



CONSTITUTIONAL AND LEGISLATIVE DIMENSIONS TO REGULATE PUBLIC HEALTH

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ABSTRACT

The promotion and protection of public health is one of the oldest functions of government and certainly one of its earliest regulatory functions. Despite the integral nature of the interplay between public health and law, each of these fields have separate identity, and has adopted its own terminologies and forms of reasoning. In thinking about the Constitutional and legislative dimensions to regulate public health, it is first important to know what we mean by public health. This article traces history to find the definition of Public Health and its intersectional interface with law focusing Constitutional and Legislative design to regulate public health in India.

Keywords: Public Health, Regulatory functions, Constitutional and Legislative design.

Introduction

Public Health

In 1920 Charles-Edward A. Winslow provided the following definition of Public Health:

Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, and the organization of medical and nursing service for the early diagnosis and preventive treatment of disease and the development of social machinery

which will ensure to any individual in the community a standard of living adequate for the maintenance of health¹.

Almost 70 years later in 1988, the Institute of Medicine (IOM) in its classic report similarly defined public health as an organized community effort to address the public interest in health by applying scientific and technical knowledge to prevent diseases and promote health.²

World Health Organization states, public health refers to all organized measures (whether public or private) to prevent disease, promote health, and prolong life among the population as a whole.³

Supreme Court of India in the context observed:

In common parlance, public health tends to refer only to aspects of medical care and prevention of disease. However, a true interpretation of the term 'public health' will include not only this traditional notion but several other aspects that promote healthy living. Public health refers to both a goal for the health of a population and to professional practices aimed at its attainment. In both senses, the term tends to be broadly defined. The Constitution of the WHO defines the goal as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The Institute of Medicine defines it as the fulfillment of society's interest in assuring the conditions in which people can be healthy. Public health, as the practice that pursues the goal of a healthy population, also has a broad definition, including the development of the social machinery, which will ensure to every individual in the community a standard of living adequate for the maintenance of health⁴.

Mission of Public Health

The mission of Public health, then is to ensure conditions that promote the health of the community. Population based strategies for improving community health efforts to control epidemics, ensure safe water and food, reduce vaccine – preventable diseases, improve maternal and child health and conduct surveillance of health problems. In addition to long standing efforts to protect community from contagious environmental health threats, the public health arena is expanding to counter new and contemporary risks: obesity, adolescent pregnancy, injury, violence, substance abuse, sexually transmitted diseases (STD), human

¹ Winslow CEA: The Untilled Fields of public Health; New York Health service , New York Country Chapter of the American Red Cross; 1920, p 34

² Institute of Medicine: The Future of Public Health. Washington DC: National Academies Press, 1988.

³World Health Organization

⁴ CASE NO.: Appeal (civil) 2152 of 2006. PETITIONER: Ashok Lenka. RESPONDENT: Rishi Dikshit&Ors. DATE OF JUDGMENT: 21/04/2006

immunodeficiency virus (HIV) infections, natural disasters and bioterrorism. Approach to improve a community health must involve both population – based and clinical preventive activities.⁵

Public Health Activities

- Prevent epidemics
- Protects the environment, workplaces, housing, food and water
- Monitor health status of population
- Mobilizes community action
- Respond to disasters
- Assure quality, accessibility and accountability of medical care
- Reaching out to link – high risk and hard – to reach people to needed services.
- Research to develop new insight and innovative solutions.
- Leads the development of sound health policy and planning services.⁶

Public health is concerned with the total system and not only the eradication of a particular disease. Its activities aim to provide conditions in which people can be healthy and focus on entire populations, not on individual patients or diseases⁷.

Public Health Functions

The three main public health functions are:

- The assessment and monitoring of the health of communities and populations at risk to identify health problems and priorities.
- The formulation of public policies designed to solve identified local and national health problems and priorities.
- To assure that all populations have access to appropriate and cost-effective care, including health promotion and disease prevention services.⁸

⁵Llyod F. Novick& Cynthia B. Morrow. *Defining Public Health:Historical and Contemporary Developments*; Jonas and Bartlett Publishers.

