

## **EDITORIAL NOTE- COVID 19 SPECIAL ISSUE**

The Student Editorial Board is pleased to announce a **COVID Special Issue** of the HNLU Student Bar Journal. The COVID 19 pandemic has disrupted the day to day life of all sections of the society and brought about a peculiar set of legal and policy challenges. The issue aims to broadly analyse and promote discussion on the battle against the Covid-19 pandemic and way forward.

The issue contains four short articles that cover a wide range of recent issues, from labour law changes to violence against health workers. The first article, **Conundrum Surrounding Labour Laws in Uttar Pradesh** deals with the slew of labour law changes that have taken place during the pandemic and how detrimental they will be for labour welfare. The second article, **Violence against Healthcare Workers** talks about the insufficiency of existing laws to deal with violence against health workers and the need for a more comprehensive legislation to address the same. The third article, **COVID-19 Outbreak Leaves the Criminal Justice System Paralysed** talks about how the pandemic has had huge effects on justice delivery process across the country and a need to offset this. The fourth article, **COVID-19 and the Suspension of IBC: A Step Back** discusses how the recent amendments to IBC can actually end up being counter productive. The fifth article, **A Solution to Lockdown Panic Buying with the Help of Game Theory** discusses the recent phenomenon of panic buying, the various economic dimensions associated with it and its possible solution by utilising Game Theory.

We sincerely hope that this edition of the HNLU Student Bar Journal contributes to the growing output of law school reviews in India and takes forward the tradition of student editing and reviewing. We would like to thank all the authors, the University, the professors and the Board whose kind contribution made this issue possible. We hope this will be an enriching read.

- **Student Editorial Board**

# THE CONUNDRUM SURROUNDING THE LABOUR LAWS IN UTTAR PRADESH

By Aman Kumar Yadav<sup>1</sup>

*“Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history.”*

- Dwight D. Eisenhower

## INTRODUCTION

The Government of Uttar Pradesh has stirred up the whole legal fraternity after its proposed Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020 (‘Ordinance’)<sup>2</sup> which seeks to suspend all labour laws in the state but three, Building and Other Construction Workers Act,<sup>3</sup> Workmen’s Compensation Act,<sup>4</sup> and Bonded Labour System (Abolition) Act.<sup>5</sup> Also, it proposes to suspend all the provisions of the Payment of Wages Act<sup>6</sup> except Section 5. The Constitution of India provides for the matter related to Labour laws in List III under Schedule VII thereby any proposed change needs President’s assent.

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## IS THE USE OF ORDINANCE ULTRA VIRES?

### Ordinance making power:

Ordinance making power of the Governor under Article 213 of the Indian Constitution (‘the Constitution’)<sup>7</sup> is an extraordinary law making power which should be used judiciously. It empowers the State’s executive head to legislate in time of assembly’s break. The apex court in

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<sup>1</sup> IIIrd year student, National Law Institute University, Bhopal.

<sup>2</sup> Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020 (May 6, 2020).

<sup>3</sup> Building and Other Construction Workers Act, 1996.

<sup>4</sup> Workmen’s Compensation Act, 1923.

<sup>5</sup> Bonded Labour System (Abolition) Act, 1976.

<sup>6</sup> Payment of Wages Act, 1936, § 5.

<sup>7</sup> Constitution of India 1950, Article 213

Krishna Kumar Singh v. State of Bihar held that, ordinance don't create enduring rights and in order to promulgate one, the Governor must be satisfied that action required is immediate.<sup>1</sup> Here, during the pandemic, when the government should be taking pro labourer and workers measures, it is trying to bypass the principles laid down by the apex court under the garb of reviving the economy post the COVID-19 crisis.

Directive Principle of State Policy:

The apex court has time and again reiterated that although Directive Principles of State Policy ('DPSP') are unenforceable in a court of law, where legislation is already enacted by the state providing basic requirements to the workmen, then the State can certainly be obligated to ensure observance of such legislation. Non implementation of such laws would amount to a denial of the right to live with human dignity as enshrined in Article 21.<sup>2</sup> Since the DPSPs are enshrined in the Constitution under Arts. 39(e), 39(f), 41 and 42 for providing safeguards to the workers and labourers, the act of the executive's head is said to be ultra vires as, instead of preserving the already provided rights, it is superseding the existing laws.

**POOR IMPLEMENTATION AND SUSPENSION OF VARIOUS ACTS**

In the present crisis, the migrant workers have suffered the most. States have no record of the number of migrant workers. The Interstate Migrant Workers Act,<sup>3</sup> that requires registration of migrant workers when they go from their home state to a destination state, would have made it much easier had it been implemented properly. The states could have reached out to them, helped them and transported them back to their home states. This clearly shows how poorly the laws are implemented on the ground level.

What happens when the applicable laws are suspended

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<sup>1</sup> Krishna Kumar Singh v. State of Bihar, 2017 (2) SCJ 136.

<sup>2</sup> Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

<sup>3</sup> Interstate Migrant Workers Act, 1979.

The Trade Unions Act<sup>1</sup> provides for the registration and protection of the Trade Unions in India. In a country like India where the employer is always at the driving position, we cannot take away the protection provided to the Trade Unions. They used to stand for the basic rights of the workers and bargain on their behalf. Suspension of this act will take away their bargaining shield from them.

