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IS COVID-19 AN EXCUSE FOR NON-PERFORMANCE AND NON-ENFORCEABILITY OF BUSINESS CONTRACTS? ANSWERS FROM ECONOMIC ANALYSIS WITH A BRAZILIAN PERSPECTIVE.

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1. NUTSHELLING THE CONCLUSIONS

(a) In any contract, parties only perform because it is worthy for them, and law surely can influence their behavior making sure it is not worth breaching.

(b) Business contracts with different moment of payment can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty.

(c) COVID 19 imposes great burden and uncertainty towards the contracts and courts may aggravate such uncertainty.

(d) Statutory or jurisprudence provisions are not prepared for COVID 19.

(e) For its characteristics as Business counterparties, neither of the parties are interested in losing a recurrent investor or a recurrent investment.

(f) The Coase theorem, once again, shows itself as the best perspective of analysis. Since neither the Courts nor the statutory provisions can interfere efficiently, only the parties, if in a built environment of low transaction costs, will allocate the burdens in an efficient way.

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(g) Economic predictions are negative under the scenario of COVID 19 impacting the business activities. However, such predictions point toward even worse scenarios (especially regarding corporate restructuring or breaches of contract) when taken under courts.

(h) Statutory provision – as soft law - and courts have the mission of building a low transaction cost environment, which can be artificially settled by a nudge to negotiate.

(i) The duty of information and good faith are old worth statutes from Civil Continental Law that can help building a duty of best efforts regarding renegotiation without imposing extra-legal penalties.

2. REVIEWING THE LEGAL ECONOMIC LITERATURE ON PERFORMANCE OF CONTRACTS

From a Law and Economics standpoint contracts make promises enforceable by law - in such a way that performing a contract is keeping a promise[3]. Having that in mind, it is coherent to ask what leads parties to perform. As Adam Smith suggests, it is not from the benevolence of the butcher and of the baker that we expect our dinner, but from their regard to their own interest[4]. Choosing to perform goes beyond a moral expectation from Philosophy or Religion, cooperation is the best way towards efficiency, as it helps the parties to reach their economic purposes within a negotiation. However, it would be unreasonable to expect cooperation if the business dynamics and the laws that involve it do not provide a safe environment for the parties to keep their promises.

Within this subject, Ejan Mackaay and Stéphane Rosseau explain that there are different types of contracts concerning the importance of law enforcement for the promises to be kept. For example, when one buys oranges in the grocery store nearby, the parties will most likely achieve their interests regardless of what the law states, since payment is made immediately by both parties[5]. However, this is not exactly true for contracts that are not instantly performed. Within contracts such as sales of goods with instant payment and future delivery - if there is no law enforcement for the promises to be kept - the seller may: (i) simply choose to appropriate since there is no liability for the delivery (ii) not perform since unexpected events create obstacles for performance (iii) deliver goods that do not specifically fit the expectations of the buyer.

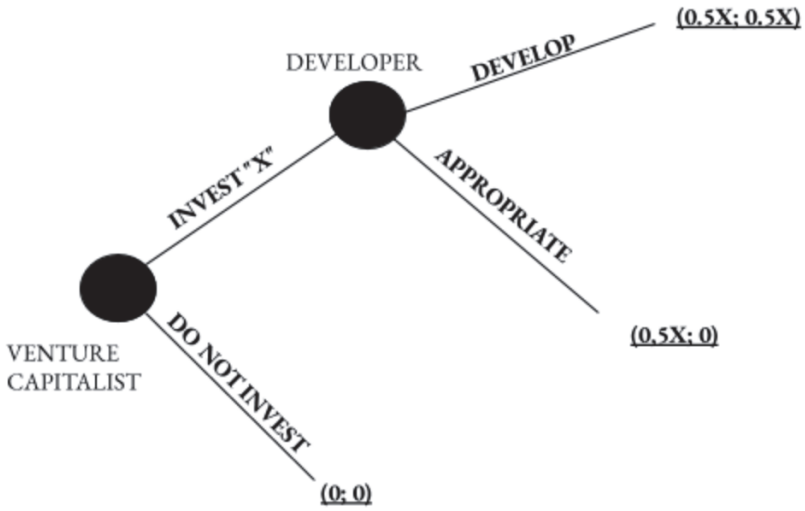
In this sense, Ulen and Cooter have taught us that it is efficient for the economic legal system to enforce promises - making the parties legally responsible for them - to guarantee that either the terms of the contract will be respected or that if a party breaches the contract, the counterparty will be remedied for it. Ulen and Cooter also affirm that this not only provides internal efficiency to the relation between the parties, leading them to achieve the interests that were explicit at the time of the conclusion of the contract, but also external efficiency, since it generates wealth.

To better understand what is suggested by the authors, let us analyze a hypothetical situation: a software developer needs an investor for his start-up company. With the investment, the developer will be able to turn "x" into "2x". The developer tells a venture capitalist that

[3] 6 ULEN COOTER & THOMAS ROBERT, LAW AND ECONOMICS, (Pearson 2012).
[4] ADAM SMITH & CANNAN EDWIN, THE WEALTH OF NATIONS, (Bantam Classic 2003).
[5] EJAN MACKAAY & STÉPHANE ROUSSEAU, ECONOMIC ANALYSIS OF LAW, (Atlas Juridico 2015).

they will share the expected profit of "x" if the venture capitalist decides to invest "x", which the developer does not have. If the promise made by the developer is not enforceable by the law, i.e. by a court, the investor will probably not invest, since the developer will be able to appropriate the investment without actually developing the software. If the promise is enforceable by law, the developer commits a breach of contract if he does not develop the software for which he will have to pay damages. Therefore, the venture capitalist will feel safe enough to invest. In this sense, both parties want the promise to be enforceable, since the developer knows that the venture capitalist will not invest if there is no liability for appropriation.

The parties perform because they understand that it is better for both of them to cooperate.



- *THE NUMBERS IN PARENTHESIS REFER TO HOW PROFITABLE EACH CIRCUMSTANCE IS FOR THE INDIVIDUALS - BEING THE FIRST ONE THE VENTURE CAPITALIST'S PROFIT AND THE SECOND ONE THE DEVELOPER'S PROFIT.*

- *IF THE DEVELOPER APPROPRIATES - BREACHING THE CONTRACT - HE WILL HAVE TO PAY DAMAGES IN THE AMOUNT OF THE EXPECTATIONS HE CREATED.*

- *COOPERATION PROVIDES INTERNAL EFFICIENCY - SINCE BOTH PARTIES ACHIEVE THEIR HIGHEST PROFIT IF THE SOFTWARE IS DEVELOPED - AND EXTERNAL EFFICIENCY - SINCE "X" OF WEALTH IS CREATED IF THE SOFTWARE IS DEVELOPED.*

- *THE MAIN REASON WHY THE PARTIES COOPERATED WAS BECAUSE BOTH OF THEM KNEW THAT THE PROMISE MADE BY THE DEVELOPER WAS ENFORCEABLE BY LAW*

The example helps us to answer the question from the first paragraph: parties perform because it is worthy for them, and law surely influences their behavior. In the investor-developer situation, law acted coercively when assuring that a party in breach would have to pay damages. Nevertheless, law not always has to be operated like that. Eric Posner teaches that sometimes the legal system interferes in cooperation and sometimes enhances it, as the present article will further elaborate within the COVID-19 context[6].

Moreover, the developer-investor situation is connected to the lessons of Eric Posner in the sense that it helps us to understand the application of *damages.* Eric Posner affirms that "*contract remedies should (...) give the party to a contract an incentive to fulfill his promise unless the result would be an inefficient use of resources*"[7]. We will also analyze this concept regarding COVID-19 in the future topics of this article.

Concerning specifically the developer-investor situation, the damages are *expectation damages*. Since expectation damages refer to compensating the injured party putting he/she in a position he/she would be if the contract had not been breached, its application is efficient for the example because it leads the promisor to take the maximum level of commitment to keep the promise, as he has to fully compensate the promisee (counterparty) in case of a breach.

The referred concepts from the law and economics analysis on contracts make it easier to comprehend the importance of having a legal system that enforces agreements, a principle

[6] ERIC A. POSNER, LAW AND SOCIAL NORMS, (Harvard University Press 2000).
[7] RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW, (Aspen 1972).

usually referred as *pacta sunt servanda* - i.e. agreements must be kept - for both Civil Continental Law and Common Law, even though its application varies regarding these two bodies of law.

Nevertheless, the situation that was analyzed through the perspective of the referred authors did not consider the alteration of relevant context for the agreement due to unexpected circumstances. This appears to us to be the case of COVID-19 in many business and commercial contracts, which the present article will examine.

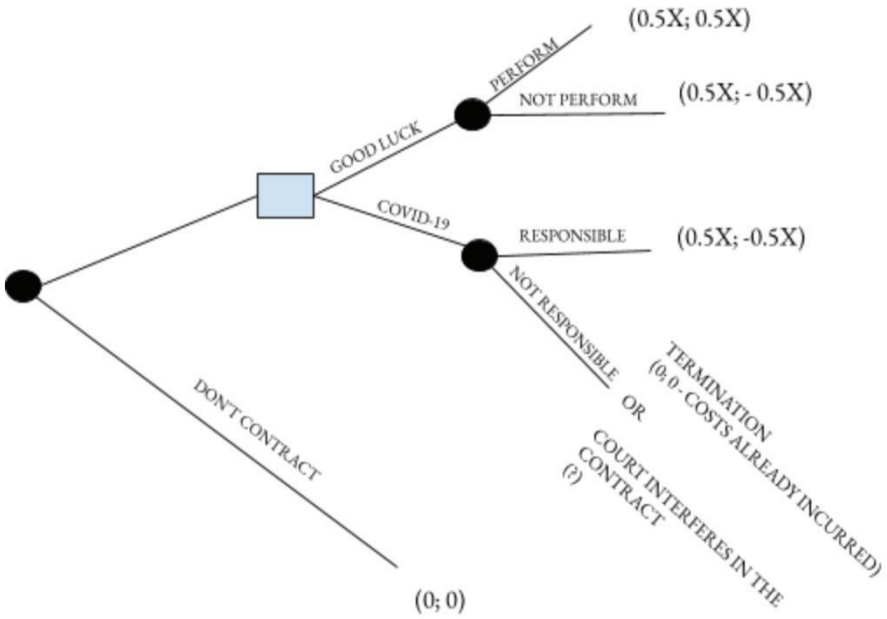
3. SOME CHARACTERISTICS OF BUSINESS CONTRACTS

As mentioned on the first topic, contracts that have gaps between different payments of the agreed obligations are the ones related to which more obstacles to perform may arise, since unexpected events can affect them. And this not only presents one of the main characteristics of business contracts, but also a relevant discussion regarding COVID-19.

Business contracts that concern this element of different moment of payment of the obligations can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty. These risks can be mitigated by mandatory provisions, but these are not the only sanctions that involve the relation between the parties. Even if there is uncertainty whether a promise is enforceable or not, long-run business contracts, which are common, may have performance guaranteed by the existence of *social sanctions*, such as reciprocity in behavior, and attacks to reputation. For example, when parties engage in a contract of supply of goods, if the demander delays payment, the supplier may perform poorly until the demander starts to pay properly. This kind of practice can be understood as a social sanction and may prevent wrongdoing even if the law does not enforce the promises made by the parties. The practice of rewarding cooperation and punishing appropriation within the environment of a relational contract is called *tit for tat*. And if a party constantly performs poorly it will hardly engage in new business contracts since its reputation will be attacked by the other party.

Combining this perspective with the concepts presented on topic 1, let us analyze a hypothetical scenario that may be facilitated by the events regarding COVID-19: Individual A owns a drugstore and wants to expand it. During the expansion, the drugstore will be closed.

The expansion will be worth "2X" to Individual A. Individual A contracts with Individual B, who promises to expand the drugstore and complete the construction by a specific date. The expansion of the store costs "X" to Individual B, so he charges Individual A "1.5X" for the construction. The contract requires Individual A to pay "X" in advance and "0.5X" when the construction is completed. If no unexpected event impedes Individual B to perform, this relation will follow the same structure of the developer-investor example: both parties will cooperate and make a "0.5X" profit. However Individual B may have bad luck. Let us imagine that Individual B needs the state to issue a construction permit to start a certain stage of the construction and that, due to COVID-19, the state suspends the issuing of all construction permits for works such as the one Individual B is operating for Individual A. What happens in this case?



- *IF THE PARTIES ARE LUCKY AND NO UNEXPECTED EVENT CREATES OBSTACLES FOR THE PERFORMANCE, THE STRUCTURE REMAINS THE SAME AS THE ONE PRESENTED ON THE INVESTOR-DEVELOPER SITUATION*
- *IF THE PARTIES ARE UNLUCKY AND AN UNEXPECTED EVENT SUCH AS COVID-19 CREATES OBSTACLES FOR THE PERFORMANCE, TWO SITUATIONS MAY ARISE (UNDER BRAZILIAN LAW, WHICH MAY BE SIMILAR TO OTHER*

BODIES OF LAW) IF THEY DECIDE TO LITIGATE. (I) A COURT MAY FIND EITHER THAT COVID-19 DOES NOT FALL WITHIN THE SCOPE OF EXEMPTION OF LIABILITY IN SUCH A WAY THAT THE CONSTRUCTOR HOLDS ALL THE RISKS REGARDING HIS PERFORMANCE OR (II) THAT THE CONSTRUCTOR SHOULD NOT PAY DAMAGES SINCE PERFORMANCE WAS IMPEDED BY THE COVID 19.

- *IF THE CONSTRUCTOR IS RESPONSIBLE UNDER THE LAW, THE COURT WILL DECIDE THAT HE HAS TO PAY DAMAGES TO THE OTHER PARTY AND THE OTHER PARTY WILL BE ENTITLED TO TERMINATE THE CONTRACT. IF THE COURT FINDS THAT THE CONSTRUCTOR IS NOT RESPONSIBLE FOR THE NON-PERFORMANCE, THEN IT MAY LEAD EITHER TO A TERMINATION OF CONTRACT PLACING THEIR PARTIES ON THEIR "STATUS QUO ANTE" OR TO AN INTERFERENCE BY THE JUDGE ON THE CLAUSES OF THE CONTRACT (WITHIN THE BRAZILIAN LEGAL FIGURES THAT WILL BE PRESENTED IN THE NEXT TOPIC).*

Therefore, we can see that regardless of what is written in the law, the parties will be able to achieve an efficient contract without reaching a court. And here's why: neither of the parties want the contract to be terminated. The store owner most likely plans to operate his business after the COVID-19. Also, the constructor surely wants to perform a contract that is actually concerned to his main activity after all. Reaching a court may lead either to the unsatisfactory termination of contracts or to the interference by a third party on what they had negotiated. Since decisions regarding COVID-19 are still uncertain, the risks within this procedure are too high. Also, as we have seen on the investor-developer situation, the performance of contract generates wealth, so the states are also benefited if the parties perform. In this sense, it is more efficient to enhance cooperation *stimuli* than to create strict rules for contract interference by the state.

4. LEGAL FIGURES THAT CAN BE ADDRESSED ON BUSINESS CONTRACTS WITHIN THE COVID-19 CONTEXT

The spread of the COVID-19 has been impacting the dynamics of many businesses. Since there is no concrete solution to the disease by the present moment, governments all around the world have adopted social distancing as the strategy to avoid major impacts on their health system, which appears to be the most coherent plan to be followed given the situation.

However, this policy involves the suppression of different economic activities, since most stores had to suspend physical operations, borders had to be closed and almost all events that would gather a large amount of people had to be either cancelled or postponed. Due to these new circumstances, the performance of contractual obligations of many kinds can become impossible or at least extremely hard to be executed by now.

One of the main principles in Civil Continental Law countries is the so called *pacta sunt servanda*, which means that the parties to a contract are obligated to comply with their contractual obligations or else they will be held liable for a breach of contract. Nonetheless, if the parties face circumstances that make the performance impossible or that are extremely different from the circumstances that were expected by the conclusion of the contract, *pacta sunt servanda* can be avoided.

In some cases, coherently dealing with performances that are not instantaneous regarding the conclusion of the contract, under the Brazilian Law, if an unexpected event creates extreme difficulties for a party to perform a contractual obligation with an advantage provided to the other party, this contract can be avoided under article 478 of the Civil Code, which refers to the *excessive burden* doctrine.

Also, legal scholars - such as Nelson Nery Jr. - discuss the possibility of addressing article 317 of the Brazilian Civil Code to analyze that if there is an unexpected event that creates high imbalance between the performance of the obligation at the time of the conclusion of the contract and the performance of the obligation after dealing with the unexpected circumstances - generating disequilibrium to the *value* of the obligation for the parties as well - a court could interfere in the terms of the contract without the necessity of analyzing how difficult one of the obligations itself became to the other party[8].

[8] NELSON NERY JR., THE BASIS OF THE LEGAL BUISNESS AND THE REVIEW OF THE CONTRACT, (2004).

The referred understanding of article 317 is related to the Theory on the Objective Basis of a Negotiation, suggested by Karl Larenz[9]. In accordance with the author, this Objective Basis is affected either if the obligations between the parties are not as balanced as they were at the time of the conclusion of the contract due to an unexpected event - which some authors understand to be the nature of article 317 - but also if the purpose of the contract is frustrated. The latter, by a broad analysis of the intentions of the Brazilian Law, can even be understood as incorporated in the Brazilian Civil Code in articles 421 and 422, which also would provide the possibility of termination of contract.

To summarize this brief description of the Brazilian contract law, we can understand that, in theory, the Brazilian law provides the parties with many possibilities to attempt either termination of contract or a judicial interference on the terms of the contract in circumstances that are at least similar to the COVID-19 crisis.

However, what is written in the law may not always be the best alternative to the parties to solve their problem.

4.1. Cooperation and internal efficiency

In the beginning of the 1960s, Ronald Coase brought an intense discussion to Law and Economics with his article *The problem of social cost.* Within the debates around *externalities* - i.e. the benefits and costs held by third parties to a contract that are not taken into account by the party that performs - Coase suggested that reasonable parties were surely able to agree on the most efficient contract regardless of what was stated in the law[10]. If Coase were correct with this assumption, that could mean that tort law was not as efficient as people expected.

To understand Coase's Theorem, let us analyze the following situation inspired by the economist himself: a small factory produces useful goods for the neighboring community. The production of these goods is worth 1.5X. The factory also sends smoke - a sub product of its activity - to the environment. This smoke is harmful for the neighboring properties. The legal framework can create the responsibility for the factory to pay damages of X for all the owners of the neighboring properties. However, this can be extremely expensive for the factory,

[9] KARL LARENZ, BASIS OF LEGAL BUSINESS AND CONTRACT ENFORCEMENT, (2002).
[10] R. Coase, *The Problem of Social Cost*, 3 JOURNAL OF L. & ECON.1, 1–44 (1960).

creating huge obstacles for its operation. The factory could also install a device in the chimney that would contain the harmful emissions, but this is just as expensive as the damages that the factory would have to pay for the owners. On the other hand, if the legal framework is silent regarding the subject and neither the factory nor the owners attempt to communicate and cooperate, it is no-win situation as well, since the owners will suffer losses concerning their property and this may lead them to boycott the factory and attack its reputation. But, considering that communication is easy between the factory and the owners, the parties can cooperate.

	FACTORY'S SITUATION WITHOUT COOPERATION	PROPERTY OWNERS' SITUATION WITHOUT COOPERATION	COOPERATION
FACTORY HAS TO PAY DAMAGES/ INSTALL DEVICE BY ITSELF	DAMAGES OR DEVICE (-X)	DO NOTHING BUT THEN WILL LOSE THE FACTORY NEARBY (-1.5X)	SPLIT THE COSTS OF THE DEVICE (-X/2) AND THE FACTORY STILL OPERATES (1.5X)
FACTORY DOES NOT HAVE TO PAY DAMAGES	DOES NOTHING BUT THEN *SOCIAL SANCTION/BOYCOT T* LEADS THE FACTORY TO INTERRUPT OPERATIONS (-1.5X)	PROPERTIES WILL BE HARMED (-X)	SPLIT THE COSTS OF THE DEVICE (-X/2) AND THE FACTORY STILL OPERATES (1.5X)

It is clear in the table that bargaining within their own and specific situation is the most efficient solution for their relation. But looking at it with a broader perspective, this internal

efficiency also provides external efficiency because it guarantees the operation of a factory that regards an interest of the whole economic system and generates wealth.

Ronald Coase, nevertheless, made it clear that the only reason why cooperation would be possible for that specific situation was because the costs of reaching an agreement were low. These costs are *transaction costs*, obstacles for the parties to properly bargain between them, such as not possessing all the information within the context of the contract or having a hard time to reach the party that you want to negotiate with.

The conclusion suggested by Ronald Coase is that, assuming zero transaction costs, the parties will definitely reach the most efficient agreement for both of them, i.e. *Pareto Efficiency*, which means that a party cannot better off its situation without making the other party's situation worse off. For situations in which parties do not have all the elements of negotiation on their hands, tort law still has huge importance. What is important to comprehend is that law should not only determine sanctions, but also reduce transaction costs for the parties to negotiate, providing them with the most proper environment to achieve efficiency.

Regarding the enforceability of contracts, and now addressing the COVID-19 situation, addressing the courts to enforce a contract facing unexpected events may not only be expensive as usual but can also provide unexpected results (specially concerning Brazilian law, according to which there are many legal figures that can be applied for different circumstances within the context of the agreement).

In such wise, since the parties may not even know what to expect from a court regarding their contract - since the court can even change its clauses or terminate under the Brazilian law - the fairest and most efficient alternative for the parties is for them to renegotiate themselves the clauses pursuant to the new circumstances. Nonetheless, to avoid opportunistic approves to the uncertainty of courts concerning the change of circumstances, the legal system, i.e. the state, has to provide conditions for the individuals to feel safe enough to renegotiate and have the new contract clauses enforced by law.

4.2 Commercial relations and external efficiency

When it comes to most business contracts, as already discussed above, the payment of contractual obligations does not occur immediately. In such wise, one cannot evaluate an idea

until after he knows what it is, and after its disclosure he has little reason to pay for it[11]. This is the problem that arises when attempting to unite ideas and capital, a combination that benefits the economic system internally and externally. The investor must trust the developer not to steal capital and the developer must trust the investor not to steal his idea. It is a similar controversy faced on the developer - investor analyzed on the article if the promises were not enforceable. The solution comes from contracts, promises with material sanctions for breaking it, especially legal sanctions.

Business contracts, within this context, present the characteristics of investments, in such a way that the company that pays first expects to receive benefits, pursuant to the contractual obligations, in the future, in such a way that, while the second payer does not perform, the other party finances it. This structure was already mentioned above, but now we will desiccate the different "stages of investment" that may regard the contracts. We can have relational contracts, private contracts and public contracts, as the level of investment expands. Cooter and Schaefer teach us that there are different sanctions for the different stages. For relational contracts, we have social sanctions as a strong element that arises in case of non-performance. For private contracts, social sanctions are combined with civil sanctions. And for public contracts, those two combine with regulatory sanctions. However, since business contracts are the agreements that regard the development of the parties' core activity, they do not want to terminate the contract or to have strong sanctions applied. They do it in the worst-case scenario. They want the contract to be performed. Reaching the courts is expensive and the procedures may take a long time, as we will see on the results from the ABJ[12] research, especially given the present circumstances. Also, it must be considered that “writing down a law does not make it effective; it is as effective as its supporting sanction"13. The civil sanctions depend on the understanding of the courts (which are not very clear regarding unexpected events as the COVID-19 may be considered)[14]. But what is relevant to consider concerning the different types of business relations described above is that - according to the investor/developer situation analyzed on the first topic - law must guarantee that there is a comfortable environment for the parties reach an agreement to perform, since the economic

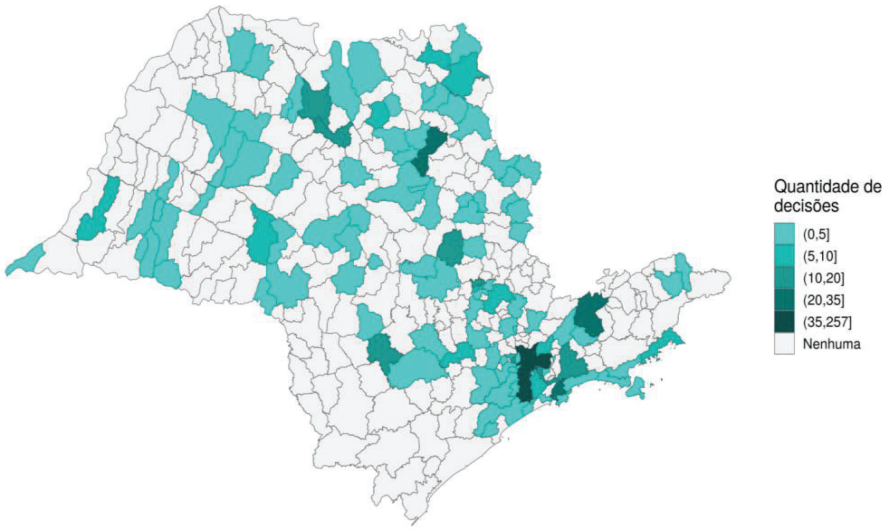
[11] HANS-BERND SCHAEFER & ROBERT D. COOTER, SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS, (Princeton University Press 2011). (hereinafter “HANS-BERND”)
[12] Brazilian Association of Jurimetrics.
[13] HANS-BERND, supra note 11, at 10.
[14] Cuiabá Plaza v. Minerva Energia, (2020).

gains that both of them will achieve will - simultaneously - be an economic increase for the whole system.

5 Empirical Evidence from the Brazilian Perspective

On the present topic, we will analyze how COVID-19 has changed specifically the Brazilian economic scenario either by its own occurrence or by the consequences of the public measures that were adopted by the country, hoping that this analysis will help to understand the situation of different states.

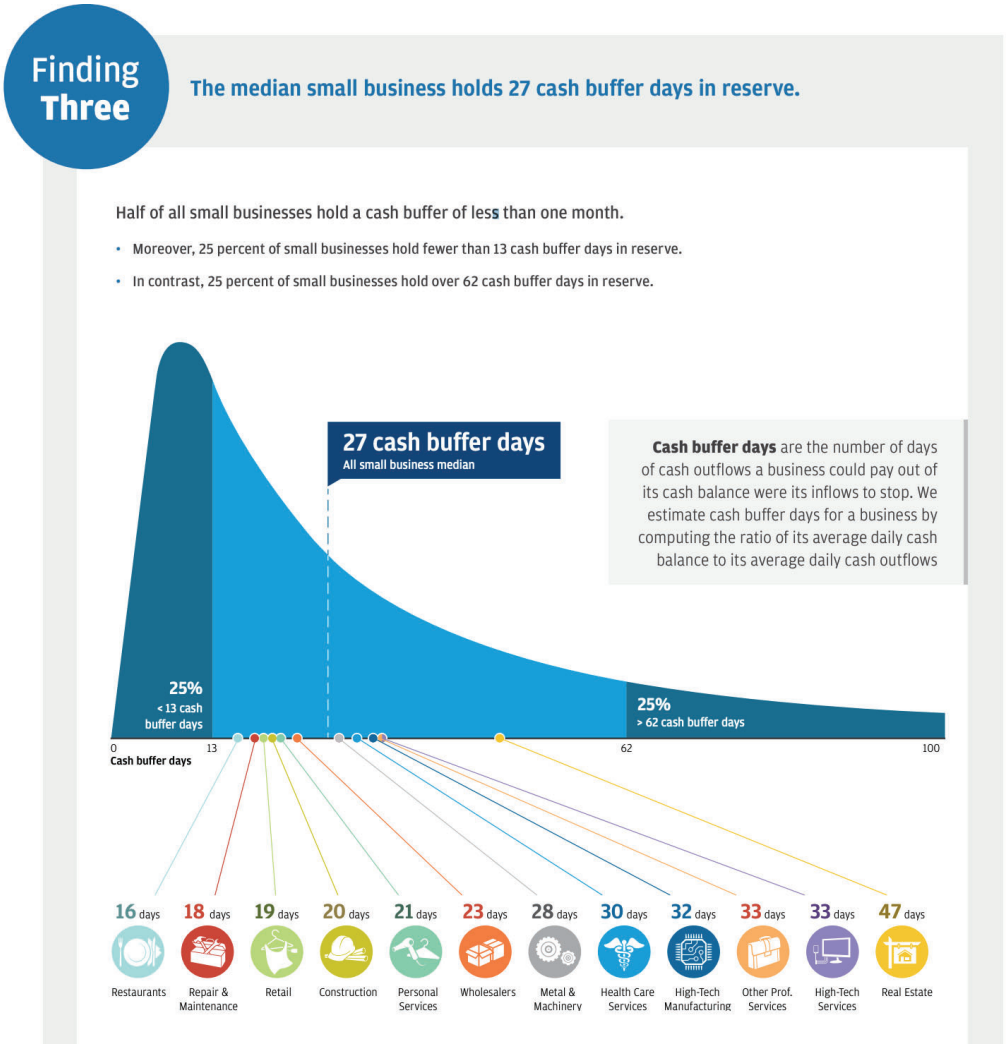
A problem that parties to a contract may face when addressing the courts to analyze their agreement is that a decision may take a long time to be provided to them. Not only COVID-19 brings a new discussion to the table but also it affects many kinds of business, in such a way that a lot of courts will have to deal with a considerable amount of cases concerning an undetermined matter. To highlight that, ABJ, *Associação Brasileira de Jurimetria*, provided data from a research on the impact of COVID-19 on the Justice Court of Sao Paulo, according to which 112 districts from 319 total had already dealt with a COVID-19 by April 4th, 2020. 811 decisions regarding COVID-19 were identified by the same date[15].



[15] Julio Trecenti & Marcelo Guedes Nunes, *Mentions to Covid-19 in the lower court decisions of the TJSP,* (2020)

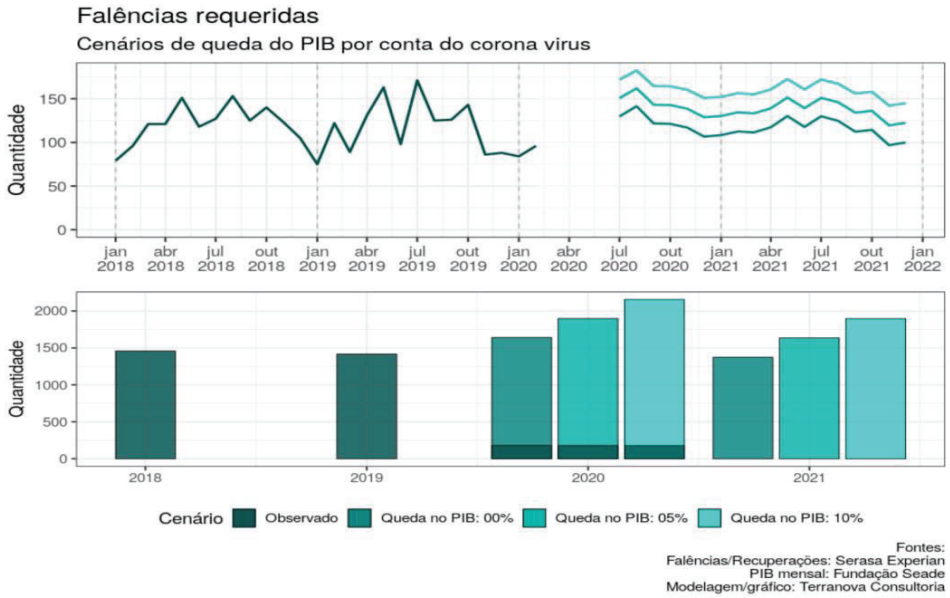
Menções à Covid-19 nas decisões de primeira instância do TJSP; Associação Brasileira de Jurimetria; Julio Trecenti, Bruno Daleffi e Marcelo Guedes Nunes (04.04.2020)

Also, another concern related the COVID 19 regards to bankruptcy. All around the world, stores had to suspend operations due to state programs to contain the spread of the virus. In Brazil, by the end of May 2020, only "essential services" are allowed to regularly function. Depending on how long this kind of policy is adopted, it may lead many business activities to financial distress. In this sense, JP Morgan Chase published, on September 2016, the results of a research according to which around half of the small business cannot survive for more than one month in a situation such as this[16].



[16] JPMORGAN CHASE & CO., https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-small-business-report.pdf. (last visited July 17th, 2020).

Furthermore, considering the possible impacts of COVID-19 on the Brazilian GDP, Terranova was able to reach estimate numbers of bankruptcy requests for 2020 and 2021, which are higher than on the previous years. This not only represents major impacts on the state's economic system, but also a significant increase in volume of cases for the Brazilian courts to deal with[17].



The expectation for GDP that provided basis for the last chart is convergent with the results published by the CEPAL (The Economic Commission for Latin America and the Caribbean) on *Informe Especial COVID-19 No 2: dimensionar los efectos del Covid-19 para pensar en la reactivación.*

[17] Daleffi, Bruno; Trecenti, Julio; Guedes Nunes, Marcelo. *O que dizem os processos no Tribunal de Justiça de São Paulo sobre a COVID-19*?. 2020

Cuadro 6 | Proyecciones de crecimiento del PIB de América Latina y el Caribe, 2020

	Crecimiento del PIB 2020
América Latina y el Caribe	**-5,3%**
Argentina	-6,5%
Bolivia (Estado Plurinacional de)	-3%
Brasil	-5,2%
Chile	-4%
Colombia	-2,6%
Ecuador	-6,5%
Paraguay	-1,5%
Perú	-4%
Uruguay	-4%
Venezuela (República Bolivariana de)	-18%

Therefore, the sequence of events created within the context of COVID-19 is the following: (i) states, such as Brazil, have to adopt measures of social distancing - which are indeed necessary - to contain the spread of the virus, (ii) many businesses suspend operations, (iii) this leads them to financial distress, (iv) financial distress affect either the judiciary system or the economic system directly, (v) the amount of cases for the courts to deal with also affect the economic system, at least indirectly. In this sense, providing ways to contracts be performed without enforcing then on courts is in our understand the best solution to mitigate the harms of COVID-19, since the generation of wealth benefits the whole dynamics of businesses activities.

6 LEGISLATIVE NUDGE

Throughout the article, we have been arguing that parties must cooperate and renegotiate business contracts before reaching a court to litigate, defending that a so-called safe environment for renegotiation must be provided by law. However, we have not described yet (i) what would be that safe environment and (ii) why it is law's responsibility to facilitate renegotiation. As a conclusion of the article, this is what will be done on this last topic.

Many individuals - whether or not they have studied economics - are usually committed to the idea of the *homo economicus, i.e.* the thought that we think and choose extremely well, always improving the utility of a choice. However, it has been proven by diverse studies on behavioral economics that we, humans, do not behave like that. We make a lot of biased decisions. A good way to explain that is to analyze the sunk cost fallacy. It occurs when one continues a behavior as a result of previously invested resources (time, money or effort)18. For

[18] Arkes, H. R., & Blumer, C.*The psychology of sunk costs. Organizational Behavior and Human Decision Processes*. 1985.

example: it is common for people to attend to events they have paid tickets for regardless of how much they want to do it at the time of the event. And, by doing that, he/she wastes not only the money he/she has paid for the ticket, but also the time doing something he/she did not want to do. Through another perspective of bad choices, an individual may choose to immediately litigate - before attempting to renegotiate a contract - because he/she has a negative perception of the counterparty that did not perform, even though it may have occurred due to unexpected events which makes the event, in fact, neutral. In this sense, the so-called comfortable environment for renegotiation is a circumstance in which the parties can make a choice with the minimum amount of biases as possible.

