that arise.

To address the conundrum, the question of legality of the state action and the measures introduced subject to the national and international laws should serve as a key standard of enquiry. Moreover, the role of law as a vehicle to achieve social justice should be a guiding value in scrutinizing the COVID-19 response measures. This engagement should also be extended to any enquiry related to the evaluation of the international impact of the COVID-19 response measures, as the nexus between international law and social justice is increasingly gaining prominence in recent years. The question of legality facing COVID-19 response measures is more sensitive and intricate than in other contexts, where similar question may arise. The issue of legality of COVID-19 response measures pertains to the fundamental traits of the sovereign action, which every state would seek to justify as part of its duty or responsibility to protect its own citizens.

The effects of the COVID-19 response measures could be noticed both domestically as well as across borders. Among them, domestic challenges questioning the legality of the response measures are bound to arise in national courts, whereby the states that are amenable to the judicial review of its governmental actions could come under due scrutiny, based on established national legal standards. However, international challenges questioning the legality of a state response to COVID-19 would be more difficult, as states would tend to seek resort to the specific exceptions recognized in their international obligations in various fields of international relations. Where recognized exception may not exist, states may defend their actions based on the justification of sovereign duties and responsibilities or the manifestation of its right of sovereignty. However, the actions of a state should be subjected to a scrutiny based on international legal standards and practices, which will provide invaluable guidance for the states to ensure legitimacy in handling future pandemic situations and restore the confidence of the people over the state mechanism.

The possibility of challenging the legality of state actions before international tribunals or dispute settlement bodies face various limitations. Such limitations are generally perceptible in different fields of international relations, but specific challenges of individual state action are viable. The recourse to some international forums to challenge the legality of a state response to

COVID-19 is primarily limited to other aggrieved states who would have *locus standi* to raise a dispute. For example, the trade restrictive measures imposed by a member state of the World Trade Organization (WTO) in response to COVID-19 outbreak could be challenged by other member state(s) of the WTO by resorting to the WTO Dispute Settlement Mechanism. It is only the member states and not the affected individuals or traders or business entities from those states who have the right to initiate actions before the WTO. This inherent limitation makes the potential for related challenges subject to the political will of individual states and the desire of any individual or trading entities to question the trade restrictive measures of a foreign state may not be satisfied, unless they successfully persuade their home states to initiate an action before the WTO.

The limitation upon individuals right to initiate an action before an international forum however is not prevalent in all fields, except very few. For example, individuals who perceive violation of human rights guaranteed in different international human rights treaties could seek the intervention of relevant international bodies established to hear and address individual complaints. It is possible in certain forums like the special committees that are empowered to receive individual complaints regarding state derogation of obligations under specific international human rights treaties. The Human Rights Committee (CCPR) could receive individual complaints alleging state derogation of obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) could receive complaints pertaining to the violation of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

It is important to note that individual resort to international forums may not be available to the citizens of all member states of specific human rights treaties. Recourse to said international forums is only possible against the states that are parties to the relevant international human rights instrument as well as their respective protocols that permit recourse to the specific committees established to receive individual complaints. So, the actions of those states that are party to the a human rights treaty but not to its additional protocol could not be challenged before the international committee. Although some general concerns as to limited utility of these international forums could be expressed, it is arguable that the role and utility of different committees should be studied in its own merits and acceptance. For example, among the two instruments referred here, the protocol pertaining to the ICCPR has been accepted by 116 states, while the protocol pertaining to the ICESCR has gained acceptance of only 24 states as of May 2020. In comparison of these two international forums, it is evident that the role of CCPR would be more significant with regard to the potential challenges relating to the alleged derogation of civil and political rights resulting from COVID-19 response measures than those challenges relating to the alleged violations of economic, social and cultural rights caused by state responses to COVID-19. In spite of the possible role international forums could play in certain aspects like human rights related challenges, generally it is expected that national courts or domestic redressal forums would be the most prominent institutions that would be called upon to determine the legality of the COVID-19 response measures of the states. Therefore, individual states should seek to ensure judicial independence and be willing to submit to the judicial review to establish the legality of their actions and to restore the confidence of its people.

The objective of the present paper is to examine the scope of relevant national and international legal standards in assessing the legality of some prominent COVID-19 measures that were typically introduced in response to the pandemic in 2020. The significance of the paper is its identification and analysis of key national and international normative standards relevant to determine the legality of state actions as well as its emphasis on the need to take a socio-legal approach in assessing the legality, which is crucial to reinforce that law remains an essential vehicle to achieve social justice, especially at the times of emergency pandemic situations. The second part of the paper briefly identifies some typical COVID-19 response measures and discusses the concerns it triggered. It also introduces some relevant legal standards that would form the basis for any assessment of legality of the introduced measures, including the emergency powers conferred upon the states and its limitations. The third part of the paper explores the impact of the state action or inaction upon specific segments of its society and examines the scope of related national and international legal standards including the role of pertinent institutions in assessing the legality of COVID-19 response. The fourth part specifically explores the implications of the COVID-19 response measures upon free trade across borders and examines how relevant international norms including the WTO rules govern the situation. The concluding part of the paper discusses the findings and proposes the need for adopting a socio-legal approach in assessing state responses to COVID-19 pandemic outbreak as well as in developing specific legal standards to guide state action for future pandemic outbreaks.

## STATE RESPONSE TO COVID 19 AND ITS CONSEQUENCES

The response measures introduced by the states could be classified into two dimensions, namely the measures that have internal consequences and those which have cross-border or external consequences. Internally, COVID-19 response measures have impacted various segments of the society. One of the pertinent way to segment the groups is to see how the measures have impacted patients including the very persons who were infected with the virus, those who have been designated with the duty to treat and care the infected and the larger segment of the rest of the society. Compulsory quarantine and testing measures, initiatives introduced to trace the movement of COVID-19 patients, closure of regular outpatient and medical services for other ailments, temporary makeshift arrangements to treat COVID-19 patients, etc are some of the typical actions of the state in most jurisdictions that are directly pertinent to the first segment.

With regard to the second segment, namely, the frontline doctors and health care works, who were deployed to treat and care the infected, the lack of action of the state, especially in not providing sufficient personal protective equipment (PPE) or other conditions to safely discharge their duties have come under stronger criticism in many states. The dereliction of the state in this regard has the potential to raise legal challenges based on the norms mandating the provision of occupational health and safety. Finally, regarding the largest segment, consisting of the rest of the society, a range of various diverse set of implications resulting from the COVID-19 response measures have been identified. It is beyond to scope of the present paper to systematically trace all those implications and identify specific legal sources that would be relevant in determining the legality of the relevant measures

introduced by the state. However, the paper specifically examines the scope of the general emergency powers of the state to determine whether they enjoy unfettered freedom in imposing restrictions, or such powers are subjected to any explicit limitations.