The most important of all, the Industrial Disputes Act<sup>i</sup> that governs the field of employment and termination of workers will also be suspended. Its suspension would lead to complete arbitrariness, employers will be at full liberty to hire and fire workers at their whims and fancies, job security will be a thing of the past. In India, the payment below minimum wages amounts to a situation of bondage. Now the government has also suspended the Minimum Wages Act<sup>2</sup> by an ordinance, the employers cannot be questioned for a wage below the prescribed amount. The whole rationale of the Bonded Labour Act will be defeated as the worker won't have any remedy to go to a court of law even when they are underpaid, indirectly resulting in bonded labour.

The current situation is so desperate that the labourers will work for any amount of money. On one hand, the government is keeping the Bonded Labour Act to show that they are not forcing labourers into a situation of bondage, but on the other, the government is increasing exploitation of the labourer by exempting employers from paying minimum wages. The Factories Act which provided for the safety of workers in the establishments, for potable water, electricity, and other necessary facilities also stands suspended. Now the employer won't be bound to provide for any essentials. The government is planning to suspend labour laws to focus on industrial growth. It has always been contended that we have too many labour laws that have barred industrial growth. But the question that comes up is, can any healthy democracy focus on industrial growth at the cost of exploitation of labourers?

The Bonded Labour System (Abolition) Act, the Contract Labour (Regulation and Abolition) Act and the Interstate Migrant Labour Workmen Act are interconnected laws. One cannot be repealed without affecting the other. The term 'Migrant Worker' is associated with the concepts of contract labour and bonded labour. The Inter-State Migrant Workers form a large part of contract labour with the additional and aggravating character of having come from another state.

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<sup>1</sup> Trade Unions Act, 1926.

<sup>2</sup> Industrial Disputes Act, 1947.

In its turn, contract labour is by and large bonded labour. Contract and migrant labour, sub-species of bonded labour are peculiar in Indian industries. All three share some commonality among themselves. The Compact Committee Report of 1977, after examining the case of the Dadan labour (Inter-state migrant labour of Orissa), observed that the characteristics of the Dadan labour systems resembled in some cases to bonded labour system. The statesman stated that the acts related to women and children will continue to prevail. However, it has not been made clear that what all laws will come within the purview of women and children related acts.

In one blow, the government has removed almost all the labour laws, putting the labourers in a very perilous state. The nation as a whole has already made them suffer a lot by the poor implementation of these laws, and now this ordinance only adds to their suffering.

It will (a) take away their job security, employers can hire and fire them at their will, (b) suspend the minimum wages law, which will force workers into bondage, and (c) will waive off all the laws mandating statutory requirements for worker health and safety. Those people cannot be said to have dignified life guaranteed under the Constitution. Deliberately or not, the State of UP also invoked the Essential Services Maintenance Act (ESMA), 1968, thereby banning strikes in all corporations and departments under it for six months. Under this, the police authority has the power to arrest anybody without a warrant if they are found violating the provisions of the Act.

### **CONCLUSION**

No matter how noble the intention of the government is, it cannot encourage exploitation of labourers, that too when you are a labour-intensive economy. This is surely an abuse of the power given to the Governor for filling up the legislative gaps in time of need. It will not only increase the hardships suffered by the workers, but also the practice of hiring and firing. This step was a drastic measure whereby the government of other states including the like of Madhya Pradesh, Gujarat, Rajasthan etc. also went on to provide certain relaxations in the applicable labour laws in the state. The ordinance violates the boundaries set by the Constitution of India. It has not yet been approved by the President and it is expected from the executive head of the nation to protect the rights of the labourers who are at their most vulnerable state.

## VIOLENCE AGAINST HEALTHCARE WORKERS: NEED FOR A COMPREHENSIVE LEGISLATION

By: Mohit Soni<sup>1</sup> and Ritika Goel<sup>2</sup>

### INTRODUCTION

The recent COVID-19 pandemic has highlighted the ever-present issues of misbehaviour and violence against the healthcare workers and disproportionate safety equipment for them. Violence against healthcare workers has been reported in various parts of the country. In response to these attacks, the Central government had passed an ordinance on 22<sup>nd</sup> April in order to protect the healthcare workers. At the same time, various states have also taken several measures, including various enactments and issuing notifications to protect the health care workers. The State Governments are invoking *National Securities Act, 1980* against the individuals causing hurt or grievous hurt to health care workers. Before the ordinance, the attackers were to face prosecution under the India Penal Code 1860.

This variety in the use of legal provisions has pointed out the legal shortcomings which has resulted in inadequate protection of healthcare workers. To offset this, Ministry of Health & Family Welfare, prepared a draft bill titled as “*The Healthcare Service Personnel and Clinical Establishments (Prohibition of Violence and Damage to Property) Bill, 2019*” hereinafter referred as the “draft bill”. Had the same been passed by the legislature, a mechanism would have already been in place to deal with such attacks. This article aims to analyse the available legislative material and provide certain suggestions with regards to a proper legal framework to deal with the protection of health care workers in the long run.

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<sup>1</sup> IIIrd year student, National University of Study and Research in Law, Ranchi.

<sup>2</sup> IIIrd year student, National University of Study and Research in Law, Ranchi.