⁶ Executive Summary. *For a healthy nation: return on Investments in Public Health* ,1994 US Department of Health and Human Services

⁷ WHO

In general people equate medical care with health, but the vast majority of research into the health of populations identifies so called 'societal factors' as the major determinants of health status.⁹

Public health law

Public health law should not be confused with medical jurisprudence, which is concerned only in the legal aspects of the application of medical and surgical knowledge to individuals. Public health is not a branch of medicine, but a science in itself, to which, however, preventive medicine is an important contributor. Public health law is that branch of jurisprudence which treats of the application of common and statutory law to the principles of hygiene and sanitary science.¹⁰

Public health law shares conceptual terrain with the field of law and medicine, or health care law, but remains a distinct discipline. It is not that public health law is contained within a tidy doctrinal package; its boundaries are blurred and overlap other paths of study within law and health. Public health law is susceptible to theoretical and practical differentiation from other disciplines at the nexus of law and health.¹¹

Public health law can be defined as the study of the legal powers and duties of the state, in collaboration with its partners (e.g., health care, business, the community, the media, and academe), to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals.¹²

Law and Public Health

The enactment and enforcement of law, moreover, is a primary means by which government creates the conditions for people to lead healthier and safer lives. One of the chief organizing force for Public Health lies in system of law. Laws are the product of legal system. These developed at different times in response to different circumstances and issues. There is no one repository where entire body of Public Health Law can be found. Four different types of

⁸*ibid*

⁹ Jonathan M. Mann, *Public Health and Human Rights*, American Bar Association Journal on Human Rights, Fall 1998, Vol. 25 No.1, pp. 2,3 and 4

¹⁰ James A. Tobey: *Public Health Law: A manual of Law for Sanitarian*, 6 -7 (1926)

¹¹ Lawrence O. Gostin: *Public Health Law: Power, Duty, Restraint*; Revised & Expanded Second Edition 2008.

¹²*Ibid*

law can be found by virtue of their form or authority viz Constitutional, Legislative, Administrative and judicially based laws¹³.

Public Health in Constitution Design

Public Health power and law is ultimately derived from the Constitution India, the legal foundation of nation. There are indirect and tacit references in Indian Constitution as to the role, the state has to play in the development of health of the people.

Preamble

Preamble of the Constitution describe the Indian polity as “Socialist, secular, democratic” and enshrine three cardinal principles “Justice, Liberty and Equality.”

In a socialist regime, health in practice would mean a social responsibility of the State. Secular dimension would suggest that health, should be made available irrespective of distinctions of caste, community and religion. Democratic feature would also have to achieve this goal. Polity should promote the welfare of the people including welfare of the health of the people of India. The three principles imply that health must be provided equally and impartially to all individuals and sections of the Indian Community.

Public Health under Fundamental Rights

Articles 14 to 16 embody the principle of equality and its corollary non-discrimination. Equality may be extended to include equal access to health services.

Article 17 abolishes untouchability and it has an indirect connection with health insofar as the Article stipulates punishments for refusing admission to any person the public institutions including hospitals and dispensaries.

Article 19 confers on the individual the right to six freedom. It reflects intervening factor in the case of the freedom to practice any occupation in so far it relates to occupation pertaining to the field of health.

Article 24 prohibits the employment of children below 14 in any factory or mine or engaged in any other hazardous employment. It has a direct bearing on the health of the adolescent

Articles 25-28, pertains to freedom of conscience and free profession, practice and propagation of religion. It potentially reflects on norms of health or sanitation, and a healthy

¹³Jones & Bartlett: *Law, Government and Public Health*.

way of living. The Constitution clearly states that restrictions may be imposed on this freedom in the interest of health.

Article 30 permits a religious minority to establish and administer its own educational institutions inclusive of medical education and training, and thus it has a bearing on health.

Public Health under Directive Principles of State

Article 38 mandates the State to ensure the health of workers, men and women and the tender age children are not abused and are not forced by economic necessity to enter avocations unsuited to their age. The children have opportunity to develop in a healthy manner and are protected against exploitation and against moral and material abandonment. Without public health welfare of people such achievements are not possible.

Article 39(e) relates with workers to protect their health.

Article 41 provides right to assistance in case of sickness and disablement. It deals with “The state shall within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in case of unemployment, Old age, sickness and disablement and in other cases of undeserved want

Article 42 makes provision to protect the health of infant and mother by maternity benefit.

Article 47 is relevant to health. It refers to the objective of raising the standard of living of the rural population in particular, and this has included health and improved sanitation which are directly a health category but others which have an indirect bearing on health. The latter includes (a) better housing, (b) better communication, (c) wider education and (d) prohibition of intoxicating drinks and drugs.

Article 48 takes care of the health of animals. The State has to endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Article 48A makes provisions for the State to protect and improve the environment and to safeguard the forests and wild life of the country.