Implications of the COVID-19 related state response measures could be classified into various categories including the human rights and the economic implications. While human rights implications pertain to individual rights, the category of economic implications includes not only individual economic rights but also the implications on the broader economy of a society. In the light of the swift introduction of the measures in most states, the actions of the government call for a scrutiny to determine its rationality and legality. While the question of rationality of the measures will mostly have political implications for the government, the question of legality of the measures has the potential to seek justice against transgression of rights of different stakeholders affected by the COVID-19 response measures.

The sources of law and legal standards upon which the state response to COVID-19 could be assessed would vary, depending on the nature of the implications and the stakeholders who are impacted by the introduced measures. While the internal implications of the measures could be subjected to a scrutiny primarily under national legal standards and domestic law sources, any legal challenge of external implications of the national measures would have to refer to sources of international law. In addition, international law could also be an invaluable legal source in any challenge related to the internal implications of the measures introduced by a state, if the state in question has binding obligations by virtue of being a party to an international legal instrument referred as a source or a relevant obligation is binding upon the state by virtue of its attainment of the status as a customary norm.

The domestic legal sources serving as the standards for determining the legality of COVID-19 measures would differ between states. But the international law relevant to the scrutiny of legality of the COVID-19 measures is fundamentally the same for all countries, although the scope and extent of obligations undertaken by individual states under international legal instruments may differ due to the reservation of obligation permitted by specific instruments. Therefore, identifying and examining the scope and relevance of different international legal sources in determining the legality of national COVID-19 response measures is essential in the context of both internal as well as external impacts of the measures. In this regard, it is also relevant to take note of the role of different forums that could serve to redress the related grievances. In cases pertaining to the internal dimension of the implications, national courts and other domestic grievance redressal bodies like the medical ombudsman would be playing a significant role. Regarding the external implications, international tribunals and dispute settlement bodies, like the WTO dispute settlement mechanism, will serve as the primary forum to address the challenges, especially in assessing the question of legality of the trade measures raised for discussion in this paper.

#### **DOMESTIC IMPLICATIONS OF STATE RESPONSE TO COVID-19 AND THE STANDARDS TO DETERMINE THE LEGALITY**

Among several questions facing the state response to the COVID-19 pandemic, it is significant to examine the implications for some of the key frontline stakeholders namely the COVID-19 patients and those who have been designated to care and treat those patients. These two groups gain greater significance because of their direct involvement in the plethora of the pandemic. Firstly, concerns over the COVID-19 response measures have been focused on the impact over different segments of the society and the implications of such measures over the COVID-19 patients themselves did not get much attention. It is often assumed that the actions of the states in response to the COVID-19 pandemic were strenuous at caring and curing those that are infected by the viral disease. However, the need to identify the scope of the right to health of the COVID-19 patients and to determine whether it was effectively protected should be crucial, because it was the priority of the care and treatment of those infected, which the states have widely used as a justification for the imposed measures.

Regarding this group of people, one of the key issues pertains to the diagnosis of the infection. As many states were not well prepared for testing a large segment of its population for the viral infection, it has given rise to a major concern that COVID-19 patients were unable to get timely detection and care. Even in cases, where those who have been tested and found to have been infected, concerns regarding lack of enough medical care facilities and attention have emerged. Even in states, where the rights of the patients that are consciously propagated during normal times could not pay much attention to such rights during this pandemic. Some of the concerns pertaining to the COVID-19 patients and their treatment during the outbreak were identified by different international organization that deserves a closer attention to explore effective means of enhancing the protection of related rights in the future.

COVID-19 guidance issued by the United Nations Office of the High Commissioner for Human Rights, which derives from various international human rights instruments, could serve as a useful reference to identify and challenge the legality of the acts of a state pertaining to right to health care and treatment (UNOHCHR, 2020). Non-discrimination principle, promulgated as a core value of various international binding instruments as well as national constitutional documents, is a fundamental legal standard, which should direct the state action in providing diagnosis, health care and treatment to COVID-19 suspects and patients. The non-discrimination principle entails treatment to all on an equal footing. Such a treatment should not only be made available in a timely manner, but also should be an appropriate one. The lack of effective medicine to treat COVID-19 should not serve as an excuse to provide the best possible medical treatment that are being made available to any other or only certain COVID-19 patients. Treatment should not depend on the ability of the patient to pay and any other factors that typically triggers discrimination. Such factors pertain to various vulnerable segments of the society, who's right to health care and treatment needs to be safeguarded specifically. For example, the risk of older people not been given priority in treatment makes them vulnerable, particularly in the light of higher rate of mortality in this age group. Similarly, people with disability could face situation of lack

of consideration of their underlying physical challenge and thereby not been able to receive the right degree of care and attention. The vulnerability of the disabled people could also increase if there is a lack of special provisions for the treatment of the disabled.

Certain categories of people like minorities, refugees and displaced people, people serving detention, migrant people and even indigenous natives are also identified by the World Health Organization (WHO) as potential vulnerable groups in having access to health care and treatment. For example, refugees, displaced people or undocumented migrants, who generally lack access to health care facilities are prone to face increased risk of being ignored during the times when there is a huge influx of local people in hospitals due to the outbreak. Potential discrimination in treatment of minorities or people in detention is also an apprehension. Finally, in case of the indigenous people, the concern does not pertain to the risk of discrimination. Instead, the need for the state to be considerate and respectful of the native concepts of health and traditional methods of treatment of the indigenous people in any COVID-19 related health care response is emphasized.

The Preamble of the Constitution of the WHO proclaims that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being and such a right should be guaranteed irrespective of the race, religion, political belief, economic or social condition of the people (WHO, 1946). The states that are parties to the ICESCR, 1966 have the binding obligation to guarantee the right to physical and mental health to everyone (Article 12) and such a right should be of highest attainable standard. Specific steps to achieve the full realization of the right have been prescribed, among which two specific aspects are pertinent for the ongoing discussion. Firstly, state parties should take measures for the treatment of certain diseases including epidemic and endemic diseases. Secondly, states should also create necessary conditions to ensure that medical service and attention will be available to all (emphasis added) in case of sickness. This specific obligation to guarantee right to health to all people within the jurisdiction of a member state would be highly pertinent in addressing the concern discussed earlier that certain vulnerable segments of the society may not have a recognized means of access to medical care.