### **JUDICIAL APPROACH**

Amid the COVID-19 pandemic, Hon'ble Supreme Court and various other High Courts have heard various petitions seeking proper redressal of such attacks. The Hon'ble Supreme Court of India in the case of *Jerryl Banait v. Union of India*,<sup>1</sup> took cognizance of incidents including the ones where medical staff that had gone to screen persons suspected of coronavirus were attacked and stones were pelted on them by miscreants. Similarly, incidents of misbehaviour with medical staff by the patients and forceful eviction of doctors from their homes by landlords due to fear of transmission came to notice of the Court.

The Court held that *"In wake of calamity of such nature all citizens of the country have to act in a responsible manner to extend helping hand to the Government and medical staff to perform their duties to contain and combat the COVID-19. The incidents as noted above are bound to instil a sense of insecurity in Doctors and medical staff from whom it is expected by the society that they looking to the call of their duties will protect citizenry from disease of COVID-19"* and after doing so, it emphasized that it is the duty of the State and the Police administration to provide necessary security to medical staff when they visit places for screening the people to find out the symptoms of disease. The Court also directed the State to take necessary action against those persons who obstruct and commit any offence in respect to the performance of duties by healthcare staff on COVID duty. In the case of *Sanpreet Singh v. Union of India*<sup>2</sup>, High Court of Uttarakhand directed the State Government to ensure proper nourishment and necessary care to the medical workers, who are unable to visit their respective residences. Furthermore, District Magistrates were directed to look into the grievances of health care workers in their respective Districts.

Additionally, in the case of *Registrar v. State of Maharashtra*<sup>3</sup>, the High Court of Bombay observed that obstruction to health care workers can result in the imposition of National Security Act, 1980. The High Court of Madras, in the case of *S Jimraj Milton v. Union of India*,<sup>4</sup> suggested that the State Government shall increase the salary of the health care workers. Further,

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<sup>1</sup> *Jerryl Banait v. Union of India*, 2020 SCC OnLine SC 357.

<sup>2</sup> *Sanpreet Singh v. Union of India*, Writ Petition (PIL) No. 52 of 2020.

<sup>3</sup> *Registrar v. State of Maharashtra*, Suo Moto Public Interest Litigation (St.) No.10541 Of 2020.

<sup>4</sup> *S Jimraj Milton v. Union of India*, W.P.No.7414 of 2020.

in the case of *Azra Usmail v. UT of Jammu and Kashmir*<sup>1</sup>, the court ordered to look into the grievances of the family members of the health care workers who are unable to look after their homes because of commitment to their duties. In the same case, a judicial note was taken that the violence against the healthcare workers is not new and that there is a need for a proper legislative framework. These judicial pronouncements rightly point out to the vacuum of effective legislation to deal with the violence against the healthcare workers.

### **EXISTING REMEDIES**

In the wake of COVID-19 pandemic, the Centre has passed an ordinance<sup>2</sup>, thereby defining the acts of violence against healthcare service personnel and their properties. The ordinance also makes the acts of violence to be a non-bailable cognizable offence. The imprisonment under the ordinance ranges between three months to seven years. The ordinance also raises a reverse presumption against the individuals prosecuted under the same.

Other than this, the provisions of the Indian Penal Code, 1860 would come to the rescue of affected health care workers. Under the IPC, Section 323; for Voluntarily Causing Hurt, Section 325; for voluntarily causing grievous hurt, Section 352; for Assault or criminal force and section 506; for criminal intimidation among others are the provisions for prosecution of the offenders.

The Draft Bill was rejected by the Home Ministry, on the ground of similar provisions coming under the IPC. The draft Bill had increased punishment ranging between six months and ten years along with provisions for compensation. Despite this, the available remedies and the draft Bill do not completely address the issues of healthcare workers in the long term.

### **INSUFFICIENT LEGISLATIVE FRAMEWORK**

The Epidemic Diseases (Amendment) Ordinance, 2020 states that an act of violence includes harassment, harm, injury, hurt, intimidation or danger to the life, obstructing or hindering

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<sup>1</sup> *Azra Usmail v. UT of Jammu and Kashmir*, WP(C) PIL no. 4/2020.

<sup>2</sup> The Epidemic Diseases (Amendment) Ordinance, 2020.

discharge of duties, or causing loss or damage to any property or documents. Thereby, causing or abetting acts of violence against the healthcare professional, a penal offence.

However, there are issues with the present ordinance which make it insufficient to be adopted as long-term legislation. Primarily, the ordinance concerns itself with epidemics only, making it infructuous for general circumstances. Further, as the ordinance came into force keeping COVID-19 in focus, the act of violence lacks an important form of harm. COVID-19 is a highly contagious disease and there have been alleged instances where some suspected patients have been spitting openly, thereby being negligent towards the communicability of the disease. Looking at the severity of the situation, the Ordinance should also include a provision which makes the person liable for transmitting the virus, whether negligently or purportedly, and thereby invoking the principle of strict liability.

The Ordinance raises a presumption of *actus rea* and *mens rea* towards the accused. Even though this reverse onus is fruitful to deal with this pandemic, the same cannot be true in the long run. Generally, these acts of violence are a form of disappointment and sadness caused by the loss of a loved one or some similar situation. This certainly is not true for all the acts of violence, nevertheless a reverse presumption would be unnecessary harassment to the accused and violate principle of fair and impartial trial.

