Combating COVID-19 by Contracting out Health Data of Keralites: Some Legal Questions

Image source: Hindu Business Line

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The State of Kerala has been in the forefront of fighting COVID-19 ever since the coronavirus hit India. From successfully treating the first three infected patients to halting a much disastrous community spread, the well-coordinated efforts of the State government, especially of its top-class public health system, has attracted much global attention. However, amid round-the-clock measures to sustain a flattened curve, the government is now faced with a political crisis. A technology-driven data collection project aimed at increasing the efficiency and effectiveness of its fight against the pandemic has pushed the government to a defensive position. More specifically, a contractual arrangement between the State government's IT division and a US-based tech company, Sprinklr, for collecting, storing and processing the health data of Keralites has raised many doubts in the minds of not only the opposition parties but also the general public.

Multiple lawsuits have been filed before the High Court of Kerala to cancel the project and seek compensation for sharing the sensitive health data of Keralites with a foreign company. Through a series of directions, the Court has asked the government to take informed consent of individuals before collecting the data and interdicted Sprinklr from breaching the privacy of the same. The State government has already constituted an expert committee consisting of two former bureaucrats to submit a comprehensive report on the deal before the High Court of

Kerala. Apart from the political legitimacy of governmental action and the related allegations, the controversy cut deeply into questions of legality, from contracts to data protection laws, which the authors try to outline broadly in this article.

Public and Private Law Attributes of a Government Contract

Contracting with private entities for procurement of services is inevitable for every modern state and its sub-national agencies (including provincial governments like that of Kerala) in order to deliver the public functions. Since the provenance of the current controversy is an alleged contract to procure services, it is imperative to first look at some essential questions of contract law. Unlike a contract between two private parties, the contracting power of a government is circumscribed by the Constitution, in addition to the principles of contract law.[1] While Article 298 of the Constitution of India spells out the executive power of the Union or the State government 'to make contracts for any purpose', Article 299 lays down the necessary protocol to ensure that an illegitimate contract does not saddle the State.

To protect the public policy goal of a government contract, the Constitution and the related judicial opinion have mandated such contracts to be in writing and executed in the name of the President or the Governor as the case may be.[2] Later, considering the practical inconveniences of parties and tribulations of the bureaucracy, the judiciary has toned down the rigidity of this Constitutional provision by not insisting on endorsing a formal document.[3]

Although many courts have taken a liberal view by allowing the government to conclude contracts through correspondences,[4] there has not been a case where the requirement of authorisation by the President or the Governor is spared with. In other words, in every government contract, the judiciary still maintains the position that the officer who enters into a contract is duly authorised by the Constitutional authority.[5] From the facts available in the public domain, the Sprinklr agreement, in the form of a purchase order, was undersigned by

[1]For a comprehensive discussion, see, Varottil, Umakanth. 2016. "Government Contracts". In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, 967. Oxford University Press.
[2]State of Madhya Pradesh v. K.P. Chowdhary, AIR 1967 SC 203.
[3]State of Orissa v. Bishandayal & Sons, AIR 2001 SC 544.
[4]State of Madhya Pradesh v. Firm Gopi Chand Sarju Prasad, AIR 1972 MP 43.
[5]State of Gujarat v. Lalji Khimji [1993] 1 SCR 366.

the Secretary of the IT department without due authorisation by the Governor. This fails to be in tune with the prevailing legal position.

Let us now turn to the question of whether the said agreement could be validated afterwards. According to the judicially settled law in India, ex-post ratification by the Governor is illegitimate and will be against the ideals of public policy.[6] If at all there is a legal avenue to justify this act possibly, it would be through the provision for 'emergency procurement and accounting' contained under the Disaster Management Act.[7] The Government of India has already invoked this legislation to deal with the pandemic. However, 'disaster' defined under the Act is arguably not meant for public health emergencies,[8] and invoking the emergency procurement measures under the Act to bypass constitutional provisions would be untenable.

Furthermore, the only exception possible under the Act is the waiver of a standard procedure requiring inviting of tenders, not the exclusion of contract execution by a constitutional authority.[9] The political argument that a state government's 'rules of business' allows for a distinct procedure than what is given under the Constitution would be indefensible from the legal standpoint. In short, the alleged contract between the parties is *prima facie* invalid. Does this mean the government can wash its hands off if the company wants to enforce the contract because the contract formation has not been lawful? The government may still be prevented from evading its obligations, either by the application of the equitable principle of promissory estoppel or by the principles of restitution contained under the contract law.[10] For example, if a party makes an unjust enrichment, both government and the private company may make a claim against the other party under Section 70 of the Indian Contract Act. Yet, the chances of success look bleak considering a presumed gratuitous character of the contractual arrangement here.