The aspirations of the international legal instruments seeking to achieve the right to health may not manifest in a uniform manner in the member states that are parties to the instruments. States may have different approach in the path they choose to pursue the attainment of the right to health. While some states may explicitly recognize the right as part of their constitutions, while other may only seek the attainment of the right through other forms. Certain states may not choose to recognize healthcare as a right but as an obligation of the state in the constitution. Although the distinction may not be apparent, substantial difference in terms of enforcement will result depending on the choice of how health care is recognized in a national legal system. While the recognition of healthcare as a right, generally entails enforcement by individuals who are deprived of the right in national constitutional courts, its recognition as a constitutional directive to the state as its obligation is not enforceable before the court of law.

As constitutional directives to a state are perceived as aspirations that the state should seek to achieve gradually when conditions permit, individuals cannot seek to enforce the obligation of the state to aspire for the provision of health care before the court of law. This distinction is crucial to note, while assessing the legal systems of individual states to determine the scope of healthcare protection. Similarly, the legal status of the right being a constitutional right or a non-constitutional ordinary right (possibly recognized as a part of a statutory norm, which is subordinate to the constitution in the national legal hierarchy) would also be relevant in terms of how effectively the right is secured or enforceable in a given jurisdiction. Therefore, the legal status of healthcare could differ between different states and the study of certain Asian jurisdictions in this regard by the WHO reveals such differences (WHO, 2011). Out of the eleven south east Asian countries studied by the WHO, it was found that only six of them had recognized the right to health as a constitutional right, while five of them had only recognized healthcare as a directive to the state.

In the states, where health care provision by the state cannot be enforced in the court of law as a matter of right, it could be perceived as limitation in asserting health care for all. However, to overcome this limitation, the judiciary could play an important role in such jurisdictions. For example, in India, where healthcare is not explicitly recognised as a right, the courts have been forthcoming to recognize healthcare as an integral part of right to life, which is recognised as a fundamental right that is enforceable before a court of law. In the case of *Paschim Banga Khet Samity v. State of West Bengal* the Supreme Court of India held that "Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21" (*Paschim Banga Khet*, 1996). Such an approach by the apex court would ensure that the states do not seek to use the absence of an explicit right to healthcare as an exception in providing healthcare to all.

In addition to the practical advantage in enforcing access to health care, this human rights approach of reading health care as a part of right to life also provides various other distinct benefits. First, right to life being a fundamental right cannot be suspended by the states even at times of declaration of state of emergency during pandemic outbreaks. While an emergency declaration would entail the suspension of ordinary rights, a state does not have the legality to suspend the fundamental right to life. Secondly, studies have found that in states where right to health may not find acceptance, reading the same as part of right to life, which is less prone to controversies or challenges in being recognized as a fundamental right would be an effective way of realising access to healthcare for all (Hunt, 2016). Finally, in this context it is relevant to note that the concern of access to health care during the pandemic outbreak is not limited to the citizens of the state but to all people within the jurisdiction of the state. This includes foreign aliens who are present within the territories. In this regard, the role of the state in ensuring access to health care for those foreign national who have arrived in their territory, including those who's arrivals are subjected to mandatory quarantine subsequent to the outbreak, as well as those who are transiting the territory should receive special attention. The actions of some of the states prohibiting the docking of the ships arriving in their territorial waters, restricting the disembarking

of the people from the ships already docked in their ports, etc have given rise to some serious questions of legality of state action. As these special group of people are technically within the territory of the state in question, the international obligation to provide health care access to all within the jurisdiction of a state party would be a fundamental normative standard against which the state action should be assessed.

Another segment of the society, which also did not get much attention in this process is the patients suffering from other ailments and required medical care and treatment. In introducing COVID-19 prevention and treatment measures, many states decided to cutdown or temporarily stop health care services and treatment to patients of other ailments. In addition, the decision to curtail or stop diagnostic services to refocus on COVID-19 response had denied innumerable people preventive or timely treatment of other ailments. In most states, when testing for COVID-19 took the centre stage, the testing for other ailments took a strong beating. The right to health care and treatment of people suffering other ailments is equally crucial as it is reported that in the long run, the potential death rate resulting from suspension of the right of this group of people could even be higher than lives lost due to COVID-19 infection. It should be borne in mind that the right or obligation pertaining healthcare as enshrined in national constitutions as well as the recognition of the same in international legal instruments discussed earlier, primarily pertains to the provision of health care for all ailments and at all times and not confined to the situations of pandemic outbreaks.

Next, how the actions or inactions of a state having adverse implications on the frontline staff, who were designated to test, treat and care the COVID-19 patients could be challenged is an important question. This issue is vital for addressing the grievances of individual frontline staff, who suffered violations of their rights during the pandemic. The question is even more crucial to ensure that other frontline staff who would be designated to serve in the future pandemic outbreaks are not demotivated and are ensured of enough protection and effective means of redressal. In this regard, the national and international legal standards governing occupational health and safety is an important source of reference to determine the legality of state action or inaction. The gravity of the situation facing the frontline staff during COVID-19 is evident by the fact that at least 35, 000 health workers were infected with virus as of 21 April 2020 (WHO, 28 April 2020).

The WHO has identified that the frontline health workers are exposed to various hazards increasing their risk of infection. Some of the specific hazards that calls for an affirmative state action includes higher levels of pathogen exposure, long working hours causing physical fatigue and psychological distress, lack of infection prevention and control measures including related training, lack of sufficient or effective personal protective equipment, threat or exposure to verbal and physical aggression as well as social stigma due to the nature of the work they carryout, etc. In each of these identified hazards, the state has a paramount role to play. While many of these hazards could be comprehended under the relevant legal standards governing occupational health and safety of the health care sector, a state's role in preventing physical and mental abuse of health care workers should receive a special attention.

States should have in place measures to prevent abuse and protect frontline healthcare workers both within and outside the workplace. While some states have taken some explicit measures like issuing of stern warnings of ill treatment of healthcare workers, like for example the prohibition to force their eviction by landlords, more specific measures aiming to protect them from all forms of physical and mental transgressions are called for. More significantly, the dereliction of some states in providing enough conditions and protective measures to ensure occupational health and safety has come under greater criticism. Any omission on the part of the state in this regard should be strictly assessed in the light of the relevant national and international legal standards.

Domestically, although most states have well established labour law standards governing occupational health and safety, they were generally enforced against industrial vocations, especially pertaining to private ventures. However, the need to enforce those national labour standards against the state is highly crucial. Especially, the scrutiny of health and safety in the health care facility at the time of a pandemic outbreak calls for the need to adopt a positivist and utilitarian approach by the relevant domestic labour tribunal or judicial body in assessing the action or omission of any state. Although examining the scope of specific national legal standards governing occupational health and safety is beyond the scope of this paper, it is important to note that the genesis of the most of the national legal standards in this regard could be traced to the international legal sources established under the auspices of the International Labour Organisation (ILO).