Fundamental Duties in context to Public Health

Article 51A is perhaps relevant to public health because it makes the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures

Health Legislation in the Indian Federal Set – up

Article 246 empowers Parliament and Legislatures of States to make laws with respect to any of the matters enumerated in Seventh Schedule of the Indian Constitution. The seventh schedule mentions the specific responsibilities of different layer of Government in a federal framework towards the question of health. Such responsibilities are indicated under the Union List, State List and the Concurrent List.

List I - Union List

The entries listed as to subject matter 28, 51, 58, 59, 81 and 84 are the matters relating to the health services and health status of the people and Parliament has exclusive power to make laws on the subject.

List II- State List

The listed entries no. 6, 7, 8, 9, 10, 14, 15, 16, 21, 28, 31 and 51 are the matters pertaining to the health of the people and Legislature of any State has exclusive power to make laws for State.

List III - Concurrent List

The entries 3, 5, 16, 18, 19, 24, 25, 29, 30, 63, 91 and 92 refer to the various aspects of physical, mental and social health care policy, the policy with regard to drugs and medicines etc. Parliament, and the Legislature of any State, both have power to make laws on these matters.

Panchayat, Municipality and Health

Panchayats and Municipalities are also liable to improve and protect the public health.

Article 243G of Indian Constitution empowers the legislature of a state to endow the panchayats with power and authority in relation to matters listed in the eleventh Schedule. The entries 11, 23, 24, 25 and 26 of this schedule have direct relevance to health which relates to drinking water, health and sanitation including hospitals, primary health centers and

dispensaries, family welfare, women and child development and social welfare including welfare of the handicapped and mentally retarded.

Article 243-W gives power to the Legislature of a State to endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government. The entries 5, 6, 9, 16, and 17 of Twelfth Schedule pertains to public health issues as water supply, public health, sanitation, solid waste management and safeguarding the interest of weaker sections of society, including the handicapped and mentally retarded, vital statistics including registration of births and deaths and regulation of slaughter – houses and tanneries.

Judicial Exegesis

*In Vincent Panikurlangara vs Union of India &Ors*¹⁴ Apex Court pointed: -

The maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority--perhaps the one at the top.

*In PaschimBangassKhetMazdoorsamity V. State of West Bengal &Anr*¹⁵ Supreme Court Observed: -

It is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. It is necessary that a time-bound plan for providing these services should be chalked out.

*In Kirloskar Brothers Ltd vs Employees' State Insurance Corpn*¹⁶ Supreme Court held: -

The maintenance of health is the most imperative constitutional goal. Health is a state of complete physical, mental and social well-being and right to health, therefore, is a fundamental and human right.

*In MuktiMorch Vs Union of India*¹⁷, Supreme Court aptly observed: -

¹⁴1987 AIR 990

¹⁵1996 SCC (4) 37

¹⁶1996 SCALE (2)1

¹⁷[1984] 3 SCC 161

It is the fundamental right of everyone in this country, assured under Article 21 to live with human dignity, free from exploitation. This right derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just as humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

In Consumer Education & Research Center and Ors V. Union of India &Ors¹⁸a three-Judge Bench of Supreme Court held:

The jurisprudence of personhood or philosophy of the right to life envisaged in Article 21 of the Constitution enlarges its sweep to encompass human personality in its full blossom with invigorated health. The expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen.

On 18 September, 2002 the Divisional Bench of Bombay High Court delivered the Judgment stating:-

The right to life enshrined under Article 21 is the most precious fundamental right and permits a citizen to live he likes and eat what he chooses but such individual right must be subordinate to the public good. Public health is always a matter of policy in the governance of the subjects. The demarcation of legislature fields under the entries is not like watertight compartments and it happens sometimes that such legislative fields overlap. ¹⁹

In Pt. ParmanandKatara vs Union of India &Ors²⁰Supreme Court ruled: -

Article 21 cast obligation upon the State to preserve life. Every doctor has professional obligation to extend services to protect life. All Government hospitals and Medical institutions are bound to provide immediate medical aid in all cases. The effort to save the person should be the top priority. Patient in any case has not to be neglected.

¹⁸(1995) 3 SCC 42

¹⁹[Dhariwal Industries Ltd. And Anr. V. Union of India; 2003 (2) Bom CR 698]

²⁰1989 AIR 2039,

*In State of Punjab & Ors vs Ram Lubhaya Bagga Etc*²¹. Supreme Court emphasized:

To secure protection of one's life is not merely a right enshrined under Article 21 but an obligation cast on the State to provide this both under Article 21 and under Article 47 of the Constitution. The obligation includes improvement of public health as its primary duty.

*In Ashok Lenka vs Rishi Dikshit & Ors*²² Supreme Court of India ruled: -

In terms of the Directive Principles of State Policy, the State is bound to make endeavors to promote public health which is one of its primary duties of the State.