Moving forward to the draft Bill, violence is stated to be causing harm, injury, hurt, grievous hurt, intimidating or endangering the life of the healthcare professional in the discharge of duty. It also includes individuals hindering or obstructing the discharge of duty by the health care workers or causing harm to the clinical establishment. The trouble herein is with the ambiguity attached to the prohibited act of violence. There shall be a description of penalties for different acts, for example: acts of causing hurt by means of weapons, acts of causing grievous hurt by means of dangerous weapons and acts endangering the life of the healthcare worker, or even causing death. Each shall have a different scale of punishment prescribed.

It had been the apparent ground of rejection for the draft bill that these provisions are available under the IPC. However, attacks against medical workers form a different class of offence which need to be addressed specifically in a separate legislation. IPC fails to make this kind of

distinction. Besides this, IPC also lacks the principle of compensation making it insufficient to deal with the issue of violence against the healthcare workers in the long run. Therefore, the vacuum of legislation for the safety of healthcare workers cannot be fulfilled by the IPC. The present ordinance and draft Bill with several modifications and a reformulation can take the shape of a legislation that will be applicable even after the epidemic.

The success of legislation cannot be ensured unless proper enforcement of the same is done. The evidence of poor enforcement is rarely found but one such evidence can be found in a report of Vidhi Centre for Legal Policy<sup>1</sup> which states that in the state of Haryana, no punishment has been ordered between the years 2010-2015. And more often than not, the complaints were not registered as First Information Reports. This raises a serious question over the enforcement of legislation.

A solution to ensure that proper enforcement is done and the grievance of the healthcare workers is not left unheard, it should be mandatory for the head of an institution to lodge a complaint when a written grievance is received from a healthcare provider. Further, it should be made mandatory that details of the complaint are to be shared with the National President of the Indian Medical Association and the General Secretary of the Indian Medical Association. These organisations shall also be directed to keep a record and vigilance over the FIRs so registered.

### **COMPENSATION**

Compensation is an essential factor through which the confidence of the health care workers can be regained. However, the amount of compensation is a topic of wide disagreement. It is advisable that the amount be kept dynamic and no minimum or maximum limit is enforced. The final compensation should be calculated by granting the money spent on the recovery of the health care worker along with the amount which one such worker might have earned but failed to do so because of the harm caused (This factor shall be calculated based upon the average receipt over last one year.) Further, for the loss of properties, the compensation shall be provided based

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<sup>1</sup> *Violence against Healthcare Professionals in India: Recent Legal and Policy Issues*, Vidhi Centre for Legal Policy.

upon the market value of the property including the depreciation over the year and the loss caused for the period till the property is properly functional again (This factor keeps in mind the loss of property in private clinics and hospitals.) Such a hefty amount of compensation will be a proper deterrence against the miscreants.

### **CONCLUDING REMARKS**

While concluding the need for a comprehensive legislation to protect the health care providers from undue harm, the legislative barrier also needs to be addressed. The matter of Public Health falls under Entry 6 of State List, this raises a difficulty in the formulation of central law for the same. However, the Centre may resort to Article 249 in order to frame this law in the national interest. This importance of this legislation is more than clear. Even though several states have enacted a law in this matter, the instances of violence have not reduced. The law is needed for proper deterrence, compensation, enforcement and to bring the confidence of the health care providers in the protection of the law. This law is necessary to assure the health care providers about the sanctity attached to the service and the respect they garner for providing that service.

# THE COVID-19 OUTBREAK LEAVES THE CRIMINAL JUSTICE SYSTEM PARALYSED

By Isha Choudhary<sup>1</sup>

*"The coronavirus requires a challenging balance of rights: the rights of the defendant to a speedy trial and a trial by a jury of their peers against the rights of courtroom actors and jury members to their health"*

- Theodore Wilson, University of Albany's School of Criminal Justice.

## INTRODUCTION

The global outbreak of the virus has posed a serious challenge for Indian prisons which are already occupied over their capacity. Subsequent to the warning issued by the WHO<sup>2</sup> affirming that the prisons across the world have the potential to bring to a gigantic rise in the mortality rates due to this pandemic, multiple petitions were filed before the various High Courts of the country seeking a release of prisoners falling in certain categories. As per the 2018 Prison Statistics of India<sup>3</sup>, the prisons are crowded over and above the sanctioned capacity by 17.6%. The said figure is relevant as this makes the prisons a fecund area for the spread of the disease. Also, it serves as a wakeup call for long overdue prison reforms.

## A GLANCE AT THE SC ORDER

The Supreme Court took all the issues under consideration, and by an order dated 23<sup>rd</sup> March 2020<sup>4</sup> asserted that the hearings would be conducted by way of video-conferencing as a measure

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<sup>1</sup> IInd year student, National Law University, Jodhpur.

<sup>2</sup> Hannah Summers, 'Everyone will be contaminated': prisons face strict coronavirus controls, The Guardian, (March 23, 2020), <https://www.theguardian.com/global-development/2020/mar/23/everyone-will-be-contaminated-prisons-face-strict-coronavirus-controls>.