The ILO Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) and its related Recommendation (No.197) of 2006 mandate the member states to take active steps to achieve a safe and healthy working environment through a national system and national programmes on occupational safety and health. In pursuit of this, member states are required to take into account of the principles prescribed by the ILO instruments relevant to the promotional framework. The Recommendation (No.197) enlists those key instruments pertaining to the promotional framework, which includes 18 conventions and protocols as well as 21 distinct Recommendations. Although many of those instruments are aimed at promoting industry specific occupational health and safety, the scope and coverage of these instruments evidences the development of *lex specialis* in the field. However, a cursory review of the list of instruments may not find a specific focus on health care workers. But several ILO instruments would be highly relevant in assessing the action or inactions of the states to secure the occupational health and safety of the health care workers during the COVID-19. This can be established by reviewing the scope of a seminal instrument in the field namely the ILO Occupational Safety and Health Convention, 1981 (No. 155).

The 1981 Convention, prescribing a comprehensive set of principles and national action plans upon member states to effectively guarantee occupational health and safety, applies to all branches of economic activity and all workers employed therein. Although, the term branches of economic activity connote private activities in general, the Convention conspicuously extends the scope of the economic activity to cover all branches in which workers are employed including those in public services as well as

public employees. Interestingly, the 1981 ILO Convention does not limit the definition of the term 'health' to the absence of disease but also comprehends the physical and mental elements affecting health. Moreover, the ILO has recently identified a set of its instruments relevant for the protection of workers against COVID-19, which includes 8 distinct conventions, 5 separate recommendations and 3 guidelines and codes of practices (ILO, 2020). The legal standards emanating from these myriad of international instruments as well as domestic labour law standards implementing those standards should serve as the key sources of reference in determining whether individual states have indeed discharged their legal obligations to protect the frontline healthcare workers or not.

Apart from those who were infected by the COVID-19 and the frontline workers who took care of them, the state response measures also impacted people from various walks of life, which could be discussed as the impact upon the third segment of the society. In this regard, it is relevant to note that most states introduced stringent measures that had serious implications on various rights and privileges of common people. Some states declared formal emergency, while other introduced several measures that were reminiscent of the effects of emergency and this calls upon the examination as to the scope and limitations upon the powers of a state to take emergency measures. Generally, the declaration of formal emergency could entail the suspension of various human rights guaranteed to the people and therefore are subjected to clear legal standards and principles in most national legal systems. The limitation of space would not permit a detailed discussion of national constitutional limitations upon the emergency powers of the states, but some general characteristics could be pointed out here for the benefit of the discussion.

Firstly, invocation of emergency powers by a state is generally considered as an exceptional act subjected to various checks and balances and therefore should always be a measure of last resort. The unprecedented effects of COVID-19 pandemic arguably justifies the invocation of emergency measures by the states but whether the states acted within the confines of relevant norms would be a key question arising in related challenges. Secondly, while the declaration of emergency could empower the states to suspend a range of rights of the people temporarily, certain rights cannot be denied even during the emergency. For example, the right to life is considered as a paramount among all fundamental rights and many national constitutions have recognized that the same cannot be suspended at any time including the period of emergency (Lillich, 1985). Similarly, certain rights cannot be suspended during emergency, unless there are strong public safety grounds. For example, the privilege of the Writ of Habeas Corpus cannot be suspended when an emergency is declared in the USA, unless the public safety may warrant it during a rebellion or invasion (Tyler, 2009). This example shows that the sheer declaration of emergency by a state does not always lead to the suspension of all rights. Instead, the gravity of the situation that prompts the declaration of emergency and the scope and limitation of the emergency powers legally sanctioned are some of the key factors relevant to assess a state response. States should be called upon by the independent judiciary to justify the need and account for suspension of specific rights. Utilizing the opportunity of potential challenges of COVID-19 related state response measures, national courts should strive to laydown guiding principles, which states should follow in determining which rights could be justifiably suspended as a result of pandemic outbreaks in the future. In this way, the national courts will not only be able to render justice to the aggrieved people, who have suffered from a wrongful suspension of their fundamental rights but also prevent any similar consequences resulting from deprivation of rights in the future.

When national constitutions defer, it is necessary to look beyond and refer to international legal norms that should serve as the guiding value to determine which of those human rights cannot be suspended during declarations of emergency. Studies have indeed recognized that international law has an indispensable role to play in this regard. (McGoldrick, 2004). A set of rights and freedoms, the suspension of which is not permitted under regional or international human rights instruments, has been identified to include right to life, prohibition of torture, prohibition of slavery or servitude, prohibition of retroactive criminal laws, right to recognition of legal personality, freedom of conscience and religion, prohibition of imprisonment for breach of contractual obligation, rights of the family, rights of the child, right to a nationality and right to participation in government (Sorabjee, 1991). Many of the rights identified in the above list like prohibition of torture, prohibition of slavery etc do not seem pertinent to the situation of emergency declaration resulting from a pandemic outbreak. But other rights and freedoms like right to life, freedom of conscience and religion, rights of the family and rights of the child are quite pertinent for our discussion and they have arguably been affected by the response measures introduced by states during the recent COVID-19 outbreak.

During COVID-19 outbreak, pertinent rights and freedoms mentioned above have not been formally suspended as such in most states, but various restrictive measures imposed by the states have apparently caused adverse effects on the exercise of those rights. The classic example in this regard is the right to life. Although, right to life was not suspended as such, the lockdown restrictions have deprived people of their right to movement, right to livelihood, right to food etc. The above rights that faced deprivation have close nexus to the right to life and it is argued that the right to life cannot be guaranteed effectively without securing these allied rights that are quintessential for the enjoyment of the right to life. For example, the Supreme Court of India in *People's Union for Civil Liberties v. Union of India* case held that the right to life includes right to food although the right to food has not been explicitly guaranteed under the Indian Constitution. This judicial approach is particularly relevant when right to food is not a justiciable right and interpreting it as part of the justiciable right to life is innovative and a highly utilitarian. Other judicial experiences and methods to constitutionalize right to food as an enforceable right can also be found (McDermot, 2012). When the economic consequences of COVID-19 restrictions results in deprivation of food for the downtrodden, it is arguable that such a consequence amounts to the deprivation of right to life itself. Therefore, the actions of the states during COVID-19 could in effect be argued as amounting to the deprivation of the right to life and hence the prohibition of right to life during the times of emergency under international legal standards discussed earlier should serve as a key reference in assessing specific national response measures in this regard.