To answer the second question suggested on this topic, we must analyze what Richard Thaler describes on *Nudge*: our decisions are heavily influenced by small and apparently insignificant details[19]. The author compares the power to display the options for a decision maker with the profession of architecture. Architects know that the way you locate the bathrooms in a building will have subtle influences on how people interact. Accordingly, the way *choice architects* provide information for the decision makers will influence what path they will take. Choice architects have the responsibility for organizing the context in which people make decisions. In such wise, the state is surely a choice architect in many fields, and law is a tool for the architecture. Within our specific discussion, even though the law cannot make it mandatory for the parties to renegotiate, since legal figures such as the Brazilian ones presented on the article and hardship clauses exist and are important, it can create incentives for a stage of renegotiation before the proceedings start, in which the duty - within the consequences of good faith - and the benefits of this new agreement will be explained to the parties. And it will do so because internal efficiency to contracts increases, external gains arise as well.

7 NUTSHELLING THE CONCLUSIONS

(a) In any contract, parties only perform because it is worthy for them, and law surely can influence their behavior making sure it is not worth breaching.

[19] Thaler, R. H., & Sunstein, C. R.. *Nudge: improving decisions about health, wealth, and happiness*. Rev. and expanded ed. New York: Penguin Books. 2009

(b) Business contracts with different moment of payment can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty.

(c) COVID 19 imposes great burden and uncertainty towards the contracts and courts inflict such uncertainty

(d) Statutory or jurisprudence provisions are not prepared for COVID 19.

(e) For its characteristics as Business counterparties, neither of the parties are interested in losing a recurrent investor or a recurrent investment.

(f) The Coase theorem, once again, shows itself as the best perspective of analysis. Since neither the Courts nor the statutory provisions can interfere efficiently, only the parties, if in a built environment of low transaction costs, will allocate the burdens in an efficient way.

(g) Economic predictions are negative under the scenario of COVID 19 impacting the business activities. However, such predictions point toward even worse scenarios (especially regarding corporate restructuring or breaches of contract) when taken under courts.

(h) Statutory provisions, in a soft law manner, and courts have the mission of building a low transaction cost environment, which can be artificially settled by a nudge to negotiate.

(i) The duty of information and good faith are old worth statutes from Civil Continental Law that can help building a duty of best efforts regarding renegotiation without imposing extra-legal penalties.

INTERNATIONAL COMMERCIAL ARBITRATION IN THE AFTERMATH OF THE PANDEMIC: A LAW AND ECONOMICS ACCOUNT

*Carolina Arlota**

1. INTRODUCTION

This essay researches the main consequences of the pandemic caused by the COVID-19 virus in the field of international commercial arbitration through an economic analysis of law.[1] This essay conceptualizes international commercial arbitration as an alternative mechanism for dispute resolution, focusing on how the pandemic may modify the incentives for parties in a different set of circumstances.

In such a context, this essay discusses how the pandemic may impact current contracts which are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international commercial arbitration as a final and binding dispute resolution mechanism in their original contract. In addition, this essay discusses which incentives parties may have to include arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance). This essay concludes that, in the aftermath of the COVID-19 pandemic (and it inducing an increased likelihood for contracts to be cancelled/ excused) and related uncertainties in different court systems, it is likely that international commercial arbitration will be even more popular among international business parties as a choice for resolving international legal disputes.

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[1] WORLD HEALTH ORGANIZATION, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (Mar. 11, 2020).

International arbitration is the primary method for resolving disputes between states, corporations, and/or individuals.[2] Although its popularity continues to grow in this globalized world, it has been used for centuries to resolve international disputes.[3] Lew, Mistelis, & Kröll define international arbitration as "a dynamic dispute resolution mechanism varying according to law and international practice," and most jurisdictions do not rely on a single rigid definition.[4] International arbitration's essential features are that it is a private mechanism of dispute resolution designed and controlled by the participating parties to determine their rights and obligations within the scope of their submission. This determination is final and binding among the parties.[5]

Accordingly, arbitration is an alternative to national courts. Its finality and binding nature clearly differentiate it from other alternative dispute resolution (ADR) mechanisms such as mediation and conciliation.[6] The finality and binding character of arbitration is both a contractual commitment of the parties (the manifestation of the private law nature of arbitration) and the effect of the applicable law (highlighting the public law nature of arbitration).[7] An implied obligation of arbitration is the exclusion of court proceedings.[8] In other words, the dispute is not resolved in domestic courts, and, exempting limited cases based on minimum due process considerations, there is no appeals process. These exceptions vary according to national laws and whether the international arbitration proceedings involve an institution. For example, the International Chamber of Commerce (ICC) requires the ICC Court to check the formal requirements of every award, and authorizes a limited review restricted to correction, interpretation, and remission, as determined in Articles 34 and 36 of the 2017 ICC Rules of Arbitration, respectively. Articles 37 and 38 of the United Nations Commission on International Trade Law—UNCITRAL Arbitration Rules (as revised in 2010) allow for review of interpretation and minor corrections of the award.

International arbitration differs according to the nature of the dispute and the parties involved. Although their overall structure might be similar, each type involves specific features.[9]

[2] N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on international arbitration*., U.K, Oxf., 1 (2015). (hereinafter "BLACKABY")
[3] G. Born, *International arbitration: Case and materials*. N.Y: W.K., 11(2015). (hereinafter "BORN")
[4] J.D.M. Lew, L. Mistelis & S. Kröll, *Comparative international commercial arbitration*, N.L.: K.L.I., 3 (2003).
[5] *Id.* at 3.
[6] *Id.* at 13–14.
[7] *Id.* at 5.
[8] *Id.* at 5.
[9] S. KRÖLL, ELGAR ENCYCLOPEDIA FOR COMPARATIVE LAW 78 (U.K.: Edward Elgar 2006).

International arbitration is classified as *state arbitration* if between states;[10] as *investment arbitration* if the dispute involves the host state and at least one party is a foreign investor;[11] and *international commercial arbitration* if pertaining to transactional disputes of a commercial nature. The last is the focus of this work, because international commercial arbitration comprises a minimum of 90 percent of all international business arbitration.[12]

It is important to note that, due to the nature of the topic involving private parties, public international law references in this essay are used when it is unavoidable. It is noteworthy that the pandemic will affect primarily international commercial arbitration (as detailed further) and also investment arbitration, as governments adopted measures such as regulating prices, restricting travel, preventing foreigners from crossing national borders, compelling private properties to produce certain goods, and restricting travel and commerce.

This essay offers three unique contributions. First, it analyses the impact of the pandemic for international commercial arbitration through a law and economics methodology. Hence, it advances the study of strategic litigation in the international context. Second, it advances the literature on the potential advantages and limitations of international commercial arbitration over litigation in the international setting. Third, the insights presented here might also be applicable to other future emergencies, regardless if another pandemic, global economic crisis,[13] or climate change related emergencies.[14]

In light of the above, this essay offers preliminary considerations regarding the impact of the COVID-19 pandemic on international commercial arbitration. This essay is organized as follows. Part II presents an overview about international commercial arbitration as an alternative dispute resolution mechanism (ADR). Part III discusses how the pandemic may impact current contracts that are silent regarding international arbitration agreements. It further contrasts this legal

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[10] *Id.* at. 78.
[11] R. D. BISHOP, J.R. CRAWFORD & W.M. REISMAN, FOREIGN INVESTMENT DISPUTES 10 (Netherlands: Wolters Kluwer International 2014). THE ICSID CONVENTION, C. BALTAG (ED.), ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 23 (Netherlands: Wolters Kluwer International 2017).
[12] RALPH H. FOLSOM, PRINCIPLES OF INTERNATIONAL LITIGATION AND ARBITRATION 63 (Minnesota: West Academic 2016). (hereinafter "FOLSOM")
[13] INTERNATIONAL ENERGY AGENCY., https://www.iea.org/topics/covid-19 (April, 2020).
[14] Owen Jones, *Why don't we treat Climate Crisis with the same Urgency as Coronavirus*, THE GUARDIAN (March 5, 2020), https://www.theguardian.com/commentisfree/2020/mar/05/governments-coronavirus-urgent-climate-crisis.

scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. Part IV discusses which incentives parties may have in order to include arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance). This essay concludes that, in the aftermath of the COVID-19 pandemic and the increasing likelihood for contracts to have performance excused as well as the potential uncertainties in different court systems around the world, it is likely that international arbitration will be even more popular among international business parties as a choice for finally resolving international legal disputes.

2. AN OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION

First, this Section establishes the nature of international arbitration as based on consent of the parties involved and relate manifestation of their autonomy. Second, it presents the main terminology. It defines arbitration agreement and its main requirements. Third, it addresses the international legal framework supporting international commercial arbitration agreements (the will of the parties to submit their future disputes to arbitration) and international awards (to be bound by the final decision reached by the arbitral tribunal) and efforts taken by disparate jurisdictions in harmonizing their legal system in support of international commercial arbitration.[15]

International commercial arbitration is always consensual, with very limited exceptions[16] based on domestic legislation as authorized by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[17] Crucially, this convention also requires the recognition and enforcement of arbitration agreements.[18]

[15] C. Arlota, *The Impact of (Mis)Communication on International Commercial Arbitration*, OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (May, 2020), https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-915

[16] BORN, *supra* note 3, at 34–35.

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3, entered into force 7 June 1959 (New York Convention) https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf. (hereinafter the "New York Convention")

[18] *Id.* Art. I & II.

An arbitration agreement is a written contract, typically a clause in a larger contract (the underlying contract, hereinafter), which requires that the parties must settle legal disputes outside of court; in this context, they must submit to international arbitration.[19] The parties may submit current or future disputes. The former is known as a submission agreement or a *compromis*, but it may be significantly harder to convince parties to submit to arbitration once the contract has been signed and the problems are no longer theoretical. Parties involved in arbitration proceedings are technically denominated claimant (called "plaintiff," if it were a court case) and respondent ("defendant").

A valid arbitration agreement requires both an obligation to arbitrate in good faith and an obligation not to litigate (not to resort to the judiciary to resolve the legal dispute).[20] An arbitration clause must be in writing for the parties to be able to enforce the arbitral award abroad.[21] Most jurisdictions[22] (either through their domestic laws or their own courts), when considering the severability (separation, i.e., autonomy) between the arbitration agreement and the underlying contract, assume the validity of the arbitration agreement, and allocate to the arbitral tribunal the power to determine if the underlying contract exists, and if it does, its validity and related legal requirements.[23]

Most jurisdictions also have enacted domestic statutes differentiating domestic arbitration from international arbitration, aiming at a secure, arbitration-supportive legal system in the international sphere.[24] States recognize the need for predictability and certainty in international commerce in light of the significant challenges posed by international arbitration itself, including choice of law, jurisdictional issues, and enforcement uncertainty.[25] Therefore, the New York Convention and the vast majority of current national arbitration regulations define *international*

[19] BORN, *supra* note 3, at 85.
[20] BORN, *supra* note 3, at 315–334.
[21] A. G. Maurer, *Settling international commercial disputes through arbitration*, N.L: W.K.I., 156 (2018). (hereinafter "MAURER")
[22] BLACKABY, *supra* note 2, at 105–106.
[23] BLACKABY, *supra* note 2, at 104.
[24] BORN, *supra* note 3, at 45.
[25] BORN, *supra* note 3, at 45.

arbitration as that which refers solely to "arbitration agreements that have some sort of *foreign* or *international* connection," in the words of a world expert.[26]

The harmonized practices of international arbitration are based on sophisticated rules of procedure, which are administered by institutional arbitrations and supported by domestic legislation significantly influenced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[27] Such rules have been enacted domestically (entirely or partially), regardless if a country follows the common or the civil law legal tradition.

Countries with legal traditions as different as India, which is preponderantly a common law jurisdiction, [28] and Croatia (civil law jurisdiction) use the Model Law as a paradigm for their legislation on international arbitration.[29] The procedural rules aim for optimal effectiveness throughout the arbitral process, minimizing judicial intervention; the involvement of courts is limited to assisting the enforcement of arbitration agreements and awards.[30] Despite such harmonization efforts, distinctions remain with regard the specific social context in which the international arbitration is taking place, the participants involved, and the nature of the dispute.[31]

Nonetheless, the New York Convention has been considered a very successful unifier in setting the minimum requirements for the validity and enforcement of international arbitration agreements and awards.[32] Finally, this study acknowledges that the consequences of the recently signed Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters remain to be seen for international commercial arbitration,[33] because one of international commercial arbitration's main advantages has been the reciprocity of the enforcement of arbitral agreements and awards under the New York Convention.

[26] BORN, *supra* note 3, at 158.
[27] BLACKABY, *supra* note 2, at 1.
[28] A. Bedi, *Alternative dispute resolution in India*, (D. Campbell (Eds.), Comparative Law Yearbook of International Business (185–203) Netherlands: Wolters Kluwer International 2018), 192.
[29] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status
[30] BLACKABY, *supra* note 2, at 1.
[31] P. E. Allori, *International arbitration in different settings: Same or different practice?* (Bern: Peter Lang 2007), 223–224.
[32] BORN, *supra* note 3, at 24.
[33] The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, (July 2, 2019) https://files.constantcontact.com/31ff2a09001/37d43e0f-1cd4-4b0b-9928-89e2fd3f6caf.pdf

3. THE IMPACT OF THE PANDEMIC ON CURRENT CONTRACTS

Part III starts with an outline of the general reasons why parties often chose international arbitration as an alternative dispute mechanism rather than pursue litigation in multiple foreign courts. In light of this basic framework, it discusses the impact of the pandemic on current contracts that are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. The issues discussed assume a significant level of generalization (as we do not control for the legal tradition or the specific stage of development in different jurisdictions). In addition, this Part assumes that parties have access to sophisticated lawyers and that the arbitration agreement was the product of strategic design (not by lack of legal planning). Part III also considers similar effects of the of the pandemic around the globe in a non-exhaustive approach, such as delays in court systems and potential lack of personnel due to health-related effects of the pandemic. This Part concludes that the COVID-19 pandemic is likely to favor parties to pursue arbitration as opposed to litigation in domestic courts regardless if they have a valid arbitration agreement in their original contract or if such contract was silent.

3.1 General Reasons for International Commercial Arbitration

This Section outlines the main reasons why parties consider the alternative dispute mechanism of arbitration instead of litigating in domestic courts (which, potentially, may occur in multiple jurisdictions in the absence of a choice of forum clause and/ or an arbitration agreement). Hence, the first major reason for parties choosing international arbitration is the centrality of the dispute, namely, they only have to present their case once, which is in the arbitral proceedings (and assuming there is no need for the intervention of domestic courts in support of the arbitral proceedings).[34]

[34] G. B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (Netherlands: Wolters Kluwer International (2016), 115–117. (hereinafter "BORN 2016")

Second, long-arm statutes, which authorize defendants to be sued in courts in jurisdictions where they have had no physical presence, but merely engaged in conduct such as negotiations or even texting, provide a significant incentive for parties to negotiate an arbitration agreement.[35]

Third, arbitration is a "deluxe" procedure, conducted in a specialized forum, where the arbitrators have technical and (usually) legal expertise on the subject of the dispute. They also have time to hear the case and consider its implications—as opposed to generalist judges.[36]

Fourth, arbitration is often more cost effective than court proceedings, because a valid arbitration agreement excludes the potential for multiple lawsuits in different jurisdictions—as long as the seat of the arbitration is a state member of the New York Convention. The absence of appellate review (an appeal on the merits of the case) and the fact that arbitration tends to be faster also adds to its cost effectiveness. Arbitral proceedings are conducted in the language(s) selected by the parties in their agreement. This saves time and the expense of hiring official certified translators, which are often required by certain jurisdictions. Moreover, in international arbitration, the defeated party typically bears the legal expenses.[37]

Fifth, international commercial arbitration proceedings are generally not open to the public. Yet, in light of the recent trend in institutional arbitration rules to increase transparency, parties should emphasize the need for a confidentiality requirement in their arbitration agreement.[38] For parties interested in the protection of intellectual rights (including patents and trade secrets) and those who view litigation (or even the commencement of arbitration itself) as potentially damaging to their reputation (either based on cultural views, as it is often the case in Asia,[39] or due to their industry or particular trade, such as in boutique firms), an international arbitration agreement specifically addressing confidentiality is extraordinarily valuable.

Sixth, parties may also choose the procedural rules applicable to their arbitral proceedings as long as their agreement encompasses disputes "capable of settlement by arbitration."[40] On the other hand, the non-arbitrability doctrine covers matters that cannot be solved by international arbitration in a given jurisdiction. The decision on non-arbitrability is left to each country, as public

[35] MAURER, *supra* note 22, at 150.
[36] Bühring-Uhle et al., 2005, pp. 105–128.
[37] MAURER, *supra* note 22, at 158.
[38] MAURER, *supra* note 22, at 159.
[39] G. HOFSTEDE, G.J. HOFSTEDE & M. MINKOV, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (New York: McGraw-Hill 2010), 236–245.
[40] The New York Convention, arts. II(1) and V(2)(a),.

policy issues are better determined by individual jurisdictions. The rationale for the non-arbitrability doctrine is that it allows each contracting state to the New York Convention to determine the matters of domestic law that require more judicial protection and therefore cannot be arbitrated; these typically reflect concerns based on public interest and policy.[41] Unlike the UNCITRAL Model Law, the Convention opted not to provide an all-encompassing legal framework for the totality of aspects of international arbitration.[42] Due to the flexibility of the Convention, countries are more assured of their sovereignty regarding which matters must be litigated and which can be resolved in an expedited fashion through arbitration.

Accordingly, parties engaged in international business transactions have important reasons to choose international commercial arbitration over litigation, as such arbitration offers centrality of the disputes, privacy, choices of language and applicable procedural rules, specialized judges with unique technical expertise, and the lack of appeals. The latter factors significantly contribute to a more expedited and cost-effective dispute resolution mechanism.

3.2 Why the Conditions of a Pandemic may support International Commercial Arbitration when the Contract is Silent about an Arbitration Agreement

This Section outlines the main factors that parties involved in an international transaction may consider in the aftermath of the pandemic in a scenario where they did not contemplate an international agreement in writing in their original contract. Technically, the question is if both parties will have interest in a submission agreement, i.e., in celebrating an arbitration agreement when the dispute is no longer conditional, but very concrete.

The pandemic is likely to affect delivery terms, bringing delay in performance of the contract, regardless of the object of such contract. Different industries were affected by the pandemic: contracts involving the tourism industry, the international sale of goods, service contracts for the maintenance of goods, and construction contracts, for instance, all will be negatively impacted by the pandemic. This is the case, because travels have been suspended and

[41] BORN 2016, *supra* note 35, at 87–90.
[42] BORN, *supra* note 3, at 35.

all delivery systems, including maritime, were subject to significant delays; disruption in transportation abound.[43]

The situation might be even direr in the energy industry, for example, due to the abundant supply of oil and lower demand.[44] Seller, thus, may have more incentives to breach at such a low sale price. Nonetheless, as the oil industry routinely establishes relational contracts that cover the parties' expectations over a number of years, rather than a one-time transaction, it is likely that they will have an arbitration clause and a force majeure/escalation clause. This is in significant contrast to a contract involving an international sale of goods, for example, where parties are more likely to have neglected to have an arbitration agreement.

In this context, this Section points out that the strategic behavior[45] of the parties in pursuing an international arbitration agreement after the dispute is concrete (technically, a submission agreement) depends on several factors, namely: the object of the contract (and if the parties are within the same industry or not), and whether it is a single contract or an installment contract, and the level of disruption caused by the pandemic (if merely logistical and/or also of significant economic nature).

It is noteworthy that the existence of a legal dispute itself increases transaction costs for the involved parties in deciding whether to pursue arbitration. However, it may also be advantageous to all the parties involved to avoid the court system, where their dispute is likely to drag on longer because of cancelations and delays caused by the pandemic (and the expected increase in legal claims it is likely to provoke). Moreover, as presented in Section A, international arbitration offers the parties an option for choosing their procedural rules, including how arbitrators will consider evidence.[46] Due to the informal and flexible nature of arbitration proceedings, this is likely to be an advantage for all the parties considering a submission agreement and expedite final resolution of their legal disputes.

All in all, it is likely that parties involved in international business transactions will prefer to celebrate a submission agreement centralizing the final resolution of their legal disputes in a

[43] Carly A. Philips et al., *Compound Climate Risks in the COVID-19 Pandemic. Nature Climate Change,* 10, 586–598, (2020), 586.
[44] INTERNATIONAL ENERGY AGENCY COVID-19 TOPICS, https://www.iea.org/topics/covid-19 (April, 2020).
[45] R. D. COOTER, THE STRATEGIC CONSTITUTION (New Jersey: Princeton 2000), 9.
[46] THE WORKING GROUP ON LEGAL TECH ADOPTION IN INTERNATIONAL ARBITRATION, *Protocol for Online Case Management in International Arbitration*, (July, 2020), 4.

single arbitration instead of potential exposure to litigation in different court systems (all likely more chaotic due to the pandemic).

3.3 Why the Pandemic is likely to advance International Commercial Arbitration in Contracts with an Arbitration Agreement

This Section discusses the main factors which parties commonly consider in deciding whether to actually start their arbitration based on a validly concluded arbitration agreement in their original contract and how the pandemic may change such calculus. It further contrasts this legal scenario with the one in which parties have not contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. It concludes that, all other factors being the same, the pandemic increases the probability of both parties being interested in pursuing arbitration as opposed to litigation in different courts.

The departing point for our analysis is the arbitration agreement celebrated among the parties (either in a bilateral contract or in multiparty contracts). The parties' strategic considerations when celebrating an arbitration agreement (and their process of negotiation) often leads them to determining key provisions of the arbitration agreement, such as choice of law and choice of the arbitral seat (the legal domicile of the arbitration) by selecting the best of each party's least favored options. Regardless of the cultural background of the parties, one party will rarely relinquish their advantage and agree to a seat and/or choice of law provision that works best for the other party, because it would also function worst for the first party. Hence, arbitration agreements tend to be an acceptable solution for all the involved parties, which makes transaction costs low for all parties to obey.[47]

Furthermore, in the international commercial arbitration context (and regardless of the industry involved), parties tend to be unwilling to litigate in courts if a legal dispute arises. This unwillingness is not necessarily due to a particular country's "superior" legal system in which courts obey the rule of law. Rather, foreign parties tend to be uncomfortable pursuing claims in the jurisdiction of the other party, if for no other reason than they assume hometown bias.[48]

[47] R. POSNER, ECONOMIC ANALYSIS OF LAW (New York: Aspen Publishers 2007), 597.
[48] 28 U.S.C. §1332(a)(1).

In such context, a party that decides to pursue an arbitral claim must initiate it timely and in accordance with all requirements specified in the arbitration agreement, including observing conciliation or mediation first if a multi-tier clause exists. If another party initiates judicial action, the party who wants to pursue arbitration should consider invoking the existence of the arbitration agreement itself so they are not deemed to have waived their right to arbitrate. These are all strategic choices that require careful assessment on a case-by-case basis and effective legal counsel in filing notices in accordance with the arbitration agreement and domestic law on the issue. It is noteworthy that strategic thinking does not authorize legal violations of professional rules of conduct.[49]

In light of the above, it is clear that once a contract has a valid arbitration agreement, parties are expected to submit their legal disputes arising out of such contract to international arbitration. The pro-enforcement bias of arbitration agreements and awards in the New York Convention is evident in the non-arbitrability doctrine (as discussed in Section A of this Part) as well as the public policy exception.[50] While often invoked in practice, neither exception has been a major obstacle to the enforcement of arbitration agreements and arbitral awards.[51] National courts may refuse to enforce foreign arbitral awards in the absence of a valid arbitration agreement or arbitral jurisdiction, under the New York Convention.[52]

The New York Convention assumes the validity of arbitration agreements, exempting defenses based on contract formation such as mistake, fraud, unconscionability, unfairness, duress, lack of capacity, and non-arbitrability,[53] which are addressed in the enforcement of international arbitration awards.[54] The majority of jurisdictions tend to presume the validity of arbitration agreements, with the practical effect that such claims are examined by arbitral tribunals—including claims attacking the existence and validity of the arbitration clause itself, rather than the underlying contract, due to the separability of the arbitration agreement.[55]

[49] 2 RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS (Netherlands: Wolters Kluwer International 2019), 277. (hereinafter "BRAND")
[50] New York Convention, arts. V(2)(a) and V(2)(b).
[51] GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING (Netherlands: Wolters Kluwer International 2016), 135.
[52] New York Convention, arts. V(1)(a) and V(1)(c).
[53] New York Convention, arts. II(1), II(3).
[54] New York Convention, art. V(2)(a).
[55] BORN 2016, *supra* note 35, at 56.

Considering the legal framework discussed above and the presumption validity of arbitration agreements, the rule is quite clear: arbitration agreements shall be enforced. Because of the certainty provided by the international commercial arbitration system (with the New York Convention and general support of domestic courts), parties are unlikely to depart from their contract, namely, the arbitration agreement and pursue litigation in courts.[56]

Moreover, the pandemic provides additional incentives for the parties to pursue arbitration. This is the case, as discussed in the previous Section, because domestic courts will be busier not only with new claims due to the economic meltdown caused by the pandemic, but also due to the period they have their activities suspended due to quarantines. Here, similar incentives apply vis-à-vis the situation in which parties did not have an arbitration agreement in their original contract.

Those findings are coherent with the economic analysis of law literature which shows that the incentives created by bilateral contracts are superior to those created by unilateral contracts when performances of the parties have interdependent values or when parties are potentially insolvent.[57] An arbitration agreement is a bilateral contract with performances of the parties contemplating interdependent values (this will be the case, as all the parties involved prefer arbitration over litigation and such choice is also dependent on the others' choice) or when the parties are potentially insolvent (which is not difficult to occur in the aftermath of the pandemic).

Accordingly, the pandemic is likely to contribute to arbitration agreements being enforced by providing extra incentives for the parties to comply with the legal certainty (provided by the legal presumption of validity of arbitration agreements under the New York Convention) and the low transaction costs manifested in such agreements.

4. PROBABLE CONSEQUENCES OF THE PANDEMIC FOR FUTURE CONTRACTS

Part IV discusses which incentives parties may have in order to include arbitration agreements in their future contracts after the pandemic. Likewise to what was discussed in Part III, the arguments assume a significant level of generalization (as we do not control for the legal

[56] ROBERT. D COOTER, & THOMAS S. ULEN, *LAW AND ECONOMICS* (2016), 400−404.
[57] Parisi, F. et al. , *Optimal Remedies for Bilateral Contracts,* Minnesota Legal Studies Research Paper No. 7-45, (2007), 14−30.

tradition or specific level of development in different jurisdictions) and the main consequences of the pandemic in a non-exhaustive approach. Part IV also addresses specific considerations of the involved parties when writing future arbitration agreements in the aftermath of the pandemic, such as the specific inclusion of force majeure clauses and its interpretation in light of transnational law concepts. This Part concludes that the COVID-19 pandemic tends to increase the probability of parties celebrating an arbitration agreement in their future contracts, including specific provisions on force majeure.

4.1 Are Future Contracts in the aftermath of the Pandemic more likely to have an Arbitration Agreement?

This Section outlines the impact of the pandemic on future contracts and contends that, all things being equal, after COVID-19 parties should be more willing to celebrate international commercial arbitration agreements for the reasons applicable before, namely, domestic court systems with clogged dockets and the need to expedite resolutions of commercial disputes in a more specialized setting. Moreover, the procedural rules applicable to international commercial arbitration can also be determined by the parties, which is a major advantage for securing not only a faster process, but also one with privacy, more informal and flexible by all accounts, including the hearing and the production of evidence.

At this point, it is worth discussing more details on the taking of evidence and flexibility of international commercial arbitration. International commercial arbitration may be institutional or *ad hoc*. The former involves an arbitral institution whose procedural rules are applicable to the parties' dispute, with administration and supervision of the proceedings implemented by the institution. In *ad hoc* arbitrations, the parties agree to submit their dispute to arbitration without the benefit of a supervising institution. Parties may select a pre-existing set of arbitral procedural rules designated for *ad hoc* arbitrations; if so, they should also designate an appointing authority to choose the arbitrator(s) in the absence of agreement among the parties.[58] The IBA issues guidelines on evidence taking, which are intended to supplement the legal rules chosen by the parties (whether institutional, *ad hoc*, or any other rule that may be applicable to the arbitration

[58] BORN 2016, *supra* note 35, at 26–27.

proceedings).[59] As all international commercial arbitration institutions are private entities,[60] so they have incentives to act fast and change their procedures in order to adapt to the effects of the pandemic.[61]

Hence, this Section contends that parties will opt for balancing flexibility and certainty in the procedural rules applicable to their proceedings, regardless of the type of commercial arbitration (institutional or *ad hoc*). With regard to institutional arbitrations, parties will look to how the major institutions responded to the pandemic and act upon such responses according to what they may assess as the best balance between flexibility and certainty. Importantly, the more flexible (and the more the informal) a particular set of rules may be, the higher the likelihood of potential judicialization in international commercial arbitration proceedings, namely, the interference of domestic courts with the arbitral proceedings. Judicialization, of course, is not cost-effective and may defeat the purpose of international commercial arbitration itself as an alternative dispute resolution mechanism, because it increases delays, bring higher costs, and leads to greater workloads.[62]

As the pandemic brings incentives for parties to move their hearings online as well as overall remote proceedings with more online sharing of data, this Section outlines the main relevant points that parties should consider. It is noteworthy that when the pandemic struck, online hearings and the use of video-conference were already well advanced in international arbitration while courts around the globe were scrambling to equip themselves with Zoom, for instance.[63]

First, experts in the field contend that the power of the arbitral tribunal to authorize remote hearings is contingent on the existence of several factors, including: specific authorization granting to such tribunal powers to manage the proceedings as it deems appropriate; whether the applicable law/rules refer to the parties' "*full* or *reasonable* opportunity to present their case"; if the applicable

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[59] INTERNATIONAL BAR ASSOCIATION, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2010).
[60] A. S. SWEET & F. GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION (U.K. Oxford 2017), 45.
[61] INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf (March, 2020).
[62] Sundaresh MENON, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 5 Asian J. Int. Law 219-245, 25 (2015).
[63] George Bermann, *Dispute Resolution in Pandemic Circumstances*, LAW IN THE TIME OF COVID-19, (2020) 168–170.

law/rules consider hearings a mandatory requirement or if arbitral tribunals have the authority to proceed on the basis of documents only, despite parties requesting hearings. [64] Therefore, parties should specifically address that situation in their future arbitration agreements.

Second, cross-examination online has been traditionally quite contentious. Nonetheless, current renowned literature finds that alleged risks of remote testimony and concerns regarding the body language and the demeanor of witnesses are overstated.[65] Moreover, there appears to be no successful challenges of an arbitral award due to hearings being conducted remotely, so far.[66] This, however, does not mean parties will not attempt to do so. Therefore, aiming to avoid potential challenges, incentives point to parties specifically contemplating remote hearings, including cross-examination of witnesses and experts, in their arbitration agreement.

A related concern that is expected to be magnified after the pandemic is cyber intrusion in international commercial arbitration proceedings. The more remote hearings occur, the higher the risk of such intrusions. A survey of the ethical rules governing lawyers shows that, except for Russia, national legislators remain reluctant to extend the duty to incorporate cyber-security-related obligations.[67] However, the existence of general duties that can be interpreted to include the duty to protect data in general should encompass such obligations. There is a general expectation of confidentiality, regardless of the extent to which the proceedings are deemed private, as parties and lawyers expect that they alone will have access to their communications and case strategy, and arbitrators expect that no one else would attempt to view their previous working drafts or overhear their deliberations.[68] Therefore, parties should specifically address cyber risk and related obligations in their arbitration agreements.

4.2 Specific Considerations when drafting Future Contracts in the Wake of the Pandemic

The common legal challenges posed by international transactions include difficulties in coping with potential fluctuation caused by natural or market forces that affect factors such as

[64] Abdel Wahab, *Abdel Wahab's Pandemic Pathway*, GLOBAL ARBITRATION REVIEW ONLINE (May 6, 2020).
[65] M. Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37 J. Int. Arbitr., 21 (2020).
[66] *Id.* at 29.
[67] S. Alekhin, A. Foucard & G. Lourie, *Cybersecurity, international arbitration and the ethical rules and obligations governing the conduct of lawyers: A comparative analysis*, Transnational Dispute Management: Special Issue on Cybersecurity in International Arbitration, 21 (May 2019).
[68] S. Cohen, & M. Morril, A call to cyberarms: The international arbitrator's duty to avoid digital intrusion by taking reasonable cybersecurity measures, 40 Fordham Int. Law J., 981, 994 (2017).

currency, delivery, insurance, and freight and overall costs.[69] Moreover, international business transactions tend to rely more on e-communication, which may contribute to additional misunderstandings caused by language, interpreters, and what should actually be written down.[70] Hence, negotiating force majeure clauses in international arbitration agreements is an intricate process. They may be even more complex than negotiating the underlying contract they aim to protect, due to detailed specificities, including their scope and relation with the arbitration agreement, their relation with legal duties imposed by legislation applicable to the main contract,[71] as well as a lack of legal (and cultural) knowledge about arbitration, inherent bias among the negotiating actors, for example.[72]

In such a context, the more detailed an arbitration agreement establishing a force majeure event is, the higher the transaction costs in negotiating such agreement. That said, parties often agree on such excuse of performance, despite the fact that there is not a single definition of force majeure.[73] Common elements allude to an event which occurs after the contract formation and which is beyond the reasonable control of the parties; and the event may cause performance to be more onerous or impossible for one or all the parties. Hence, force majeure clauses may determine the suspension of performance, renegotiation of key elements of the contract, and preclusion of the termination of the contract due to a breach caused by the event or even bringing the contract to an end.[74] The International Chamber of Commerce Force Majeure Clause 2003 (as the recent updated 2020) do not mention pandemic, as they only referred to epidemic; this, however, does not preclude invocation of such force majeure clause, as pandemics are epidemics of global proportion.[75]

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[69] BRAND, supra note 50, at 2.
[70] J. R. SILKENAT, J. M. ARESTY, & J. KLOSEK, (EDS.), THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS: A COMPARISON OF CROSS-CULTURAL ISSUES AND SUCCESSFUL APPROACHES (New York: American Bar Association 2009)
[71] Martins, José Eduardo Figueiredo de Andrade, *Duty to mitigate the loss no Direito Civil brasileiro*. São Paulo: Verbatim, (2015) 224–228.
[72] O. Lando, *Contracts*, 3 K. Lipstein (Ed.), International encyclopedia of comparative law, 13–41 (1986).
[73] C. Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 Change of Circumstances, Force Majeure or What*?, Katharina Pistor (Ed.) Law in the Time of COVID-19, 155–165, 156 (2020). (hereinafter "TWIGG-FLESNER")
[74] TWIGG-FLESNER, supra note 74, at 156.
[75] TWIGG-FLESNER, supra note 74, at 157.