*In Javed & Ors V. State of Haryana*²³ Supreme Court stated: -

Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

In *Tapan Kumar Sadhukhan vs Food Corporation of India & Ors*²⁴ Apex Court ruled: -

The State must conform to the letter and spirit of Article 47 to improve public health. The State has to protect poverty stricken people who are consumer of sub-standard food from injurious effects.

*In Virendra Gaur and Ors vs State Of Haryana and Ors*²⁵ Supreme Court held: -

Article 47 imposes the duty on the State to improve public health as its primary duty. Article 51-A (g) imposes "a fundamental duty" on every citizen of India to protect and improve the natural "environment". Hygienic environment is an integral facet of right to healthy life. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21.

Indian Laws and Regulations Related to Health

Significant legislation effecting Indian health from 1873 to recent sets the scene for the substantive provisions of the statute by stating what the statute is intended to achieve. These can thus be enumerated below:

Northern India Canal and Drainage Act 1873; Births, Deaths and Marriages Registration Act 1886; City of Bombay Municipal (Supplementary) Act 1888; Epidemic Diseases Act 1897;

²¹Date of Judgment: 26/02/1998; BENCH: S.B. MAJMUDAR, M. JAGANNADHA RAO, A. P. MISRA JJ

²²AIR 2006 S.C. 2382.

²³AIR 2003 SC 3057

²⁴(1996) 6 SSC 101

²⁵1994 SUPPL. (6) SCR 78

Lepers Act 1898; White Phosphorus Matches Prohibition Act 1913; Destructive Insects and Pests Act 1914; Indian Medical Degrees Act 1916; Poisons Act 1919; Indian Red Cross Society Act 1920; Dangerous Drugs Act, 1930; Drugs and Cosmetics Act, 1940, (Amended in 1955, 1960, 1962, 1964, 1972, 1982 & 1986); Indian Nursing Council Act, 1947; Pharmacy Act 1948; Dentists Act 1948; Census Act 1948; Drugs (Control) Act 1950; Drugs and Magic Remedies (Objectionable Advertisements) Act 1954; Prevention of Food Adulteration Act 1954 (Amended in 1964, 1971, 1976 & 1986) ; Essential Commodities Act 1955; Slum Areas (Improvement and Clearance) Act 1956; Indian Medical Council Act 1956; Maternity Benefit Act 1961; Personal Injuries (Compensation Insurance) Act 1963; Post-Graduate Institute of Medical Education and Research, Chandigarh, Act 1966; Insecticides Act 1968; Indian Medicine Central Council Act 1970; Medical Termination of Pregnancy Act 1971; Homoeopathy Central Council Act 1973; Water (Prevention and Control of Pollution) Act 1974; Water (Prevention and Control of Pollution) Cess Act 1977; Air (Prevention and Control of Pollution) Act 1981; Bhopal Gas Leak Disaster (Processing of Claims) Act 1985; Narcotic Drugs and Psychotropic Substances Act 1985 (Amended in 2001); Environment (Protection) Act 1986; Child Labour (Prohibition and Regulation) Act 1986; Consumer Protection Act 1986; Mental Health Act 1987; Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988; Destructive Insects and Pests (Amendment and Validation) Act 1992; Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993; Transplantation of Human Organs Act 1994; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 (Amended in 2002 & 2003); National Environment Tribunal Act 1995; Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1996; National Institute of Pharmaceutical Education and Research Act 1998; Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999; Juvenile Justice (Care and Protection of Children) Act 2000; Biological Diversity Act, 2002; Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003; Disaster Management Act 2005; Food Safety and Standards Act 2006; Maintenance and Welfare of Parents and Senior Citizens Act 2007; Jawaharlal Institute of Post-Graduate Medical Education and Research, Puducherry Act 2008; Prevention and Control of Infectious and Contagious Diseases in Animals Act 2009; Clinical Establishments (Registration and Regulation) Act, 2010; Civil Liability for nuclear damage Act, 2010; Protection of Children From Sexual Offences Act, 2012; National Institute of Mental Health and Neuro-Sciences, Bangalore Act, 2012; Sexual Harassment of

Women at Workplace 2013; The Street Venders Protection of Livelihood and Regulation of Street Vending) Act, 2014. 31

Rules Notified

Aircraft (Public Health) Rules, 1954; Indian Port Health Rules, 1955; Drugs & Cosmetic Rules 1955; Drugs and Magic Remedies (Objectionable Advertisement) Rules 1955; Maternity Benefit (Mines and Circus) Rules, 1961; Insecticides Rules, 1971; The Water (Prevention and Control of Pollution) Rules, 1975; Air (Prevention and Control of Pollution) Rules, 1983; Hazardous Wastes (Management and Handling) Rules, 1989; Transplantation of Human Organs Rules, 1995. Pre-Natal Diagnostic Techniques [PNDT] (Principal) Rules 1996 (The PNDT Amendment Rule, 2003); PNDT Advisory Committee Rules, 1996; Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996; Bio-Medical Waste (Management and Handling) Rules, 1998; Noise Pollution (Regulation and Control) Rules, 2000; Medical Termination of Pregnancy Rules, 2003.