## TRADE MEASURES IMPOSED IN RESPONSE TO COVID-19 AND GOVERNING INTERNATIONAL NORMS

On 22 June 2020, the WTO reported that the world trade has contracted sharply during the first half of the year and projections for the rest of the year as well as the next year have been quite grim. The WTO also highlighted the huge reductions in commercial aviation and activities in container ports. Along with the WTO, other key international economic organization like the IMF, the World Bank and the OECD have also predicted steep decline in global trade and GDP growth. However, much of the decline in global trade is not due to explicit export or import restrictions but due to the general economic and transportation disruptions caused by the COVID-19 pandemic outbreak. Our concern in this paper is not so much the decline in trade volume due to the impact of the COVID-19 but the question of legality of the introduction of specific trade restrictive measures by different states in response to the pandemic.

The WTO also has not specifically pointed out how much of the reduction in global trade could be attributed to the specific export or import restrictions imposed by the states. However, a closer introspection of notifications of such trade restrictive measures from the WTO member states (by virtue their reporting obligations under the WTO Agreements) provides clear insights. Assessment of those notifications not only provides the scope and intensity of the trade restrictions imposed but also the typical justifications individual states sought to furnish. (WTO, 2020). Regarding the external dimension of consequences of COVID-19 response measures introduced by different states, namely the cross-border effects, one of the key concerns pertains to the implications for the free trade. Although, there are several other cross border adverse effects that have resulted from COVID-19 restrictions imposed by national governments like international air travel bans, denial of foreign ships docking in ports, restricting the disembarkation of foreign nationals in the board of the cruise ships already docked in ports, closure of international postal services, etc, the scope of the present paper does not permit the discussion of each of them. Therefore, the present section will mainly analyse direct trade measures imposed by states under the auspices of the WTO and address the question of how the legality of the trade restrictive measures resulting from COVID-19 pandemic could be assessed under the relevant WTO norms.

Trade restrictions connotes a barrier to free trade, whereby it could impact imports as well as exports. In as much as the international trade regime under the General Agreement on Tariffs and Trade (GATT) and the WTO regulate various forms of trade restrictions, they are predominantly focused on import restrictions. While there are amplitude of rules addressing trade barriers facing imports both in the form of tariff barriers and non-tariff barriers, there is only a limited focus on export restrictions individual member states could impose in relation to their foreign trade. The concentration of norms regulating import restrictions is understandable as countries at normal times are mostly interested in enhancing their exports while limiting their imports. This motivation, which has the potential to cause more damage to imports, no wonder has resulted in the concentration of norms governing imports more than exports. This characteristic is important to note for the subject matter of focus in this section namely the foreign trade restrictions resulting from COVID-19 state response. In the light of the potential increase in demand for various goods as well as to ensure enough supply to the domestic consumers, states have imposed restrictions on export of a range of goods. Such restrictions were placed not only on medicines, medical goods, hygienic products, personal protective equipment but also on food supplies. These restrictions raise a fundamental question as to their legality and to determine the same, it is relevant to explore to what international trade norms recognize public health needs and permit trade restrictions.

International trade norms in both the GATT and WTO Agreements recognize the need for its member states to adopt measures essential to protect public health. First and foremost, Article 20 (b) of the GATT recognizes the general exceptions, whereby member states could adopt or enforce trade restrictive measures on various justifiable grounds including those necessary to protect human life or health. In addition, the WTO Technical Barriers to Trade Agreement (TBTA) also permit member states to adopt technical measures on public health grounds. Article 2.2 of the TBTA permits member states to adopt technical regulation governing trade, which are necessary to fulfil legitimate objectives including protection of human health or safety. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) enables the member states to adopt measures necessary to protect public health in the process of formulation or amendment of the relevant laws and regulations. (Article 8, TRIPS). Moreover, member states are permitted to exclude inventions from patentability for the protection of public order or morality including for the purpose of protection of human life and health.

Despite the above enabling provisions, it is important to note that each of the above permissions to impose trade restrictions on public health grounds are qualified with certain limitations and states seeking to impose relevant restrictions should act within the recognized limitations. Failing to act within the prescribed limitations would make the otherwise permitted trade restrictive measures contravening the obligations of the member states. For example, in the GATT dispute *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, the prohibition of imports of Cigarettes by Thailand was challenged. The GATT Panel in interpreting the term “trade restrictive measures necessary to protect human life or health” in Article XX(b) of the GATT held that the import prohibition measures imposed by Thailand did not meet the “necessity test” as Thailand continued to permit the sale of domestic cigarettes and at the same time prohibited the importation of cigarettes. The Thailand import prohibition on public health grounds case reveals that states, while seeking to resort to public health exceptions under the relevant international trade rules, do not enjoy an unfettered freedom to impose trade restrictions. There are essential safeguards built in the GATT and WTO Agreements to ensure enough checks and balances. The examples discussed above mainly pertains to the restrictions related to imports or domestic exploitation of intellectual property rights. But as pointed out earlier, the COVID-19 responses of the states were also in the form of export restrictions and it is relevant to briefly address the relevant norms governing export restrictions.

Article 11 of the GATT aimed at eliminating quantitative restrictions in foreign trade does not generally permit any prohibitions or restrictions including those implemented in form of export licenses pertaining to the exportation or sale for export of any product to other member states. Although there is a general prohibition of export restrictions in the GATT, it recognizes certain exceptions, whereby export prohibitions or restrictions that are temporarily imposed in order to prevent or relieve critical shortages of foodstuffs or other products essential for the exporting member state are permitted. It seems plausible that states, which imposed export restrictions in response to the COVID-19 pandemic, could resort to these justifications comfortably. However, as in the case of permitted import prohibitions and restrictions, the freedom of the member states to introduce export prohibitions and restriction should be assessed in the light of any related limitations. Moreover, the exceptions recognized should be narrowly interpreted in the light of the purpose and objective of the regulation of export prohibition or restrictions in the GATT agreement. Although, the jurisprudence for the past disputes challenging export prohibitions or restrictions could throw some light in this direction, there is a growing concern that the regulations governing export prohibitions or restrictions under the GATT/WTO regime are relatively limited in scope. In the light of this concern, the OECD has recently called upon the need to do more on question of nexus between trade and health including agreement prohibiting export bans in order to face the trade consequences of future pandemics better (OECD, 2020). Until such more elaborate norms on export prohibitions are developed, any assessment of the current export prohibitions or restrictions imposed by different states in the light of the COVID-19 situation can only stand scrutiny within the limited provisions of the GATT/WTO on the matter. Next, it is important to closely and systematically examine specific trade measures imposed by states in response to Covid-19 in order to highlight the related trade restrictive or trade facilitation effect and the potential for legal challenges before the WTO.