The party which tends to be the repetitive player in any transaction is likely to have the advantage in writing the contract draft,[76] including the tentative provisions of the arbitration agreement and force majeure clauses. The repetitive player is the party who professionally engages in the commercial activity sought: the seller, in a sale of goods transaction; the moneylender, in a lender contract, and so on. Because the seller is the repetitive party, they often write the first proposal. Most sectors use model clauses developed by sophisticated legal counsel and suited to their needs.

An interesting discussion regarding repeated players and domestic litigation in the U.S. court system is worth mentioning. The Priest and Klein model for litigated disputes and disputes that were settled before or during litigation in the United States does not seem applicable to the decisions in international commercial arbitration settings.[77] The main justification for this understanding is that the advantages of international arbitration over multiple ligation in different courts are applicable to both parties and that settlement might be encouraged even before commencing arbitration (though mediation or conciliation) or at any time later in the arbitration proceedings.

Moreover, as discussed earlier in Part II, arbitration agreements are perceived as the optimum solution for both parties when they celebrated their contract. Besides these specificities, there is prestigious U.S. literature applicable to courts defending that any litigation rate favoring the plaintiff is possible, to the extent that the 50% winning prediction defended by Priest and Klein has very difficult requirements for validation.[78] Professor Shavell argues that any litigation rate is possible when the parties involved have asymmetric levels of information.[79] This would be the case for the seller in a given transaction, in particular, if we consider it as a repeated player.[80]

Having established the potential advantage of the repetitive player, this Section turns its analysis to the drafting of international arbitration agreements. This activity is considered a specialized craft, a work of art that involves strategic choices such as the choice of law, choice of forum, excuses of performance, and yet this does not mean the opposing party will accept the

[76] C. K. ADAMS & P.K. CRAMER, DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS-BORDER AGREEMENTS GOVERNED BY U.S. LAW 14 (New York: Wolters Kluwer 2013).
[77] G. Priest & B. Klein, *The Selection of Disputes for Litigation*, 8 Oxf. J. Leg. Stud. , 1–55 (1984). (hereinafter "PRIEST & KLEIN")
[78] S. Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 Oxf. J. Leg. Stud, 493, 495–498 (1996).
[79] *Id.* at 495–498.
[80] PRIEST & KLEIN, *supra* note 78, at 28–29.

proposed clause.[81] If parties are not in the same industry, the asymmetry of information will likely be higher, because it would be harder to obtain information about the reputation of the repetitive player. Hence, pertinent concerns about specific sectors are illustrative and relevant for future claims arising out of legitimate expectations of the parties and to the interpretation of the arbitration agreement. The arbitration agreement itself is a contract; as such, it builds on contractual cannons of interpretation: ambiguity is constructed *contra proferentem* (i.e., against the drafter of the provision); specific terms prevail over general terms, giving effect to all parts of the parties' agreement; and trade usage.[82]

In such a context, parties should include information about their expectations and contractual equilibrium, which may provide guidance for future arbitral panels in assessing claims of excuse of performance and related defenses of the contract itself. Among the principles of the *lex mercatoria* derived from reported arbitral awards, *pacta sunt servanda* ("contracts shall be obeyed") and *rebus sic stantibus* (the mandatory nature of contractual clauses exists as long as the initial set of circumstances among the parties remains the same, without unforeseeable events altering the initial equilibrium of the contract) are noteworthy because they are related to potential excuses of performance, including force majeure events. Nonetheless, these principles on their own are generally insufficient when applied to actual disputes, due to the absence of rules indicating where the application of *pacta sunt servanda* terminates and that of *rebus sic stantibus* begins.[83]

Accordingly, parties have incentives to actually negotiate provisions on excuse of performance and related liability, and to specifically contemplate pandemics and climate change disruptions from now on in their contracts, as these events appear to become more common.

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[81] FOLSOM, *supra* note 13, at 5; S. M. Chesler & K.J. Sneddon, *The transactional lawyer as storyteller*, 15 L.C. & R. 119, 120–121 (2018).
[82] BORN 2016*, supra* note 35, at92.
[83] A. Samuel, & M. F. Currat, *Jurisdictional problems in international commercial arbitration: A study of Belgian, Dutch, English, French, Swedish, U.S. and West German Law*, Zürich: Schulthess Polygraphischer Verlag, 245 (1989).

5. CONCLUSION

This essay started with an outline of international commercial arbitration. It proceeded to analyze the potential impact of the pandemic in current contracts which are silent regarding international arbitration agreements. It further contrasted this legal scenario with the one in which parties have already contemplated international commercial arbitration as a final and binding dispute resolution mechanism in their original contract. In addition, this essay addressed which incentives parties may have to include in arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance).

Part II presented an overview of international commercial arbitration, introducing basic concepts and applicable terminology in light of arbitral proceedings and the New York Convention dynamics with domestic courts, in particular.

Part III started with an outline of the general reasons why parties often chose international arbitration as an alternative dispute mechanism rather than pursue litigation in multiple foreign courts. In light of this basic framework, it discussed the impact of the pandemic on current contracts that are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. Part III found that the COVID-19 pandemic is likely to favor parties to pursue arbitration as opposed to litigation in domestic courts regardless if they have a valid arbitration agreement in their original contract or if such contract was silent.

In Part IV, the incentives that parties may have in order to include arbitration agreements in their future contracts after the pandemic. This Part also addressed specific considerations of the involved parties when writing future arbitration agreements in the aftermath of the pandemic, such as the specific inclusion of force majeure clauses and its interpretation in light of transnational law concepts. This Part concluded that the COVID-19 pandemic tends to increase the probability of parties celebrating an arbitration agreement in their future contracts, including specific provisions on force majeure that go beyond pandemic but also include disruptions caused by climate change.

In light of all the arguments discussed previously, this essay concludes that in the aftermath of the COVID-19 pandemic (and its induced increasing likelihood for contracts to be cancelled/

excused) and related uncertainties in different court systems, it is likely that international commercial arbitration will be even more popular among international business parties as a choice for resolving international legal disputes.

Annex I: International Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3, *entered into force* 7 June 1959 (New York Convention). Retrieved from https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

European Convention on International Commercial Arbitration of 1961 – UN Treaty Series, Vol. 484, p. 364, N. 7041

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded July 2, 2019).
Retrieved from https://files.constantcontact.com/31ff2a09001/37d43e0f-1cd4-4b0b-9928-89e2fd3f6caf.pdf

Inter-American Convention on International Commercial Arbitration of 13 January 1975. Retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf

UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (as revised by the 2010 Amendments).
Retrieved from https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

Annex II: Databases on International Commercial Arbitration

For a free database on international awards: International Arbitration Case Law (IACL), which produces summaries of recently released arbitral awards, including investment arbitration: www.transnational-dispute-management.com/casere ports.asp

For a free database on the New York Convention, including its history, different versions, authoritative final versions in different languages, and court decisions: http://www.newyorkconvention.org/

For free access to cases on the New York Convention and additional UNCITRAL documents, the Case Law on UNCITRAL Texts (CLOUT) website is hosted by the United Nations: https://uncitral.un.org/

For a public database providing information on published and unpublished awards and all features of arbitrator decision making, see Arbitrator Intelligence: https://arbitratorintelligence.com

FINANCING THE CORONA CRISIS IN EUROPE

Hans-Bernd Schäfer[1]

1. THE LOANS PROVIDED BY THE EUROPEAN STABILITY MECHANISM TO COMBAT THE CORONA CRISIS ARE TOO SHORT, ONLY SIMULATE EUROPEAN SOLIDARITY AND CARRY A HIGH MONETARY POLICY RISK

On the 9th of April, after two days of negotiations on a European financing programme to deal with the Corona crisis the finance ministers of the euro area agreed, amongst other things, on a line of credit provided by the European Stability Mechanism (ESM). All further-reaching proposals from France, Italy and Spain, but also from many respected economists in Germany, are thus off the table for the time being. Nevertheless, the German government has succeeded in presenting this as a breakthrough in European solidarity. The headlines of the world press spoke of a line of credit of 240 billion euro. According to Politico on April 10 "The ESM will make €240bn available in spending for indebted countries." The Süddeutsche Zeitung already titled "240 billion from rescue aid" on March 25. On the homepage of the German government it says "The Eurogroup has agreed on a 500 billion euro protection program." This indirectly puts the ESM loans at EUR 200 billion.[2] These are widespread but misleading claims, as we will show here.

2. ONLY 5 STATES WOULD HAVE AN INTEREST RATE ADVANTAGE AND ONLY 3 STATES WOULD HAVE A SIGNIFICANT INTEREST RATE ADVANTAGE FROM ESM LOANS

The finance ministers of the euro zone proposed that each member state can borrow an amount of 2 percent of its gross national product as a loan under the ECCL (Enhanced Conditioned Credit Line), set out by Art. 15 of the ESM Treaty, as a "Pandemic Crisis Support".[3] The strict conditionality laid down in Art. 3 and Art. 12 of the ESM Treaty is waived. The only condition is that the loan has to be used for health care costs arising from the Covid 19 crisis.

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[2] Federal Finance Minister Olaf Scholz, *A Day of European solidarity and strength*, THE FEDERAL GOVERNMENT (Apr. 11, 2020), https://www.bundesregierung.de/breg-de/aktuelles/statement-scholz-1742786.

[3] *Report on the policy response to the Corona-19 pandemic*, CONSILIUM EUROPA EU (Apr. 9, 2020, 11:05 PM), https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/.

How attractive are the Corona loans for the member states of the euro zone? The ESM refinances itself with loans, including bonds,[4] which are guaranteed by euro zone member states in proportion to their share of equity. The German quota is 26.9 percent.[5] Depending on the creditworthiness of the individual member states, the ESM's refinancing loans are subject to interest rates that are equal to the average of all interest rates that the member states have to pay on their debts in the national bond markets, weighted by their equity ratios. This interest rate is currently 0.53 percent. In addition, there is an interest margin which allows "full coverage" of all costs of the ESM, Art. 20 (1) ESM Treaty. In April 2020, lending interest rate at 0.76 percent according to ESM figures.

It is quite plausible that the interest margin for corona loans will be reduced somewhat because the mild conditionality of these loans provides for comparatively low administrative costs. At present, however, the lending rate is 0,76 percent.

Using this interest rate as a comparison, it turns out that 14 of the 19 euro zone countries pay a lower interest rate for national government bonds with a duration of 10 years than for ESM loans. In only 5 euro zone countries is an ESM loan cheaper than national government bonds. The finance ministers of the eurozone countries, of course, knew this when they made their decisions on 9th of April. However, they insinuated to the European public that there is a much higher credit volume. They blew up a balloon, that for a few days produced the desired headlines, that the ESM would provide 240 billion euros to fight the Corona crisis.[6]

Table 1: Interest rates on 10-year government bonds in the member states of the euro zone in percent

Member State of the euro zone	Interest rate for 10-year government bonds in percent, as	Member State of the euro zone	Interest rate for 10-year government bonds in percent, as

[4] The eurobonds, often scorned in the public debate, therefore already exist and are explicitly set out in Art. 21(1) ESM Treaty: "The ESM shall be empowered to borrow on the capital markets from banks, financial institutions or other persons or institutions for the performance of its purpose."

[5] *Amended Annexes I and II to the Treaty*, ESM (Jan. 15, 2020), https://www.esm.europa.eu/sites/default/files/2020-01-20_amended_annexes_i_and_ii_effective_from_15012020.pdf

[6] It is also to be noted that it is currently entirely unclear, what duration the loans provided by the ESM shall have. According to an internal guideline of the ESM, the ECCL, which is supposed to be used according to the finance ministers, has a duration of only one year and can be prolonged twice for a further duration of six months. It only serves as a measure for ensuring liquidity and does not meet the criteria of the long term need for corona-loans. While this can be altered by a resolution of the finance ministers, official documents have so far remained silent in this regard and so have the people, who might know more, when asked about this issue.

	of April 13 2020		of April 13 2020
Belgium	0.087	Luxembourg	-0.36
Germany	-0.349	Malta	0.553
Estonia	n.a.	Netherlands	-0.086
Finland	-0.24	Austria	0.087
France	0.1	Portugal	0.856
Greece	1,776	Slovakia	0,43
Ireland	0,206	Slovenia	0,731
Italy	1,587	Spain	0,777
Latvia	-0.04	Cyprus	1.929
Lithuania	0.31	Average of all euro area countries	0.539
Source: Bloomberg, Eurostat and ESM, the values for Luxembourg, Finland, Latvia and Lithuania date from February 2020.			

Let us now take a look at those eurozone countries for which an ESM loan is cheaper than national debt. These are Greece, Italy, Portugal, Spain and Cyprus.

Table 2: Potential loan volumes and savings of the 5 countries for which an ESM loan is beneficial

	Euro zone, gross domestic product 2019 at market prices in billion euros	Maximum ESM loan to combat the corona pandemic of 2 percent of GDP in billion euros	Interest savings when taking out an ESM loan compared with the issue of 10-year national government bonds in percentage points Interest savings per year	

			in million euros	
All euro area countries	11,905	238.1		
Greece	187	3,74	1,016	38,0
Italy	1.788	35,76	0,827	295,7
Portugal	212	4,24	0,096	4,1
Spain	1,245	24.9	0.017	4.9
Cyprus	22	0,44	1,169	5,1
Total of the 5 countries	3,454	69.08		
Sources: Eurostat, ESM, Bloomberg				

The highest possible loan amount of those countries for which an ESM loan results in an interest rate advantage over national government bonds is less than 70 billion and thus amounts to 29 percent of the amount that politicians and newspapers blurt out. If there were a political consumer protection law, every citizen could obtain a temporary injunction to have the misleading information on the homepage of the Ministry of Finance deleted. For two countries the financial advantage is so small that it almost vanishes into thin air. In order to estimate this advantage, column 3 of table 2 contains the current difference between the interest rate for 10-year national government bonds and the interest rate for ESM loans. Multiplying this difference by the highest possible ESMC loan for each country results in the highest possible interest saving per year and country. Only Italy, Greece and Cyprus can count on significant advantages, taking into consideration the size of the country. For Portugal and Spain the savings are not worth mentioning and are so low that the question arises whether the additional transaction costs of an ESM loan, such as negotiation and reporting costs, do not render borrowing from the ESM unattractive from the outset.

For the remaining 3 countries, the benefits are modest but significant. These advantages, however, cannot belie one important fact. The ESM credit line is - even in combination with further lines of credit from the European Commission amounting to 100 billion euros and the European Investment Bank amounting to 200 billion euros - so small that these countries would have to increase their national debt considerably if another solution were not found.

According to this calculation, the interest savings for those countries that have any advantage at all from taking out an ESM loan amount to 311,8 million euro per year. This amount does not constitute an ongoing burden in the budgets of ESM-member countries, but is a consequence of the state guarantee. The German share in this guarantee is 26.9 percent. If all 5 countries with relatively high interest rates take out an ESM loan, the total loan amount will be 69.1 billion euros and the German share of liability will be 18.1 billion Euros in the worst case scenario, if all loans were to be completely defaulted on.

3. ESM LOANS, CONDITIONALITY AND "OUTRIGHT MONETARY TRANSACTIONS" (OMT) OF THE EUROPEAN CENTRAL BANK

The German government claims that the ESM is a well-established crisis mechanism that can be deployed quickly. This, rather light-footedly, disregards the fact that the ESM's corona loans do not comply with its statutes. Neither do they correspond to the ESM's general objectives of providing stability aid to members with serious financing problems under strict conditionality, nor was the ECCL set up for the purpose of disease control. What the ESM is doing now is comparable to an automobile company deciding to breed sheep for a transitional period instead of producing cars. Now, the ESM is not a listed company for which such a thing would be completely unthinkable, but a legal entity with its registered office and head office in Luxembourg. It came into existence by means of an international treaty outside the institutional framework of European law. Ultimately, the ECJ, as court of last instance according to Art. 37 III ESM Treaty, would have to decide by means of an interpretation under international law whether this construction is permissible without amendments to the articles of association. There are also exceptions in German law which, for example, allow a GmbH to deviate from the articles of association if the decision is urgent and does not entail any permanent change.[7] The legal problems pertaining to these decisions, born of necessity and time constraints, are only hinted at here.

However, it seems crucial that taking out an ESM loan to combat the Corona crisis could have far-reaching consequences for the overall structure of the European Monetary System. This applies above all to the abrogation of strict conditionality and the question of how this affects the permissibility of the OMT (Outright Monetary Transactions) of the European Central Bank. The conditions for a corona loan for the improvement of the health care system

must be different and much milder than for an ESM loan, which serves to restore financial stability. As a consequence, this raises the question what impact taking out an ESM loan as part of "Pandemic Crisis Support" will have on the central bank's ability to buy government bonds of individual countries if they fall into a financial crisis.

When, at the height of the financial crisis in 2012, Italy came under pressure from the financial markets and the interest rates for government bonds rose to unsustainable levels, the President of the European Central Bank Draghi gave his famous speech "Whatever it takes". He announced a programme to buy government bonds of distressed member states, provided that the state had previously borrowed from the ESM, subject to strict conditionality. This announcement alone caused interest rates on Italian government bonds to fall rapidly. This so-called Draghi Plan was the subject of decisions of the German Federal Constitutional Court and the European Court of Justice. It was accepted as admissible under European law and under the German constitution. The arguments behind these decisions, however, rely heavily on the fact that the OMT transactions of the central bank to support individual member states are accompanied by the strict conditions attached to taking out an ESM loan. The European Central Bank had in a press release in September 2012expressed in a clear manner the conditions , attached to OMT purchases.[8] According to this statement, the "strict and effective conditionality" of an ESM loan is a necessary precondition for any OMT purchases, which, moreover, according to this statement, will be terminated as soon as the borrowing state fails to meet the conditions. The ECJ found that this programme is covered by the mandate of the central bank and in its reasoning made particular reference to strict conditionality.[9]

How are OMT purchases by the central bank of government bonds of a country taking out an ESM loan to cover corona-related health care costs to be assessed? The terms and conditions of the ESM loan are completely different to those of the Draghi Plan. Is it sufficient for the central bank's OMT purchases if a country heading towards sovereign default proves that it has spent the ESM loan on healthcare? If that was to be the case, there would be only little

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[7] Harbarth, *Münchener Kommentar zum GmbHG*, 3, § 53 p 44 (2018); Zöllner/Noack, *Baumbach/Hueck GmbHG*, 22, § 53 p 40 (2019).

[8] *Directorate General Communications*, *Technical Features of Outright Monetary Transactions*, ECB (Sep. 6, 2012), https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[9] Peter Gauweiler and Others v. Deutscher Bundestag, ECJ C-62/14. In the judgment it says “Accordingly, the fact that the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase

remaining of the ban of state financing by the central bank as laid out in Art. 123 (1) TFEU. It is not possible today to predict how the European Central Bank will react should debt crises of individual states occur in connection with the high demand for public loans caused by Corona. It is to be feared, however, that targeted purchases of the debt instruments of these states will then be made within the framework of the OMT programme, although these states have not agreed to strict macroeconomic stabilisation in accordance with Art. 3, Art. 12(1) ESM Treaty. By deciding to use the ESM as a finance instrument for corona-related loans, the finance ministers may have taken a further step towards a central bank that acts as a financial policymaker, ironing out the shortfalls of member states in acting appropriately in terms of financial policy.

4. CORONA BONDS WITH VARYING RISK POTENTIAL AND MORAL HAZARD

Many leading German economists and politicians have suggested Eurobonds in recent weeks.[10] They emphasized that the situation is different from the one 10 years ago, at the outbreak of the financial crisis, when Eurobonds were also proposed. There are 2 reasons for this. Firstly, the Corona crisis is a catastrophic shock and an exceptional case for everyone in the European Union, which obliges us to show solidarity. This word appears 7 times in the Treaty on the Functioning of the European Union. Article 222 (1) TFEU states: "The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal...". This current situation is exemplary for this requirement. Secondly, the proposals on corona bonds currently under discussion are not joint government bonds as proposed during the financial crisis, for which the member states would be joint and severally liable, and which were rightly criticised and rejected.

Bonds with joint and several liability, which entail a high and confusing risk for the guarantor state, are questionable with regard to constitutional law. They pose a risk for democracy and parliamentarianism as international or European obligations may give rise to financial risks that undermine the significance of general elections and parliamentary decisions. The German Federal Constitutional Court has stressed this connection in its decision on the

is undertaken by the ESM (see, to that effect, judgment in Thomas Pringle v. Government of Ireland and Others, C-370/12, EU:C:2012:756, paragraph 60)…" (para. 63).

[10] Jens Südekum, Gabriel Felbermayr, Michael Hüther, Moritz Schularick, Christoph Trebesch, Peter Bofinger & Sebastan Dullien, *Europa muss jetzt finanziell zusammenstehen*, FRANKFURTER ALLGEMEINE ZEITUNG, (2020).

conformity of the German participation in the European Stability Mechanism with German constitutional law. It concluded that the highest possible risk of 190 billion euros that the Federal Republic of Germany is bearing with its quota in the ESM does not pose a threat to the democratic state given its economic strength.[11] It also stated that the assumption of such risks by the Bundestag, the Federal German parliament, are unconstitutional only if they not only restrict the financial leeway but can almost completely drain it.

The Eurobond models discussed and politically proposed today lead either to limited pro rata liability or to no liability at all for the debts of other states. Mixed forms in which the liability ratio of a state is smaller or larger than its payout ratio are also being discussed.

Least problematic with regard to constitutional law would be a Corona Bond, which covers the credit demand of all eurozone states arising from the epidemic. Each member state would then only be liable for the amount of the total credit it takes out itself. In that case, no repayment obligations on the part of one state can arise for another state. The result would be an average interest rate of between 1.6 percent for Italian government bonds and -0.35 percent for German government bonds because the financial markets would price in the risk of state insolvency for individual debtors according to their share. This average interest rate currently stands at 0.53 percent. If such corona bonds amounting to 1 trillion euros were issued, and Germany received a payout of 20 percent, it would pay 0.9 percent higher interest - compared to German government bonds. This would lead to an annual additional burden and, in the case of a corona bond with a term of 10 years, to an indirect transfer payment of 18 billion to the financially weaker countries, which would pay a lower interest rate than for national government bonds. After 10 years, the bond could be repaid and revolved into national government bonds. This would not constitute any guarantee risk, but would result in a moderate and temporary transfer of EUR 18 billion within 10 years.[12] Such a proposal is currently being put forward by Italy, according to an interview with Italian Prime Minister Conte[13]. The proposal of a corona bond of this kind is sometimes met by the argument that a

[11] *See* German Federal Constitutional Court Cases 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, published in the official report BVerfGE, vol. 132, pp. 195-287, pp. 251 ff. and Cases 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12, published BVerfGE, vol. 135, pp. 317-433, pp. 408 ff.

[12] In comparison the German Federal budget includes an annual amount of 20 billion euro for covering the basic costs of living and protection for refugees who are not from Europe and with whom we do not share a legally binding common destiny. In 2017 this figure amounted to 21 billion euro, in 2018 23 billion euro.

[13] SÜDDEUTSCHE ZEITUNG (Apr. 20 2020), https://www.sueddeutsche.de/.

corona bond only serves as an entry into a European transfer union and cannot be reversed.[14] But special situations require special measures, and nobody can force Germany to permanently subsidise the national budgets of other Member States of the European Union with Eurobonds. This variant of Eurobonds not only has the advantage of being constitutionally innocuous. It also leaves the liability risk exclusively with the debtor and thus reduces moral hazard.

By contrast, financing via the ESM results in a guarantee of 26.9 percent, the German capital share. This would also apply to models such as the one proposed by Felbermayr, Hüther and others, which suggests only providing corona bonds for those states which have difficulties in carryint out the corona-induced expansion of national debt on their own.[15] However, the proposal of these scholars would have the advantage that, because all the states in the euro zone assume the liability risk in accordance with their quota, a high corona-induced increase in the debts of financially weaker countries will not trigger a speculative attack by the financial markets on these countries.

The mantra-like argument of the need for unity of liability and decision-making in this context fails to recognise the fact that some of the most important and successful institutions of capitalism allow risk spreading, insurance, risk shifting and shielding against external shocks. Their introduction has always brought changes to the relationship between liability and decision and was accompanied by moral hazard. Without the invention of the partnership, which enabled merchants to pool risks,[16] without the invention of the legal entity, which effectively protects companies against risks to their existence posed by creditors of the shareholders, without the limited liability company, which allows parts of the private assets of shareholders and partners to be withdrawn from creditors' access through the principle of separation, there would be neither capital markets nor large companies. The fact that these developments carry moral hazard problems only demonstrates the need to strike a balance between the principle of risk diversification and the principle of liability. Only this enables individuals, companies and entire societies to take risks that would otherwise be avoided as unacceptable.

[14] Lüder Gerken & Bert Van Roosebeke, *Solidarität ja, aber nachhaltig*, SÜDDEUTSCHE ZEITUNG, (2020).
[15] FRANKFURTER ALLGEMEINE ZEITUNG, https://www.faz.net/aktuell/.
[16] H.-W. Sinn, *Gedanken zur volkswirtschaftlichen Bedeutung des Versicherungswesens*, *77* ZEITSCHRIFT FÜR DAS GESAMTE VERSICHERUNGSWESEN, 1.

LEGAL ISSUES OF THE CORONAVIRUS PANDEMIC: A LAW-AND-ECONOMICS PERSPECTIVE

Thomas S. Ulen[1]

1. INTRODUCTION

The coronavirus pandemic has become a defining event of our times. We have all been affected by the disease in one way or another. Some of our friends, relatives, colleagues, and noted people we admire have had the disease and, in far too many instances, we have known people who have died from the disease. Our schools have been interrupted. Our plans to travel have had to be shelved. We are still avoiding crowds, remembering to wear a mask when outside, and to wash hands frequently, and mastering the art of the Zoom class or meeting.

In this section of the article I lay a foundation for what comes next. To that end, I begin with a brief history of this particular pandemic and a comparison with other recent or historical pandemics. Then I will turn to a brief account of the economic impact that the pandemic has had, followed by a discussion of the public health and economic policy responses to the pandemic.

My focus throughout will be on the United States, but that is only because I am much more familiar with matters in that country. I hope that readers will recognize in their own countries events and issues that are analogous to those I highlight and will be able to derive some lessons for policy and law there.

Writing about an ongoing event like the coronavirus pandemic presents problems that will be obvious: Matters change quickly so that what we thought we knew on April 15 is contradicted by something credible that is publicized on July 20. Because our knowledge is deepening and events are unfolding so quickly, there is always a chance that what I have to say today will be out of date tomorrow. I have tried to anticipate this possibility by speaking as generally and as conditionally as I can, and noting what contingencies might arise and how they might affect my analyses.

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1.1 Background on the Pandemic

The beginning of our current health and economic woes dates to the outbreak in Wuhan, China, in December, 2019, of the disease, covid-19, that comes from being infected by the novel corona-virus, SARS-CoV-2.[2] The virus and its disease spread so quickly from its origin that the World Health Organization declared the situation to be a pandemic on March 11, 2020.

According to this dating, the world is currently in the sixth or seventh month of the pandemic. Worldwide, there have been – as of early August, 2020 – 19 million cases of covid-19 reported, and over 700,000 deaths.[3] That is a case fatality rate (or CFR, a term of art in epidemiology) of 0.0368 or 3.7 percent, which is almost four times the CFR for seasonal influenza.[4] Those are breathtakingly large numbers.

The country with the most reported cases as of early August, 2020, is the United States, with almost 5 million cases and over 160,000 deaths. The case fatality rate for the United States is approximately 4 percent. That is, the United States, with 4 percent of the world's population, has had 26 percent of all the world's reported covid-19 cases and 23 percent of world deaths from the disease.

For the sake of comparison, recognize that in the Ebola virus outbreak of 2014-2016 there were about 28,000 cases and 11,300 deaths in West Africa and 36 cases and 15 deaths that occurred elsewhere in the world. Note that the CFRs from the 2003 SARS outbreak and the 2014-2016 Ebola virus were much higher than that for covid-19 but that both SARS and Ebola affected a much smaller number of people worldwide and in the U.S.

The only comparable recent pandemic to today's was the Spanish influenza outbreak of 1918-1919. Estimates are that about 500 million people, one-third of the world's population then, contracted the disease (which was caused by the H1N1 virus) and that worldwide deaths were 50 million, with approximately 675,000 deaths in the United States.[5]

[2] CENTRE FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/sars/about/fs-sars.html (last visited Aug, 2020).

[3] CORONAVIRUS STATISTICS, https://covid19stats.live/ (last visited Aug, 2020).

[4] STATISTA, www.statista.com. (last visited Aug, 2020).

[5] CENTRE FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html (last visited Aug, 2020).

All of this testifies to the immense seriousness of the current coronavirus pandemic. This health crisis is orders of magnitude worse than any other recent health scare and unlike anything that the world has seen in the past 100 years.

Although we have learned a great deal about covid-19 and the novel coronavirus over the past half-year, there is still much that we do not know. And our uncertainty has contributed to our chaotic public health responses to the virus. We have learned, among many other things, that the disease has a greater effect on those with underlying health problems, such as obesity, diabetes, heart, and respiratory problems. Young people seem not to become as sick from the virus as older people do. Asymptomatic people may account for between one-third and one-half of all transmissions of the virus. This last point highlights the importance of being able to test for the presence of the novel coronavirus and to get those results quickly. The more testing we do and the quicker we get the results and can move to isolate those who have the disease and trace their contacts to warn them of their exposure to the disease, the faster we will be able to stop the spread of the virus.

But what do not know is important, too, in devising sensible public health policies. For example, we suspect, but are not sure, that transmission of the virus from human to human principally occurs through airborne droplets. Thence, the strong public health admonition to wear face masks and maintain social distancing. But one important thing that we do not know is whether having had covid-19 and survived generates antibodies that protect the individual from a recurrence of the disease, and if a recurrence is possible, whether that recurrence will be worse, the same, or not as serious as previous episodes. There is now some anecdotal evidence that those antibodies do *not* protect against catching the disease a second or third (and so on) time. As a result, antibody testing, which was touted at one point early in the pandemic as an important means of determining who had and might have survived covid-19, becomes less important than tests to determine who currently has the disease. Finally, we do not know why, in the U.S., covid-19 strikes minority populations so much harder than other groups and seems to be much more fatal to Native American, black, and Latinx populations than to others.

1.2. The Economic Costs of the Pandemic

There have also have been very large economic costs of the pandemic. The disease has caused significant rises in unemployment and drops in Gross Domestic Product around the world. In the United States, there were approximately 40 million adults who filed for unemployment benefits in the period between March and July. That is not quite one-third of the labor force and has led to the highest levels of unemployment – on the order of 15 percent – since the Great Depression of 1929 to 1933.

In late July, the U.S. Commerce Department estimated that in the second quarter of 2020 (the period of April, May, and June), the U.S. GDP fell 9.5 percent, which equates to a 32.9 percent annual rate of decline. This was the largest three-month collapse since modern recordkeeping began and "wiped away nearly five years of growth."[6]

Estimates are that the GDP of the UK will fall 11.5 percent this year. Germany reported, in late July, a drop in GDP for the second quarter of 2020 that was even greater than that in the U.S.[7] China has had a relatively modest decline of 2.6 percent in its GDP (on an annualized basis) and has recently reported a 3.2 percent increase in GDP in the second quarter of this year over the second quarter of 2019.

What happens for the rest of 2020 depends on what happens to the number of covid-19 infections and deaths. If infections decline, then economies will gradually return to health over the course of the remainder of 2020. But that presumption has already been violated in the case of the United States. After some heartening declines in the number of new cases, especially in states, like New York, Connecticut, and New Jersey, that were "hot spots" in March, April, and May, the number of new cases, particularly in the South and West of the United States, has begun to rise again. Recently, in mid-July, the number of reported new cases across the U.S. rose to over 75,000 per day – significantly higher than had been the case in the earlier days of the pandemic.

It is too soon to tell what impact this resurgence of cases might have on the economic costs of the pandemic. Many jurisdictions are responding to the uptick by reinstating the lockdown or "stay at home" policies that were in place from mid-March on. That is, they are closing bars and restaurants and limiting public gatherings as they had done from, roughly, mid-March through early May

[6] Ben Casselman, *Virus Wipes Out 5 Years of Economic Growth*, *N.Y.T.*, 1 (2020).

[7] *Id.*

or in some instances late June, when they relaxed restrictions. The evidence suggests that the states that had either weak initial public health responses to covid-19 or relaxed their restrictions earliest are the states that are experiencing the greatest increases in cases and deaths. Notably, Texas and Florida had no or few public health restrictions on their populaces and have been among the states with the greatest increases in cases and deaths this June and July. A notable exception to this general rule is California, the most populous state, which imposed restrictions on movement and retail operations very early in our experience with the pandemic, but is, nonetheless, one of the three or four states having the greatest increase in the number of cases and deaths.

Conversely to this evidence, those states that maintained their restrictions most forcefully and the longest in time are experiencing either a slowing in the number of cases and deaths, such as Illinois, or a decline in the number of cases and deaths, such as New York.

We also know that no other developed economy than the U.S. has had this resurgence of cases. Most of Europe, for example, had, relatively speaking, run-ups in the number of cases and deaths comparable to those in the U.S. in March and April and early May. But from those peaks, most European countries have all begun a continuing and relatively rapid decline in both numbers of those infected with covid-19 and deaths. It is still unclear why the U.S. experience has been so contrary to that of Europe, although we shall see some possible distinctions in the public health policy response in the U.S. in the following section.

Our leading public health experts are deeply concerned that the Fall and Winter months of 2020 are going to bring another surge in the number of covid-19 cases. The situation will be complicated by the return later in the year of the seasonal influenza, which may interact with the coronavirus in very detrimental ways for public health.[8]

1.3. The Policy Responses to the Pandemic

In discussing policy responses to the pandemic, we can distinguish between two different classes of responses: one to the health issues raised by the pandemic, the other to the economic issues.

[8] CNN WORLD, https://edition.cnn.com/world/live-news/coronavirus-pandemic-07-14-20-intl/h_0a1e9579c6acb8adc5a8cd454f221d59 (last visited Jul. 14, 2020).

An important point to bear in mind is that the health and economic policies are related. To see this, recognize that consumers are not going to return to in-person dining and shopping if they do not feel safe doing so. Nor are employees going to return to work if they perceive the workplace as a place where they are more likely to catch covid-19 than if they stayed at home. So, the safer people feel from infection, the sooner they will return to work and routine commercial activities.

Another complication in policy response, at least in the U.S. case, is to ask what level of government was instituting and enforcing a policy response to the pandemic. The American system of governance has three levels of government – federal, state, and local.[9] We might, therefore, consider how each level has responded to the coronavirus pandemic.

1.3.1 Public Health Policy

The public health response from the federal government has been weak, contradictory, and politically motivated. When the first reports of the disease arrived in late January, 2020, the President was preoccupied with his impeachment trial in the U.S. Senate (which began on January 16). He had apparently been briefed in late December and early January by intelligence officers and one of his economic advisors, Peter Navarro, about the possibility of a pandemic. But in the absence of more compelling evidence and given the momentous importance of the impeachment trial, the President did not to pay close attention to these early reports.

President Trump routinely downplayed the severity of covid-19 and suggested that the Democrats were building hysteria about the disease in their campaign to damage his presidency. As he memorably said, "There are only 15 people with the disease, and soon there will be none." And "It's like a miracle; someday it will just disappear."[10]

This unfortunate attitude pervaded the federal government and prevented that entity from acting to address the disease for almost two full months, till mid-March. And even then the federal response was half-hearted. For example, the president invoked the Defense Production Act of 1950, legislation introduced at the beginning of the Korean War that allows the president to direct

[9] THE WASHINGTON POST, https://www.washingtonpost.com/ (last visited Aug. 4, 2020).