<sup>3</sup> Ministry of Home Affairs, National Crime Records Bureau, Prison Statistic India, (2018).

<sup>4</sup> Coronavirus impact: Supreme Court to conduct hearings via video conferencing from today, The Economic Times, (March 23, 2020), [https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-conduct-hearings-via-video-conferencing-from-today/articleshow/74764793.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-conduct-hearings-via-video-conferencing-from-today/articleshow/74764793.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

to restrict the human interface and further escalation and spread of the deadly virus. In addition to this, all the states and UTs were ordered to formulate committees<sup>1</sup> to deliberate upon the aspect of release of prisoners who have been jailed as undertrials for offences prescribing a maximum imprisonment for seven years and also those who have been jailed for up to 7 years on parole.

In furtherance of the said order, the various state governments have been active in the release of prisoners along with abiding by the guidelines provided. Maharashtra government has already released<sup>2</sup> 601 inmates were released from 37 prisons of Maharashtra in a matter of 3 days succeeding the SC order and other states are expected to follow suit.

### **CHALLENGES POSED BY RE-INTEGRATION OF PRISONERS IN THE SOCIETY**

The challenge which is posed by the re-integration<sup>3</sup> of a large number of prisoners in the society has not been dealt with the foresight that it should have. The struggle of prisoners does not end with their release. Various societal and legal barriers that exist in the society make it comparatively difficult for them to hold a position in the society and secure a consistent source of earning. This, in turn, leads to a situation where these inmates have to live a life of poverty and consequently suffer from mental health issues.

At the same time, the employers avoid employing such people to prevent any additional liability which the firm may incur as a consequence of their past background. This highlights the issue of a purposeful discrimination at the employer's end.

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<sup>1</sup> *Coronavirus: SC directs states, UTs to set up panel to consider release of prisoners on parole*, The Economic Times, (March 24, 2020) [https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-sc-directs-states-uts-to-set-up-panel-to-consider-release-of-prisoners-on-parole/articleshow/74771877.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-sc-directs-states-uts-to-set-up-panel-to-consider-release-of-prisoners-on-parole/articleshow/74771877.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>2</sup> *Coronavirus: Maharashtra releases 601 inmates from 37 jails in 3 days*, The Economic Times, (March 30, 2020), [https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-maharashtra-releases-601-inmates-from-37-jails-in-3-days/articleshow/74887322.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-maharashtra-releases-601-inmates-from-37-jails-in-3-days/articleshow/74887322.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>3</sup> *The Challenges of Prisoner Re-Entry Into Society*, Social Work @Simmons University, (July 16, 2016), <https://socialwork.simmons.edu/blog/Prisoner-Reentry/>

Another important task is to offset the various devastating social effects<sup>1</sup> that come up when a prisoner is released into the society. The cost of this is not limited so as to being measured in economic terms but also extends to the compromised overall well-being of the society.

It is suggested by the 2015 Congressional Research Service Report<sup>2</sup> that, over a period of five years, on an average 76.6% of released prisoners return to the prison for one or the other reason. Mass incarceration is also deemed to be a contributing force<sup>3</sup> or rather a worsening factor to the pre-existing social and economic neighborhoods of the society.

### **CONCLUSION**

It is important to bring to notice the repercussion of the large-scale prisoner release on the society and the prisoners themselves. Systems need to be put into place to avoid a conflict between the two. Adopting measures like video-conferencing for the purpose of conducting trials do not seem to be a feasible idea considering the low levels of internet penetration in India. The release of these prisoners and the method adopted for conducting trial of the persons accused prima facie appears as a field day for these people to escape the clutches of law. The need of the hour appears to be a set of more stringent and effective guidelines to address the instant challenges created by the pandemic.

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<sup>1</sup> *White supremacy and mass incarceration*, Al Jazeera, (January 22, 2013) <https://www.aljazeera.com/indepth/opinion/2013/01/201311782939161836.html>.

<sup>2</sup> Congressional Research Service, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* (2015).

<sup>3</sup> National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/18613>.

## COVID- 19 AND THE SUSPENSION OF IBC- A STEP BACK

By Khushi Dua<sup>1</sup>

### INTRODUCTION

The entry of a black swan event, i.e. COVID-19, has significantly affected the lives of people. The effects of this pandemic have been looming mainly on the economy. To overcome the unprecedented shock to the economy, Nirmala Sitharaman has recently announced a significant relief to cash-starved firms in the form of a suspension of Insolvency proceedings for six months which may extend up to one year. The Government of India in its move to amend the Insolvency and Bankruptcy Code (IBC) by introducing Section 10A in the code which suspends the Section 7, 9 and 10 of the IBC. In short, the creditors/lenders during these six months cannot file any fresh case for bankruptcy<sup>2</sup>. However, the amendment is waiting for the President's approval<sup>3</sup>.

### IMPACT OF INTRODUCTION OF SECTION 10A

Essentially, the intention of the government behind introducing Section 10A is to give some sigh of relief to companies. The Section 10A puts an embargo on Section 7, 9 and 10 of IBC. Section 7 lays down a provision under which the financial creditors can file an application for insolvency proceeding, Section 9 lays down a provision under which operational creditors can file an application for insolvency proceedings and under Section 10 the corporate debtor can itself file an application for initiating insolvency proceedings<sup>4</sup>. Although the suspension of these sections acts as a breather for those companies who have a fear of being dragged into NCLT, these changes will serve as a dark phase for the creditors. These changes will bleed the balance sheet

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<sup>1</sup> Ist year student, National University of Advanced Legal Studies, Kochi.