Due to COVID-19, several countries have notified the WTO about the trade related measures they have introduced as a result of the pandemic. Such notifications pertain to different aspects of trade regulated under various WTO legal instruments. Since the outbreak of the pandemic until 25 June 2020, a total of 182 notifications have been made and out of which the highest number of 66 notifications pertained to the issue of technical barriers to trade (TBT) regulated by the WTO TBT Agreement. Next, a total of 41 notifications were made relating to the Sanitary and Phytosanitary (SPS) measures introduced under the WTO SPS Agreement. A third striking number of 37 notifications were related to the Quantitative Restrictions (QR) that were imposed as a result of COVID-19 pandemic. In addition to these, 15 notifications relating to Market Access (MA) for goods, 5 notifications pertaining to Export Restrictions (ER), 5 notifications referring to both SPS and TBT Agreements, 3 arising out of Government Procurement Agreement (GPA), 2 pertaining to both MA and Goods Council, and 2 each relating to Committee on Agriculture, Goods Council, Trade Facilitation Agreement (TFA) and Trade-Related Aspects of Intellectual Property Rights (TRIPS) respectively. A close assessment of the measures introduced by the WTO member states in response to the COVID-19 pandemic outbreak is essential to find, how the introduced measures seek to address public health needs and how such measures could potentially impact trade.

Firstly, the assessment of the notification relating to the measures introduced in the agriculture sector indicates the potential for a mixed impact. The European Union (EU) notification relating to the agricultural sector mainly pertains to the subsidies introduced by the EU member states in agricultural and forestry sectors. However, the notification did not include certain related subsidies possibly introduced by the EU member states but not reported to the European Commission. Similarly, the notification also did not include the support measures introduced by the member states in other sectors of the economy. The introduction of subsidies or other support mechanism (both that are notified and not notified) could have trade distorting effects and therefore could be questionable under the relevant rules of the WTO to determine their legality. Many other countries have introduced a range of economic support mechanism in response to the disruption caused by the COVID-19 pandemic and most of those measures have been introduced by states under the pressure to act in a short time. Due to those circumstances, the chance of verifying the compatibility with the WTO rules on subsidy would have been minimal and hence such measures could come under greater scrutiny in the future. At the same time, certain measures introduced by countries that could positively facilitate trade in agricultural products could also be found. The notification of its measures by Israel is a good example, which reveals that the agricultural production, as well as related essential industries and services were excluded from the purview of the COVID-19 emergency regulations imposed in Israel restricting commercial activities. Israel has also increased the import quota for certain agricultural products under a voluntary duty-free scheme. It has introduced conspicuous measures to facilitate imports in agricultural products by not only maintaining the required services in its ports of entry but also accepting e-certifications or official and scanned copies of phytosanitary or health certificates related to the agricultural products in the place of original certificates.

Interestingly, New Zealand and Singapore have also notified the WTO about a declaration they have launched to facilitate free trade in essential goods for combating the COVID-19 Pandemic, which they have also opened it for other WTO members to join (WTO, 16 April 2020). The declaration seeks to eliminate tariffs as well as import and export restrictive measures in essential goods. The declaration notified separately by New Zealand and Singapore on 16 April 2020 aims to guarantee production and free flow of essential goods like medical supplies and food to different target markets. It is important to note that the declaration vows to eliminate trade restrictions not only in imports but also exports. The declaration originating from two of the member states rather than from the Goods Council itself, shows that individual member states could lead an initiative to supplement the purpose and object of the international organization instead of waiting for an official instrument.

Distinct from the facilitation effect discussed above, countries have imposed measures causing explicit restraint on exports. Myanmar notified the WTO that it had imposed restrictions on export of rice in response to the pandemic. It justified the restriction on the ground that rice is an essential food in its national diet, and it had to prevent potential critical shortage in the supply of the grain. Thailand initially introduced export restriction that was limited to a certain food product. However, export restriction was later expanded to include goods containing different types of protective masks. In comparison, North Macedonia's export restriction was mainly related to agricultural products that included wheat and meslin as well as wheat flour.



However, it sought to justify its restriction not only on the ground of prevention of critical shortage of essential products but also protection of human health. Finally, the export restrictions imposed by Kyrgyz Republic was the most comprehensive among those member states who notified export restrictions in response to COVID-19. The Republic's export restrictions included seven types of food and agricultural products and a range of feeds. Its purpose for the export restriction was distinct from others and could be questionable as it notified that the underlying aim was to supply its population with strategic food and products. Ukraine on the other hand, responded to the crisis by notifying under the GPA that its law relating to public procurement will not apply to any procurement aimed at fighting the COVID-19 outbreak within Ukraine and instead will be governed by a new set of rules of procurement.

Unlike some of the member states' response to the COVID-19 discussed earlier, which obviously created barriers to the free trade, the market access related measures notified to the WTO were mainly aimed at facilitating the free trade in specific category of goods. Canada was the first to notify certain market access measures that were aimed at facilitating the imports of vital medical supplies and it later extended these measures with the waiver of customs duties on the imports of certain medical supplies. Columbia followed suit by notifying a series of its unilateral measures eliminating customs duties to an extensive list of more than 150 categories of products with the intention to tackle the health emergency resulting from COVID-19 and to protect humans (WTO, 2 April 2020). Interesting, this was further extended to additional products through a subsequent notification to the WTO. Korea and Dominican Republic, on the other hand, introduced market access measures with tariffs and tax elimination that had a limited scope of covering only masks and related pharmaceutical items. Chile introduced four specific measures of market access that were mainly in the form of simplification of procedures for exports and imports (including donations) that are critical for the fight against COVID-19.

The Australian COVID-19 related market access measures were mainly in the form of tariff concessions aimed at facilitating the import of goods to manage the pandemic crisis. However, interestingly, these measures were given retrospective effect by providing refunds to customs duties paid for the imports of the prescribed goods in the three months period preceding the date of publication of the measures. While Switzerland suspended custom duties for importation of essential medical goods, the measures introduced by Bangladesh covered both duties as well as taxes related to the imports of such goods. The measures introduced by Costa Rica not only included moratorium of tariffs for imports but also tax exemptions for the companies affected by the COVID-19 health emergency. Finally, in furtherance of the declaration made by Singapore and New Zealand on 16 April 2020, which was discussed earlier, both states have issued a separate notification enlisting specific goods that will benefit from the aspirations of the declaration. These notifications made to the WTO Committee on Market Access as well as the WTO Committee on Trade in Goods, although is a consequence of the declaration, the scope of the Singapore notification is broader than the one made by New Zealand. While the Singapore notification enlisted various goods in two annexes that would enjoy a range of benefits including tariff elimination, non-application of export prohibitions or restrictions, removal of non-tariff barriers and trade facilitation in essential goods, the New Zealand notification was mainly confined to the elimination of import tariffs on specific goods enlisted in a single annex covering mainly medical and hygienic products required for tackling the pandemic.