[10] Christian Paz, *All the President's Lies about the Coronavirus*, THE ATLANTIC MONTHLY (Jul. 13, 2020), https://www.theatlantic.com/politics/archive/2020/07/trumps-lies-about-coronavirus/608647/?utm_source=share&utm_campaign=share.

private manufacturers to produce items needed in an emergency.[11] In this instance, the president said that he would use the Act to instruct certain manufacturers to produce personal protective equipment (PPE), items that were and still are running short in hospitals and that doctors and nurses need to treat covid-19 patients safely, and to limit the export of PPE. The President suggested that the shortage was due to doctors and nurses taking the equipment from hospitals for their own use. There is not a shred of evidence to support this suggestion.

On March 13 the president declared a "national emergency" due to covid-19. One week before the emergency declaration, the President authorized $8.3 billion in spending on the pandemic, $5.3 billion for ongoing efforts to contain the virus and $3 billion for research on a vaccine against covid-19. On the same day as the President declared the pandemic to be a national emergency, he also suspended all interest payments on student loans until the end of the pandemic. What that emergency entailed was not entirely clear, for two reasons. First, the federal government did not really follow its declaration with concrete steps and, worse, was inconsistent. The emergency order suggested that the federal government intended to promulgate guidelines drawn up by the Centers for Disease Control and Prevention, but then the president disavowed those guidelines and, worse, began to use Twitter to encourage citizens in the states that enacted public health measures to oppose those measures. In at least four instances involving states with Democratic governors, President Trump tweeted the message "LIBERATE ___!" adding the state name in the blank – thereby encouraging his followers to protest lockdowns or stay-at-home orders. In one of those states, Michigan, men armed with assault weapons briefly occupied the state legislature to protest the governor's public health orders.

The second reason for the ineffectiveness of the president's emergency order was that his administration's dithering about what to do – including its repeated contentions that the pandemic was not serious but was, rather, a mild influenza – left such a vacuum in the nation's policy space that many of the nation's fifty governors, some of them working in conjunction with other governors in their region, took over the task of crafting public health policies to address the pandemic. In many states, most of them in the northern and eastern halves of the country, the principal policies

[11] COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/in-brief/what-defense-production-act (last visited Aug, 2020).

were to issue "stay at home" orders, ban gatherings of more than 10 people, close commercial and retail businesses, and the like. Public health officials are the ones who suggested these responses, and many governors tied their policies to those suggestions.

But some governors, most of them in southern states, such as Florida, Texas, and Arizona, did not follow those suggestions. They allowed commercial entities to remain open, would not endorse or even allow mayors to endorse the public wearing of masks, and followed the President in suggesting that the reaction to covid-19 was overblown. And, as we have seen, those states experienced a significant spike in covid-19 cases and deaths, beginning in June and July.

1.3.2. Economic Policy Responses

An unintended consequence of the public health measures instituted in states from early- and mid-March was astonishingly large economic costs. Most businesses simply closed. The so-called hospitality industry – restaurants, hotels, airlines, cruise ships, vacation rentals, and more – was devastated. Unemployment, as I indicated above, rose to its highest levels since the Great Depression, and recent estimates are that the GDP of the U.S. fell by 9.5 percent in the second quarter, the largest quarterly drop since records have been kept. Economists at the University of Chicago estimated that 37 percent of the labor force could continue to work by connecting from home or some other remote location but that 63 percent of the labor force in the U.S. could not work remotely.

To their great credit, Congress and the Federal Reserve acted quickly and generously to the economic crisis. For example, the Federal Reserve announced on March 12 that it would loan $1 trillion to banks to help them maintain their clients' liquidity. Three days later, the Fed reduced interest rates to zero and announced a $700 billion "quantitative easing" program."Quantitative easing" involves the Fed's purchase of assets as a means of getting liquidity into the hands of asset holders.

For its part Congress passed four bills between mid-March and early May to ease the economic consequences of the coronavirus pandemic. Taken together, those four bills appropriated almost $3 trillion for various forms of relief. "Quantitative easing" involves the Fed's purchase of assets as a means of getting liquidity into the hands of assetholders. Included in those programs were $1,200 to be distributed to all adults who earned less than $75,000 per year, a Paycheck Protection Program that loans money to businesses and forgives the repayment of the loan if a large fraction

of the loan goes to pay employees, and the addition of $600 per week to whatever state benefits unemployed workers receive.

Congress is currently considering a fifth relief bill. They are doing so acrimoniously and under a binding time constraint. The moratorium on evictions and foreclosures that was part of the earlier relief acts expires on August 1. So, too, does the $600 per week federal supplement to state unemployment compensation. Unemployment benefits are, by and large, a state, not a federal, responsibility and vary considerably depending on one's domicile state. There has been some speculation on whether those receiving the state weekly benefits plus the $600 federal benefit are comfortable enough *not* to seek re-employment. Those who believe that the $600 federal supplement is too generous apparently believe that its continuation will prolong unemployment. With those expirations, the economic situation is likely to become even worse.

1.4. The Plan of the Article

The next section of this article will give a brief introduction to law and economics, the tools of which I intend to use in Section III to examine some legal issues raised by the coronavirus and covid-19. There are, of course, other disciplines – epidemiology,[12] microbiology, demographics, public health, medicine, psychology, and more – that have central things to contribute to our understanding of this disastrous situation. But economics, perhaps surprisingly, does have important contributions to make to assist our understanding of the legal issues raised by this pandemic.

2. A BRIEF INTRODUCTION TO LAW AND ECONOMICS

Law and economics – or the economic analysis of law – is a scholarly innovation that Professor Bruce Ackerman of the Yale Law School has called "the most important development in legal scholarship of the twentieth century." This new method uses tools from microeconomics to throw light on legal issues.

[12] DAVID QUAMMEN, SPILLOVER: ANIMAL INFECTIONS AND THE NEXT HUMAN PANDEMIC (W. W. Norton & Company 2013)

For example, consider the negligence liability standard. Under the traditional understanding of negligence, if there has been an accident; a victim has been injured; and an injurer has been identified, a court ought to find the injurer liable for money damages to compensate the victim if that injurer failed to take "reasonable care." If the injurer *did* take reasonable care or if the victim failed to take her own reasonable care, then the injurer ought not to be liable.

The economic view of negligence is consistent with this traditional view but distinct and, I and many others believe, richer. First, the economic understanding provides a different view of what care should count as "reasonable." According to law and economics, the social costs of accidents will be minimized if actors invest in "cost-justified precaution." That is precaution that will prevent an accident or mitigate losses and whose cost is less than the expected accident losses. One calculates "expected accident losses" as equal to the probability of an accident's taking place, given the amount of precaution taken, times the losses that the victim is likely to suffer. This is not an easy calculation to make, and advanced treatments of the subject seek to explore how people do or might make this calculation. Note, by the way, that we can analyze many different ways in which to help individuals and organizations to make these calculations – in the context of automobile accidents by, for example, clearly posting speed limits and other traffic laws, by requiring automobile manufacturers to build safety features into their cars, by mandating the wearing of seat belts and other passenger restraints, by moving to a regime of autonomous vehicles (which, by some estimates, will significantly reduce automobile accidents, 94 percent of which are due to human error), and more. In application, suppose that there has been an accident involving two motorists, one of whom is clearly the injurer; the other, the victim, who has suffered losses (such as damage to his car, medical expenses for his own injuries, and lost income from being unable to work). The injurer will be held liable to the victim for his damages if precaution that would have prevented the accident (such as not speeding or obeying the traffic rules) cost less than the probability that the accident would have occurred times the victim's losses, and the injurer did not take that precaution. If he did take the precaution but an accident happened anyway, he will (or should be) excused from negligence liability for the victim's losses.

Second, where traditional analysis focuses on what should happen if there is litigation, as in the examples above, law and economics lays even greater stress on how law can influence pre-accident behavior so that accidents are far less likely to happen or to be less injurious if they do occur. That is, law and economics imagines that if potential injurers know (perhaps through their

attorneys) the actions that will excuse them from negligence liability in the event of an accident, then they will take adequate precaution – that is, precaution whose cost was less than the expected benefit to a potential victim. Prior to an automobile accident, any given driver does not know if she will be the injurer or the victim. But that fact should not matter to negligence's ability to induce adequate precaution by both parties. If she is thinking about precaution as law and economics imagines that people do or ought to do, she will take all cost-justified precaution so that however things turn out, she will be protected. If she is the injurer but has taken all cost-justified precaution, she will not be liable for any victim's losses. If she is the victim and has been injured by a person who took reasonable care and is, therefore, not liable, she will have, nonetheless, minimized her own injuries by taking reasonable care.

Law and economics has thrown light by applying the tools of microeconomics – such as game theory, the analysis of risk allocation, and the theory of decisionmaking under uncertainty – on issues is all areas of civil law, criminal law, corporate law, administrative law, family law, and more.

There are two important recent developments in law and economics. The first is what is called "behavioral law and economics."[13] Behavioral science (or behavioral economics) imports the findings of cognitive and social psychology into legal and economic decisionmaking. Psychologists, most notably Daniel Kahneman[14] and Amos Tversky,[15] have done numerous experiments to see whether actual behavior confirms or refutes rational choice theory, the prevailing theory of decisionmaking in microeconomics. Rational choice theory posits that decisionmakers are rational in the sense that their preferences are transitive (if *A* is preferred to *B* and *B* is preferred to *C*, then *A* is preferred to *C*) and their actions are well-suited to achieving their goals. An implication of RCT is that rational people do not make mistakes unless they are misled or misinformed. For example, standard microeconomics proposes that individuals have attitudes toward risk that influence people's decisions when faced with uncertainty: People are either risk-averse, risk-neutral, or risk-

[13] EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS (2018).

[14] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2020).

[15] MICHAEL LEWIS, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2016).

seeking. Those categories speak for themselves. For our purposes here, it is important to note that standard microeconomics imagines that if a person is risk-averse, they are risk-averse with respect to any decision about an uncertain course of action. It does not matter, for example, whether the uncertainty arises from a gain (as in buying a lottery ticket) or a loss (as in a house fire).

However, in a famous series of experiments and papers, Kahneman and Tversky showed that most people are risk-averse with respect to gains but risk-seeking with respect to losses.[16] They showed that as a result of this finding, people's choices can be affected – indeed, changed – by how a choice is framed. For instance, if people are presented with a choice between public health options, both of which frame the choice by focusing on lives saved, they behave in a risk-averse manner. However, if people are presented with precisely the same choice between public health options that frame the choice by focusing on lives *lost*, then people behave in a risk-seeking manner.

The second important development in law and economics is the rise of empirical legal studies.[17] Using experiments, data from public archives, case data, and more, law-and-economics scholars have subjected the hypotheses about legal issues to confrontation with data to see whether the real world agrees with or refutes those hypotheses. To take one famous example, John Donohue and Steve Levitt showed in 2001 that half of the remarkable decline in crime that began in the U.S. in 1991 can be attributed causally to the legalization of abortion by the U.S. Supreme Court in January, 1973.[18]

The contributions of behavioral and empirical law and economics will continue to enrich our understanding of legal issues, as I hope to show in the following section.

3. LEGAL ISSUES RAISED BY COVID-19

The novel coronavirus and the pandemic that it has spawned have raised new legal issues or exacerbated old and on-going legal issues. For example, many employers, retail merchants, restaurants, airlines, hotels, and customers and employees of those businesses are deeply worried

[16] Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE, 453 (1981); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA, 263 (1979).

[17] 2 ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW (2018).

[18] John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON., 379 (2001).

about how the law will deal with liability issues if businesses reopen to their employees and customers. What if a cohort of customers at a restaurant, all of whom dined there on the same evening, come down with covid-19? Under what theory may they sue the restaurant for its responsibility for their getting ill? What problems of proof will they encounter? Understandably, customers and employees want to be safe, and businesses want to be assured that if they take adequate precaution, they will not be held liable for their employees' or customers' illnesses. Do existing principles of tort liability provide both sides of this issue with adequate incentives to take care? Will they feel reasonably protected against liability and infection? Or does the federal government need to intervene to make the tort liability system post-covid-19 better?

In this section, I shall use the tools of law and economics to help understand how to think about these legal problems. Almost all of my examples will come from the United States, but my hope is that because every country is experiencing this same pandemic, these examples will resonate with every country's experience.[19]

3.1. Emergency Powers

Covid-19 is a disease that comes from being infected by the SARS-CoV-2 virus. It is, we have come to learn, highly transmissible from human to human, especially in the minute droplets that humans emit when they breathe, cough, sneeze, talk, sing, yell, and the like. For example, one of the first "superspreader" events took place at a church choir practice in Seattle in March. By contrast, it has recently been discovered that it is extremely difficult for the coronavirus to be transmitted from surfaces to humans. Of course, these findings about transmissibility could change.

Another important finding is that asymptomatic carriers of the coronavirus – that is, people who have the virus but have yet to manifest any symptoms of covid-19 – account for between one-third and one-half of all transmissions.

Finally, the best estimate of how long it takes between the time one becomes infected by the coronavirus and begins to manifest covid-19 symptoms is two weeks. For some, the disease may manifest itself soon after having been infected, and for others, later.

Taken all together, these facts suggest problems that defy the abilities of rational individuals to deal with by themselves or by agreement with other rational individuals. First, there is the ability of individuals to determine if they have been infected. If tests were readily and cheaply available and if their results could be given within a very short time, such as 15 minutes or even 24 hours, then rational people might be able to get tests and results of tests frequently and fast enough to take actions that would diminish the spread of covid-19. They could, for example, immediately isolate themselves so as not further to infect others. In addition, if a test on Monday had shown a given individual to be covid-19-free but a test on Wednesday showed her to be infected with the disease, then public health officials could do "contact tracing." That would involve contacting those with whom the now-infected individual had spent time between the (negative) Monday test and the (positive) test on Wednesday and warning them, then contacting those whom those direct contacts had been with and warning them, and so on. These informational matters are beyond the reasonable ability of even the most rational person to deal – information being one of the most difficult items for people to deal with adequately. Moreover, it can be time-consuming and is far better left to trained individuals to do. I should note that the complexity of contact tracing can be greatly diminished by more frequent testing and more rapid results. If, for example, it takes two weeks for results of a test to come back, the contact tracer has to try to get a list of everyone the infected person has been near in the past two weeks, who those people have been near, and so on. By contrast, if people are getting tested twice a week (which is the standard that public health officials recommend), the number of people who might have been near an infected person in the few days between tests is far smaller, and, therefore, the contact tracer's job is far simpler. It is also true and worth noting that technology – as with mobile phone apps as have been used to great effect in South Korea – can make the job of contact tracing much, much simpler and, probably, more accurate. But privacy concerns about these apps are keenly felt in the United States. Thus, practically speaking, society must undertake the jobs of testing and contact tracing and design policies for disseminating the information thereby gathered, subject to privacy considerations. The United States federal government has completely mismanaged the testing for covid-19. The first tests they produced were flawed and had to be recalled. The tests now in use are of questionable veracity. To take but one example: Governor Mike DeWine (R-Ohio) had a test for covid-19 early on August 6 before he was to meet President Trump, who was visiting Ohio. The test was positive, indicating that Gov. DeWine had covid-19. So, he did not meet with the President. Later in the

day, Gov. DeWine took a second test for covid-19 that indicated he did *not* have covid-19. Either he had a miraculous and spontaneous cure over the course of the day, or, more likely, the test is flawed. The number of tests that are now available is wholly inadequate for the public health task at hand.

Second, the transmission of the coronavirus to others is what economists call an "externality" or an "external harm." That is, it is a harm that the infected person can impose on others without their consent, even without their or the infector's knowledge. Economists recommend *internalization* as the means of dealing with externalities. That would mean bringing to the attention of the externality-generator that he is doing harm unintentionally and restricting the infector's behavior so as to minimize his ability to impose the disease on others. For example, public health authorities would probably recommend "social distancing," that the infector be isolated, that he and those he is around wear face masks to prevent infecting or being infected by virus-laden air droplets, and that his contacts be traced. Public health specialists refer to this conjunction of practices as "test, trace, and isolate."

Third, because up to 50 percent of infections can come from asymptomatic infectors, isolation and face-mask-wearing may not be enough, however important they are. The normal interactions of human beings – commuting to work, shopping, attending sporting events and concerts, going to a restaurant for a meal or a bar for a relaxing evening, watching a movie at the cineplex, and so on – often involve large numbers of people being within close proximity. That being the case, there is a public-health argument for restricting the number of people who can be out in public or even going so far as to issue "lockdown" or "stay at home" orders.

Authorities, such as public health administrators, might issue hortatory advice to people within their jurisdiction to follow these practices. Alternatively, governmental authorities might issue orders to those in their jurisdiction to obey these public health guideline with, perhaps, fines or other sanctions for failure to comply. In the United States, those governmental authorities might be federal, state, or local. If the federal authorities issued mandatory guidelines (and other facilitating orders) to deal with the information and externality problems presented, there would be one national policy to govern all 330 million people in the country. There are both advantages and disadvantages of that unitary policy. A large advantage would be that everyone would be doing the

same thing to combat the spread of the disease. Among other things, that single policy would minimize the spread of the disease between localities or states that might have different policies. A large disadvantage would be that there might be enforcement issues that outrun the ability of federal authorities to control. Relatedly, as I am about to point out in the text, a single policy for the entire country will almost certainly not account for significant differences – as in population density – across states and localities.

Alternatively, as has been the practice of the Trump administration, regulation may be pushed down to the states. States then would be free to develop their own regulations and guidelines and their enforcement practices. Some states entered into interstate compacts (agreements among states, subject to Congressional approval[20]) with nearby states to adopt similar practices with the result that there was regional uniformity in regulations. Among all of the fifty states, there was a great deal of variation in the range and seriousness of the guidelines and regulations that they adopted to deal with the problems of covid-19. For example, Iowa and Illinois are neighboring states, but Iowa did not have stringent regulations while Illinois did.[21] The states in the Middle Atlantic and New England areas and Illinois in the Midwest, adopted stringent lockdown practices. Other states, such as Florida, Georgia, Texas, and Arizona, refused to institute stringent behavioral controls or stay-at-home orders. The consequences of these variations were predictable and predicted: The states with more stringent controls have, by and large, fared better than those that had more lax controls. But, in truth, the contrast is not as sharp as that. Some states that imposed lockdown orders early, like California, have seen a recent spike in cases. Indeed, California has become the state with the greatest number of covid-19 cases.

The central legal issue in all these matters has been the exercise of emergency powers that all state governments have granted their governors and that Congress has granted to the executive branch. There cannot be any question that the benefits of giving government emergency powers in special circumstances exceed the costs and that the emergency of the covid-19 pandemic and the informational and externality issues justify invoking those powers.

[20] Lisa Hansmann, *Interstate Compacts: A Primer*, EDMUND J. SAFRA ETHICS CENTER HARVARD UNIVERSITY, (Apr. 30, 2020) https://ethics.harvard.edu/files/center-for-ethics/files/interstatecompactsprimer.pdf.

[21] PANDEMIC ECONOMICS, https://bfi.uchicago.edu/podcast/pandemic-economics/ (last visited Aug, 2020).

That doesn't mean that there are no legal questions raised by the use of emergency powers to deal with the covid-19 pandemic. For instance, some have contended that contact tracing violates privacy interests and that mandatory face-mask wearing infringes on civil liberties. Others have argued that forbidding groups of people greater than a certain, small number to gather violates the First Amendment right of assembly and freedom of religion. Still another set of complaints has arisen about the government's compelling the closure of some businesses, such as bars, restaurants, hotels, sporting venues, and cinemas. Some have claimed that the extraordinary economic costs inflicted on those businesses amount to a compensable taking.[22]

I do not find those criticisms compelling, but I recognize that they are important questions that those exercising those emergency powers should be prepared to answer. In all those cases, I think that the answer is that the benefits of the regulations exceed their costs. Nonetheless, I leave for another day the question of whether those who are financially injured by the exercise of these emergency powers have a valid claim for compensation.

Additional questions are these: Should there be fines for failing to wear a mask? Or for failing to obey an order to isolate oneself? Or for a doctor's failing to notify the authorities that a patient has covid-19? Or a business' failing to police social distancing? Would it be lawful to fine people for failing get a covid-19 vaccine?

3.2. Covid-19 and the Commerce Clause

The search for a vaccine to protect individuals from covid-19 has begun in earnest. There are said to be over 100 pharmaceutical companies, worldwide, engaged in a race to develop a vaccine. In the United States the Trump Administration selected five companies in early June to receive substantial financial aid with their vaccine development. Among other help, the administration has promised to assist with manufacturing promising vaccines if the Food and Drug Administration has granted emergency use licensing to a particular vaccine or that vaccine has received full and

[22] Mary Williams Walsh, *What Is Insurable in a Pandemic*, B1 *N.Y.T.* (Aug. 7, 2020).

final FDA approval.[23] In normal circumstances a new drug or vaccine must pass through three phases of clinical trials,[24] and prudent pharmaceutical companies, knowing that approval is not certain till the results of widespread testing (phase III) are complete, do not undertake manufacturing till the drug receives final FDA approval. Because manufacturing takes time, it can be months or longer till an approved drug is widely available for patient use. Indeed, the prior record for developing and bringing to patients a safe and effective vaccine is four years.[25] This is a truly innovative policy for which the administration deserves great credit.

But even with these efforts to discover a vaccine for covid-19 and to make it available early, there is another hurdle that must be surmounted: In surveys only 50 percent of the respondents plan to get vaccinated against covid-19 once a vaccine is available.[26] This is distressing. Economists believe that vaccination against a communicable disease is an "external benefit" – that is, an action that confers an unbargained-for benefit on other persons. The greater the percentage of a population that has been vaccinated, the less likely that any unvaccinated person is to contract the disease from another person.

Governments can take advantage of an external-benefit-generating activity by either mandating or subsidizing that activity. For example, governments typically mandate that young people be educated through a particular age on the theory that a literate and numerate population is a social benefit, not just an individual advantage. Governments typically subsidize getting the annual influenza vaccine. In many communities the shot is free.

With respect to increasing the number of people who will get the covid-19 vaccine when it is available, a Congressional mandate to get the vaccine like the one I suggested at the end of the last section, is, apparently, not constitutional. Congress has until recently used the Commerce Clause

[23] U.S. HEALTH AND HUMAN SERVICES, *U.S. Government Engages Pfizer to Produce Millions of Doses of COVID-19 Vaccine*, (Jul. 20, 2020), https://www.hhs.gov/about/news/2020/07/22/us-government-engages-pfizer-produce-millions-doses-covid-19-vaccine.html.

[24] WCG CENTRE WATCH, *Human Clinical Trial Phases*, (Jul. 2020), https://www.centerwatch.com/clinical-trials/overview#:~:text=Once%20approved%2C%20human%20testing%20of,continuing%20to%20the%20next%20phase.

[25] Noah Welland & David E. Sanger, *Trump Administration Selects Five Coronavirus Vaccine Candidates as Finalists*, *T.N.Y.T.*, (Jul. 27, 2020) https://www.nytimes.com/2020/06/03/us/politics/coronavirus-vaccine-trump-moderna.html.

[26] Warren Cornwall, *Just 50% of Americans plan to get a covid-19 vaccine. Here's how to win over the rest*, Science, (Jun. 30, 2020) https://www.sciencemag.org/news/2020/06/just-50-americans-plan-get-covid-19-vaccine-here-s-how-win-over-rest#:~:text=Recent%20polls%20have%20found%20as,vaccine%2C%20with%20another%20quarter%20wavering.

of the *Constitution* as the basis for national regulation of an activity or industry.[27] But the Supreme Court has decided in a series of cases that the Commerce Clause cannot be used as the basis for the regulation of noncommercial activities.[28]

If this view is correct, then to increase the benefits of taking the covid-19 vaccine, the federal and state governments will probably have to rely on changing attitudes and subsidization.

Urging people to get the vaccine early may face some significant hurdles. It is possible that the survey finding that only about 50 percent of adult Americans intend to get the vaccine once the FDA has approved it may be due to the public's skepticism about the approval process. Like so much of the federal and some states' public health policies to stop the spread of the coronavirus, vaccine testing – like the wearing of masks, social distancing, and the like – has been politicized; in fact, some or many of the survey respondents may fear that the Trump Administration, which is in serious danger of not being reelected on November 3, 2020, may short-circuit the clinical testing process in order to get a political bounce from having produced a vaccine.

3.3. Reopening the Courts

When governors began to issue stay-at-home orders in early March, courts and lawyers realized that they should suspend the business of the courts. And so 45 states and territories suspended jury trials. By mid-Summer, 2020, most states had not yet resumed jury trials. In Champaign County, Illinois, the county circuit clerk began to send out jury summons in June with instructions to appear in mid-July. Some of those summoned sought to be excused on the ground that serving as a juror would expose them to infection with covid-19, and the circuit clerk accepted that as a reason for postponing jury service for those who raised that fear.

Some courts have experimented with "virtual proceedings," in which the parties involved – judges, lawyers, plaintiffs, defendants, and others – use a computer communication program to do some routine proceedings. But new trials or trials that were interrupted by the pandemic are not taking place.

[27] United States Constitution, Art. I, § 8, Cl. 3.
[28] United States v. Alfonso Lopez, 514 U.S. 549 (1995).

Most famously, the United States Supreme Court heard oral argument in several cases through telephonic and computer connections. Those virtual connections were made available to the public so that for the first time the public could listen to the Court's proceedings without being physically present at the Supreme Court Building in Washington, DC.

The federal judiciary, in contrast to the states, "has been processing cases at a rate pretty close to normal."[29] Judge Jed Rakoff, United States District Judge of the United States District Court for the Southern District of New York, reports that the federal judiciary typically has a much smaller caseload than do state judges and that the federal courts have been very good at planning for emergencies like the coronavirus pandemic. Much of his courts' business early in the covid-19 crisis consisted of application for those in jail or prison to be released to home confinement. Those applications usually turn on whether the applicant is a flight risk or a danger to the community, but in the pandemic, they turn on the ground of fear of contracting covid-19 in jail or prison.

A more routine issue is how a prisoner and his counsel can safely and securely consult. Many jails and prisons are not adequately equipped to allow video consultations, and yet they are not comfortable with in-person meetings between counsel and client.

Arraignments, trials, and other legal proceedings are, generally, public. Thus, the plaintiff, the defendant, counsel, and the public all have a right to be present. To conduct such proceedings requires having courtrooms or other venues that are large enough to allow social distancing. Some courts have allowed a defendant in a criminal proceeding to appear by video from the room in the courthouse where he is confined before appearing in court (the "cellblock").

The wearing of masks in court proceedings may raise fairness issues. Lawyers may not be able to notice tell-tale signs of prejudice, such a smirk or scowl, if a prospective juror is wearing a mask. Some lawyers have asked judges to allow masks to be removed from potential jurors during *voir dire* and from witnesses during testimony, and those requests have been granted.

Because of fears that many jurors may have of being in close proximity to other jurors, the Arizona Supreme Court, anticipating that many calls to jury duty would be ignored, has reduced the number of potential jurors that can be struck [without cause] by each side to two, from the usual six."[30]

[29] Jed S. Rakoff, *Covid and the Courts*, N.Y.REV, 10-12 (2020).

[30] Shaila Dewan, *Drama in Courtrooms: The Return of the Jury*, A7 T.N.Y.T., (Jun. 11, 2020).

There is a broadly held feeling that these and similar measures are mere stopgap measures, that the standard in-person proceedings are vastly preferable. But no one will feel comfortable with returning to the *status quo ante* until we are well beyond this pandemic.

3.4. Liability

In the current Congressional negotiations regarding a new relief bill, the Republican negotiators are said to have liability relief as their top priority. They cite concerns that the behavior of employees, customers, and others may be adversely affected by fears of contracting the coronavirus and of liability for harms arising from having contracted covid-19 due to the negligence of a shopowner, an educator, an employer, a healthcare professional, and so on. For example, an employer may be worried that one or more of his employees may bring an action against him alleging that he contracted covid-19 in the workplace. Or a theater owner may fear that his customers may sue him for negligently failing to clean his establishment with the result that some customers were infected with covid-19.

I recognize that these are two-sided transactions – that employees may be reluctant to return to work unless they are confident that the workplace is safe and that customers will not patronize a restaurant or hotel unless they are assured that the proprietor has followed public health guidelines on masks for employees and customers, maintaining social distancing, ventilation, and so on.

The Republican position is surely premised on both of these concerns – on protecting employers from liability if they have been nonnegligent and on encouraging employees and customers to feel safe in going to work and going to commercial establishments to shop.

There must be other, unspoken premises at work in this position, and I suspect that they are these: that trial lawyers will perceive suing employers, commercial entities, healthcare providers, educators, and others for negligent care in the pandemic as a potentially lucrative business opportunity[31] and that there is little substance to these allegations, that they are merely a means of shaking down defendants for money.

[31] Andrew Duehren, *Senate GOP Aims to Funnel Covid Liability Cases to Federal Courts*, W.S.J, (Jul. 16, 2020).

The Democratic position – because almost everything in the U.S. is politicized today – is probably this: that the tort liability system works reasonably well to provide incentives for everyone to take care; that only those who violate obvious norms of precaution are held liable for injuries; and that the safety regulation system, which provides *ex ante* safety standards for those who might cause harm, fills in the gaps in the tort liability system.[32]

Rather than waste time fighting about whether the tort liability system works well or ill, whether trial lawyers perform a vital function or are mere predators on the business community, let us try to find a middle way forward. William Galston of the New Center and *The Wall Street Journal* has recently suggested such a way: Congress should offer a "safe harbor" act that says if employers and commercial establishments comply with Centers for Disease Control and Prevention guidelines for safe workplaces, schools, and commercial businesses, the act would "guarantee employers [and businessowners] who can demonstrate that they have met these standards a 'safe harbor' against litigation [related to covid-19]."[33]

There are details that need to be specified. For instance, because this compromise would apply only to the current pandemic, there needs to be a sunset provision. The act might say something general, such as that the act should lapse within six months of the end of the pandemic or by the end of 2022, whichever comes first, or something specific, such as that the act expires when a safe and effective vaccine against covid-19 is widely available. This latter provision would have the effect of inducing people to get the vaccine. Having failed to do so could be deemed contributory negligence.

Another detail that needs addressing is for employers to make certain that their employees get tested frequently and isolate themselves if they have been found to test positive for covid-19. There ought, also, to be incentives for someone, perhaps the federal government, to compensate employees for their lost wages while they isolate or are recovering from covid-19. Some employees who are not feeling well or who have been exposed to the coronavirus or have tested positive for the disease might not stay away from work if to do so means losing income. We have a friend whose son worked with someone who had tested positive for covid-19 but stayed on the job because she needed the income. Our friend's son was frightened but did not want to go to his employer to tell

[32] Ephrat Livni, *US businesses want immunity from coronavirus lawsuits*, QUARTZ, (Apr. 24, 2020).

[33] Galston, *Democrats Should Back 'Safe Harbor' Law,* A17 W.S.J., (May 13, 2020).

him about his co-worker's infection. A law that provided for the continuing compensation for an isolated worker would obviate this problem.

3.5. Voting

On November 3, 2020, the American people will vote for federal (president, vice-president, and 35 Senate seats) and state offices. The experiences that many states have had in holding their primary elections between January and July, in the midst of the coronavirus pandemic, have raised concerns about the viability of in-person voting. In those states that allowed mail-in votes, the state authorities and the post office were overwhelmed by the volume of mail. Many voters who had requested mail-in ballots never received them and, as a result, never voted. Take the Commonwealth of Kentucky. Four states officially call themselves a "Commonwealth," rather than a State – Kentucky, Massachusetts, Pennsylvania, and Virginia. There is no difference between a "commonwealth" and a "state." In a normal election only 1.5 percent of voters request a mail-in or absentee ballot. Here is a brief primer on the differences between mail-in and absentee ballots. Many use the words "mail-in ballots" and "absentee ballots" interchangeably, but there are subtle differences between them. The absentee ballot, which is available in all 50 states, the District of Columbia, and all U.S. territories, is for those voters who will be out of the state or incapacitated and unable to vote in person on the scheduled date of the election. That practice began during the Civil War (1861-1865) to allow soldiers who were stationed away from their home states to participate in their home state elections. Federal law today requires that absentee ballots be sent to armed forces personnel and citizens who are overseas. In 16 states a voter who requests an absentee ballot must give a "reasonable excuse" for being unable to vote in person. Another 28 states and the District of Columbia have what is called a "no excuse" absentee ballot, which means that one simply has to ask for an absentee ballot but does not have to provide a reason for wanting to vote absentee. Thus, the "no excuse" absentee ballot is equivalent to a mail-in ballot. All of the likely swing states in the 2020 presidential election – Florida, Pennsylvania, North Carolina, Michigan, Wisconsin, and Arizona – allow the "no excuse" absentee ballot. Some states impose additional restrictions on absentee voters, such as a requirement that their ballot be notarized or witnessed or

that the voter provide his own stamp for returning the absentee ballot. But those ballots can also be placed in secure boxes or handed to a clerk at the appropriate state office; so, the stamp requirement should not significantly deter voting.

In contrast to the absentee ballot, there are five states – Washington, Oregon, Utah, Colorado, and Hawaii – that vote almost entirely by means of a "mail-in" ballot. In those states voters do not have to request a ballot by mail; the authorities send an application to every registered voter in the state. And typically, the state provides a prepaid return envelope. But in the June primary elections, Kentucky state officials in essence ran two parallel elections – a mail-in election involving 760,00 mailed ballots and 270,000 people who voted in-person at a limited number polling places. With the help of both the Republican and Democratic parties, state officials made the process work relatively flawlessly. There were a few delays at some polling stations, but there were not long lines of voters waiting, as they socially distanced, to get in. And the state had provided special venues for receiving the flood of mailed ballots and an increased number of workers to count those mailed ballots. All went well.

Other jurisdictions held elections that did not go as smoothly. In April Wisconsin held its primary election. At the time the mayor of Milwaukee, Wisconsin's largest city, and the governor had issued stay-at-home orders to try to stop the spread of the coronavirus. The governor tried to use his emergency powers to postpone the election till June, but the Wisconsin Supreme Court, on a party-line 4-2 vote, voided the governor's order, arguing that postponing an election was not within the governor's emergency powers. They were probably correct. At the federal level, we have recently been reminded that the president does not have the power to cancel or re-schedule a federal election. The timing of federal election matters comes from an 1845 statute and other controlling legislation and constitutional doctrine. In Wisconsin, one of the most hotly contested items on the ballot was for a seat on the Wisconsin Supreme Court. There was some speculation that the Wisconsin Supreme Court's ruling against the governor's attempt to postpone the election till June was, at least in part, motivated by the Republican Party's belief that its candidates are generally favored if voting is more costly or difficult. In the end, despite the very long lines at polling places, the Democratic candidate for the open seat on the Wisconsin Supreme Court won.

Therefore, the in-person voting and submission of absentee ballots went on as scheduled. In a normal, non-pandemic year, there are 180 polling places in the City of Milwaukee. But in this

pandemic year, the city only opened *five* polling places, largely because poll workers (approximately 60 percent of whom were older than 61 in 2018 and therefore would have been more vulnerable to contracting covid-19) were reluctant to show up.[34]

So, absentee ballots were the only recourse for those who did not want to brave the long lines at the greatly diminished number of polling places. A federal district court issued an extension that moved the deadline for the state to receive absentee ballots by six days, which would have allowed people to send in ballots that were postmarked after the primary election took place (an almost unheard of extension).