<sup>2</sup> Timsy Jaipuria, *Government to suspend insolvency proceedings for six months- amends IBC*, CNBC TV 18, available at <https://www.cnbctv18.com/legal/govt-allows-temporary-relief-from-insolvency-proceedings-for-firms-5758061.htm>, last seen on 24/04/2020.

<sup>3</sup> Arnav Sinha, *Case against Suspension of the Insolvency and Bankruptcy Code amidst COVID-19*, The Indian Review of Corporate and Commercial Laws, available at <https://www.irccl.in/single-post/2020/05/22/Case-against-Suspension-of-the-Insolvency-and-Bankruptcy-Code-amidst-COVID-19-Lockdown>, last seen on 24/05/2020.

<sup>4</sup>Anjali Bhatia, *No Fresh Insolvency cases for a year- A narrow escape for companies*, IBC Laws, available at <https://ibclaw.in/no-fresh-insolvency-cases-for-a-year-a-narrow-escape-for-companies-by-advocate-kajal-bhatia/>.

of creditors. Here, the question arises that does the amendment of blanket suspension will serve the legislative intent of government? Is there a need to give a closer look to the amendment? Will there be unintended consequences that still need to be evaluated? Are we going back to Pre-IBC period?

### **ANALYSIS**

Does the suspension of IBC serve the purpose of code? It does not serve the purpose of IBC. There is no doubt that the IBC is one of the finest reforms in India which acted as a ray of hope for ease of doing business. In Bankruptcy Law Reforms Committee report, the committee stated that the objective of bankruptcy reforms is to avoid problems in extreme downturns in the business cycle<sup>1</sup>. But the blanket suspension of IBC has thwarted the way for better insolvency outcomes.

The powers given to the creditors under Section 7 and 9 for applying to insolvency proceedings will be taken away. This has triggered the creditor in control regime of IBC, which played a significant role in its success. These recent changes will do exactly opposite, and we will be again reverted to debtor-in control regime. This will force the creditors to accept the unfair demands of corporate debtors, and it will also put them in an unreasonable position.

Even if we consider the intention of government behind the suspension of Section 7 and 9, the decision makes sense but the suspension of Section 10 will not serve the purpose. It closes all the doors for the corporate debtor to go for voluntary insolvency. This can also be used as a tool by wilful defaulters to escape from the legal proceedings. It won't be too far-fetched to say that it is a double-edged sword which can be used by corporate debtors.

However, it is pertinent to note that the insolvency proceedings against personal guarantors have not been suspended. If the promoters of a company have provided personal guarantees to lenders, the companies may still be dragged into courts under Part III of IBC.

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<sup>1</sup> Ministry of Finance, Government of India, *The Report of the Bankruptcy Law Reforms Committee Volume 1: Rationale and Design November 2015*, available at [https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf).

The attention has to be drawn towards the limited alternative remedies that will be available to the creditor to get their claims back. After the suspension of IBC, the creditors will have to go for extensive litigation which will lead to undue delays. The creditors can file a summary suit under Order XXXVII of CPC or file a commercial suit under Commercial Courts Act, 2015. The lenders can also take over the management of a company under SARFAESI ACT, 2002 if they hold a mortgage over the immovable properties of a debtor.

No doubt, the suspension of IBC along with the operation of other recovery laws, will not achieve the objective of its suspension, but it will surely deprive both creditors and debtors of the benefits under IBC<sup>1</sup>.

### **SUGGESTIONS**

The ominous cloud of recession or at least a hitherto inexperienced economic slowdown requires a robust framework for rehabilitation more than ever before<sup>2</sup>. But a blanket suspension of the IBC is an incomplete solution to keep the wheel of an economy moving. It could result in further delays in the already overburdened system and result in other unintended consequences<sup>3</sup>. Various channels are available to the government to make the insolvency regime better in the situation of global crisis other than a blanket suspension of IBC.

The introduction of Pre-Pack deals will also act as a blessing in disguise<sup>4</sup>. Although Section 29A is a significant hindrance to introducing Pre-Pack deals, it can be added as an exception under IBC. However, there are various criticisms regarding the introduction of Pre-Pack schemes in India. Therefore, India needs a new-devised Pre-Pack policy where operational creditors can also

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<sup>1</sup> Hemant Kothari, *Suspension of IBC- A Half Baked solution to ease financial stress*, Money Control, available at <https://www.moneycontrol.com/news/economy/policy/suspension-of-ibc-its-a-half-baked-solution-to-ease-financial-stress-5285481.html>, last seen on 19/05/2020.

<sup>2</sup>Krishnava Dutt, *Is IBC suspension antithetical to pandemic protection*, The New Indian Express, available at <https://www.newindianexpress.com/opinions/2020/may/26/is-ibc-suspension-antithetical-to-pandemic-protection-2147967.html>, last seen on 26/05/2020.