The measures triggering the most concern pertains to the 'quantitative restrictions' in trade that were imposed as a result of COVID-19 pandemic. The imposed quantitative restrictions were mainly in the form of export prohibition, although some member states only introduced procedural restrictions and did not impose an outright ban on the exports of notified goods. However, quantitative restriction in imports were also notified. Similarly, the range of goods covered under the export prohibitions or restrictions also varied among the member states. While some countries limited the prohibition or restriction mainly to health and pharmaceutical products other extended it to the export of food and commodities. For example, the Kyrgyz Republic, which was one of the first countries to impose export prohibition in the wake of the pandemic, prohibited exports in mostly food products and the scope of the prohibition was extended to only a couple of sanitation products. It is also relevant to note that the Republic sought to justify the prohibition under the grounds of the need to supply its population with "strategic food stuffs and other products." Similarly, Egypt and Thailand imposed export prohibition of both food as well as sanitation goods and medical equipment. In this context it is interesting to note that North Macedonia was the only member state which imposed export prohibition only on food products.

In contrast, countries like Albania, Ukraine, Colombia, Korea, Georgia, Bangladesh, Moldova and Saudi Arabia imposed export prohibition only on medical, health and sanitation goods. Unlike the above WTO member states that sought to impose outright export prohibition, other WTO members including Costa Rica, Israel, EU, Paraguay, USA, Norway and Peru introduced a export licensing or authorization system that had to be satisfied in order to carry out the exportation of medical, health and sanitation goods. However, among those members, the EU later notified that some of its member states namely the Cyprus, Estonia, France, Greece, Romania, Slovak Republic as well as the United Kingdom have subsequently introduced export prohibition of certain medicinal products (WTO, 16 June 2020). Brazil on the other hand has used an interesting mix of measures that included 'export prohibition' or 'export license requirement' for certain medical, hospital and hygienic products and a 'prior authorization' requirement for the export of pharmaceutical products.

In this context, Australia has stood out conspicuously as it had introduced special purposive measures targeting to address specific concerns. The restrictive measures introduced by Australia were mainly targeted at non-commercial exports of personal protective equipment and sanitisers in order to "prevent individuals and criminal syndicates from hoarding, price-gouging and profiteering on non-commercial exports from Australia" (WTO, 18 June 2020). However, legitimate exports for commercial and humanitarian purposes as well for the purpose of caring family in overseas were exempted. Finally, unlike all the above notifications that pertained to the exports, Columbia notified the WTO of its decision to impose quantitative restrictions, which was targeted upon the imports. It sought to impose limitations on imports of fuel alcohol on the grounds of decrease in domestic demand as well as other related domestic circumstances resulting from the COVID-19 outbreak. The above analysis of the

quantitative restriction measures introduced by the WTO member states in response to the COVID-19 reveals a greater diversity and patterns, most of which could raise specific questions of legality that could be determined with reference to the legal standards of different WTO agreements.

The next set of state response to COVID-19 that were notified under the WTO SPS Agreement mainly were meant to protect animal and plant health, as well as to ensure food safety. The actions undertaken by member states in this regard ranged from import bans to increased procedural requirements like the need to produce special phytosanitary certificates for imports. The import restrictions relating to the SPS measures were targeted at the imports of certain types of products and/or imports from certain countries (that were initially the prominent places of the outbreak of the virus). Russia and Kazakhstan were some of the countries who first imposed import restriction of certain types of sea and animal foods from China. Mauritius extended such import restrictions beyond China targeting imports also from countries in EU, Italy, Iran, Reunion Island, South Korea and Switzerland. Korea subsequently introduced restrictions on importation of a range wild animals that it considered as potential intermediate hosts for COVID-19 although it provided for the possibility of seeking an import permit of such animals from its authorities with the furnishing of a prescribed sanitary certificate.

Most of the other SPS measures introduced by the WTO members like Argentina, Australia, Brazil, Chile, Chinese Taipei, Costa Rica, Ecuador, Egypt, EU, Indonesia, Japan, Mexico, Peru, Philippines, South Africa and USA pertains to specific certification or document requirements to satisfy the sanitary and phytosanitary regulations in force in their respective jurisdictions. Certain countries like Philippines have introduced additional measures to ensure safety of food commodities and imports justifying the need for enhanced standards due to the public health threats emanating from the COVID-19 pandemic. While some introduced enhanced regulations or new rules, others were modifying the requirement to accommodate alternative or electronic forms of SPS certifications and documents.

Switzerland is an interesting example, which relaxed labelling requirements for food products in order to address the possible short supply of certain food ingredients and packaging materials caused by COVID-19 pandemic. It permitted the derogation subject to certain conditions and limited the period of relaxation to period of six months. It provides a distinct example of how SPS measures could be constructively adapted to pandemic situations and such measures need not always be about making the relevant rules more stringent. Similarly, Kuwait notified its decision to postpone the date to adopt a new set of technical regulation and standards relating to the export of food products to Kuwait from other countries, which is equally a considerate decision to respond to the pandemic situation. In addition to certain member states suspending or delaying the application of certain SPS measures discussed above, a group of mainly developing countries have submitted a joint request to the WTO under the provision of SPS and the TBT requesting, especially the EU, to suspend the processes and entry into force of reviews seeking to determine the reductions of maximum residue levels (MRLs) for plant protection products. The suspension and delay of entry into force of the MRLs were mainly requested to overcome the COVID-19 challenges facing the trade in related plant protection products. Notifications comprehending both SPS and TBT provisions were also issued by United Arab Emirates (UAE) and Ecuador with an aim to facilitate the imports of certain animal, agricultural and food products and to protect the people in the organic certification process respectively.

In comparison with the COVID-19 related measures introduced under different headings of WTO trade regulation discussed earlier, the measures introduced under the head of TBT has a high concentration of a specific member state introducing most of the measures. Brazil is the state in example that has made 20 distinct TBT notifications, the highest for any single member of the WTO in response to the COVID-19. The range of measures introduced by Brazil includes extraordinary conditions for the approval of execution of conformity assessment activities including in other countries affected by the virus, as well as several exceptional criteria and procedures to promote the manufacturing, market authorization, trade and supply of different health, medical and sanitation products. It also introduced extraordinary criteria, technical requirements and procedures for handling petitions for market authorization and post market registration amendments to the ingredients of the covered products, for clinical studies required to validate certain medical devices and for the importation, marketing, and donation of various medical devices. It suspended the publication of a certain ordinance mandating a compulsory certification of personal protective goods. Under the TBT provisions, Brazil imposed previous authorization requirement for the export of certain drugs and salts used in the fight against the virus and established the criteria for importation of certain COVID-19 diagnostic products.