Regulations

Food Safety and Standards (Laboratory and Sample analysis) Regulations, 2011; Food Safety and Standards (Prohibition and Restrictions on sales) Regulations, 2011 and Food Safety and Standards (Contaminants, toxins and Residues) Regulations, 2011.²⁶

Health Committee and Commission Reports

Over the past decades, several Committees and Commissions have been appointed by the Government to examine issues and challenges facing the health sector, to review the current situation regarding health status in the country and suggest further course of action in order to accord the best of healthcare to the people.

The earliest committees included, the Health Survey and Development Committee (Bhore Committee) and Sokhey Committee. Other main Committees in the Post-Independence period, included Mudaliar Committee, Chadha Committee, Mukherjee Committee, Jungalwalla Committee, Kartar Singh Committee; Mehta Committee, Bajaj Committee amongst others. Some of the recent Committees include the Mashelkar Committee and the National Commission on Macroeconomics and Health.

²⁶Source: Legislative Department Ministry of Law and Justice (Government of India)

These committees made many landmark recommendations and advised for strengthening India's health system

Conclusion

Community health is national wealth. Our constitution makers were aware about the public health. Courts offers important guidance to public health agencies. The existing legislations provide for public health responses, but in a scattered nature.

The effectiveness of public health service to the community depends on the way the public health laws prevailing in the community. Of all the legal frameworks, public health or otherwise, provisions are largely 'restrictive' in nature and not true public health legislations. As a result, these provisions do not appear to be adequate to safeguard for social and economic disruptions and large scale health crises. The state Municipal Acts do not address all measures to be undertaken during an outbreak of a dangerous disease and are often vague. Laws existed in a number of States in India for the prevention of adulteration of food- stuffs, but they lack uniformity having been passed at different times without mutual consultation between States.

All important public health issues have not been addressed in a single legislation. India satisfies all conditions for emerging as an attractive surrogacy hub. Surrogacy continues to grow by the day, the proposed law to regulate it continues to remain in incipient stages. Confusion over legal requirements and conditions reigns supreme as the Assisted Reproductive Technologies (Regulation) Bill hangs in limbo. The present guidelines are a consequence of those originally framed by the Indian Council of Medical Research (ICMR). However, these do not have any legal sanctity and are not binding. The earlier emphasis on medical rehabilitation has now been replaced by an emphasis on social rehabilitation.

The above matrices highlight that there is a need for further strengthened legal provisions. There is an urgent need to assemble the provisions in one over-arching public health legislation, so that the implementation of the responses can be effectively monitored.

In 1955 and again in 1987 the central government developed a Model Public Health Act, but could not advocate states to adopt them. The National Health Bill 2009 seeks to ensure broad legal framework for providing essential public health services and functions and powers to respond to public health emergencies through effective collaboration between center and the states. Some states like Gujarat and Karnataka have a gone a long way in drafting the Public Health Bill.

The Gujarat Public Health Bill appears to be the only more coordinated public health legislation at the state level; an in-built consultative mechanism of involving the State Public Health Boards is expected to ensure standardized public health response. Regulatory resources, choices have to be made regarding which public health problems to address and the best regulatory approach to be taken.

India has to develop a model Public Health Act to address current and emerging public health issues including new challenges in communicable disease prevention and control health promotion and health protection, chronic disease and injury prevention, poisonings and bioterrorism threats.

Another perspective to consider for smooth implementation of legal provisions pertaining to public health. Sound rules and policy are essential in implementation of public health regulation. This lacks completely in the Indian context. Despite the enactment of a law prohibiting the casteist and deplorable practice of manual scavenging, many continue to labour in the profession in the face of neglect, deprivation and indignity. Often, the implementation agencies at center and state look up to the ministries for implementation of public health measures in hours of emergencies and even otherwise. India need a regulatory agency for implementation of these laws, India also require a 'public health standards defining agency' which can set standards for these measures and ensure uniformity in implementation of control measures, including legal enforcement.