<sup>3</sup>Aditi Deshpande, *Fresh Insolvency to be suspended for Six months under the IBC*, available at <https://www.outlookindia.com/outlookmoney/talking-money/fresh-insolvency-to-be-suspended-for-six-months-under-the-ibc-4638>, last seen on 15/04/2020.

<sup>4</sup> Anandaday Mishra, *Pre-Packaged Deals in IBC*, Tax Guru, available at <https://taxguru.in/corporate-law/pre-packaged-deals-ibc.html>, last seen on 8/05/2020.

be a part of the decision-making process. The increase in the moratorium period under IBC is another change that could have been brought in by the government.

The attention has to be drawn towards the case of *Union of India v. Infrastructure Leasing and Financial Services Limited & Others*<sup>1</sup>, in which NCLAT had granted a moratorium relief over the loans taken by the IL & FS and its 348 subsidiaries<sup>2</sup>. The relief had been granted under Section 241 and 242 of the Companies Act, 2013. The NCLAT had passed this order under the principle of equity, keeping in mind the economic interest of the nation and IL & FS. Similarly, in the case of *Bhupinder Singh v Unitech Limited*<sup>3</sup>, the Supreme Court also granted two months moratorium relief to Unitech from any legal proceedings against the company's management<sup>4</sup>.

Courts can also take the approach adopted by the courts in these two cases, in the recent scenario where moratorium relief can be granted to corporate debtors depending upon various factors such as the nature of the default, economic interest of company and public. Another amendment of the government to exclude 'COVID-19' related debt from the definition of default and increase in threshold limit from Rs. 1 lakh to 1 crore already serves the purpose of government to protect MSMEs and Corporate Debtors from insolvency proceedings. But these amendments seem redundant in the light of the blanket suspension of IBC.

Various countries like the United Kingdom, Singapore, Belgium and Germany etc. across the globe have changed the procedural aspects of Insolvency and Bankruptcy laws. Still, no country has put a blanket suspension of Insolvency and Bankruptcy Code. Thus, the effects of the blanket suspension of insolvency proceedings call for an urgent need to revisit the decision, and the government has to devise a policy by balancing the interest of both creditors and debtors.

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<sup>1</sup> Union of India v Infrastructure Leasing & Financial Services Limited and Others, Company Appeal (AT) No. 346 of 2018 (NCLAT New Delhi, 12/10/2018).

<sup>2</sup> Shashank Pandey, *Explainer- The IL & FS Insolvency case*, Bar and Bench, available at <https://www.barandbench.com/columns/ilfs-insolvency-the-journey-so-far>, last seen on 21/07/2019.

<sup>3</sup> Bhupinder Singh v Unitech Limited, Civil Appeal No. 10856/2016 (Supreme Court, 20/01/2020).

<sup>4</sup> *Government to take management control of Unitech- Supreme Court agrees*, Live mint, available at <https://www.livemint.com/companies/news/govt-to-take-over-management-control-of-unitech-supreme-court-agrees-11579517982836.html>, last seen on 20/01/2020.

# A SOLUTION TO LOCKDOWN PANIC BUYING WITH THE HELP OF GAME THEORY

By Nitya Bothra<sup>1</sup>

## INTRODUCTION

The recent hastily imposed lockdowns by various countries in the backdrop of Covid-19 pandemic brought to fore the curious phenomenon of ‘panic buying’. There were news reports of food items, hand sanitizers, masks, and various other fast moving consumer goods being stocked out as people rushed to their nearest supermarkets. Panic buying is a phenomenon<sup>2</sup> or herd behaviour which occurs when consumers buy unusually large amounts of a product such as food, fuel, etc. in the anticipation of, or after, a disaster or perceived disaster, or in anticipation of a large price increase or shortage. It has a potential to impact vulnerable populations due to underlying socio-economic inequalities being exacerbated by the pandemic. One way to counter this phenomenon is via the application of ‘game theory’.

Game theory can also be considered as a “*study of ways in which interacting choices of economic agents produce outcomes with respect to the preferences of those agents, where the outcomes in question might have been intended by none of the agents*” There are various types of games based on the number of players as well as perfect and imperfect information in the market.

## STATEMENT OF THE PROBLEM

The pandemic induced crisis of selfish behaviour and greed and fear of being left with nothing has caused the consumers to choose based on “sucker’s payoff” which in turn has caused a disparity between the hoarders and those left with nothing. Sucker’s payoff is the concern that if a consumer shops sparingly, they will end up with the worst outcome while others benefit

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<sup>1</sup> IInd year student, Gujarat National Law University, Gandhinagar.

<sup>2</sup> *Panic Buying*, Cambridge Advanced Learner’s Dictionary & Thesaurus.

through hoarding<sup>1</sup>. This has also caused a hike in prices of commodities such as toilet paper and various other basic necessities around the globe. Toilet paper panic buying could be seen rampant in United States of America, Australia, Japan, Hong Kong, Germany among others.

In times of crisis such as the present COVID '19 pandemic, the decision of buying supplies in a socially responsible manner does not depend only on the consumer and their choice but also depends on the choices of other consumers.

### **APPLICATION OF GAME THEORY**

Game theory is based on the assumption that people have stable preferences and that their choices are based upon choosing the alternative from a given set of alternatives that are ranked highest under these preferences. Game theorists assume that players have sets of capacities that are typically referred to in economics as comprising 'rationality'. The game is a deliberate approximation, designed to include important aspects of the interaction and exclude unimportant ones.