After Brazil, Kuwait was the member, which imposed the second highest number of COVID-19 related measures under the TBT. The fifteen distinct measures introduced by Kuwait were mainly related to the test methods as well as measurement units, standards and other requirements for health, medical and sanitation products, and protective devices. Thailand with a 7 distinct COVID-19 related TBT measures stood at the third position. It introduced criteria and procedures for market authorization of imported pharmaceuticals, medical devices, certain hazardous substances and hand sanitizers as well as restrictive measures relating to licensing of imports for the sale certain industrial products. The measures also provided the requirements for registration and approval of imported medical devices and COVID-19 diagnostic test kits, operational guidelines for hazardous substances, and the characteristics of certain cosmetic products not permitted for production, importation or sale.

Other prominent members that introduced TBT measures includes Argentina, Canada, Czech Republic, Ecuador, Jamaica, Kenya, Korea, Morocco, Peru, Ukraine, Switzerland, Namibia, Indonesia Uganda, and United States. While most of these measures pertained to the technical standards and procedures for the approval of the manufacture, trade and sale of medical, health, sanitation and diagnostic products and protective equipment some prominent measures that stood out could be remarked. For example, Canada introduced desperate measures that would permit access to products helping to limit the spread of the COVID-19 virus, even if such products may not fully meet its regulatory requirements. Kenya imposed an importation ban of second hand or used garments and footwear. Switzerland also introduced TBT measures relaxing the labelling requirement for

food products. It also introduced temporary exemptions from two pertinent requirements namely a) the authorisation and import requirements for placing medicinal products on the market and b) the conformity assessment procedures for medical devices and personal protective equipment.

Interestingly, Indonesia introduced a temporary exclusion measure of specific ingredients in certain food products because of the disruption in imports of related raw materials triggered by the COVID-19. This demonstrates how states could adapt their domestic technical requirements in the light of trade disruptions caused by pandemic outbreak. Korea introduced a TBT measure aimed at banning the import of waste plastic to promote recycling of domestically accumulated waste plastic that was found to have increased due to the COVID-19. This evidences an interesting scenario of how the TBT measure resulting from COVID-19 pandemic is constructively engaged to address an environmental issue. Finally, China and EU were the two member states that have issued a specific notification under the WTO Trade Facilitation Agreement specifically enumerating various trade facilitation measures and related resources that were introduced in response to the COVID-19 pandemic outbreak. These measures are timely and serve as a good example of how important trading markets can positively respond to introduce measures aimed at facilitating rather than limiting the flow of international trade at the time of unprecedented trade disruptions caused by a global pandemic.

The ongoing analysis will not be complete with out taking note of two other distinct notifications made by Canada and Hungary that are related to the WTO TRIPS Agreement. The Canadian response pertains to the introduction of an amendment to its patent legislation to extraordinarily empower the patent Commissioner to authorize the supply of a patented invention for the purpose of responding to the public health emergency. Although, the need and rationale behind this radical measure could be understood, it could trigger challenges if the move could be interpreted as beyond the scope of the exceptions recognized under the TRIPS Agreement and capable of distorting fair international trade in related products or services. In contrast, the Hungarian TRIPS related measure is more moderate as it seeks to authorize a compulsory licencing requirement for public health purposes and that too for exploitation of the right only within Hungary.

## CONCLUDING REMARKS

The examination of the state response to the COVID-19, both at the domestic frontier as well as in the cross-border context of international trade, reveals that the introduced measures could be subjected to various challenges. Although, states may seek to justify their responses under the grounds of extraordinary circumstances arising of the global pandemic, the need for independent assessment of the state actions is crucial to render social justice and restore the confidence of people over their respective state mechanism. In this context, the determination of the legality of the state action will serve as a credible assessment. The role of domestic and international judicial or other dispute settlement bodies is highly crucial in scrutinizing the state actions. However, the discharge of this role is not an easy exercise as any legal assessment of the state response to COVID-19 must tackle the potential defences pertaining to the unprecedented emergency circumstances resulting from the outbreak of the global pandemic. Although emergency and exceptional powers recognized in national and international regimes have been utilized by the states in tackling the pandemic situation, the diverse nature of the state response, both in the domestic frontier as well as in context of international trade, raises a range of complex legal questions.

First, it is clear from the analysis in this paper that states do not enjoy unfettered emergency powers to impose any measures they may deem necessary to tackle domestic challenges arising out of a pandemic situation. The analysis reveals that the state response should be clearly within the confines of the national constitutional mechanism as well as international human rights obligations. Similarly, the freedom of the states to impose trade restrictive measures in response to the pandemic should equally be limited within the exceptions permitted by the international trade regimes like the WTO. The analysis of mirage of state response to COVID-19 pandemic in this paper, both in the context of domestic human rights as well as international free trade reveals a range of legal challenges that could emanate. The analysis in the two major sections of the paper revealed how the state responses could positively or negatively impact the human rights and international trade obligations respectively. Although, relevant national and international legal standards prescribing the limitations of the state actions exist, the assessment of COVID-19 related response measures by national courts or international tribunals will not be an easy task. These institutions may not be able to strictly interpret relevant legal standards in assessing state actions as the situation arising out of COVID-19 pandemic outbreak was essentially unprecedented in terms of scale as well as consequences.

Any legal scrutiny of the state action should therefore seek to engage innovative approaches and appropriate interpretative tools to ensure social justice prevails at the end of the day. Under such circumstances, the state actions could not be effectively adjudged from a stringent positivist approach. Therefore, the need for taking a socio-legal approach to the interpretation of the relevant norms gains a greater significance. The sociological interpretation of law has profound impact in attaining social justice in the past and such an approach has a great potential to serve the needs of justice arising out of the unprecedented consequences resulting from the COVID-19 pandemic. The sociology of law in particular emphasizes the need for appraising law as a social phenomenon and in the present context, when every society in the world has faced a grave impact of the COVID-19 pandemic, any assessment of the legality of related state response cannot ignore this crucial construction of law in the society. A sociological approach, in contrast to the engagement of economic theory of law will serve better at this juncture, not only in appraising the domestic law governing individual human rights but also international trade norms. Apart from effectively serving as an instrument of achieving social justice, the engagement of this approach will equally provide useful insights for law reforms in relevant national and international legal standards, which is inevitable to ensure that they are better equipped to govern any future global pandemic crisis.

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