On the night before the election, the U.S. Supreme Court issued a stay against the district court extension. That meant that some people who wanted to vote and would have taken the opportunity to send in absentee ballots under the district court's ruling had either to make sure to post their ballots on election day or to vote in person. Apparently, so many people felt so strongly about voting (and concerned that their absentee ballots might not be counted) that they braved the long delays – some as long as 8 hours – to vote in-person.

I cite these examples of how the pandemic has adversely affected primary voting because it is everyone's belief that those difficulties signal that similar problems are likely to affect the state and federal elections in November. But those November election problems are likely to be orders of magnitude worse than those in the primary elections of the Spring and early Summer. In the average primary election only 22 percent of eligible voters cast ballots. In a national election the figure is closer to 60 percent of those eligible. Put somewhat differently, the cumulative voting totals in 47 state, district, and territorial primaries between February and June were 55 million people. The expected voting totals in all 50 states, the District of Columbia, and the territories is likely to be 150 million on one day, November 3.

The good news is that we have had the experience of dealing with pandemic concerns in the primaries and should have learned enough to deal with the issues for the general election in the Fall.[35]

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[34] Michael Wines, *From 47 primaries, 4 warning signs about the 2020 vote*, T.N.Y.T., (Jun. 30, 2020).

[35] *Id*.

Given that poll workers are likely to be reluctant to staff polling places if the pandemic is, as seems likely, still with us in November, and that many voters, too, would prefer not to have to venture out into public to vote, then the states (which are constitutionally in charge of much of the process of voting) will want to make voting by mail easy and secure.

There are several real problems and two specious problems that are likely to arise this Fall. If many more people than is normal decide to vote by absentee or mail-in ballot, there will be problems for the post office in managing this extraordinary volume and in the state election officials' ability to count the mailed ballots in a timely fashion. The percentage of mail-in ballots in presidential election years has increased continuously from 7.6 percent in 1996 to 12.9 percent in 2004 to 18.5 percent in 2012 and to 20.9 percent in 2016. Most states do not allow officials to begin processing mail-in ballots till the in-person polls have closed. Depending on the volume of these mail-in ballots and the number of people trained to check their validity and count them, it may be days or weeks before all the ballots are tallied. The State of New York took slightly more than one month to process the huge number of mail-in ballots submitted in their June primary election. So, there may be delays in the announcement of winners and losers in all of the Nov. 3 elections. Those delays can become a source of anxiety and distrust with potentially ugly consequences for the nation.

There are two specious problem with mail-in votes – both frequently brought up by President Trump. One is that they are much more subject to fraud than is in-person voting. The other is that they favor Democratic candidates over Republican candidates. There is empirical evidence on both contentions. With regard to fraud, that has been extremely rare in absentee voting and in the five states that currently rely almost exclusively on mail-in ballots. Second, there is no evidence that suggests that mail-in voting favors one party over another.[36]

There are several things that the states can do to accommodate a larger than normal volume of mail-in ballots and to ensure that the risk of fraud is minimized. States can require earlier requests for absentee ballots. Many states, like Ohio, require that such a request be made by the Saturday before a Tuesday election. But even a modest change like moving the deadline for requests to five

[36] Reid J. Epstein & Stephanie Saul, *Does Vote-by Mail Favor Democrats? No. It's a False Argument by Trump*, T.N.Y.T., (Apr. 10, 2020).

days before the election may be enough. States might set that earlier deadline both to give themselves more time, pre-election, to organize the ballots but also to allow flawed ballots (those, for instance, in which signatures on file do not match those on the submitted ballot) to be cured.

All of these matters will cost the states substantial sums of money. Congress appropriated and distributed $400m to the states to help with voting preparation in one of its early relief bills, but many experts believe that five times that much – $2b – is required to equip the states to handle the anticipated surge in mail-in ballots.

3.6. Behavioral Considerations

I have implicitly been assuming that decisionmakers in these matters – legislators, judges, lawyers, executives, businessmen, consumers, healthcare providers, and more – are reasonably rational in making their choices about law and safety. But as I mentioned toward the end of Section II, law and economics is moving away from the rational choice theory of human decisionmaking in favor of the conclusions emerging from experiments in cognitive and social psychology. Those conclusions typically find that human beings are flawed or imperfect decisionmakers. We make predictable mistakes, not just random, haphazard errors. And we do not learn very well how to avoid those mistakes. We make them over and over.[37]

Behavioral considerations must be brought to bear on the study of many aspects of the coronavirus pandemic. First and foremost, we can invoke behavioral science to explain one of the most fundamental facts about the virus: People do not seem to assess the risks of the virus accurately. It is not that they miscalculate by a small amount; they miscalculate by orders of magnitude. People are not good at estimating risks. For example, they tend to latch onto what is readily available to them rather than investigating the true, objectively verifiable risks. This is known as the "availability heuristic." A "heuristic" is a quick method of discovering something for oneself. As an example, if you were to ask a group of people in the United States which kind of death, homicide

[37] SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993).;Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).; Doron Teichman & Kristen Underhill, *Behavior Science and the Legal Response to Covid-19*, Columbia Law School Working Paper, (Jul. 2020).

or suicide, is more common, most will answer, "Homicide." Why? Because homicides are published in media and are, therefore, readily available. Suicides are typically not publicized, unless the decedent was a famous or notorious person. But, in point of fact, annual suicides are approximately three times the number of annual homicides. In 2018, for example, there were slightly more than 14,000 homicides in the U.S. and slightly more than 48,000 suicides.

Additionally, human beings suffer from "optimism bias": They believe that they are more likely than average to have favorable outcomes, a good life, a successful enterprise, a good grade, a long and happy marriage. (It is, in many ways, a charming fault about humans.) Almost 50 percent of marriages in the U.S. end in divorce. The figure for first marriages is about 41 percent; for second marriages, 60 percent; and for third marriages, 73 percent. As the great Samuel Johnson said, "Remarriage is the triumph of hope over experience." So as a first approximation, when asked what is the probability that any one couple's marriage will end in divorce, the objectively accurate answer (unless one has special knowledge about that couple) would be 50 percent. But if you ask those about to be married or recently married the question about their marriage surviving, they will give you a very low number, usually zero.

Finally, we all suffer from "confirmation bias." We place more weight on evidence that supports our position than we place on evidence that questions our position. Thus, if we dislike President Trump, we give more weight to those who are critical of him and his policies than we do to someone who applauds him and his policies.

How might these biases or heuristics apply to assessing the risk of covid-19? They all suggest that unless one has strong evidence readily available to them that this unseen and unseeable virus causes significant harm, they may discount the risk of becoming ill and discount the social benefit of taking steps to contain the viral outbreak. If public officials are saying that the disease is nothing more than a mild flu, that it will disappear quickly, that 99.9 percent of cases are harmless, and the like and if one believes those assertions rather than the tabulated evidence of the number of cases and deaths, then one will give more weight to the proposition that covid-19 is not worth worrying about; it really is not worth shutting the economy down.

In contrast, if you are a healthcare worker who has seen patients and coworkers die of covid-19, the evidence that this is a very serious disease is readily available. And you will probably be easy to convince that serious public health steps are necessary. You will also pay more attention

to the objective, tabulated information on the number of cases and deaths than to "happy talk" by politicians eager to have you believe that the risks are minimal and that all will be well soon.

3.7. Other Matters

There are, of course, other legal issues upon which I have not touched. In administrative law, for instance, there are issues about the extent, if any, to which authorities should or can relax testing standards so as to hasten the availability of new vaccines and treatments. In the area of civil liberties, there are fraught issues of the extent to which the governments can restrict freedom of assembly and movement, gun sales (which were shut down in some states), and abortions and other voluntary medical procedures (so as to free scarce medical resources for pandemic-related uses). Additionally, the legislatures, administrative agencies, and courts must wrestle with whether phone tracing of individuals, as part of a policy of contact tracing, violates individual rights to privacy. There are also civil liberties issues arising from the fact that prisoners in jails and prisons are suffering inordinately high exposure to the coronavirus and are demanding alternatives such as home confinement as more humane. Finally, there are issues of the use of federal executive power. Here the issue is not of "overreach," of going beyond what would seem to be allowed, but of "underreach," of not exercising power to do what would be prudent to do. Specifically, some scholars have raised the issue of whether the Trump Administration may have made the coronavirus pandemic significantly worse than it might have been by their inaction.[38]

4. CONCLUSION

The novel coronavirus, SARS-CoV-2, has generated the greatest health and economic crises of the last 100 years. It has affected nearly 20 million people worldwide and killed more than 700,000 people. In the United States, covid-19, the disease that this coronavirus causes, has afflicted nearly 5 million people and killed more than 160,000. In addition to the tragedy of so many

[38] David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 113 *Am. J. Int'l L.* (forthcoming Oct. 2020); Cameron Peters, *A Detailed Timeline of All the Ways Trump Failed to Respond to the Coronavirus*, VOX (June 8, 2020), https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response.

lives lost and the lasting effects of the illness on so many, the disease has devastated every developed and many developing economies. Unemployment rates have soared around the world, and GDPs have fallen by the greatest levels since governments began keeping systematic records.

Along with the health and economic problems, the novel coronavirus has generated a series of novel legal issues in many different areas of law. Those issues strain the bounds of received legal theory and require fresh thinking.

I have tried to use the tools of law and economics to address some of the more salient issues arising from the coronavirus pandemic. The public health measures that may be necessary to stop the spread of covid-19 are great, and without question they impose significant costs on individual citizens and on commercial enterprises. The personal and emotional consequences of more than 700,000 lives lost and of many other lives interrupted by and, perhaps, affected for a long time by this disease are immense. And so are the economic costs of unemployment, business and individual bankruptcies, investments gone to waste, plans shelved, education disrupted and changed for the worse, the difficulty of getting to visit and hug loved ones, and more.

I have tried to argue that in every instance law and economics argues for applying cost-benefit calculations to find the best policy responses to the challenges that covid-19 has presented us. Those calculations may not be so blindingly clarifying that they point to one and only one answer to the legal problems we face, but they do make the choices clearer – as illustrated by the matter of a liability "safe harbor" provision. Reasonable (and fallible) people may initially disagree about whether and how much to shield businesses from liability for pandemic losses. But with the help of cost-benefit analysis they are likely to find common ground.

THE `LAW AND ECONOMICS' OF GOVERNMENTS' RESPONSE TO PANDEMICS

Indervir Singh[1] and V. Santhakumar[2]

1. INTRODUCTION

Governments all over the world may use or institute laws and other measures (like the Epidemic Diseases Act, 1897 in India) during pandemics like the COVID-19. These may provide special powers to governments to restrict social and economic activities and the freedom of individuals with the purpose of containing the spread of epidemics. It may be interesting to use the framework of the `law and economics' to analyse the need for such restrictions and the conditions with which these may lead to efficient outcomes. This article is an attempt in that direction. It also uses that framework to assess the response of the Government of India towards the COVID-19.

2. MARKET FAILURES THAT NECESSITATE GOVERNMENT RESTRICTIONS DURING EPIDEMICS

A starting point of the `law and economics' is to analyse the sources of market failure that necessitate the legal or institutional interventions on the part of government on a specific issue. Pandemics may lead to the following market failures.

2.1. Negative Externality

The obvious source of market failure as part of epidemics is the negative externality. The infected individuals may cause infection in others without compensating the losses to the latter. There is a need for an entity representing all individuals to act to address this problem. The negative externality (infection in this case) is emerging from a large number of sources and can affect an equally large number of individuals, who in turn can become the sources of the externality. Hence the transaction costs (required for a possible negotiation between parties who create and are affected by the externality) are huge, which makes a legal/ institutional intervention necessary[3]. It is also not a context where financial disincentives (like taxes) can be used to control the externality (and this is also due to the information

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[3] R. Coase, *The Problem of Social Cost*, 3 JOURNAL OF L. & ECON.1, 1–44 (1960).

problems discussed in a following sub-section), and there is a need for a direct control of activities that may cause or increase the externality.

2.2. Weakest Link Public Goods

Certain actions that are taken to control the negative externality during pandemics (as in other situations) have the feature of public goods. The reduced rate of infections in a locality can be beneficial to many (one person's gain does not reduce the gain of others) and it is also difficult to exclude someone from deriving that benefit. As expected, private actors may not be willing to provide such public goods adequately and hence there is a need for the intervention of an entity representing the society as a whole (and hence the need for government intervention).

The reduction in rate of infection is also a weakest-link public good [4] which makes it different from many normal public goods. A weakest-link public good is a commodity whose effective provisioning depends on the worst performer. For example, the successful control of COVID-19 does not depend on the state which is the most successful in controlling its spread but on the state, which is the least successful. There is always a chance of second wave of infections if it is not successfully contained everywhere. Also, the extent of spread of COVID-19 depends on people who are least careful or least aware. The weakest-link good necessitates government intervention so that the worst performer is good enough to control the spread of the disease.

2.3. Scale economies in certain kinds of preventive actions

The avoidance of infections or the minimisation of the spread of infections may require individual and public (government) actions. Certain actions at the level of individuals could be cheaper. Wearing masks or washing hands is of this kind. However, there are many other actions where there is a scale economy. For example, there may be a need to check the infection of people entering a territory, and this can be carried out cheaply by a single entity (rather than a multitude of individual actors), and it is socially better if the government carries out such an activity.

[4] JACK HIRSHLEIFER, FROM WEAKEST-LINK TO BEST-SHOT: THE VOLUNTARY PROVISION OF PUBLIC GOODS, 41 (CONSERVATION ECOLOGY 2002).

2.4. Information problems

Epidemics also create multiple information problem. There could be a lack of information on the part of many individuals on what causes the infection or its implications. Private firms may not be willing to provide that information, given the substantial cost of generating such information but the very low cost of copying it. A pricing strategy which equates the price to marginal cost (which is almost zero in such cases) may not lead to the recovery of the cost of producing such information. The cost of acquiring information is not same for everyone. It is costly for the illiterate and less educated to get the right information and the chance of making a mistake is also high for them. A lot of lives may be lost before people have correct information and realise their mistakes. Hence there is a legitimate reason for the government to generate and provide that information.

Though each person may have the incentive to know whether he/she is infected and to take appropriate care (if one is not infected[5]), the private gains from this information could be lesser than the social gain (since one infected person can pass on the infection to many others), and the private incentive to use testing services may not lead to social efficiency. (Though there may not be any economy of scale in testing and that is a service which can be provided by multiple firms and a near competitive situation can be achieved in this market). There may be a need for social (or governmental intervention) due to this positive externality associated with the testing.

There are also issues of information asymmetry. Each person may not know whether the people who interact with him/her are infected or not. Even if a person knows that he/she is infected, there may not be an adequate incentive for him/her to reveal that information. Even if the information of the infection (or susceptibility) of that person is known to a third party (public system), there could be a difficulty in communicating that to the public at large. The miscommunication may cause panic and costs the society dearly. (We have seen marking/stamping on bodies during the COVID-19, and the associated problems.)

2.5. Merit good and the issues of affordability

[5] On the other hand, he/she may not take appropriate care to avoid infecting others.

Societies may have genuine reasons for not accepting the consumer sovereignty on issues such as whether the testing of infection is to be carried out or not; whether to take appropriate care or not, etc., not only for reasons discussed earlier. Some people may not be aware or convinced of the need for such steps, and these could be costly to themselves (and others). Then there is an issue of affordability. There could be a significant section of the society which may not have the required resources to take the appropriate private care (even if they are aware of the need to do so). From the point of view of economics, they should be in a position to use borrowed resources for this purpose but the imperfections in the capital market may work against it. There could be governmental interventions driven by these considerations.

2.6. Insights from behavioural economics

What we have discussed so far are possible reasons justifying societal intervention within the rationality framework of the conventional microeconomics. However, the experiments in behavioural economics have brought out important insights on the actual behaviour of people. Some of these may strengthen the need for social intervention during epidemics. People tend to have a certain inertia[6] which may discourage them from taking steps which are known to be good for themselves. They are likely to underestimate the losses in future[7]. Both these tendencies may work against taking appropriate care on the part of many individuals.

People also tend to take instinctual decisions (rather than those after deliberations) and have a herd behaviour (by simply following what their peers do)[8]. They may have mental models of reality, and these need not be always grounded in reality. Even when new information is available, these may be internalised through a process of filtering[9] and hence would only confirm their pre-judgments. (Hence there may not be a correction of one's pre-judgements even when new counter information is available.) These tendencies can work in both ways with respect to crises like COVID-19. In the initial stages when an epidemic is new and unknown, people may take substantial time to accept it or take appropriate care. It is difficult

[6] S. BENARTZI & R. H. THALER, SAVE MORE TOMORROW: USING BEHAVIORAL ECONOMICS TO INCREASE EMPLOYEE SAVING 164-187 (JOURNAL OF POLITICAL ECONOMY 2004).

[7] S. BENARTZI & R. H. THALER, MYOPIC LOSS AVERSION AND THE EQUITY PREMIUM PUZZLE 73-92 (QUARTERLY JOURNAL OF ECONOMICS 1995).

[8] WORLD DEVELOPMENT REPORT, MIND, SOCIETY, AND BEHAVIOR (The World Bank Group 2015).

[9] J. BARON, THINKING AND DECIDING (Cambridge University Press 2000).

for people to change their habits which may facilitate infections. The social norms may make it difficult to adopt new habits such as maintain social distancing and avoid large gatherings. This situation may warrant `stronger' persuasions and actions to motivate the people to change their behaviour. There may be a need to unsettle the prevailing mental models of reality, and the create newer ones which are closer to the reality.

The behavioural traits mentioned here also mean that once a set of newer habits (which are useful to control infections) are developed, then these may be continued somewhat unthinkingly. People may follow these as part of the herd behaviour too. Hence the needed change is to move from an equilibrium corresponding to one model of reality to another one.

People are motivated not only by their self-interest or are driven not only by monetary gains but also intrinsically (to be right, as part of their moral or ethical considerations)[10]. Behavioural economics has demonstrated that there could be certain incompatibilities between the intrinsic motivation and monetary gains or other extrinsic incentives[11]. This insight is useful in deciding strategies to motivate certain actors (like medical professionals) during the pandemics.

3. ON THE NATURE OF GOVERNMENT INTERVENTION

The different sources of market failure or different motivations and behavioural patterns of individuals (which are somewhat different from the rational behaviour presumed in conventional neoclassical economics) may necessitate societal or governmental intervention during epidemics. Each of the sources of market failure may warrant a specific intervention. For example, the negative externality may require restricting the activities that may increase the chances of infection, information problem may necessitate testing and the provision of such information to others and so on. However, there could be interconnections or `economies of scope' too. An intervention to address one failure may reduce the burden (effort) to act on another ground. For example, if information is known and can be made available on who is infected (and if they can be protected or quarantined), then that may

[10] W. Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. OF ECON. BEHR. AND ORG. 367–388 (1982).

[11] U. Gneezy et al., *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. OF ECO PERS, 191–210 (2011).

reduce the need to control other people. Hence there could be a selection of a combination of strategies which may reduce the social cost of an intervention.

The social cost of government intervention has two components in this case. First consists of those required to enforce restrictions (including that needed to punish people who are not following these restrictions). The second component arises due to the surplus forgone (or that cannot be generated) due to the restrictions on social and economic activities. Ideally, the government should attempt to minimise the total social cost in deciding the nature of intervention. Let us use this framework to analyse the lockdown as an intervention strategy during a pandemic like the COVID-19 in the following section.

4. LOCKDOWN AS A CONTAINMENT STRATEGY DURING THE PANDEMIC

A `lockdown' in a strict sense is the ban of almost all activities outside home by individuals other than those who are acting on behalf of the government (like medical professionals, police and so on). What are the benefits of such a strategy? Through this, the negative externality, (that is, the spread of the disease by an infected person) can be limited to his/her close family members. This should reduce the number of persons who can be infected by a patient (before that person is moved to an institutional quarantine or medical care centre). Hence a safe public environment (as a public good) does not have to be provided or the `locking down' others is the public good that is available to each individual and he/she is paying a price of locking in him/her for this public good. The enforcement of the lockdown by the government benefits from scale economies. Each diseased person may get hospital treatment, and there need not be any economy of scale in the provision of this service.

How does the lockdown solve the information problems that we have discussed earlier? In a strict lockdown, it not so important for one person to know whether she is infected or not. This information is needed only if there are symptoms which make medical treatment necessary. (Or the information on infection is necessary mostly for deciding the treatment and deciding the protocol for the safety measures to be taken by medical professionals). During the lock down, each and every family is in home quarantine. There are incentives for individuals to be free from infection (due to the cost of illness) but they may not have the incentive to acquire or provide that information to public authorities in the situation of a lockdown. The lockdown also reduces the cost (making it almost zero) of information

asymmetry in this regard. People stop interacting with others (barring one's own family members) and there is no potential threat due to the information asymmetry. This is like solving the problem of information asymmetry by banning market exchange altogether!

The lockdown may be useful when people have other habits/motivations as evident from the experiments in behavioural economics. Some people may not change their routine (like going to markets or public spaces) even if they are aware of the danger but the lockdown may force them to change it. This is much more so if their peers are also of this kind. Some people's mental model of reality may encourage them to underestimate the dangers of the pandemic, but a forced lockdown may keep them away from others, and hence reducing the spread of infections.

Another important benefit of the lockdown (if it is effective) could be the reduced number of patients in hospitals. This may ensure the availability of services to all such patients. The negative externalities on the healthcare system like the possible infection of medical professionals or the reduced availability of medical services to other patients (who are not affected by the pandemic) would also come down. Otherwise, the social cost of healthcare would go up drastically if many patients reach hospitals simultaneously.

What about the impact of the lockdown from the perspective of merit good? In one sense, it is trying to protect everyone by keeping them at their homes. However, the likelihood of infection for a particular member of the family is higher in poorer households because of the limited space within homes. They are likely to bear a higher cost due to the lockdown. The non-poor sections can work from home, or take paid leave, or may have savings to meet the expenditure during the lockdown whereas the poor may be unemployed (and their work is less likely to be amenable to be carried out from home), may have only limited savings or may have a higher marginal utility of money (and hence the cost of lost income could be higher).

What are the cost of the lockdown? There are two kinds of costs as noted earlier. First include that to enforce the lockdown. Most of the police machinery may have to be used for this purpose (and there could be a diversion of their effort from other issues). However, if the state has already put in a sizable machinery for policing, then the marginal cost of using it for

enforcing the lockdown may not be that high especially by considering that other crimes may also come down during the lockdown.

It is the second cost of the lockdown that is huge. Theoretically, the lock down would lead to a standstill of a major part of economic activities (barring those related to healthcare, or those related to precautions like the production of masks, soaps, and so on in the case of COVID 19), and those that can be carried out by work-from-home and through remote activity/supervision. This would lead to substantial economic losses. Moreover, there could be a reduction of the income of governments which can impact the provision of public services in general (if there is no effort to enhance the borrowing. The social cost of borrowing may not be that high during such periods of crises). Ideally the decision to impose the lockdown should be based on the consideration of these costs and the social benefits (described in the previous paragraphs). However, this trade-off need not be a static one, and there could be innovations and technologies enabling more efficient solutions. Some of these issues are discussed in the following section.

5. POSSIBILITIES OF RELAXED RESTRICTIONS

If the testing and identification of infected people are easier, then a different form of restrictions would become feasible. This is the mandatory quarantining of these infected people, and the hospitalisation of those among this set who are chronically ill. This should allow the government the relax the restrictions over others. This can solve almost all issues of market failure that we have discussed in the first section. The negative externality is addressed since those who are likely to cause infection are restrained (or their activities are restricted). Testing and identification should be seen as the public good here since their benefits are non-rival and non-excludable, and this service is to be provided by the government, since the private provision of this service and its use by individuals who want to know whether they are infected or not, may not be adequate. Though people have some incentive to know whether they are infected or not, all of them may not be willing to pay for the testing, or even if they test and have the information may not have the incentive to reveal it.

The testing and identification by the government (and quarantining of all infected people) also solve the information issues. It can give information on whether someone is infected or

not, and the chances of interaction with such a person can be minimised. It is a better strategy with merit good considerations. If testing is done based on the susceptibility, these can cover all people (irrespective of their socioeconomic status or ability to pay and if institutional quarantining is provided to those who cannot practice social distancing within their homes), and if all others are allowed to go on with the normal social and economic activities, then the problem of the poor bearing an unequal share of the cost of lockdown can be mitigated to a great extent.

The behavioural patterns or motivations (noted in behavioural economics) will also be taken to account through this set of relaxed restrictions. Anybody suspected is tested irrespective of the inertia (or heard behaviour) or readiness and is asked to go through quarantining. Hence this isolation can happen irrespective of whether one think whether such a measure is needed or not (based on one's own mental model of reality).

Let us consider the costs of this relaxed set of restrictions. There is a cost for testing all who are likely to have infection. (This may require testing all those who may have interacted with a person who is already infected). Then there is a cost of quarantining people with infections and to see that these people are self-isolated. Monitoring to see that the infected/suspected people are in isolation may become costlier (when all others continue with their normal activities). This may require a decentralised approach. It may be necessary to have ground level functionaries (like ASHA workers in India) working with communities or local government representatives to enforce it. There could be places where decentralised institutions are already in place and such monitoring may become easier there, but the building up of this institutional infrastructure just for dealing with the pandemic could be costly.

The second cost is the opportunity cost of foregone economic activities. However, this would be considerably less than that of the blanket lockdown, since a relatively wider set of economic activities can be allowed. Hence there could be a trade-off between the first and second costs. The higher cost of instituting a relaxed set of restrictions may encourage the governments to move towards a blanket lockdown but that would lead to higher social losses (in terms of foregone economic activities). One can visualise an optimum here, whereby the marginal cost to enforce relaxed restrictions becomes equal to the marginal social loss due to

the banned activities. This trade off and the optimum may depend on specific socioeconomic and governance contexts.

An extreme form of government intervention during epidemics is `no' intervention. We have argued in the second section that some form of intervention may be needed to address different kinds of market failure in this regard. The other extreme intervention is the complete lockdown. This may be addressing the market failure but at a huge social and economic cost. However, there could be different feasible strategies between these two extremes. However, the feasibility may depend on specific social contexts. We can understand this by considering the restrictions imposed by two countries namely Sweden and India during the COVID-19 as in the following section.

6. COVID-19: SWEDEN VERSUS INDIA

Sweden has imposed only milder restrictions during the COVID-19. Ashok Swain [12] summarises these as follows: "It has stopped classroom teachings in the universities and high schools; postponed the soccer season; and, banned the gathering of more than 50 people. Aside from this, life goes on in the country, as usual. Offices, schools, shops, bars, and restaurants are open like before, as are the spas and hairdressers. Very few people are wearing masks while walking outside." The strategies followed by Sweden are different from even those in other Scandinavian countries. On the other hand, India has followed a blanket lockdown for a number of weeks.

If people are informed and if they are careful in protecting themselves, and if their physical environment enables social distancing, then government-imposed restrictions may not be that required to control the negative externality. If people are careful in limiting their interactions with others, then government intervention in the exchanges (interactions) due to the information asymmetry may not be that important. The government can save enforcement costs that is necessary for such interventions. Those who are infected can also be self-isolated at home and only those with chronic conditions need to be hospitalized.

[12] COVID-19 STRATEGY – THE SWEDISH MODEL AND LESSONS FOR INDIA UNIVERSITY PRACTICE CONNECT, AZIM PREMJI UNIVERSITY, https://practiceconnect.azimpremjiuniversity.edu.in/covid-19-strategy-the-swedish-model-and-lessons-for-india/ (last visited May 12, 2020).

There can also be a trade-off for individuals with respect to the safety and personal freedom. It is not unusual for people to carry out apparently unsafe activities (like adventure sports) based on their personal discretion. There could be a societal aggregation of this trade off and hence there could societies which may not like a higher level of governmental intervention in the space of personal freedoms even if that is aimed at ensuring the safety of its citizens.

Given the knowledge that the end-result of COVID-19 is the chronic infection of about 5-10 percent of people, and given the personal freedoms people may enjoy, a strategy that protects who are highly vulnerable people (say by banning visitors to old age homes) or by ensuring that enough hospital workers are available (say by keeping their children in schools[13]) may become acceptable to certain countries. This may be seen as a desirable strategy since the long-run objective is to achieve the herd immunity for a substantial section of the population. Such a strategy would not lead to major economic losses and this may enhance its attractiveness.

However, such a strategy may not be acceptable to India. Or the expected loss due to this strategy could be much higher. This could be so since many people may not take adequate personal care and that may lead to a higher level of infections in the country. Many people may not be able to isolate themselves due to different constraints. Given the limited healthcare infrastructure available within the country, it may not be able to treat all chronically infected patients if infections spread fast. The possible increase in the death rate may be viewed socially and politically very costly, and that may make the blanket lockdown attractive.

There could have been another strategy in India. This is to test a large number of people who are suspected to have contacts with infected people. (Such a large-scale testing was practiced in a number of developed countries). Such a testing could have been used to practice less severe restrictions as noted in the previous section. However, the cost of large-scale testing can be high considering the size of India's population. This too may enhance the attractiveness of the blanket lockdown for the government since it has to bear the political costs of a higher level of infection and deaths, whereas the losses due to the blanket lockdown is shared by the society at large.

[13] A strategy used by Sweden

7. APPENDIX: A SIMPLE MODEL DESCRIBING THE SOCIAL COST

We have discussed three strategies, lockdown, changing habits, and testing, to combat COVID-19. Now, the question is, should a country use one or a mix of strategies. Also, should there be any limit to using a strategy? A simple model can be used to analyze the choice among the three strategies.

Let SC be the social cost of COVID-19 that a country wishes to minimize. The social cost is the function of three strategies, (i) inculcated new habits that leads to more careful actions by citizens[14] (h), (ii) the share of economic activity not allowed by the government (x), and (iii) the large-scale testing to detect infected people (t) i.e. $SC = C(h, x, t)$. The three strategies are substitute of each other.

The social cost is combination of two costs, $f(h, x, t)$ and $g(h, x, t)$, where $f(h, x, t)$ is the cost of deaths due to infection and $g(h, x, t)$ is the cost of preventing infection by using one of the three strategies. These costs may differ among countries.

Let us assume that $f_x = \frac{\partial f(h,x,t)}{\partial x} < 0$, $f_h = \frac{\partial f(h,x,t)}{\partial h} < 0$, , $f_t = \frac{\partial f(h,x,t)}{\partial t} < 0$ $g_x = \frac{\partial g(h,x,t)}{\partial x} > 0$, $g_h = \frac{\partial g(h,x,t)}{\partial h} > 0$ and $g_t = \frac{\partial g(h,x,t)}{\partial t} > 0$. The first three inequalities mean that there will be less deaths with more stringent ban on economic activity, higher investment in changing habits or creating awareness and testing at larger scale. The fourth, fifth and sixth inequalities signify an increase in the economic losses as the ban on economic activity becomes more stringent, a higher investment requirement for inculcating better habits and a positive relation between the level of testing and the cost of testing.

Since f_x, f_h, and f_t denotes the lowering of cost of deaths due to COVID-19, they represent the marginal benefits of banning economic activity (MB_x), the marginal benefits of creating awareness (MB_h) and the marginal benefits of testing (MB_t). However, negative values of f_x, f_h, and f_t mean that $MB_x = -f_x$, $MB_h = -f_h$, and $MB_t = -f_t$. Similarly, g_x, g_h, and g_t are the marginal cost of banning economic activity (MC_x), the marginal cost of creating awareness (MC_h) and the marginal cost of testing (MC_x).

[14] The investment required to inculcated new habits may include large information campaigns and enforcing certain
rules like making everyone wear mask. These actions do not need banning an economic activity but still requires large investment.

The aim of a country is to minimize the social cost $C(h, x, t)$, i.e.

$$min\ SC = f(h, x, t) + g(h, x, t)$$

Let us assume that SC is minimum at h^*, x^*, and t^*. The first-order condition of a minima will be

$$\frac{\partial C(h^*, x^*, t^*)}{\partial x} = f_x + g_x = 0$$

$$-f_x = g_x$$

$$MB_x = MC_x \qquad (1)$$

$$\frac{\partial C(h^*, x^*, t^*)}{\partial h} = f_h + g_h = 0$$

$$-f_h = g_h$$

$$MB_h = MC_h \qquad (2)$$

$$\frac{\partial C(h^*, x^*, t^*)}{\partial t} = f_t + g_t = 0$$

$$-f_t = g_t$$

$$MB_t = MC_t \qquad (3)$$

Combining (1), (2) and (3), we will get

$$\frac{MB_x}{MC_x} = \frac{MB_h}{MC_h} = \frac{MB_t}{MC_t} \qquad (4)$$

We shall assume that the marginal benefits, though positive, are decreasing (it requires $f_{xx} > 0$ $f_{hh} > 0$ and $f_{tt} > 0$) and the marginal cost is increasing (i.e. $g_{xx} > 0$, $g_{hh} > 0$, and $g_{tt} > 0$). These assumptions ensure that our second-order condition of a minima is satisfied.

Equations (1), (2), (3) and (4) mean that to minimize the social cost, each strategy should be used until its marginal benefits are higher than or equal to its marginal cost. A country may choose one or more strategies depending on their marginal benefits and marginal costs. In the

context of COVID-19, the situation may require a country to choose a mix of three strategies, though their optimal relative quantities may vary from country to country or state to state.

Equation (4) shows that the relative importance of a strategy depends on their relative marginal costs and marginal benefits. For example, a smaller MC_h must be balanced with a smaller MB_h. Since the marginal benefits are declining, a lower MB_h means choosing a high value of h to minimize the social cost. Since people having better education are in a better position to recognize authentic information and quick to understand the required precautions, the marginal cost of inculcating new habits is lower for them. Thus, the countries with better education like Sweden may depend more on creating new habits and awareness than banning economic activities. On the other hand, a high MB_h will compel the country to invest less in changing habits of its people and to prefer banning economic activities like it has happened in India. (Since there are large differences among Indian states, the optimization may require different strategies for different states).

It does not mean that a lockdown is less costly for a developing country like India. The cost of lockdown in terms of the loss of livelihood and income may be much higher in a developing country as compared to a developed one. The lack of an effective social security system makes the citizens of a developing country move vulnerable to the lockdown. In comparison to these two options, the option of testing at large scale may be cheaper for the developing countries. The relatively lower salaries of health workers in developing countries mean that the cost of testing may not be too high for them. The relatively lower marginal cost and higher marginal benefits (as pointed out earlier) of this option may warrant the large-scale expansion of testing capacity (i.e. choosing a higher value of t) to minimize the social cost.

8. EPILOGUE

The need for restrictions and intervention by governments during a pandemic is somewhat obvious due to different kinds of market failure (which make private actions and voluntary exchange) inadequate. However, there can be multiple strategies which may lead to different costs of enforcement and losses due to forgone economic activities. What is selected may depend on contextual, economic, social and political factors. There may be possibilities of

using innovative strategies that can minimize the total social cost. However certain context may allow the use of such cost-minimizing strategies where as others may not.

