

The Essential Commodities Act Needs Amendments Urgently. Here's Why.

written by Rajdev Singh | June 25, 2021



We are caught in an escapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly – Martin Luther King, Jr.

The Current Crisis

Health care services have been hit the hardest in recent times, owing to the chaos caused by the global pandemic. In particular, the world is keenly aware of the severe shortage in medical supplies India faced recently when a second wave slammed the country – leaving many struggling for vital essentials such as oxygen cylinders and pulse meters. More troublingly, some individuals hoarded – and continue to hoard essential supplies in the name of profit, worsening an already terrible scenario.

What caused such events to come to pass and what can be done legislatively to resolve it?

Interestingly, there is prior existing legislation that was put in place to address such crises, namely the Essential Commodities Act 1955 (hereinafter referred to as “ECA”). The ECA was passed with the sole objective to control the production, supply, and distribution of certain commodities, depending on the situation; in particular, Section 2A of ECA states that an essential commodity is any commodity specified in the Schedule of ECA. The first entry to the Schedule of ECA includes ‘drugs’ under the domain of essential commodities.

At this juncture, emphasis may be put on the characterisation and inclusion of certain notified medications under the category of drugs as per Section 3(b) of The Drugs and Cosmetics Act, 1940. Further, the amendment made by the Ministry of Health and Family Welfare (MoHFW) in 2020 has included medical devices under the ambit of drugs in Section 3(b) of The Drugs and Cosmetics Act, 1940. Despite having such legislation already in place, the government has been unsuccessful in resolving the grave failures of the healthcare system since they are outdated – and little has been done by authorities to remedy that.

As such, the pandemic has made discernible the lacunas of existing legislations and laid bare the inability of the central government to handle the second wave. For example, existing provisions of ECA do not offer any clarity on the concept of black marketing and hence, prescribes no punishment under Section 7 of ECA. This is clearly a major legislative oversight since,

according to reports, over five hundred FIRs have been registered alleging the hoarding and black market sale of oxygen cylinders, medical drugs like remdesivir, etc.

In simple words, the issue with the existing provisions is that whenever a person (without a license) imports medical devices or overcharges for medical drugs, it cannot be considered an offence. For example, in Delhi, a person imported and stored over five hundred oxygen concentrators at his residence and appallingly, he cannot be charged for hoarding until these medical devices are notified by the central government under the ECA and only when the price of the devices has been fixed by the authorities.

It is also worth mentioning here that the seller also cannot be held liable under criminal law or any other Act if the channels are lawful. The situation can thus be considered immoral or unethical, but not illegal.

The Judicial Standpoint

The hoarding, adulteration and black marketing of essential commodities has mostly affected the lives of people from weak economic backgrounds. Such people have died without professional hospital aid because of the severe shortage of oxygen cylinders, the unaffordable high prices of medical drugs and other necessities. There have been grievous violations to the right to life and health, as mentioned under Article 21 of the Indian Constitution. A Public Interest Litigation (PIL) has been filed before the Hon'ble Supreme Court which has highlighted the failings of our health infrastructure and stated that the mechanism on which the healthcare system is functioning is inadequate and incapable of curbing the hoarding, adulteration, and black marketing of basic medical necessities. It is because of such ineffective and outdated laws that the government has failed to control the public health crisis, resulting in the tragic exploitation of people's lives, particularly those from financially insecure backgrounds.

It would be worthwhile to make a brief note here of the recommendations suggested in the PIL: -

1. Offences related to hoarding, black marketing must be non-bailable, non-compoundable.
2. Fast-track courts should be designated with the power to deal with such matters.
3. The prices of medical drugs/medical devices should be regulated under the Essential Commodities Act 1955.

It is also significant to mention that the Hon'ble Telangana High Court division bench, comprising of Chief Justice Hima Kohli and Justice B. Vijaysen Reddy, recently asked the Telangana state government to explain why the prices of critical drugs and medical devices have not yet been included under the ECA and why was the ECA not been invoked and amended when the situation was out of control. They focused on the issue that the average citizen cannot afford the unjust prices of such critical commodities. They also pointed out that lives have been needlessly lost both because of this major legislative failure to regulate the (grossly unethical, but not illegal) practices of hoarding and black marketing as well as severe shortages caused by the poor production and distribution of supplies arising out of deeply flawed healthcare infrastructure. Such failings need to be urgently addressed under the ECA by introducing changes such as fixed pricing, defining hoarding as a punishable offence, etc.