The critical question, however, is, does Indian law, including the provisions of the Constitution be applicable if a foreign law governs the contract? A straightforward answer is that the Constitution would still apply because the law of the domicile shall govern questions

[6]Mulamchand v. State of Madhya Pradesh, AIR 1968 SC 1218.
[7]See, section 50 of the Disaster Management Act, 2005
[8]Bhatia, Gautam. 2020. "An Executive Emergency: India's Response to Covid-19". Verfassungsblog. Accessed April 19, 2020. https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19.
[9]See, note 4.
[10]See, note 1.

relating to the formation of a contract, especially the capacity of parties to enter into a contract. Moreover, requirements under the Constitution being mandatory rules of law, its application cannot be ruled out. In contrast, provisions of the Indian Contract Act shall not apply, as the designated proper law of contract is that of New York. Interestingly, the clause excludes the application of conflict of law principles, which means that only the internal law of New York would be applied and the chances of a New York court making a reference to Indian law is nil. As an additional point, the chances of a plea for State immunity from the jurisdiction may not benefit the Kerala government because of the commercial nature of the project.[11]

The selection of New York law and its local courts raises some important procedural questions concerning the choice of law and forum selection clauses. In international contracts concluded with the states (including its sub-national entities), the foreign party usually bargains for internationalisation of both the governing law and the forum selection clause plainly to avoid the so-called 'hometown justice'. To balance any asymmetry, parties generally opt for the national law of a neutral country. The selection of domestic law and the courts of the foreign company is a rare occurrence. What is most intriguing in the present case is that none of these possibilities has been thought after by the government before reaching the agreement. For instance, there were tailor-made Master Services Agreements available (in the Sprinklr website) which expressly mention neutral and more convenient legal systems (like that of Singapore, Australia, the United Kingdom, etc.) for the Kerala government. Nevertheless, debates on such issues are confined to the political sphere because of its procedural characteristic.

Social Contract, Public Trust and Constitutional Adjudication

Notwithstanding the above-mentioned legal considerations to pursue a contractual dispute, the chances of actual court litigation are thin on the ground, primarily when the relationship between the parties does not involve financial liabilities. If the government claim is valid, the agreement with the US company is a Samaritan initiative, designed to help the state IT department to manage its COVID 19 surveillance system efficaciously. Hence, the likelihood of the State government suing the company for a contractual breach would be rare, which also

[11]The Foreign Sovereign Immunities Act of 1976 (28 USC 1) follows the restrictive theory of sovereign immunity, and, thus, under Section1605, commercial disputes fall under general exceptions to immunity of states.

means that the sole victim in this whole arrangement is the citizenry. At least in terms of contract law, the residents remain remediless as they are not privy to the contract.

However, another important contractual relationship exists between the State and citizenry. As a matter of the social contract, the State has a fundamental obligation to ensure that the citizens' personal and health data is collected and used safely. Although it is debatable as to how an unwritten and legally unbinding theory of social contract is capable of sanctioning the State government, if things go wrong, avenues under the constitutional system are still open. For instance, the public trust doctrine as applied in constitutional adjudication may rightly translate the mutual obligations of the government in its social-contractual relationship with the citizenry. Using this tool, it is possible to enforce the corresponding contractual rights, arising out of the social contract. Evolved as a principle of environmental protection, doctrine of public trust places the government as the guardian of natural resources which are treated as the property of the general public.[12] Accordingly, the government has a fiduciary duty of care to the general public. Indisputably, data is the real asset (read as property) in a data economy. Therefore, any business model, which is data-driven, will have a design to monetise the data. It is the case even when they do not have control over the data. Borrowing the terminology from India's forthcoming data protection law,[13] State as the data fiduciary is accountable to the data principal (the citizen), regardless of whether the State has exclusive control and the data is localised in India.

The doctrine of public trust is, of course, just an additional tool to the protection of the fundamental right to privacy under Article 21 of the Constitution as held by the Supreme Court of India in its much celebrated Puttaswamy judgment. Nonetheless, it is quite unfortunate that we still do not have laws to protect the data privacy of individuals. Further, the limited scope of extra-territoriality of the General Data Protection Regulation (GDPR) or the Health Insurance Portability and Accountability Act (HIPAA-New York data protection law for Healthcare sector) will be of no assistance to individual residents of Kerala even if a data breach ends up in a local court in New York. Although India-specific legislation on data privacy in

[12]In the 2G spectrum case, e.g., the Supreme Court made references to this doctrine to consider telecom spectrum as a common property. See, Centre for Public Interest Litigation v. Union of India, AIR 2013 SC 3725.
[13] See definitions under the Personal Data Protection Bill, 2019, available at: https://www.prsindia.org/sites/default/files/bill_files/Personal%20Data%20Protection%20Bill%2C%202019.pdf

general, and the protection of digital health data in particular, are in the offing, at this stage, we are only left with many such hypotheses.

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