RESHAPING AND RE-STRUCTURING THE JUDICIARY- LAW AND ECONOMIC ANALYSIS

Krishna Agarwal[1]

1. INTRODUCTION

Rule of law is an important facet of Welfare State. The State is not an end in itself and an obligation is conferred on the State to meet the interests of the citizens.[2] Access to Justice is a basic Fundamental Right granted by the Constitution of India.[3] However, its fruits remained confined to a few until the process of adjudication and justice delivery is streamlined in the country, keeping newer challenges in mind. A closer look will reveal that the Rule of Law is directly proportional to the economic growth of the country.

India ranked 63 out of 190 countries in the Ease of Doing Business Index, 2020[4] while it ranked 69 out of 128 countries in Rule of Law Index in 2020.[5] According to Institute for Economics and Peace, approximately 9 % of the GDP is cost to India due to lack of proper justice delivery system. Thus, it is important to have a discourse on how the legal rules and standards controlling adjudication affect the efficiency of the judicial system.

Indian judiciary in Pre-COVID times was already facing the problems of backlog, pendency, the inadequate proportion of judges, lack of infrastructure etc.[6] COVID-19 can be seen as a negative externality as it has posed a serious crisis to the justice delivery system in India. Thus, a policy to

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[2] Harry W. Jones, *The Rule of Law and Welfare State,* 58 COLUM. L. REV. 143 (1958).
[3] Anita Kushawaha v. Pushpa Sadan, AIR 2016 SC 3056.
[4] *Doing Business in India,* THE WORLD BANK (Nov. 16, 2020), https://www.doingbusiness.org/en/data/exploreeconomies/india.
[5] *WJP Rule of Law Index,* WORLD JUSTICE REPORT (Nov. 16, 2020), https://worldjusticeproject.org/rule-of-law-index/country/2020/India/.
[6] Madan B. Lokur, *India's Judiciary is Facing an Increasing Lack of Trust by Public,* OUTLOOK (Jan. 13, 2020), https://magazine.outlookindia.com/story/india-news-indias-judiciary-is-facing-an-increasing-lack-of-trust-bypublic/302545 (Aug. 25, 2020).

address this concern must be such that the marginal benefit gained due to the introduction of the policy exceeds the marginal costs accrued due to its introduction.[7]

To combat COVID-19, India has adopted many measures and several amendments were done in various statutes. One can see that there exists a trade-off between the Right to Health and the Right to Access of Justice. The choices made by people will vary for different facts and circumstances. To deal with the issue, it was necessary that certain rules be set up for balancing the outcome of trade-off. On an optimistic note, COVID-19 has given an opportunity to strengthen the judiciary by negating the shortcomings present in the system.

The researcher has used the secondary data available through the Law Commission Report, India Justice Report, Daksh Report, Vidhi Legal Report and Supreme Court resources to attempt a quantitative analysis. The researcher has also taken reference from the works of Robert Cooter to comprehend the Law and Economic Analysis of Litigation and Out of court settlements. Further, the researcher has analyzed the situation of COVID-19 in India by referring to various Notifications, Circulars and the Ordinance released by the Government of India.

The research paper covers various perspectives to comprehend the working of judiciary, problems in the judicial system and some solutions to reshape and restructure judiciary. First, using microeconomics, law and economic analysis of litigation and out of court settlements is done to comprehend that how legal actors respond to incentives in the form of legislations, institution rules etc. Second part of the paper discusses the Public choice theory to comprehend the working of judiciary and its ancillaries. This will give a conceptual framework regarding the important factors that influence the delivery of public goods in the form of Access to Justice. The third part of the paper looks at some of the problems in the institution of judiciary with the help of facts, figures and graphs. The aggravation of the impediments in Indian judiciary which are reflected during COVID-19 is discussed in detail taking cue from Government Notifications, Court rules etc. The conceptual framework discussed in the first, second and third part of the paper compels us to think and develop solutions to restructure and reshape the judiciary during COVID-19. COVID-19 has thus given us an opportunity to re-look and re-visit the infrastructure, budgeting, conventional

[7] Economic Analysis of Government Restrictions on Individual Rights During Covid -19, June 9, 2020 https://youtu.be/orPzBjCI65M (last visited on Sep. 5, 2020).

notions which has increased the social costs during COVID-19 due to lack of ex-ante preparations. At the end, the researcher has proposed few solutions based on the conceptual framework to make the Post-COVID-19 world more efficient.

2. LAW & ECONOMICS ANALYSIS OF LITIGATION

The role of the judiciary can be two-fold 1) Dispute resolution 2) set precedents. The instruments of economic analysis can prove to be an effective tool to comprehend the reason behind the need for adjudication between the parties in dispute.

In some situations, individuals might favor out-of-court settlements (bargain theory) and in some legal entitlements are necessary in the first place when the other party has not consented to the harm. For e.g. in the case of accidents, the driver has an option to take adequate precautions and lower the harm, but he may not do so if taking precautions in the first place is a costly affair. If the parties are able to bargain by maximizing their own surplus, then by virtue of the Coase Theorem efficiency can be reached by no intervention in the market. However, in the case wherein the driver hits a pedestrian the legal entitlement is necessary as the pedestrian didn't consent for a bargain. The pedestrian again faces a trade-off between litigation and out of court settlements. He has to calculate the immediate costs (hiring a lawyer, filing the case) and estimate the benefits in the future (victory, strengthened relationships). After this, an individual has to bargain with each other.[8]

A cooperative solution will yield an out of court settlement while a non-cooperative solution will lead to litigation or an adversarial trial as in India. While negotiating the allocation and distribution of the resources should be efficient. This is possible when the transaction costs are minimum,

[8] Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J. ECON. LIT. 1067, 1074 (1989).

Liabilities are imposed on the party who can bear it at the minimum costs while rights/resources should be allocated to the one whose utility will be maximized the most.[9]

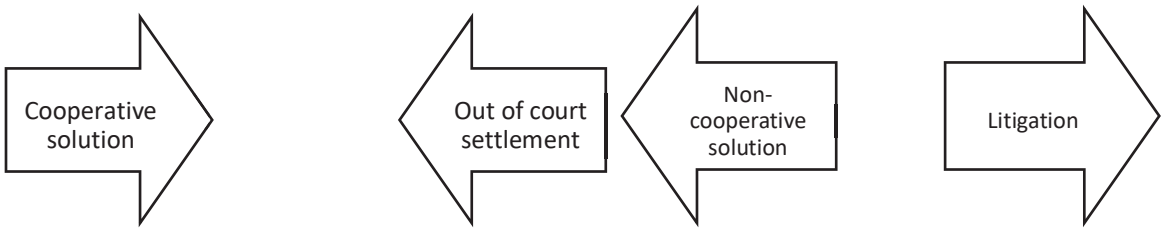

Fig. 1 Two options in dispute

The litigation can prove to be successful for the plaintiff only if **(X1-Y1) > (X2-Y2)**; (X1=benefit in litigation, Y1= costs ascertained in litigation, X2= benefits in out of court settlements, Y2= costs ascertained in out of court settlements). Thus if the Government wants to reduce the burden on courts then a mechanism should be developed where the benefits in out of court settlements are higher and the costs for the parties to choose out of court settlements lower. However, there might be scenarios when information asymmetry exists such as the parties have some vested interests in opting litigation (e.g. reputation, buying time) and the cooperative surplus although being positive, the parties not being satisfied with it opt for litigation.[10]

Law and Economic analysis reflect that when the recovery of advocate costs is made possible through law (Section 35[11], 35A[12] and 35B[13] of Civil Procedure Code, Commercial Courts Act[14], Advocate Rules etc.), the transaction costs are decreased and the Coase theorem can be applied. This mechanism incentivizes both the plaintiff and defendant to come up with honest litigation disputes and not frivolous claims which consumes the time and energy of the judiciary, in the scenario when both time and resources are in constraint.

This will further promote out-of-court settlements. This is because, if the probability of the defendant winning the case is low, he won't be interested in delaying the case or buying time because being a rational individual he will not want to lose the case and pay a hefty sum as advocate

[9] *Id*.
[10] COOTER, *supra* note 7.
[11] Code of Civil Procedure, 1908, § 35, No. 5, Acts of Parliament, 1908 (India).
[12] Code of Civil Procedure, 1908, § 35 A, No. 5, Acts of Parliament, 1908 (India).
[13] Code of Civil Procedure, 1908, § 35 B, No. 5, Acts of Parliament, 1908 (India).
[14] Commercial Courts Act, 2015, No. 4, Acts of Parliament, 2015 (India).

costs to the plaintiff. Similarly, the plaintiff will try to settle the matter as early as possible, and accepting the compromise/negotiating terms with the defendant will prove to be advantageous as the discounted gain will approximately be equal or greater, as the case may be.

The function of the judiciary is important to disincentivize the wrong-doers and create deterrence in criminals. This is possible only if the certainty and probability of punishment are greater than the harm imposed such as **Harm = Sanction/ Probability**.[15] The wrong estimation of the courts or inadequate punishment, delay in proceedings decreases the probability of punishment, and the effect of law and justice is diminished. Thus, it becomes pertinent to re-shape the judiciary if the justice system is hampered.

3. WORKING OF JUDICIARY WITH RESPECT TO THE PUBLIC CHOICE THEORY

Public Choice Theory proves to be an efficient and systematic way to study the functioning of public institutions and the public policies present in the system. This theory assumes that the actors in the institution are governed by their own self-interest. Thus, in the delivering of justice as a public good the prominent actors are the judges, lawyers, legislature, police and the parties itself. Legislature main self-interest is to being re-elected to gain authority. Lawyers are interested in multiplicity of hearings so that they can charge a hefty amount from the clients. The police system has varied interests such as security, promotions, political vantage point etc.[16] The Constitution of India provides in the article that judges should have a fixed salary, tenure, etc.[17] Some concerns were raised that the judges might be influenced by future lucrative employments. Thus, to check arbitrariness and restrict the actors from pursuing their own self-interests, Doctrine of Separation of Powers was conceptualized. The Constitution of India cannot be merely considered a document having chapters, articles and doctrines but it is an institutional structure that generates social choices.

[15] Nuno Garoupa, *The Scope of Punishment: An Economic Theory,* EJLE 10 (2010).
[16] Frank B. Cross, *The Judiciary and Public Choice,* Hastings L.J. 50 (1999) (hereinafter "CROSS").
[17] INDIA CONST. art. 124.

However, Judiciary in India is considered as a sacrosanct institution and it is a notion that judiciary will give paramount importance to general welfare as compared to collective rent-seeking. Various public choice scholars have regarded that "*the best people to resolve issues are the judges*". The access to justice is swayed in favor of the people having more of resources. The litigation of disputes involves additional costs such as the fees of the lawyer which is in turn directly proportional to the skill-set acquired by the lawyers. The court can be considered as a venue where each of the parties play their best foot but it strongly depends on their socio-economic status, the resources available to them etc. The decision of the judge is further dependent on the expert witness, participation of amicus curie etc. This augments the possibility that interest groups are more likely to succeed than the disadvantaged or minority groups owing to the lack of resources. The Indian judiciary works on the basis of hierarchy regulated by pecuniary, territorial and subject matter jurisdiction. From the cost-benefit analysis it might not be possible for each individual to file an appeal in the higher court due to constraint of resources.

One problem that may arise in the practical sense is that the defendant having excess resources might purchase the plaintiff's pleader. This indirectly might affect the judge's ruling as litigation is India is highly dependent on the working of precedents. Thus, purchasing of the pleader may lead to the purchasing of precedents. This will further defeat the ends of justice and prolong the continuation of case in the form of appeal, revision, review etc.

The Public Interest Litigation recognized by the Indian Judicial system takes care of the problem wherein the public welfare is given more importance than individual's self-interest. Thus, the doctrine of standing as practiced in USA might have adverse consequences in India.

The Public choice theory can expound the controversy between the legislatures and the judiciary to set up a National Judicial Appointment Commission where both the stakeholders were governed by their own self-interest.

Judiciary in India plays a paramount role in the process of judicial review according to Article 13(2) of the Indian Constitution[18]. It attempts to restrict the self-interests of the legislature, the executives, bureaucrats to augment the access of public goods and maximize public welfare. The

[18] INDIA CONST. art 13, cl. 1.

importance of judicial review is reflected when Part III of the Indian Constitution is violated. However, concerns had been raised that higher interference of the judiciary in the administrative law or judicial activism may defeat the legitimate concerns of public welfare by the legislature. Thus, the change in rules and the functioning of the institutions might change the incentives given to the actors present in the judicial system. Public choice theory enables us to choose between varying degrees of imperfect alternatives to maximize social welfare and optimize the distribution and allocation of public goods i.e. access to justice.[19]

4. MICROSCOPIC VIEW OF THE JUDICIARY

An Independent Judiciary is a prerequisite for the functioning of democracy and protecting the Fundamental Rights of the citizens. If the Fundamental Rights or Part III of the Constitution is violated one has the remedy to move to the Supreme Court of India directly. In the data collected, it should be noted that discrepancies may arise as there are different ways of tabulating data in different High Courts and Subordinate Judiciary (counting problems of interlocutory applications, traffics, e-challans) which makes it difficult to do a pan India analysis.

4.1 Vacancy

Court	Sanctioned Strength	Vacancy	Vacancy Percent
Subordinate Judiciary	22 677	5984	26.4
High Court	1079	395	36.6
Supreme Court	31	6	19.4
Overall	23787	6385	26.8

Table 1- Vacancy

Source: Daksh India Justice Report

[19] CROSS, *supra* note 16.

Thus, from Table 1[20], we can see in the world's largest democracy the overall vacancy in the judiciary (2018) is approximately 26.8%. The proportion of less number of judges varies from different states and across the hierarchy of judicial system. The vacancy of non-judicial staff is approximately around 20% of the approved working strength. The 245th Law Commission of India had raised concerns over the method to decide the sanctioned strength of judges. Several methods were discussed in the report such as the ideal caseload method (Total number of cases/ Ideal number of cases), time-based method [(avg time taken to decide a type of case * the number of cases of that type)/ number of judicial hours for a judge], rate of disposal method etc. According to the report to decrease the pendency and backlog, the additional number of judges required can be calculated as ((Avg institution/ Avg Disposal) - current number of judges).[17]

4.2 Trade-off between quality and quantity

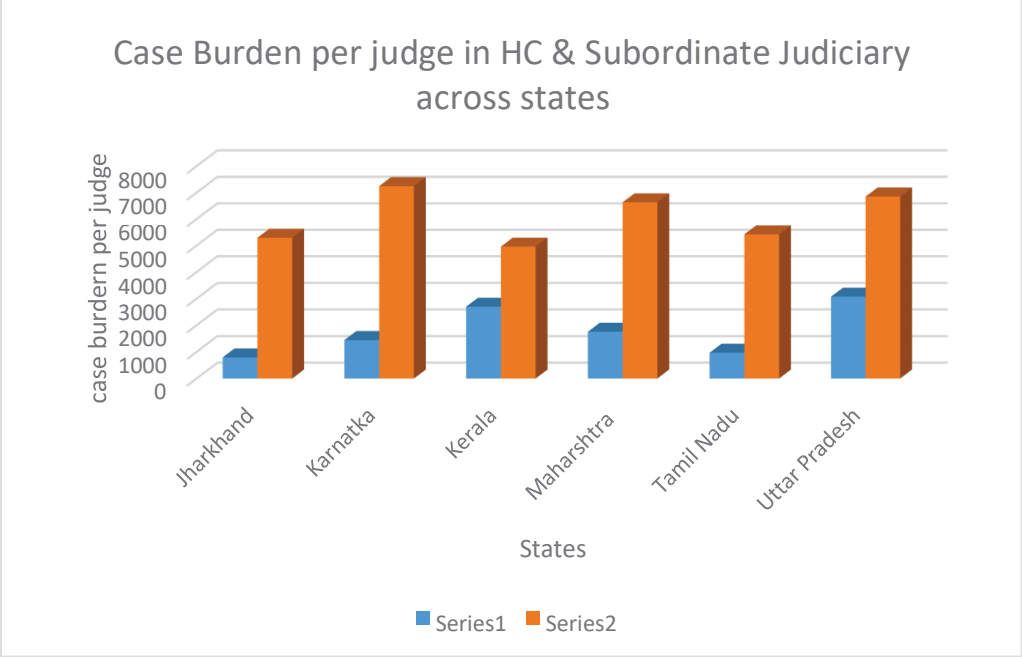

Chart 1 (Series 1- subordinate judiciary; Series 2- High Court)

[20] DAKSH, INDIA JUSTICE REPORT: RANKING STATES ON POLICE, JUDICIARY, PRISONS AND LEGAL AID (2019) (hereinafter "DAKSH"); LAW COMMISSION OF INDIA, REPORT NO. 245: ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER (2014) (hereinafter "REPORT").

From chart 1[21] it is clear that the burden of judge is higher in High Court as compared to Subordinate Judiciary. Therefore, the budget allocation to the High Court is more as compared to the Lower Courts. Appeals, Article 226 and 227 of the Constitution which discusses the writ and original jurisdiction explains the higher workload on the High Court. Despite the higher workload on the High Court, the vacancy in High Court (36.6%) is greater than that of Subordinate judiciary (26.4%). Thus this might incentivize the judges to evaluate their opportunity costs and compromise on the quality provided the stability given to them by the Indian Constitution.

4.3 Public Expenditure

The State or the Central budget allocated to the judiciary is quite meagre. Of the total budget share of the Union Government, only 0.08% is allocated to the judiciary whereas all the states cumulatively allocate 0.61% of the total spending by the States. The Fifteenth Finance Commission has calculated that approximately 564 lakhs per State is required to augment the use and efficiency of technology. The use of technology has got paramount importance during COVID-19.[22]

[21] DAKSH, *supra* note 20.

[22] CENTER FOR BUDGET AND GOVERNANCE ACCOUNTABILITY, MEMORANDUM TO THE FIFTEENTH FINANCE COMMISSION ON BUDGETING FOR THE JUDICIARY IN INDIA (2018).

Institution, Pendency And Disposal Of Cases

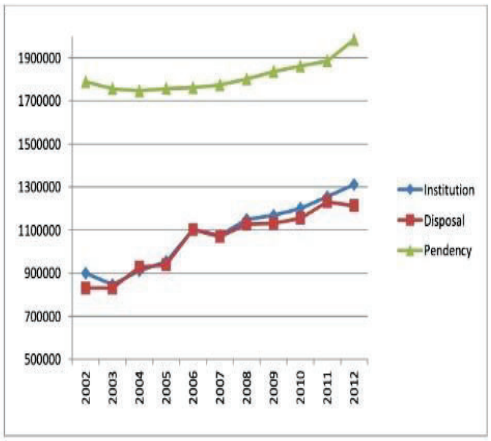

Figure 1: Institution, Disposal, Pendency in the Higher Judicial Service, 2002-2012.

Chart 2- Higher Judicial Services

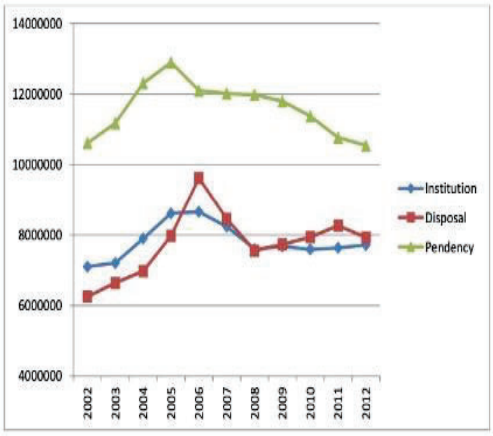

Figure 2: Institution, Disposal, Pendency in the Subordinate Judicial Service, 2002-2012.

Chart 3- Subordinate Judicial Services

Source: Daksh India Justice Report

The charts reflect the Institution, Disposal and Pendency in the Higher and Subordinate Judicial service from 2002 to 2012. The line graph in Fig.1 shows that in Higher Judicial Service, the rate of the institution of suits, the rate of disposal of suits is increasing and in the end, the rate of pendency took a dip. But the Rate of the institution of suits is much higher as compared to the rate of disposal of suits and rate of pendency. Fig. 2 shows the line graph of the Subordinate Judiciary, it can be seen that the rate of the institution of suits is decreasing and the rate of pendency and disposal of suits is remaining constant.[23] Thus, we can compare and analyze that the High Courts are facing more of pendency as compared to Subordinate judiciary.

4.4 Problems in Procedural Laws

Order XXI of CPC, 1908[24] discusses the procedure to be followed for the execution of the decree. The execution of the decree is a herculean task where the successful party again has to devote his time and resources to compel the unsuccessful party to execute the decree. This often requires the intervention of Courts in directing the judgment-debtor to pay the dues and is often done by the courts by imposing fine, attaching property, imprisonment, etc. which consumes the constraint

[23] REPORT, *supra* note 20.
[24] Code of Civil Procedure, 1908, § Order XXI, No. 5, Acts of Parliament, 1908 (India).

resources of the judiciary. Also, the lacunas present in Order IX Rule 13[25] relating to ex-parte decree further consumes time of judiciary and augments the number of appeals. The practical purpose of the Civil Procedure Code is not met as the maximization of the surplus of both plaintiff and defendant doesn't happen. Therefore, proper laws should be made keeping in mind the objective of celerity, efficiency, and utility maximization.

5. COVID-19- IN DIRE STRAITS

COVID-19 has affected the judiciary in a severe manner. Due to the negative externality imposed by COVID-19 and a higher degree of Pigouvian model opted by the Government of India, several modifications were made in the conduct of hearing. This has affected the efficiency of judicial system severely as the rate of disposal of cases has decreased. The graph below depicts the trend of disposal of cases from the year 2000-01 to 2020-21.

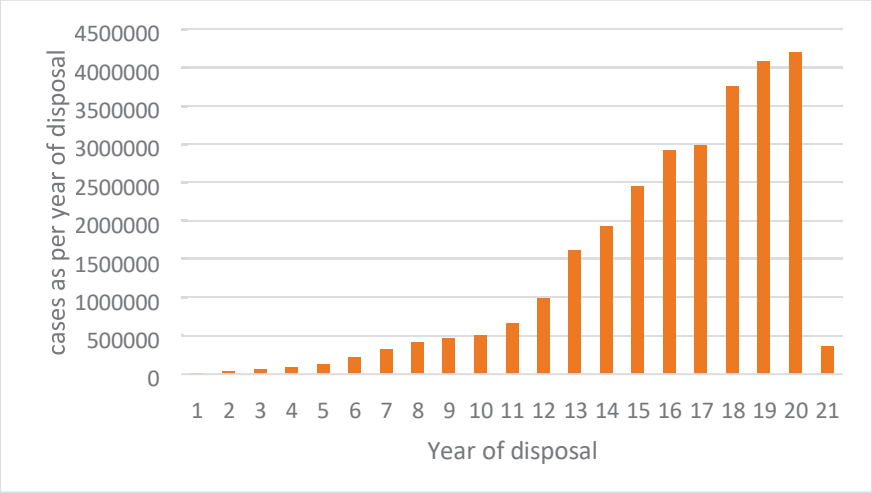

Chart 4- Year of disposal

Thus, we can see that the rate of disposal of cases was increasing from 2000 to 2019-2020[26], and till September 2020, the rate of disposal of cases has not crossed even the half of cases disposed previous year. (rate of disposal of cases of 2020-21 < rate of disposal of cases of 2019-20).

[25] Code of Civil Procedure, 1908, § Order IX Rule 13, No. 5, Acts of Parliament, 1908 (India).
[26] DAKSH, *supra* note 20.

Supreme Court of India has resorted to virtual hearing of the cases on priority basis from March 23, 2020.[27] Usually, the Supreme Court of India disposes approximately 3500 cases per month but from March 23 to April 24, 2020; SC had disposed of only 215 cases. The total number of sittings from March 23 2020 to August 9 2020 was 879. 686 writ petitions filed under Article 32 of the

Indian Constitution were dealt and 12748 matters were heard by the Hon'ble Supreme Court of India.[28]

The COVID-19 Pandemic has increased the number of cases filed and the number of disputes. The cases have increased due to the uncertainty, increase in restrictions, violation of rules, etc. in society. COVID-19 has severely affected businesses as the economy of India is facing a problem both in demand and supply of products. The supply chain of essential commodities is broken and the small producers are worst affected.

Due to the uncertainty and the high opportunity costs when one has to trade-off between the Right to Health and Right to Livelihood, the demand for products has diminished. This eventually leads to an increase in disputes as people refrain from performing their existing contractual duties. The various disputes can be divided into few categories-

1. **Force Majeure -** It has been contended in many cases due to the pandemic, the force majeure clause of the contract should be invoked. Vide Government notification on 19-2-2020[29] stated that

   "A doubt has arisen if the disruption of the supply chains due to the spread of coronavirus in China or any other country will be covered in a force majeure clause. In this regard, it is clarified that it should be considered as a case of natural calamity and force majeure clause may be invoked whenever considered appropriate, following due procedure." The Ministry of New and Renewable Energy[30] has allowed the invocation of force majeure on

[27] Supreme Court of India (Mar. 26, 2020).
[28] *Supreme Court virtual functioning amid COVID-19 over 1500 matters heard*, Bar and Bench (Aug. 20, 2020), https://www.barandbench.com/news/litigation/supreme-court-virtual-functioning-amid-covid-19-over-15000matters-heard.
[29] Ministry of Finance, Force Majeure Clause, No. F. 18/4/2020-PPD (Feb. 19, 2020).
[30] Ministry of New & Renewable Energy, Force Majeure Clause, No. 283/18/2020-GRID SOLAR (Mar. 20, 2020).

account of disruption due to coronavirus with respect to projects related to Renewable Energy. However, despite the restrictions by the Government, in most cases, the invocation of the force-majeure clause will depend on the contractual provisions. Thus the uncertainty related to force-majeure increases the litigation and thus the burden on the court.

2. **Fraud-** The nature and amount of fraud have changed and augmented during COVID-19. The uncertain times of COVID-19, disruption of supply chains, limited essential goods incentivizes the businessmen to commit fraud on delivering its financial statement. The current use allows crimes such as phishing, zoo bombing, and vishing. The risks of leakage of confidential information have also increased.

3. **Merger and Acquisition-** The unprecedented times of COVID-19 has compelled people for the re-examination of the clauses related to the acquisition agreement. One has to properly see and allocate the risks. More prominence will now be given on force-majeure clauses, warranties, etc.[31]

4. **Insolvency-** By the introduction of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, The Corporate Insolvency Resolution Professional was suspended when the default is done after 25th March 2020 by virtue of Section 10A of the Ordinance. Section 7, Section 9, and Section 10 of the IBC are suspended till 6 months which may be extended to one year depending on the circumstances.[32] However, the confusion still remains related to the initiation of proceedings against the personal guarantor. There remain several ambiguities in the construction of Section 10-A which the researcher refrains from discussing in this research. The Govt of India has also increased the threshold limit of the default by the corporate debtor from 1 lakh to 1 crore.

[31] Cameron Adderley, *Worldwide: Covid-19 Merger And Acquisition Update,* MONDAQ, https://www.mondaq.com/hongkong/maprivate-equity/938078/covid-19-merger-and-acquisition-update (Sep. 1, 2020).
[32] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, § 2 (Jun. 5, 2020).

5. **Domestic Violence/ Divorce-** The incidents of violence against the women have augmented after the imposition of lockdown and 'stay at home' policy. According to the National Commission of Women (NCW) 100% rise has been there in the cases of domestic violence.[33] The rate of divorce has also increased in many parts of the country.

The above-listed are some issues that have raised the amount of litigation during COVID-19 in India.

It becomes highly difficult to decide which case should be brought up in urgency. In times of crisis, it is necessary that justice should be accessible to all the people but the most vulnerable sections or issues of the society should be given more preference. The decision of the courts to list a particular matter as urgent should be done in a way where the Marginal Benefits outweigh the Marginal Costs of that decision.

The researchers have compared the data available for April 2019 and April 2020.[34]

S.No	Variables	Apr-19	Apr-20
1	**Fresh applications**	5197	218
2	**Judgement**	59	57
3	**civil cases**	7581	75
4	**criminal cases**	2554	86
5	**Fresh applications (SLP civil)**	52	3
6	**Fresh application (SLP Cr)**	40	8

[33] Mansi vora, Barikar C Malathesh, Soumitra Das & Seshadri Sekhar Chatterjee, *COVID-19 and Domestic Violence Against Women,* NCBI (2020).
[34] Shreya Tripathi & Tarika Jain, *Supreme Court Case-Loads During COVID-19 (April 2020)- A look at the numbers*, VIDHI CENTER FOR LEGAL POLICY, https://vidhilegalpolicy.in/research/supreme-courts-caseload-duringcovid-19-april-2020-a-look-at-the-numbers/ (Sep. 6, 2020).

7	**Fresh applications WP (civil)**	9	5
8	**Fresh applications WP (criminal)**	1	2

Table 2- Comparison of cases in SC in April 2019 and April 2020

Source: Vidhi Legal Report

Thus, we can make the following conclusion from the data listed above-

1. The number of fresh applications decreased by 95.805%
2. During COVID-19, one can see that criminal cases are given more prominence as compared to civil cases. The ratio of criminal to civil cases has changed from 0.336 to 1.14. 3. The ratio of the fresh application of SLP Criminal to SLP Civil has changed from 0.76 to 2.67.
4. The decrease in the number of writ petitions filed in the Supreme Court as fresh application has not decreased significantly. However, one can clearly observe that Writ Petitions pertaining to criminal cases has increased whereas those of civil cases has decreased.
5. The number of judgements given in April 2019 and April 2020 has not decreased significantly despite lockdown.

The pendency rate in the Supreme Court is alarmingly high and the rate of disposal of cases has decreased. Thus, for the first time, the Supreme Court of India amended its rules and has allowed the single bench to hear transfer petitions and bail matters.

The Supreme Court has allowed e-filing of cases 24*7 and the court fees are paid through an online payment.[35] However, the problem arises due to the lack of digitized documents and evidence

[35] Bhadra Sinha, *Covid pushes Supreme Court to fast-track reforms, justice delivery could get smoother*, The Print (May 22, 2020), https://theprint.in/judiciary/covid-pushes-supreme-court-to-fast-track-reforms-justice-deliverycould-get-smoother/426443/.

which has to be presented in the Courts. The online proceedings are also prone to a cyber- attack or breach of data privacy.

Several scholars have criticized the lack of open-hearing or live-streaming of proceedings which questions the accountability of the judiciary. The Bar Council of India (BCI) has argued that approximately 90% of the lawyers are not tech-savvy. The '1881' helpline is started by the court to help the advocates to effectively use the technology during proceedings. It is pertinent that a fair, transparent system with adequate infrastructure is developed for the success of virtual litigation.[36] A proper watchdog mechanism will ensure that a judge follows the protocol of 'veil of ignorance' and no 'Market of Lemons' arises.

The subordinate judiciary is the worst hit during the COVID-19. The lack of proper connectivity, data security risk in case of foreign apps such as Zoom, access, and transmission of documents and evidence electronically, ineffective emotional, or social contact with the judges are some of the impediments of the online system.[37] In various courts, the stance for the urgency of matters is related to remand, bail, recording of statements under Section 164 of CrPC, and important matters necessary for the investigation by the police.[38]

However, Virtual courts are necessary to preserve the 'Rule of Law' and the Fundamental Rights of the parties. One should overcome the shortcomings by working on the infrastructure of the judiciary by allocating a larger amount of budget to it. For adjudicating certain types of cases Virtual courts in the Post-COVID time could be a possibility to decrease the burden on courts.

6. CONCLUSION AND RECOMMENDATIONS

COVID-19 has proved to be a negative externality in the system which has increased uncertainty, litigation, and scarcity of resources. At the same time, it provides an opportunity to think about the flaws in the system and overcome it. The lack of ex-ante preparation in the past has aggravated the

[36] *The Arguments for and Against Virtual Courts,* DT NEXT (May 12, 2020), https://www.dtnext.in/News/TopNews/2020/05/12004038/1229593/Editorial-The-arguments-for-and-againstvirtual-courts.vpf.

[37] Blake Candler, *Court Adaptations during COVID-19 in the World's Two Largest Democracies,* SSRN (May 24, 2020).

[38] District Court- Chamoli, Gopeshwar, *During COVID-19 Lockdown Urgent Matter,* 08-2020 (Apr. 15, 2020).

problem during COVID-19. Thus, proper public policies should be devised to maximize social welfare.

The researcher proposes to develop a general rules and standards of certain types of disputes which can be availed by judges. These rules and standards have to be developed scientifically. The increased certainty in the system given the socio-economic of status of India will increase predictability and decrease the amount and time for litigation. If one analyses, it becomes clear that one needs to increase the strength of judges at priority basis.

Some concerns had also been raised that a country should have disinterested adjudicators (due to stability of employment) or competitive adjudicators. According to the researcher keeping the independence of judiciary intact, certain level of competition should be introduced in the system so that the judges are incentivized that a proper balance between the quality and quantity of the judgement delivered is maintained. A periodic review of the working of the judiciary should be done in a timely manner so that the problem of asymmetric information and incomplete information is cured.

The vacancies in the judiciary should be filled timely and the retirement age of judges in Subordinate Judiciary should be increased. Also, the increase in strength of the judiciary at Subordinate and High Court level will not suffice if there is no increase in infrastructure, staff proportionately. Better infrastructure, use of time-based frames, skillful training of judges, and new technology can help one to deal with the problem.

Many countries such as the USA are now focusing to develop ODR (Online Dispute Resolution) and Alternative Dispute Resolution (ADR) which can prove to be an effective way of reducing the backlogs. The use of mediation will help in reducing the transaction costs between the parties and achieve an optimal efficiency by the application of the Coase Theorem. Arbitration is time and cost-effective which can reduce the pendency and backlog in courts. Lok Adalat can also be an efficient way to deal with petty civil cases. However, presently the infrastructure of ADR is limited in India and is used only in certain cases. Lok Adalat doesn't have proper infrastructure and not well-qualified lawyers participate in it. The success of ADR is highly dependent on the priorities

and rational choices made by the parties to maximize their own gains. Thus, the legislative framework of ADR in India should be made more robust so that parties are incentivized to adopt ADR mechanism than opt for litigation.

Another method to deal with the dispute can be pretrial negotiations and in case of disputes of insolvency, pre-packaged insolvency can prove to be a better alternative. Proper training should be provided to judges for using online resources and COVID-19 related disputes.

Time frames are necessary with little flexibility in limited circumstances to make the procedural laws effective. Civil Procedure Code, Criminal Procedure Code, Limitation act, etc. provides a time frame wherein certain processes in the suit have to be completed in a time frame. But it doesn't mention the time frame to complete the entire proceedings by the court. IBC has come up with the provision of completing the proceedings in 330 days, however, it is generally not implemented in letter and spirit. A Case-specific time table can be made to decide the allocation of resources which in long run maximize the allocative efficiency.[39]

At, the time of crisis it is necessary that given the availability of resources, proper allocation and distribution of resources should be made. The judiciary of India is already facing many shortcoming, COVID-19 has given us an opportunity to look at the working of judiciary in the light of public choice theory. The rebuilding of judiciary as envisaged by Hon'ble Mr. Justice (Retd.) Ranjan Gogoi, Former Chief Justice of India has become pertinent during COVID-19. The discipline of Law and Economic analysis can be done to amend the shortcoming of judicial system in India so that the delivery of public goods (access to justice is optimal. The optimal functioning of the judicial system can be achieved when Marginal Benefits outweighs the Marginal Costs.

[39] REPORT, *supra* note 20.