The actions "cooperate" and "defect" are approximations of alternatives that may be much more complex. Cooperation may involve colluding in an oligopoly market or signing a treaty or an agreement, while defection may involve flooding the market with increased output or simply defying traffic rules. A "saddlepoint" in a two-person constant-sum game is the outcome that rational players would choose. Saddlepoint always exists in a game of perfect information and may or not exist in a game with imperfect information<sup>2</sup>. The player tends to choose a strategy associated with the outcome where each player obtains an amount at least equal to his payoff, not considering the choices and strategy of the other player. Thus, when saddlepoints exist, optimal strategies and outcomes are easier to be determined and followed. There always exists the possibility of there being no equilibrium or saddlepoint, thus, there being no compelling solution to the game. For panic-buying to be reduced or eliminated, the government must strive to achieve this saddlepoint and push the citizens, the players of the game, towards it.

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<sup>1</sup> Rodney Lay, *The Lessons from Toilet Paper Panic Buying*, Live Wire, (Mar. 20, 2020), <https://www.livewiremarkets.com/wires/the-lessons-from-toilet-paper-panic-buying>.

<sup>2</sup> Larry Samuelson, *Game Theory in Economics and Beyond*, 30 *Journal of Eco Perspectives* 107 (2016).

### ANALYSIS OF DATA

Panic buying occurs due to various factors of which the most prominent according to various studies are:

- 1. Lack of trust:** When there is a reduction of people's faith and trust in market institutions, government and administration and the private sector, versions of truths, half-truths and rumours. This lack of trust is caused by insufficient and incomplete information in the market. In a market with perfect competition and perfect information, the consumer is less likely to do panic buying due the factors like price hike and fear of other consumers' choices<sup>1</sup>.
- 2. Fear:** Fear caused due to a pandemic or any event that is out of control of human beings tends to cause irrational behaviour. This fear can be mitigated through spreading proper information of how long the lockdown will last and rationing the supplies given to each individual or family.
- 3. Tendency to avert losses:** Human beings have a tendency to avoid future losses and in times of instability in terms of prices and quantity of essential products, human beings exhibit panic buying.
- 4. Influence by others:** Influence by role models to buy items leads to panic buying in various consumers as well. This could be used as an alternative strategy by asking role models to influence people to not panic buy.
- 5. Greed:** It can also be seen that certain opportunists buy necessities such as toilet paper and sanitisers in the current pandemic, only to sell it at much higher prices later.

Several factors tend to mediate the response of a group and mitigate the herd mentality as well. These factors<sup>2</sup> are:

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<sup>1</sup> Steven Brams, Morton Davis, *Game Theory*, Britannica, (Jan. 10, 2020), <https://www.britannica.com/science/game-theory>.

<sup>2</sup> Chris Stiff, *The game theory of panic-buying – and how to reduce it*, The Conversation, (Mar. 31, 2020, 09:37 PM), <https://theconversation.com/the-game-theory-of-panic-buying-and-how-to-reduce-it-134107>.

- 1. Food Prices:** People tend not to be afraid if the food prices don't inflate and thus, not fear to lose or face the sucker's payoff.
- 2. Purchasing Power:** It refers to the ability of the consumer to buy certain items. Those with purchasing power such as the upper class and middle class are those which can afford to panic buy.
- 3. Information and awareness:** Making consumers aware and giving them access to information regarding supply chains, ability of markets, delivery statuses and present stocks helps when communicated properly.

### **RECOMMENDATIONS FOR POLICY MAKING**

There are a few methods that can be adopted such as:

- 1. Increasing cooperation:** When the perception of the consumers shifts from that of needing the supplies out of fear and greed to all consumers being faced with the same problem, panic buying tends to reduce. Mutual gain occurs in the present situation and thus, cooperation is effective in bringing equitable distribution.
- 2. Promoting discussion and spreading awareness:** In certain games it can be helpful as all players are facing similar situations and choices. Promoting discussion and conversation helps improve relationships between consumers and increases information<sup>1</sup>. Panic buying occurs due to selfish impulses of the consumers which reduce when information is spread and discussion of similar situations of the consumers is present. This would also increase trust between the various players of the game and increase benefit to all.
- 3. Preference to needy:** Various supermarkets have made it a point to open the stores for an hour only for the elderly in order to help them in this crisis situation as they are the most affected by the pandemic. This leads to equitable distribution of resources.

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<sup>1</sup> Don Ross, *Game Theory*, The Stanford Encyclopedia of Philosophy, (Jan. 25, 1997), <https://plato.stanford.edu/archives/win2019/entries/game-theory/>.

4. **Deterrent punishment:** Social sanctions such as naming and shaming those who hoard are often effective. Direct punishment such as fines or penalties can also be strong deterrents. Rationing the supplies and enforcing this through effective punishments can be extremely useful to reduce greed and selfishness amongst consumers.

In the methods discussed above, the herd mentality of panic-buying can be controlled and thus, equitable distribution can be restored. This will also help in flattening the curve and help in the possible stop of the spread of COVID '19. It would also help provide the much-needed equipment to the medical staffers and aid the recovery of the patients that are increasing by the minute.