Further, although the government has passed a notification dated 25.09.2020

in which they have fixed the prices of liquid medical oxygen and oxygen inhalation excluding GST, the update does not provide a fixed price on the sale of other medical devices considered equally essential.

Additionally, in the case of *Venkateshwar Hospitals v. Govt of NCT & Ors*, a direction was given by the Hon'ble High Court of Delhi that, in case of seizure of medical drugs and devices, the authorities should inform the District Commissioner, who in turn should pass the necessary order without any delay. Yet, authorities still cannot punish such offenders under ECA because the ambit of medical devices is still undefined in the Act and so, they are not answerable for related offences committed under the existing regulations.

On a completely contrary note, Delhi Disaster Management Authority vide its order dated 25.04.2021, did specify that persons who are committing black marketing, adulteration, hoarding etc. shall be punished under the Disaster Management Act, 2005, Epidemic Act, 1897 and Indian Penal Code, 1860 but the definition of medical devices has not received any illumination there either, rendering the development inadequate.

But modifying Section 3 of Drugs and Cosmetic Acts, 1940 and the Essential Commodities Act 1955 cannot solely resolve the situation. The ECA is clearly an enabling provision, and the central government needs to make amendments to it so as to adequately handle both present and future crises.

Propositions to Legislature

As seen above, the severe resource gap between the health facilities and the governing system of the country has forced people to buy vital medications and devices at much higher prices; some are not able to at all, leading to permanent (but avoidable) fatalities. With that in mind, here are some propositions the Central Government can consider while amending the Essential Commodities Act 1955.

1. The central government has the power to enable the provisions of the ECA. They should notify all the medical drugs and devices as essential commodities under the Act. Moreover, various notifications have been passed by the state governments which include medical drugs under essential commodities but have not included medical devices under the purview of it yet. Once the provisions of the ECA are amended, it would reduce the black marketing of essential medical supplies, which could save lives.
2. The central government should also pass an order for the regulation of pricing under Section 2A r/w Section 3 of ECA. If the order for the regulation is passed under the above-mentioned section, then the person violating those rules can be made liable for punishment under Section 7 of the ECA Act. Also, any breach committed by an individual would result in imprisonment of up to seven years, in addition to fines, seizure of property and other penalties. This would also help in releasing the seized drugs and devices to those who require them.
3. They should consider the notification passed by the Ministry of Corporate Affairs and Food Public Distribution, dated 21st March 2020, in which they have fixed the cost of hand sanitisers and face masks. Similarly, if the price of essential medical supplies is capped, cases of hoarding would reduce, and these services would be available to individuals from economically weak backgrounds, or those below the poverty line, at a fixed price. Once again, less shortage means more lives saved.
4. More Special Fast-Track Courts should be instituted to deal strictly with the

individuals involved in such crimes. The implementation of this proposition would reduce the burden on the Indian Judicial System and such courts would be able to make speedier decisions. Former Chief Justice of India, Justice S.A. Bobde also emphasized upon this issue heavily, however, the discussion did not result in a formal conclusion and this question remains unanswered. Recently, the Supreme Court's e-committee has revised the existing e-filing system to deal with all the urgent matters and to dispose of the urgent petitions in a more efficacious manner but the issue of providing powers to Special Fast Track Courts to deal with the black marketing and hoarding of COVID-19 essential drugs and devices is yet to be addressed.

5. It is also suggested that the Central Government pass effective orders to restrain individuals who do not possess valid medical trade licenses while importing essential medical supplies. These orders must contain penalizing provisions so that the offenders committing such immoral acts are punished properly. This would send out a potent message to all hoarders to terminate their unethical activities.

The government should take *suo moto* cognizance of this serious matter while keeping in mind the very real possibility of a third wave of COVID-19. Such propositions need to be urgently implemented in the event of a resurgence of cases.

The state needs to ensure the affordable pricing of essential supplies as they are arguably part of one's fundamental rights to life and health – which the state is bound to protect at any cost. A third wave would be beyond devastating and this is, quite literally, a matter of life and death – as has been the case for the last 16 months. India cannot afford to witness such large-scale devastation for the third time and the government needs to act swiftly in the coming days to prevent that.

Contributed by – Raj Dev Singh, Partner; Shruti Jena Maharathy, Senior Associate & Manasvi Mahajan, Intern