ANNEXURE

April 2020- Supreme Court Cases. The data has been collected by the researcher through the SC website.

Date	Case number	nature of proceedings	Is it a covid19 related case?	civil/criminal	name of judges (bench)	point of contention
Apr 29	C.A. No.002377-002377 / 2020	SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 27	C.A. No.007231-007231 / 2012	APEEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	HOUSING
Apr 24	C.A. No.006076-006076 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	WILL
Apr 24	CONMT.PET.(C) No.-000034000034 / 2016	WRIT PETITION (CRIMINAL)	NO	CRIMINAL	JUSTICE MR SHAH	CONTEMPT OF COURT
Apr 1	Crl.A. No.001120-001120 / 2010	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE S. ABDUL NAZEER	TADA
Apr 1	C.A. No.001526-001526 / 2016	APPEAL	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE M.R. SHAH	NGT

Apr 24	C.A. No.006110-006110 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE N.V. RAMANA, HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, HON'BLE MR. JUSTICE B.R. GAVAI	INCOME TAX

Apr 27	Crl.A. No.000989-000989 / 2018	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE N.V. RAMANA, HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, HON'BLE MR. JUSTICE B.R. GAVAI	CORRUPTION
Apr 17	C.A. No.002813-002813 / 2017	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR, HON'BLE MR. JUSTICE R. SUBHASH REDDY	VACANT POSITION OF TEACHERS
Apr 15	C.A. No.002236-002236 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN, HON'BLE MR. JUSTICE A.S. BOPANNA	RETIRAL BENEFIT
Apr 24	C.A. No.009775-009775 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME RETURNS
Apr 29	C.A. No.002379-002379 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	COMPANIES ACT
Apr 22	Crl.A. No.000722-000722 / 2017	APPEAL	NO	CRIMINAL	ON'BLE MR. JUSTICE ARUN MISHRA	NARCOTICS
Apr 27	C.A. No.006398-006398 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CUSTOMS ACT

Apr 29	C.A. No.005749-005749 / 2012	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 22	C.A. No.003609-003609 / 2002	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MS. JUSTICE INDIRA BANERJEE, HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE	RESERAVATION
					MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	
Apr 27	C.A. No.002217-002217 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CENTRAL SALES TAX ACT
Apr 17	C.A. No.003240-003240 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	SENIORITY IN RESERVATION
Apr 24	C.A. No.002368-002368 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	VACANCIES
Apr 13	W.P.(C) No.-000439 / 2020	WRIT PETITION	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE AJAY RASTOGI	GOVERNOR/ASSEMBLY
Apr 6	SMW(C) No.-000005 / 2020	SUO MOTO WRIT	YES	CIVI.L	CJI	VC

Apr 27	SMC(Crl) No.000002 / 2019	SUO' MOTO WRIT	NO	CRIMINAL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CONTEMPT
Apr 29	C.A. No.002378-002378 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	ARBITRATION
Apr 17	C.A. No.002250-002252 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	POST OF DIRECTOR
Apr 27	C.A. No.007649-007651 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	ELECTRICITY

Apr 3	C.A. No.006875-006875 / 2008	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	PROPRTY
Apr 3	C.A. No.002229-002229 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	DISASTER MANAGEMNT
Apr 24	Crl.A. No.000640-000641 / 2016	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	KIDNAPPING, DEATH
Apr 24	C.A. No.003545-003545 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX

Apr 24	C.A. No.002847-002847 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 17	C.A. No.004594-004594 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR, HON'BLE MR. JUSTICE R. SUBHASH REDDY	MORTGAGE
Apr 13	C.A. No.002230-002230 / 2020	APPEAL	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE AJAY RASTOGI	DRUGS AND COSMETICS ACT
Apr 22	C.A. No.002256-002263 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	INDUSTRIES
Apr 22	C.A. No.007508-007508 / 2005	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE M.R. SHAH	SUGARCANE
Apr 3	C.A. No.-002228 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	ELECTRICITY
Apr 24	C.A. No.002376-002376 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	ARBITRATION

Apr 3	C.A. No.001008-001008 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	INCOME TAX
Apr 29	W.P.(C) No.-000936 / 2018	WRIT PETITION	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	RAJASTHAN JUDICIAL RULES
Apr 17	C.A. No.002237-002237 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR, HON'BLE MR. JUSTICE R. SUBHASH REDDY	TOWN PLANNING
Apr 8	C.A. No.001641-001641 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ASHOK BHUSHAN, HON'BLE MR. JUSTICE S. RAVINDRA BHAT	RETIREMENT
Apr 24	C.A. No.002375-002375 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	RENT AND EVICTION
Apr 17	C.A. No.006216-006217 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR, HON'BLE MR. JUSTICE R. SUBHASH REDDY	PLOT
Apr 24	C.A. No.002374-002374 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR.	DELHI JUDICIAL SERVICE
					JUSTICE DINESH MAHESHWARI	
Apr 27	Crl.A. No.000779-000779 / 2010	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	MURDER

Apr 27	C.A. No.004499-004501 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	LAND REFORMS
Apr 8	C.A. No.002103-002103 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ASHOK BHUSHAN, HON'BLE MR. JUSTICE S. RAVINDRA BHAT	STAFF SELECTION
Apr 22	C.A. No.000667-000667 / 2012	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	NAFED
Apr 24	C.A. No.006146-006146 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	PROPERTY
Apr 24	Crl.A. No.000413-000413 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	EMPLOYEMNT
Apr 15	C.A. No.002235-002235 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN, HON'BLE MR. JUSTICE A.S. BOPANNA	INSURANCCE
Apr 24	Crl.A. No.000414-000414 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	QUASHING OF FIR
Apr 24	C.A. No.002373-002373 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR.	DRT

					JUSTICE DINESH MAHESHWARI	
Apr 24	MA-003082 / 2018	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	HOUSING
Apr 24	C.A. No.002366-002367 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE M.R. SHAH	CONSUMER
Apr 29	Crl.A. No.000417-000418 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	HOUSING
Apr 29	T.C.(C) No.000098-000098 / 2012	TRANSFERRED CASE	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE M.R. SHAH	MEDICAL
Apr 24	Crl.A. No.000416-000416 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	STRIDHAN

THE INCIDENCE OF SAFETY REGULATION ON COVID-19 COMPENSATION CLAIMS

Pranay Jalan[1]

1. INTRODUCTION

The Employees' Compensation Act, 1923, (Act), is the first piece of social security legislation towards providing for speedier, simpler, cheaper and efficient machinery for the determination and payment of compensation to the workmen.[2] The Act is modelled on the premise of a no-fault liability principle, and a liability for payment of compensation under the Act does not accrue due to any fault or wrong doing on the part of an employer.[3] Rather, the compensation is contingent on an employee (victim) showing that an injury arose out of and in course of the employment[4] or in certain occupational diseases there exists a rebuttable presumption that the injury arose out of and in course of the employment.[5]

Nearing a decade since its enactment, the provisions of the Act has been subject to a liberal interpretation by virtue of the courts taking a pro victim stance. A testimony to this fact is the notional extension accorded to an employer's premises, which now includes even an area beyond the boundaries of a traditional workspace.[6] An onslaught of COVID-19 compensation claims under the Employee's Compensation Act, would pose yet another challenge before the adjudicatory bodies in determining whether to allow compensation claims under the Act, and if to allow, how to determine liability, given the intervening uncertainty. By affording a similar liberation interpretation to the expression "arising out of and in course of employment" in COVID-related compensation claims, the adjudicatory bodies can entertain such claims, but determining the liability calls for a further enquiry into the question.

[1] 3rd Year Student, Gujarat National Law University.
[2] P.L. MALIK, P.L. MALIK'S HANDBOOK OF LABOUR AND INDUSTRIAL LAW | EMPLOYEES' COMPENSATION ACT 4-5 (2011). [hereinafter Malik]
[3] National Insurance Co. Ltd. v. Rahmath, (2012) 3 LW 371 (India).
[4] The Employees' Compensation Act, § 3, No. 8, Acts of Parliament, 1923 (India).
[5] The Employees' Compensation Act, § 3(2), No. 8, Acts of Parliament, 1923 (India).
[6] Malik, *supra* note 1.

In the context of the present pandemic, while certain workspaces may have shifted to online safe-havens, the nature of several businesses does not allow them to operate remotely. Depending on the nature of the work and the prevailing circumstances, the workers employed in these activities may be at a greater risk of contracting COVID than the general public. These activities vary in the degree of risk of exposure to COVID-19. As we move from low-risk to high-risk activities, the onus of establishing a causal connection on the victim (employee) transforms into a rebuttable presumption of causation by the injurer (employer), respectively. The issue becomes pertinent if we introspect the difficulties associated with establishing or denying the causal link of an injury such as COVID-19. The delayed onset of symptoms or lack thereof, multiple potential sources of causation, the lack of technological accessibility to trace COVID, and a general knowledge deficit in the academic sphere pertaining to a novel-coronavirus are few of the variables, which make it increasingly difficult for either of the parties, to show that the injury arose out of employment or to rebut in cases where a presumption over causation exists. The next section of the paper discusses how these problems differ in cases where (a) there exists a rebuttable presumption over causation and (b)when there is no presumption over causation, and aims to resolve it by integrating safety regulations within the liability rule.

The third section of the paper takes an economic approach to redress the externalities which arise in a compensation claim under the Act. The approach is an extension of a liability model as professed by Prof. Steven Shavell in his paper.[7] It considers two determinants i.e. *uncertainty over suit* and *differential knowledge of parties* in order to arrive at an optimal redressal model. These determinants favor a safety regulation and a liability rule, respectively. However, given the inherent externalities which exist in a COVID-19 compensation claim, the model is balanced against these externalities.

2. CAUSATION UNDER THE EMPLOYEES' COMPENSATION ACT, 1923

Under the Act, a victim claiming for worker's compensation has to establish her claim on three grounds , i.e. first, an injury has been sustained; second, that the injury has been inflicted as a result of employment; and third and the most essential element being that the injury arose out

[7] Steven Shavell, *Liability for harm versus regulation of safety,* 13(2) THE JOURNAL OF LEGAL STUDIES 357-374 (1984).

of and in course of employment.[8] For the purposes of this paper, the third element is broadly referred to as causation. The word "injury" under the Employees' Compensation Act, 1923, is of a wide connotation and includes a disease as well.[9] When a disease is contracted as the result of a virus, the circumstances create a physiological condition which in the medical parlance can be described as a disease, i.e. the consequential result of an injury, namely the travelling of bacillus.[10] The requirement of causation serves the purpose of tying the injury to the workplace. The conjunctive phrases 'arising out of' and 'in course of employment' signify that there should be some connection between the employment and the injury, and that the injury must be caused during the currency of the employment.[11]

In COVID-related workers' compensation claims, the standard (arising out of and in course of) would be difficult to satisfy. The delayed manifestation of the disease alongside the existence of multiple potential causes of contracting the virus, makes it difficult for the victim to establish this causal connection. Therefore, to avoid such an uncertainty over causation, the Act advocates for a rebuttable presumption over causation in cases where the employment carries a risk of contamination.[12] A rebuttable presumption for occupational diseases nullifies the requirement of establishing that the injury arose out of employment, but affords an opportunity to the employer to rebut that the injury in-fact did not arise out of the employment.

While, this may be a perfect solution to bypass the requirement of a causal connection for infectious diseases, it however, generates another set of externalities, i.e. the employer's inability to rebut the presumption in the absence of a pre-determined standard, hence, a looming uncertainty over the liability of employer. On the other hand, the Act does not afford the same presumption to victims not engaged in activities which have an inherent risk of contamination. However, they can still harp upon the broad contours of establishing an "injury" under the Act, on the condition precedent that requires them to prove the injury arose out of and in course of the employment. However, the uncertainty over causation results in an unreasonably high burden on the employer to establish this causal connection, and as a result, an employer might

[8] *supra* note 3; Municipal Corporation of Greater Mumbai v. Sulochanabai Sadashiv Joil, (1978) ACJ 208 (Bom) (India).
[9] General Manager, Western Coal fields v. Kalasia Bai, (1988) 56 FLR 455 (MP) (India).
[10] Mariambai v. Mackinnon Mackenzie & Co., (1967) 1 LLJ 610 (India).
[11] Mackinnon Mackenzie & Co.(P) Ltd. v. Ibrahim Mohd. Issak, (1969) 2 SCC 607 (India).
[12] *supra* note 4.

escape liability or would have very less incentives to take care. The following sections analyze this problem in greater detail.

2.1 When there exists a rebuttable presumption over causation

Section 3(2) of the Employees' Compensation Act, 1923,[13] provides that if any employee specified in Part A of Schedule III of the Act contracts a disease therein, the disease shall be treated as an occupational disease, and he shall be entitled to avail the benefit of a presumption that the disease arose out of and in course of employment, 'unless proven otherwise' by the employer. Schedule III not only mentions that all health or laboratory related work is to be treated as an occupational disease, but, it also includes any other work which carries a particular risk of contamination. The phrase 'unless proven otherwise' allows the employer to draw up a rebuttable presumption that the injury did not arise from the employment.

The existence of such a rebuttable presumption preserves the idea of restricting an employer's liability, however, this notion gets blurred due to the problems which stem from the uncertain nature of COVID-19 claims. While, there is no onus on the employee to establish a causal connection in this case, the presumption of causation amidst an employer's difficulty to rebut may have undesirable consequences. Thus, there is uncertainty as to whether the court would hold the injurer to be liable. The standard of rebuttal cannot be uniform in all cases, as some activities pose a threat greater than that of its counterpart. For example, a laboratory worker and a worker at a healthcare facility would not be exposed to the same amount of risk. Similarly, the degree of precaution on the part of an employer would also vary, to successfully rebut the presumption over causation. The question as to what level of precautions shall enable an employer to rebut, leaves her liability unrestricted, until an *ex ante* determination is made by a court. Even the courts cannot be presumed to possess a greater knowledge of the risk in COVID-19 cases, thereby a risk of erroneous judgment can set a bad precedence for future cases. In such situations, the employer might take excessive care, minimal care, or no care at all. Therefore, a safe-harboring provision can optimally restrict the employer's scope of liability.

[13] *Id.*

A safe-harboring provision in the form of safety regulations over and above a liability to compensate can considerably resolve this issue, as it can function as a standard against which the employer can rebut the presumption as well as incentivize an employer to take precautions. This would also rule out any possibility of willful misconduct on the part of the employer. The economic model discussed in the latter sections of the paper translates these externalities into *differential knowledge of parties* and *uncertainty over suit* in order to ensure that social welfare aspect of a 1923 Act is preserved.

2.2 When there is no presumption over causation

Claims of personal injury which are not treated as occupational diseases under the Act, can be brought in the form of an "injury arising out of and in course of employment".[14] In such cases, the victim has to show a causal link that an injury in the nature of COVID arose at workplace, however, the traditional notions of causation such as cause-in-fact and proximate cause test[15] makes the task increasingly difficult for the victim as well as the courts. For an employee to say that "but-for the employee engaged in his duty, the injury would not have arisen" cannot be substantiated by way of evidence.

An injury in the nature of COVID involves a risk to which all the members of public are exposed. Therefore, the statute does not contemplate about compensating the victim for diseases which constitute a risk to the general public, and the liability of the employer has been reasonably excluded in such cases.[16] This exclusion from liability, however, does not extend to cases when there is a greater peril at play, notwithstanding the fact other members outside the work may be equally exposed to the disease. Thus, in such cases, it might not be sufficient for the employee to simply say that had he not been in the employment, the injury would not have arisen. He must go further and be in a position to say "the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature

[14] *supra* note 3.
[15] Omri Ben-Shahar, *Encyclopedia of Law & Economics – 3300 Causation And Forseeability,* Tel Aviv University (1997).
[16] Ravuri Kottayya v. Dassari Nagavardhanamma, AIR 1962 AP 42 (India).

of my employment to some peculiar danger."[17] Clearly, when this added peril can be attributed to the conduct of an employee, the employer is relieved of any liability, and vice-versa.[18]

Lord Parkar's observation in Dennis v. A.J. White & Co., comprehends a similar situation comprising of a risk that is common to all but not incidental to employment. He states that when the risks are so general that an inference cannot be drawn without further evidence, it would be necessary to establish the causal relationship implied in the expression 'injury by accident arising out of the employment' by positive evidence, such as, by proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed under the same conditions, or in other words, establish that the prevailing circumstances created a special exposure to risk.[19] Therefore, the expression 'arising out of employment' can be substituted by a special exposure at the workplace.

Hence, for COVID-related claims in low-risk cases, a victim, to begin with, cannot reasonably claim that the injury would not have arisen had he not been in his employment. Further, in the absence of any standard to gauge the conditions of employment constituting a special exposure, an otherwise genuine case may go uncompensated. This makes it difficult to establish a special exposure that arose at the workplace, in order to satisfy the requirement of a causal connection under the Act. This uncertainty, thus, results in an increased burden of employee and reduced burden of employer. In such circumstances, uncertainty over liability creates no incentives for the employer to take precaution. There may also be cases where the circumstances are extremely remote and the employer should also be enabled to contradict a compensation claim in such cases.

Therefore, the incidence of safety regulations in the existing compensatory model can serve as a standard for an employee claiming that the workplace exposed her to a risk of special exposure. The role of safety regulations in such cases can thus, help the employee to satisfy the need of a causal connection, as well as allow an employer to rebut his position that the injury need not necessarily arise at the workplace.

3. THE ECONOMIC MODEL

[17] *Id.*
[18] *Id.*
[19] Dennis v. A.J. White and Company, [1917] UKHL 517 (United Kingdom).

Adopting an *ex post* liability rule to compensate under the Employees' Compensation Act, 1923, poses several inefficiencies, as observed in the previous sections. Uncertainty over causation creates an uncertainty over the court's decision in finding an injurer to be liable. In an *ex post* situation, assuming that the courts adopt a retrospective causal enquiry to determine the liability of parties, it would be illogical to determine "but-for the common touch surfaces being sanitized *n* times", the risk of harm would not have arisen. This attribution or causal connection will be impossible to satisfy or deny when the onus of proof is on the employee and an onus of rebuttal on the employer, respectively. Further, the risk of harm that a victim otherwise faces from natural sources can also make it unattractive for her to litigate. The uncertainty, ultimately leads to a dilution of incentives to reduce risk, otherwise created by liability when determination is certain.

On the contrary, adopting an isolated *ex ante* regulation model to counter the uncertainties generated out of litigation would not result in the desired effect. Assuming that the regulator possesses a superior information than private parties for regulating COVID-related safety, the challenges in the enforcement of safety regulation makes the information imperfect. This is due to the reason that the private parties would be better assessors of the risk and they would conform with safety regulations only when socially desirable. Further, the regulator cannot comprehend a communicate every aspect of the risk that may arise when the private parties engage in their respective activities. Therefore, the businesses will always run a risk of over-regulation or under-regulation in order to ensure deterrence.

From the discussion, it follows that the first factor to determine the social desirability of adopting safety regulation or a liability rule is *uncertainty over suit.*[20] The second determinant can be termed as *differential knowledge between parties and regulator.* Uncertainty over suit favors safety regulation to overcome the challenges that an *ex post* liability rule might pose. However, as observed, the shortcomings of regulating when the regulator has superior but imperfect information, poses yet another challenge. Similarly, when there is a differential knowledge between the parties and regulator, a liability rule would be preferred. In an *ex post*

[20] *See* Shavell, *supra* note 6 at 363, (describes it as parties escaping suit but we assume that the parties will not always escape suit but be held over liable in certain cases).

situation, the courts and parties would be better assessors of the risk of harm that an activity generated, but, the shortcomings of an uncertainty over suit, as observed in the liability rule, poses a major hurdle.

To address this conundrum, liability rules and safety regulation should not be seen as mutually exclusive solutions to the existing problem. It cannot be said that safety regulation can be relied upon where a liability rule fails. The disadvantages of exclusively relying on a liability rule or safety regulation would not adequately deter risks and generate social welfare. Therefore, a joint use of liability and safety regulations to remove each other's deficiencies would be a complete solution to the problem of controlling risk. The deficiencies of safety regulation, that is the inferior knowledge of regulator to specific cases and administrative costs, and the deficiency of litigating that is uncertainty can be addressed by the joint use of both safety regulation and a liability rule. In such a situation, *ex ante* safety regulation as a standard of causation absorbs the inefficiencies arising during litigation and the provision for an *ex post* liability nullifies the administrative costs of safety regulation and covers up for the imperfect knowledge of regulator. Therefore, it would be desirable that the regulations were set at a *sub-optimal*[21] level and not be as rigorous as if it were the only means of controlling liability.

The model assumes that the parties would not always be absolved of an *ex post* liability to compensate when their precautions are in conformity with safety regulation. If the parties were to be absolved of their liability, they would not be incentivized to do more than to meet the regulatory requirement.[22] Given the inferior knowledge of regulator, there may exist certain businesses which pose a greater peril than those in the same category. Similarly, non-conformity with safety regulations shall not always result in a liability to compensate. There may be certain businesses which pose a lower-than-usual risk of harm, or businesses which face a higher than usual cost of precautions, that requiring them to conform to safety regulations might lead to wasteful precautions. In such cases they should be allowed to escape liability, as this model does not assumes the possibility of neutralizing in each case. Assuming that safety regulations are enforced by using state powers and not through monetary penalties, conformity with safety regulations would be socially desirable only when reduction in expected losses in the form of liability costs would be greater than the cost of regulation.

[21] Thomas S. Ulen, Gary V. Johnson, *Ex-post liability for harm vs. ex ante safety regulation: substitutes or complements?",* The American Eco. Rev. 888-901 (1990); *See also* Shavell, *supra* note 6.
[22] Shavell, *supra* note 6 at 365.

3.1 Optimizing scope of liability where a rebuttable presumption exists

The cases where a rebuttable presumption is afforded to the injurer (employer) are cases where COVID-19 would be presumed to be an occupational disease arising out of and in course of employment. This would involve situations including but not limited to high risk work environments involving exposure to known or suspected cases of COVID in healthcare settings.[23] These are the cases where the inherent nature of workplace is at a high risk of contamination. Depending on the nature of work, the employer can adequately ascertain the degree of precautions that need to be taken in accordance with the *sub-optimal* safety regulation.

Let us assume that the regulator sets the *sub-optimal* safety regulation at a threshold, which would be socially desirable for 'some high risk activities' based on its knowledge, meaning that reduction in expected losses by complying with safety regulation would be greater than the cost of care in certain cases. Private parties, based on their personal information where they pose a greater than usual risk, might set this threshold at a higher level due to an additional liability rule. Thus, it would not be efficient to restrict the *ex post* liability simply where the employer conforms to the *sub-optimal* regulatory standard, as the information of regulator is not based on perfect knowledge of parties. If liability is to be restricted when an injurer complies with safety regulation, then businesses which pose a greater risk would escape liability by taking precautions only till the extent of the regulatory requirement.[24]

An additional liability to compensate under the Employees' Compensation Act, 1923 would incentivize employers to take beneficial precautions where they pose a greater-than-usual exposure of risk. However, the exercise of precautions above the safety regulation by private parties would also be socially desirable only when the reduction in expected losses is greater than the cost of care for those businesses which pose a greater than usual risk. When a claim is brought against an injurer (employer) by a victim (employee) when there is a presumption rebuttal, the beneficial precautions above the safety regulation can be used to successfully rebut

[23] Guidance on Preparing Workplaces for COVID-19, OSHA (No.3990-03, 2020) (US).
[24] Shavell, *supra* note 6 at 365.

the presumption *ex post* that the injury did not arise out of and in course of employment. But there would also be certain parties, which face a higher than usual cost of care above the *sub-optimal* safety regulation. In these cases, the risk of liability would not incentivize the injurer to take additional precautions. Therefore, in such cases a rebuttal shall succeed only when the injurer can sufficiently establish that precautions above the safety regulation would not have been socially desirable. An incidence of safety regulation in such cases cannot completely neutralize the risk of threat, but it can substantially reduce the probability of causation. In all other situations where the injurer does not take precautions equivalent to the safety regulation, the rebuttal would fail to succeed and the victim shall be entitled to compensation.

3.2 Establishing Special Exposure in all other cases

As noted in the previous section, the requisite standard for proving that the injury arose out of and in course of employment for low-risk cases is satisfied by introducing the concept of special exposure. The level of safety regulations followed can be used to determine whether the exposure at the workplace constituted to be special or whether it was the same as the general public, in which case the liability of the employer is excluded.

Let us assume, that the employer sets the *sub-optimal* safety regulation at threshold, which would be socially desirable for 'some low risk activities' based on its knowledge, meaning that reduction in expected losses by complying with safety regulation would be greater than the cost of care in certain cases. For an employee claiming a special exposure, he could rely on the level of safety regulation followed at the workplace, to show that the injury arose out of and in course of employment. When the level of precaution would be lower than safety regulation for low-risk businesses, special circumstances resulting in a risk of special exposure can be established. In such cases, the employee would be at a greater risk when compared to the general public, and the risk can be attributed to the business. A victim, litigating for workers' compensation can thus establish the causal link that the injury arose out of and in course of employment.

Non-conformity with safety regulations does not necessarily mean that an *ex post* liability to compensate would always arise, as there might be businesses which pose a risk too remote, that a special exposure cannot be said to arise. If the facts also suggest that an employee's duty

at a job was of the nature in which the risk involved was the same as a member of the public would face, the liability shall not arise. In these cases conformity with safety regulations would not be socially desirable, and the existence of a liability would not incentivize the employer to take precautions more than requisite standard, as it would amount to a wasteful precaution. However in low-risk cases, conformity with safety regulations should always be allowed to relieve any liability of the employer as the special exposure which would otherwise arise from the business, would then to restored to a level of ordinary risk faced by the general public.

4. CONCLUDING REMARKS

From the discussion, it flows that a pre-existing liberal interpretation of the Employees' Compensation Act, 1923, with the benefit of a joint-liability model, comprising of safety regulations and a liability rule can accommodate a compensation claim arising out of COVID-19. The model, undoubtedly gives an impression that there is a departure from an established social security legislation, towards a model based on employer's liability for harm. This can be considered to be the latent effect of introducing safety regulations. While, the intent is to introduce safety regulations for the purposes of facilitating the causal enquiry, this observation highlights that the existing social security model, might not be sustainable without the help of external aids, as in the present case. The primordial objectives of the Act are based on the presumption that an employee's harm can be best mitigated by the State. However, the rise of insurance has changed this notion to an extent where private parties are better assessors and mitigators of risk. Thus, an alternate model might be a temporary fix but not a permanent remedy with the changing liability landscape.

AN INSTITUTIONAL ECONOMICS ANALYSIS OF WEARING A MASK: INTERNALISING THE EXTERNALITY

Varada Shyama Bhat N[1] *and Mahek Khandelwal*[2]

1. INTRODUCTION

Human behaviour is the result of the circumstances and responses to various social factors considering the stakes involved in decision making. When the costs are high, individuals think and rationalize before bearing the cost; when the costs are low, individuals decide to bear the costs. This behavioural pattern can also be traced in the Indian masses reflex to the stimuli of various lockdown and unlock periods in the past six months. Initially, the fear of the unknown and uncertainty played a vital role in enforcing a lockdown and attempted imposition of social distancing to contain the spread of the novel coronavirus. As people became familiar with recovery rates, complacence grew, resulting in choking the already weak public administration and health infrastructure. To contain the surge of the virus, the Government responded by introducing a series of measures such as social distancing with lockdown, which resulted in shutting down the global economy[3] resulting in an economic slump. The country has faced an acute shortage of money in terms of migrant labour crisis and a crumbling economy. The economy consists of various individual units working with self-interest in profit motives to reap economic benefits. Various disciplines observe and study parts of this pandemic, for instance, the medical fraternity focuses on developing a vaccine, the psychology aspect concerns itself with the mental health aspect, the financial aspect deals with the monetary policy and institutional economics provides the necessary tools to understand individual behaviour. Institutional economics does not restrict the study of individual behaviour to their purchasing power but rather extends to a study of their behaviour and decision making. This decision making includes economic decisions like savings and investments, expenditure patterns like buying Veblen goods and also decisions that affect the society at large like not

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[3] Nuno Fernandes, *Economic Effects of Coronavirus Outbreak (COVID-19) on the World Economy*, UNIVERSITY OF NAVARRA, IESE BUSINESS SCHOOL. (Sept. 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3557504.

wearing a mask and not complying with social distancing norms. Many learned individuals are of the opinion that until a vaccine is developed the only effective method to control the spread of the virus is to strictly wear a mask and adhere to the social distancing norms.

This essay attempts to analyse economically the impact of not wearing a mask and not conforming to the social distancing guidelines in public spaces. A broad understanding of the issue reflects that there are certain costs associated with individuals not wearing a mask and there are also costs that the society has to bear otherwise; an externality arises when the former exceeds the latter. This externality is attributed to information asymmetry insofar as individuals are not aware of the transaction costs[4] (transaction is going out without a mask) and moral hazard where individuals though they are aware of the impact still make an active choice not to wear a mask and flout the social distancing guidelines.[5] This externality results in market failure. The essay evolves to internalise both the costs and benefits; the solutions provided include efficient local self-governments to internalize the costs, and effective implementation of rules and guidelines to increase awareness engendering reduction of information asymmetry.

1.1.Market Failure

Market failure is the economic situation defined by an inefficient allocation of goods and services in the free market. Additionally, individual incentives for rational behaviour do not lead to rational outcomes for the group. In essence, it means that each individual makes the correct decisions for him/herself, but these prove to be the wrong decisions for the group. In traditional microeconomics, this is shown as a steady-state disequilibrium in which the quantity supplied does not equal the quantity demanded.[6] Market failure can be identified as a two-fold issue in the wake of such a pandemic. First, the market failure of tangible physical goods. However, this essay mainly focuses on the second one, namely, the market failure arising out of individual behaviour. Individual behaviour refers to the transactions that arise out of decisions like wearing a mask or deciding what the socially desirable and optimal level of going

[4] F.H. Hahn, *Equilibrium with Transaction Costs*, 39 ECONOMETRICA, 417,439 (1971).
[5] Herbert G. *Grubel, Risk, Uncertainty and Moral Hazard*, 38 THE JOURNAL OF RISK AND INSURANCE, 99,106 (1971).
[6] Market Failure, 28 ECONOMIC AND POLITICAL WEEKLY, 2489 (1993).

out of the house is; subsequently what is the level of social distancing that has to be maintained. Wearing a mask is an economic transaction not because of the monetary cost of buying the mask but because of the non-monetary difficulties one has to face while wearing a mask. Most important, when an individual decides against wearing a mask, it is the society that bears the brunt.

A negative externality is a cost borne by society and parties who are not directly involved in the transaction. The producer and consumer initiate a transaction and any third party including but not limited to any organization, property owner or public resource or society as a whole, are affected by this transaction. This impact on the third party is defined as an externality. It may also be referred to as a spillover effect. A negative externality can be in the form of high external cost—a negative externality results in market failure. With reference to COVID-19, negative externalities are the outcome of an imbalance between the private cost and social cost and that of lack of awareness. Assuming Adam Smith's theory of Free Markets that states individuals act in self-interest to be true, an individual who steps into a public place should wear a mask and maintain social distancing as the same align with his self-interests; but such is not the case. It is quite evident that when an individual steps out without a mask, not only is the individual exposed to the imminent threat of contracting the virus but also his surroundings are compromised. This impact on the surroundings is considered an externality leading to market failure.

This externality leads to a strain in resource allocation in the fight against COVID. This impacts the number of beds available and the number of people infected in the country; such is the grave nature of the market failure.

2. PRIVATE COST AND EXTERNAL COST

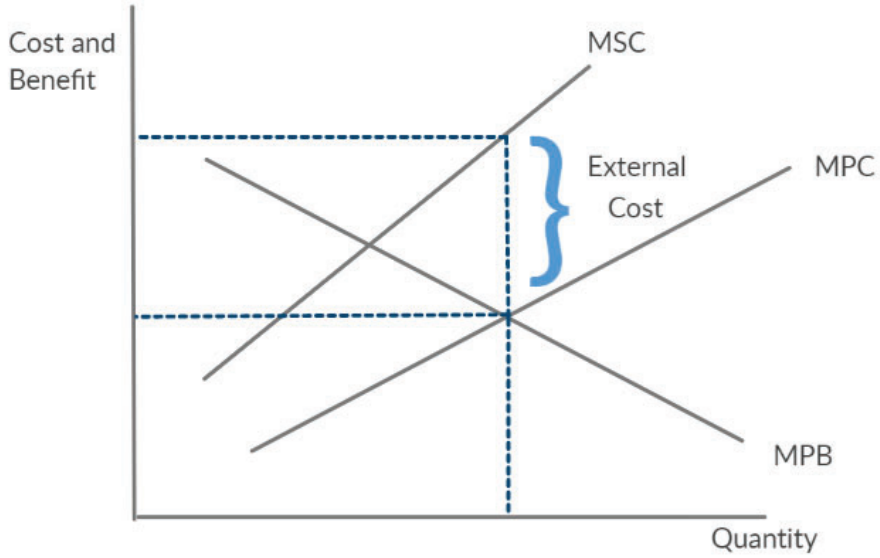
A socially optimal transaction is one where either the private cost or social cost is equal, or the social cost exceeds the private cost (MSB=MPB). A private cost is a cost that an individual bears to get a private benefit which is rivalrous and exclusionary in nature; whereas, a social cost is often non-monetary and in some cases non-mercantile. In the current situation, the spread of COVID-19 is a very high cost which probably cannot be exceeded by any other cost.

In order to proceed with the comparison with private and social cost, it is imperative to make certain assumptions, like:

- All individual decisions are based on bounded rationality.
- Though the marginal impact of each person not wearing a mask may be subjective and different, but for the purpose of this essay, we assume that at a theoretical level and practical level there is some harm which is minimal that is met under all circumstances. The threshold of that difference may vary depending on various factors like the number of people who one comes in direct contact with and personal immunity strength but is still contingent on the fact that it is harmful in one way or the other.
- The recovery rate is high, but the state and individuals would still prefer preventive action over recovery.
- The absolute monetary cost of buying a mask is so low that it is negligible and accessible by all.
- All masks and social distancing guidelines are equally effective to all.
- The factors affecting decision making are out of one's own free will without social factors like religion, gender and other demographic and geographic factors.

2.1. Private Cost

Private cost is the cost borne by an individual or firm directly involved in a transaction, and private benefit is the benefit derived by an individual or firm directly involved in a transaction as either buyer or seller. The private benefit to a consumer can be expressed in terms of utility, and the private benefit to a firm is profit. The private cost that is borne by an individual in this situation includes the price of the mask, and the other difficulties that they face in order to comply with the rules and the private benefit are that one is protected from the virus. MSC=MPB. Search socially optimal level graph



(a.) Private Cost

In this instance, the social cost includes the difficulty faced by society when individuals do not wear a mask or do not comply with the social distancing guidelines. The marginal private cost in this situation is the increase in difficulty in every successive hour that a person spends outside wearing a mask. This also includes the cumulative effect of multiple difficulties. For instance, when a person wears glasses, the marginal cost is not the only difficulty in breathing but also the continuous fogging of glasses and itchiness. These costs are above and beyond any other normal difficulties that they face due to change in lifestyle and economic activities. It is also important to note that for some individuals, the cost will be higher because they are not making any economic gain by wearing a mask. Contrastingly, some celebrities or individuals may make an economic gain by simply wearing the mask of a certain brand. For example, when a person is wearing a mask at a convenience store while buying daily essentials, there is no real economic gain per se that is derived from wearing a mask. But, on the other hand, when a consumer chooses to go to a shop where a shopkeeper is wearing a mask over a shopkeeper who is not wearing a mask,[7] the shopkeeper's economic interest is directly linked to the cost

[7] Karl Dieter, *Externalities, Social Networks, and the Emergence of Norms: A Critical Analysis and Extension of James Coleman's Theory*, 85 SPRING 167,196 (2018).

borne in order to wear a mask.[8] A celebrity may endorse a particular brand and make profits out of it, linking the costs to direct economic benefits. What is interesting to note is wherever there are direct economic benefits, people are most likely to follow without intervention; thereby making rules and regulations necessary for instances where there are no direct economic incentives at play. As clearly seen in the graph, when an individual breaks the rules of the lockdown, the social cost is greater than the private cost, but, the individual perceives a greater marginal benefit from it.

Instances of individuals perceiving greater private benefits than the private cost by ignoring the external cost.

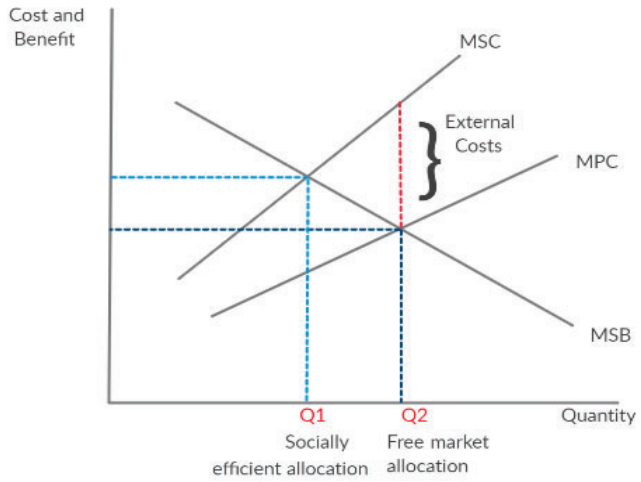
It has been alleged that Kanika Kapoor has violated the social and legal norms by attending casual parties and gatherings despite the contested corona positive status. The U.P. Police have filed an F.I.R. regarding the same. Irrespective of the corona result status it is noteworthy that the said individual had returned from the U.K. this mandates a strict quarantine that was violated. In this instance, based on the media reports and statements of the accused, it is safe to say that the private costs that were considered are monetary, and therefore, it was low. The perceived private benefit was non-monetary and was very heavily linked to social capital and personal social gains. Hence, resulting in the presence of the said individual at various parties. These acts attract the penalty of law because there are larger social costs involved. The social costs are the levels of policy implementation, the safety of other individuals at those gatherings and higher costs of enforcement considering the celebrity status of individuals gathering.

2.2. Social Cost

The social cost is the total cost to society. It includes private costs plus any external costs. Rational choice theory suggests that individuals will only consider their private costs. For example, when deciding how to travel, we will consider the cost of petrol and time taken to drive. However, we won't take into consideration the impact on the environment or congestion

[8] Robert Frank, *Melding Sociology and Economics: James Coleman's Foundations of Social Theory,* 30 JOURNAL OF ECONOMIC LITERATURE 147,170 (1992).

levels for other members of society. Therefore, if social costs significantly vary from private costs, then we may get a socially inefficient outcome in a free market.[9]



(b.) <u>Social Cost</u>

The social cost is a scenario including the spread of the coronavirus and the cost of administering the healthcare services. Beyond this, it also includes the cost of enforcing the rules and regulations. For example, if the Government were to employ marshals to keep a check and fine individuals who do not wear a mask, the cost of such administration is also borne by the taxpayers in its monetary sense, and it also increases the cost because there are more individuals who are prone to risk in their duties. It is also to be noted that there is an overarching social cost of economic breakdown due to increased threats of the virus. As seen in the graph, the social marginal cost increases as the number of individuals who do not wear a mask increases. The external costs arise due to the decisions that individuals make, albeit, the concession that the arithmetic number of people they impact are not the same.[10] In this scenario, as seen in the graph, the social benefit is no more than the private benefit, but the social cost exceeds the private cost. It is inconceivable at any point to derive a social benefit out of not wearing a mask, especially given the circumstances of widespread COVID infections. The far-reaching hypothesis may look like individuals while exercising should not wear a mask because

[9] Ronald H. Coase, *The Problem of Social Cost*, 22 THE JOURNAL OF LAW & ECONOMICS, 141,162 (1979).
[10] R. Roberts et al., *A guide to interpreting economic studies in infectious diseases*, 16 CLINICAL MICROBIOLOGY AND INFECTION, 1713,1720 (2010).

it is counter-productive and exercising is considered to be helpful to the health of individuals and healthy individuals put less strain on the healthcare system. Even if such a hypothesis were to be proved, the social cost still exceeds the private benefit.

For example, the Karnataka state government opened a COVID care facility of 10,000+ beds only to close it down in a month's time citing the reason to be the lack of patients. It is interesting to know that the social cost in its monetary sense is also borne by the citizens, but more importantly, there is a reduction in the healthcare infrastructure. It may be argued that there is still some benefit out of it because it has been stated that the beds will now be given to government hostels and hospitals. However, this benefit does not outweigh the social cost for not having a 10,000 bed COVID care facility. It is crucial to analyze the reasons cited for its closure. It is not true that there is a lack of patients, but it is just the lack of patients who enrol themselves in COVID care facilities. It also brings into light the problems of market failure from the aspect that there is gross underreporting and under testing for the virus.

3. THE PROBLEM OF AN IMPENDING SOCIAL COST

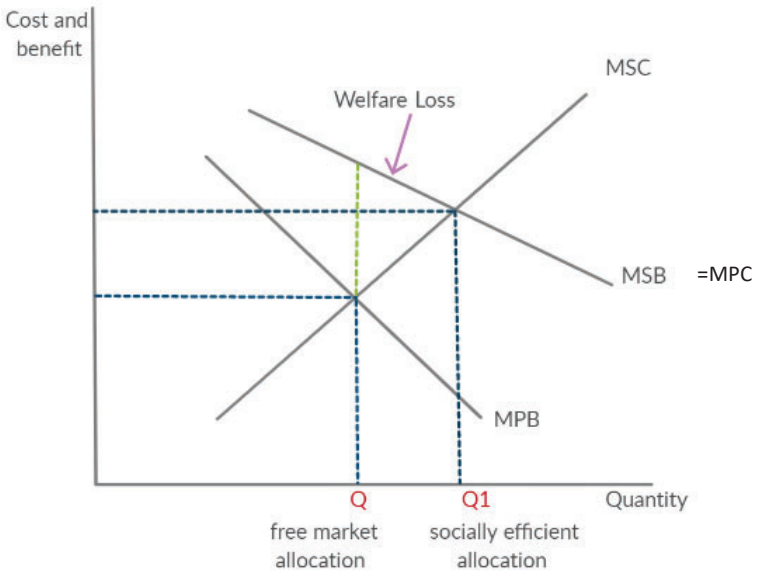
On conducting written interviews with over 150 people of an almost homogenous section of the society of those who can be considered to function at a level where the monetary cost of the mask is almost negligible. Most of these individuals have access to public spaces in urban settings like the city of Bangalore or Kochi. An enquiry was made on the number of times an individual had gone out (daily, once a week or once a month). Following this, they were asked about problems or difficulties if any at all, faced while wearing a mask. They were then given an opportunity to share their opinion on why other people do not wear a mask. By incorporating a correlation between the numbers of times a person had gone out and the difficulties they faced while wearing a mask, we can arrive at a rough estimate of the private cost that the individual pays. As a result of this private cost, if the person has taken off their mask in public spaces, it clearly shows the tipping off point wherein the individuals make an active trade-off where they consider the private benefit of taking off the mask to be greater than the private cost. The consequence of this is often not considered. This is the point where the externality begins because now the individual's action has resulted in a very high social cost.

Let us assume that person X wears glasses and goes out daily. X admits that due to fogging up of glasses and itchiness, the mask is removed for the most part of the day. Another person Y has gone out only once a month to purchase essentials. Y confesses that despite not removing the mask at all, there was an alarming sight of the general public at large, not wearing masks properly. Person Z is of the opinion that it is not possible for him to socialize in a restaurant with a mask. Person L works in a pharmacy near a COVID care centre and is almost always wearing a P.P.E. at work.

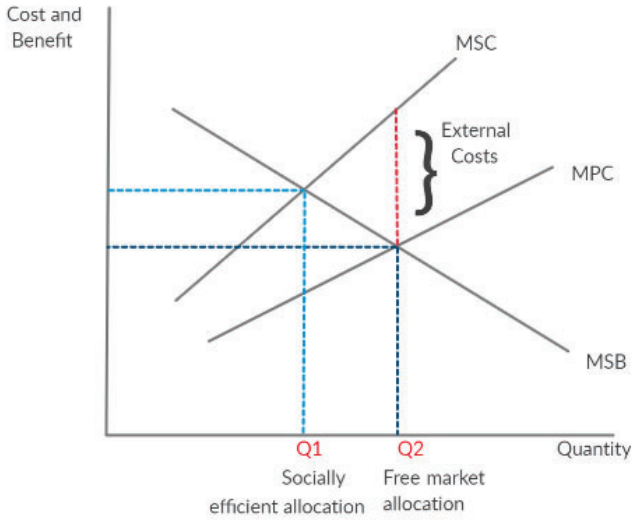
- **Analysis when each of them wears a mask - <u>Ideal scenario</u>**

	Private cost	**Private benefit**	**External cost**	**Social Benefit**
Person X	High	High	Low	High
Person Y	Low	High	Low	High
Person Z	Low	High	High	Low
Person L	High	High	Low	High

X represents someone like a shopkeeper who might want to wear a mask but is unable to because of the issues that X faces like the long durations and work conditions. X's private cost is quite high because they bear the brunt of issues like fogging up of glasses and so on. The social cost is low if they continue to wear a mask despite their private costs. The social benefit is quite high due to multiple reasons like economic mobility and activity and making the choice of bearing the private cost rather than a simple trade-off removing a mask. But, in reality, as mentioned earlier, X removes the mask quite often; now, the private costs are low because of the trade-off resulting in high social costs. The high social benefit that had accrued does not seem high anymore because of the social cost. It is better that there is less economic activity than a shopkeeper coming in contact with his customers without a mask, thereby resulting in low social benefit as well.

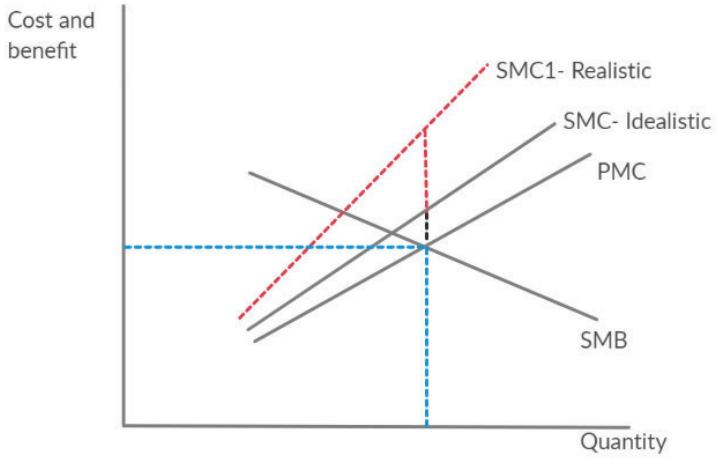


(i.) X in an idealistic situation



(ii.) X in a realistic situation

Person Y in an ideal scenario is wearing a mask and going out only when required, and this means that his private cost is very low because of the less number of times he has gone out. His private benefit is quite high because he is wearing a mask. His social cost is low because he is also wearing a mask and does not add on to the externality. Y assumes in an ideal scenario that people have to follow social distancing guidelines; therefore, there is a high social benefit out of it. But in reality, he realizes that people are not wearing the mask, and hence the social benefit is reduced.

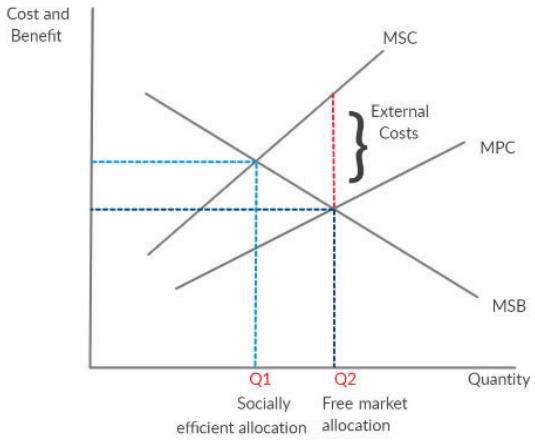


In the idealistic situation, Y serves as a negative externality where the difference between the social marginal cost and the private marginal cost is significantly low; whereas in the realistic situation there is a substantial difference between the private and the social marginal costs.

Person Z represents the worst form of the externality because that is the socially least desirable group to fight the pandemic. This would be the representation of those individuals who still choose parties and other narrow personal gains over the safety and precaution against COVID. It may be a result of various factors like belief in one's own immunity, wrong prioritization of safety measures and so on. Here the private cost is low because one doesn't bear the difficulty of wearing masks or living away from a fancy social media life filled with glamour. Since this individual deprioritizes the safety of being protected from the virus, the other forms of validation form high private benefit. It is imperative to note that the attitude of the person decides whether being protected from COVID because of a mask and social distancing is a high private benefit or low private benefit, nevertheless here a party or gathering is perceived as a higher private benefit over the costs. The social cost is very high because it increases the cost of enforcement and adds more patients or has the potential to spread the virus.[11] The social benefit is the lowest because most of these acts harm the society and benefits are intangible and personal like satisfaction, emotional bonding and social acceptance, this benefit cannot be

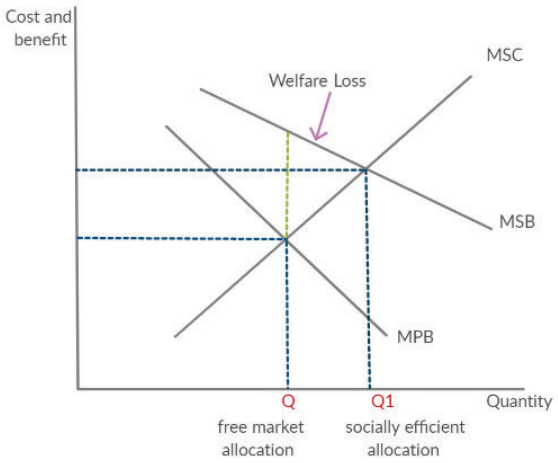
[11] Ralph Turvey, *On Divergences between Social Cost and Private Cost*, 30 ECONOMICA 309,313 (1963).

outweighed as against a large number of persons being saved from the shackles of the pandemic. Since the outlook of the person is in itself questionable, it remains the same in a normative sense and realistic sense.



Z in both, idealistic and realistic, situations is a negative externality

Person L represents the small fraction of the society that is the positive externality. This person represents those pharmacists and support staff who at almost all times wear a P.P.E. kit. Normatively they have a high private cost because they have to endure the insulation and higher stress levels and workloads. For these individuals, the private benefit is the combination of direct economic incentives like fixed salaries and so on. Most importantly, the benefit is the level of protection they have against the virus in such compromised environments of work. The Social cost is very low because they are incentivized enough to wear masks and P.P.E.s and use sanitizers to prevent the viral infection. These individuals are responsible for the actual situation to change along with other COVID warriors like doctors, and so on. In reality, the private benefit becomes quite low; this is owing to the fear and a large number of healthcare workers being infected by the virus. The rationale behind the private benefit becoming low is the actual increase in private cost.



L in both, idealistic and realistic, situations is a positive externality

- **Realistic analysis**

	Private cost	**Private benefit**	**External cost**	**Social benefit**
Person X	Low	High	High	Low
Person Y	High	High	High	Low
Person Z	Low	High	High	Low
Person L	High	Low	Low	High

4. Bounded Rationality vis-a-vis Wearing Masks in Public and its Economic Analysis

In modern economic analysis, the assumption of perfect rationality as seen in the classical school has been questioned time and again. As a response to perfect rationality institutional

economics adopts bounded rationality. Bounded rationality takes into account the limitations that humans face, as in the case of lack of awareness of every single possible outcome or not being able to measure or prioritize utility in its objective sense and personal bias.[12] Therefore, bounded rationality is the principle that acknowledges the fact that humans are not always fully rational and sometimes act based on other factors like personal tastes and preferences, societal significance and status and so on. Sometimes, individuals also choose less effective options and are happier or more satisfied with less efficient outcomes. With respect to COVID-19 and not wearing a mask, one must assume bounded rationality over perfect rationality. Even in the premise of the bounded rationality, one must act in a manner that the Government's cost to enforce social distancing and other rules is less than the benefit that arises out of such measures. It is safe to assume that the unsurmountable cost due to a rapid increase in the community spread of the virus is the worst outcome and individuals along with the Government, strive to keep that at bay. Therefore, as long as the spread of the virus is in check, that is, a non-monetary benefit that individuals are willing to pay. The following sections entail a cost-benefit analysis and the impacts on costs of enforcements which in turn reflect in the level of social cost.

4.1. Wearing a Mask

Bounded rationality often focuses on adaptive behaviour suited to an organism's environment. The media and statistics have helped in creating an atmosphere which has reinforced the importance of wearing a mask. By going out in public and refusing to wear a mask while one is ailing of a contagious disease, he possesses the potential risk of contaminating the others, and some or one of them may die. Despite criticisms of not accounting for morals and principles of individual behaviour, a cost-benefit analysis is befitting to understand the larger outcome of containing the virus. Understanding the rationale behind a multidisciplinary problem is quite cumbersome, but a cost-benefit analysis will broadly discuss the incentive structures that are fairly universal in nature. As mentioned earlier, the costs here include private costs like difficulties faced while wearing a mask and not just the costs of procuring the mask. The private benefit extends to one's safety which is of subjective importance. It is, however, true that if each individual wears a mask at all times, and it is beneficial for society. The externality as a

[12] Gregory Wheeler, *Bounded Rationality*, THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Sept. 9,2020), https://plato.stanford.edu/archives/fall2020/entries/bounded-rationality/.

result of one not wearing a mask is internalized when one wears a mask. This corrective action can happen as a result of a Pigouvian tax or other solutions, as explained later in the essay. A cost-benefit analysis will clearly reflect that the risk of not wearing a mask includes the opportunity cost of being infected by the virus, which is a very high cost to any individual. The benefits they are not limited to an individual trying to avoid the virus, but it includes a higher level of economic activity because each one is aware that the other is also taking precautions. This reduces the strain on the level of socially optimal movement on individuals, i.e., the restrictions on genuine inter-state travellers or inter-district travellers will reduce because everyone in most parts of the country is taking precautionary measures. The point of equilibrium on the socially optimal movement graph is the one where the social cost is either equivalent to or less than the private cost and the social benefit is greater or equivalent to private benefit.[13] Therefore, the summation of Rs. X (cost of the mask) + nL (n signifies the intensity which is subjective and L is the non-monetary cost like fogging up of glasses and so on) is less than D (the benefits that accrue when each individual wears a mask and is aware that others also take precautions). The benefits grow largely when wearing a mask is coupled with restraint being exercised by symptomatic individuals, and when people do not roam around unnecessarily.

4.2. Staying at Home

Where resources and situations permit, it is best for individuals to stay indoors. This brings a dual benefit; firstly, it reduces the risk factor of contracting the virus and secondly; if one is an asymptomatic carrier, it prevents the spread of the virus. However, in economic analysis, what is more significant is the reduction in enforcement costs as a result of a lesser number of people being subjected to the policy or the rule. Those individuals who are vulnerable to infection may choose to self-isolate. Others may withdraw their children from school or stop visiting crowded places such as cinemas, clubs, gyms, and the like. This scenario we label as 'voluntary individual self-isolation'. In this response, we see some reduction in the costs. The next response level, we describe as being 'voluntary corporate self-isolation'. At this point, employers may voluntarily reduce the scale of their operations or even cease operations in order

[13] Richard Cornes & Todd Sandler, *In the Theory of Externalities, Public Goods, and Club Goods,* 2 CAMBRIDGE UNIVERSITY PRESS 17, 36 (2012).

to protect their staff.[14] What is important to note is that as each scenario has emerged that the social costs due to the health externality are likely to be falling, while the social costs due to the behavioural externality are likely to be rising. The behavioural externality will result in disorder costs such as reduced amounts of economic activity resulting in job losses. It could (and did) result in panic buying and hoarding. As externalities are internalized due to behavioural responses, the divergence between social and private costs will fall. If that differential falls to zero before equilibrium, then there is no market failure. In the Buchanan and Stubblebine terminology, the externality is not Pareto relevant. It may be the case; however, the externality persists in equilibrium – that is, it is Pareto relevant.[15] At that point, market failure has occurred. In the case of COVID-19 market failure occurs when individuals, despite their voluntary behavioural responses, are still imposing costs upon each other. Given that there are two externalities at work, this is very likely to be the case. The health externality and the behavioural externality work in opposite directions to each other. As more people choose to voluntarily self-isolate in order to avoid contracting the virus, they impose greater behavioural costs on others.

5. BRIDGING THE GAP BETWEEN PRIVATE COST AND SOCIAL COST

The broadly accepted economic solutions to the negative externalities are the Pigouvian tax, Coasean bargaining, tradable permits and quotas. During the past six months, the Government has attempted resorting to all these possibilities.[16] The Pigouvian tax is essentially the fine that the Government has levied on persons not wearing a mask in public places; Coasean bargaining can be seen in certain supermarkets and stores where one does not have access to enter unless a mask is worn and a subsequent random body temperature check is completed. Along with free dispensation of sanitizers, customers are requested to maintain social distancing, and there are instances where shops allow only one person to enter the aisle area. Tradable permits were seen during strict lockdowns where individuals were required to make inter-district passes or other forms of documentation like a COVID pass to move around. This solution is valuable when the strategy is set to reduce the quantity that is instrumental in assessing the marginal

[14] Darcy Allen et al., *On Coase and COVID-19,* SSRN (Sept. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585509.
[15] Carl J. Dahlman, *The Problem of Externalities*, 22 THE JOURNAL OF LAW & ECONOMICS 141, 141-162 (1979).
[16] Andrew Winterbotham, *The Solutions to Externalities: From Pigou to Coase*, 26 THE STUDENT ECONOMIC REVIEW 171-180 (2012).

external cost. The price of permits can be very useful in nudging users to, firstly, reduce moving out and secondly, increase their private cost, thereby resulting in greater societal benefit. The idea of quotas is to limit the level of activity. In India, this level was set at daily essentials. This was crucial to decide what must be the components that add up to the socially optimal level of activity. Save for this a situation would arise where individuals who have the purchasing power are able to dictate the terms of the market who would then be unfair for individuals operating at an income basket below that. According to certain media houses and the reflection of the COVID dashboard in India, only some of these have been successful, and that is also limited to small geographical areas. Considering the Indian culture and diversity, coupled with the attitude towards rules and regulations, the social cost of enforcement, has been very high. What the situation warrants now is the solution where the social costs of enforcement in reducing and that can be achieved in the following ways:

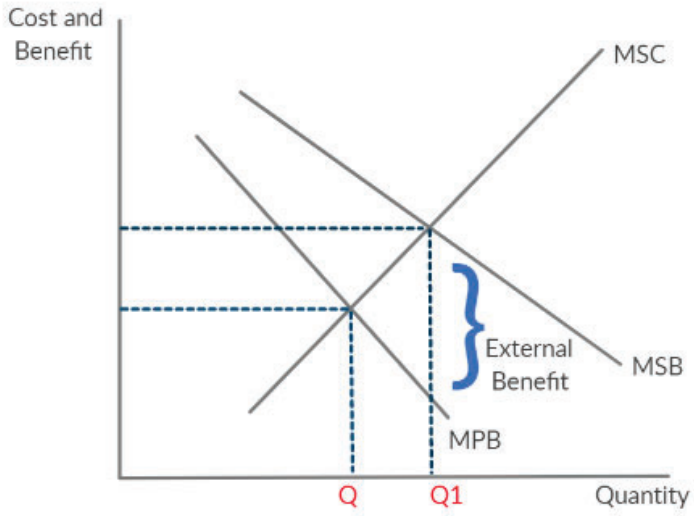
a. By leveraging and employing, in a controlled manner, the already existing three-tier governments with the local self-governments and other last leg policy implementers.

b. Efficient implementation as a function of increased awareness and incentives.

5.1. Local Self-Government

Apart from the already existing norms, local self-governments are closely related to the Pigouvian Tax and Coasean Bargaining. Local governments are uniquely positioned to combat the issues from these aspects because, in the country, the most familiar face of administration is that of the local self-government. The cost of enforcement reduces because most of them are more likely to follow these when it is a decentralized implementation because the immediate surroundings behavioural cost is high. It is more likely that one's immediate surrounding will induce such behaviour expectations. The monitoring of movement is also higher when local authorities have a say over it. Ironically, the Disaster Management Act, 2005 does not emphasize on the constitutionally recognized and elected bodies of the Local Self Government. This provides more insight into the capacity of the country to home quarantine and gives valuable insight into the testing efficiency and need for institutional quarantine centres and other COVID related infrastructural facilities. The private cost of these individuals increases

to almost the level of social cost to cover the majority of the marginal external cost. This is because individuals are aware of the close nature of the implementation of the rules and regulations. It is more beneficial to look into the marginal benefit of this arrangement. The private benefit doesn't really change in this scenario but the social benefit increases because the transaction cost from a centralized point of policy implementation is higher than that of a decentralized one.



5.2.Efficient implementation as a function of increased awareness and incentives.

Implementation of rules and regulations need not always be archaic or draconian; they can also be socially evolved principles where awareness plays a pivotal role. Awareness is very closely linked to social outlook and accountability. The rules, regulations and fines and their penal provisions deal with the accountability part of it[17] but, that is insufficient. Attitude and social perspective are inseparable from accountability as far as efficient implementation is concerned. In this scenario, awareness is about the disease and its spread and transparency about Government's actions and policies including data. Since there is no objective measure of

[17] Classen, *Externalities as a basis for regulation: A philosophical view*, 12 THE JOURNAL OF INSTITUTIONAL ECONOMICS, 541-563 (2016).

efficiency or value of policing as a policy of implementation of rules, one can assume that it is not very efficient mainly because the number of people breaking the rules is insurmountable whereas the police force is overburdened with work and also prone to the infection. Furthermore, the aspect of repeating the mistake also persists. On the other hand, if the Government were to consider a combination of education and awareness along with it, the dissemination of information may be expected to reduce the repetition aspect and convince more individuals to abide by the law. This will help as a remedy to the externalities faced.

6. CONCLUSION

The spread of COVID-19 is not single-dimensional like the failure of public healthcare, but it involves variables from a subset of the overlap of psychology, institutional economics, medicine and international trade. A substantial part of the COVID pandemic deals with people not wearing masks and not following social distancing guidelines. Consequently, by employing an institutional economic analysis which helps in resolving the problem that has already been identified by the public at large, i.e., people identify the problem that other people do not wear a mask and follow social distancing; through institutional economics, we understand the rationale behind this.

This problem of the spread of COVID can be curbed by unifying the efforts of all levels of Government and citizenry. One way to overcome the overwhelming impediments is to not do anything about it, but this does not seem to be a viable solution, inter alia the Government has to protect the ideal of the welfare state and use the power vested in it when individuals beckon to them for rescue. The solution of increasing awareness combats the information asymmetry and the solution of local self-government deals with the moral hazard part of the causation of the externality. The academic nature of the market failure is such that it is inescapable, but as economic actors, it is justified to use tools to mend behaviour and achieve the true state of welfare. With such clear contextualization, elevating the private cost of individuals to include the external marginal cost shall achieve net nil externality. In conclusion, the genesis of economic analysis lies in human behaviour aimed at maximizing happiness within the social framework of society bound by incentives. Therefore, the decision of either wearing a mask or

not also stems from human behavioural patterns that work at different levels of preference attached to the happiness that is derived from not contracting the virus. Despite the limitations of bounded rationality, individuals value the sense of community as long as majority members of society take necessary precautions. These incentives also include disincentives like fines for not using masks in places of public access. A simple task of wearing a mask creates an entirely new area of behavioural study and lifestyle changes, all in order to save oneself and those individuals one comes in contact with making the economic analysis of that act an insightful one.

INSOLVENCY AND BANKRUPTCY CODE: FINANCIAL DEATH, AND POSSIBLE RESUSCITATION OF PANDEMIC AFFECTED WORKMEN

1. INTRODUCTION

The Indian Insolvency Regime exhibits characteristics more suited to a pubescent teen, in as much as it is frequently amended, and made to consciously clarify its constitution even on account of any specific activity that might disturb the originally intended objectives of its being.[1] The birth, and constant evolution of the Insolvency and Bankruptcy Code (2016) ("the code") to better govern the economic needs of a developing nation, is in accordance with the trial, and error procedure with respect to economic legislation, as practiced by the Indian legislature, and validated by the judiciary.[2]

It is well established that insolvency laws are to only prescribe procedure, and requirements for timely insolvency resolution, and not bind the committee of creditors with resolution plans which might not take into account the peculiarities of a case of a specific debtor.[3] The procedure, ideally, is to facilitate timely resolution of insolvency,[4] and reinstate the corporate debtor,[5] or as a more final measure see the corporate debtor through liquidation;[6] but due to the pandemic, the conditions are far from ideal, and the procedure prescribed by the code stands frustrated.

Therefore, to alleviate pressure on the already battered state of Indian economy, sections 7, 9, and 10 of the code, which provide for the initiation of the insolvency resolution process have been suspended by the insertion of section 10-A, with respect to defaults arising on, and after March 25, 2020.[7] This suspension will continue till six months from the specified date, and would be susceptible to extensions not exceeding an overall period of a year.[8]

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[1] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 19.
[2] Swiss Ribbons Private Limited v. Union of India, 2019 4 SCC 17 ¶ 120; *accord* Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 ¶ 15.
[3] *Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Part 2, Sub-part IV (A), 215 ¶ 20, (2005).
[4] *Preamble,* The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[5] *Id*. Part-II, Chapter II.
[6] *Id*. Part-II, Chapter III.
[7] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, No. 9, 2020 (India).
[8] The Insolvency and Bankruptcy Code, 2016, § 10-A, No. 31, Acts of Parliament, 2016 (India).

The aforementioned suspension, coupled with the retrospective raising of the default threshold under section 4 of the code from one lakh to one crore,[9] would ensure that micro, small, and medium enterprises can utilize the calm period provided by this suspension to evaluate, and deal with the financial damage they sustained due to the ravaging effect of the pandemic. Another section adversely affected by the pandemic is workmen, who are also creditors to whom an operational debt[10] is owed by the corporate debtor.

Though the rights of the labour, especially unorganized labour, are easily overlooked, the placement, and subject matter of certain provisions of the code actually pay heed to the interests of workmen, but considering how the National Company Law Tribunal, and National Company Law Appellate Tribunal are not courts of equity,[11] and how they cannot adjudge the validity of the resolution plans approved by the committee of creditors;[12] can the provisions of the code alone carry the workmen from harm's way?

On that backdrop, part II explores the enabled position of workmen through the perspective of the courts, and the provisions of the code, to bring a claim initiating the insolvency process against the corporate debtor. Part III buttresses the importance of workmen in keeping the corporate debtor's company an ongoing concern, which provides them with leverage against the committee of creditors, and further analyses the application of that leverage during a pandemic; part IV recognizes explicit provisions incorporated in the code for the benefit of the workmen, and analyses the shortcomings of those provisions. Part V lays emphasis on the need for an appeal mechanism for the claims of special classes like workmen, , and analyses relevant provisions of the code in light of judge law, part VI introduces a new method of insolvency resolution in the labour intensive sector of real estate, on the adoption of which, the interests of all the creditors, including special classes of creditors can be taken into consideration. Part VII concludes the paper with a gist of the discussion.

2. WORKMEN AS OPERATIONAL CREDITORS

[9]Ministry of Corporate Affairs Notification, Mar. 24, 2020, [F. No. 30/9/2020-Insolvency], https://ibbi.gov.in/uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf.
[10] The Insolvency and Bankruptcy Code, 2016, § 5 (21), No. 31, Acts of Parliament, 2016 (India).
[11] K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶ 45.
[12] K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶ 45.

Since workmen provide services in the form of their labour in return of a financial claim which becomes operational on the date as specified by the employer, the nature of the debt owed to the workmen can be classified as operational debt.[13] Therefore, on chronic default of payment of their wages, workmen, who are operational creditors,[14] could prefer an application under section 9 of the code to initiate insolvency proceedings against the debtor.

Though the code enables workmen to initiate insolvency resolution against the corporate debtor, maintaining the procedure prescribed by the code might prove financially burdensome to any individual workman who seeks relief through the initiation of insolvency resolution.[15] The aforementioned observation becomes especially relevant if we take into account the recent amendment to section 4 of the code,[16] which has raised the default threshold to one crore, which constructively disqualifies any individual workman to even file a claim under section 9 of the code.

2.1. Standing of Trade Unions as "any other entity established under a statute"

Therefore, it could be plausible that a trade union registered under the Trade Unions Act, 1926,[17] could represent the workmen that are a part of the union, and present their claims as one, allowing accumulation of default to the extent of satisfying the threshold prescribed under section 4, this would also serve to alleviate the financial burden that would be levied on individual workmen on every step of the insolvency resolution process. Further, pursuing legal claims to which any member of the trade union or the trade union is a party, which arise as a result of the relation between the employer and the employee, and might affect the rights arising out of such a relation, is a statutorily recognized function of the trade union.[18]

The standing of a trade union however, to file an application for insolvency resolution against the debtor, is not explicitly fleshed out in the code. Section 3 (23) of the code, which clarifies who is a "person" for the objectives of the code, does not in unambiguous terms recognize a trade union as a "person", who could then be classified as a type of creditor for the purposes of

[13] The Insolvency and Bankruptcy Code, 2016, § 5 (21), No. 31, Acts of Parliament, 2016 (India).
[14] *Id*.
[15] J.K Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company, (2019) 11 SCC 332.
[16] Ministry of Corporate Affairs Notification, Mar. 24, 2020, [F. No. 30/9/2020-Insolvency], https://ibbi.gov.in/uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf.
[17] The Trade Unions Act, 1926, § 8, No. 16, Acts of Parliament, 1926 (India).
[18] *Id*., 15 § (c).

being recognized as a beneficiary of the corporate debtor's operation. The code does however, recognize "*any other entity established under a statute*" as a person for the purposes of the code.[19]

Therefore, a purposive interpretation, keeping in mind the provisions of the Trade Unions Act, 1926,[20] and the preceding provisions of section 3 (23) (g) of the code is warranted. The composition of section 3 (23) of the code is teeming with explicitly specified entities,[21] which are governed by the provisions of a general enactment,[22] which enables them to be recognized as those entities for the purposes of regulation, and as a "person" under the code. Therefore, *noscitur a sociis* a trade union registered under the Trade Unions Act, 1926, can easily be classified as "*any other entity established under a statute*", for being recognized as a person. Further, the specified mode for an insolvency application made to the adjudicatory authority by an operational creditor recognizes the fact that claims can be made conjointly.[23]

However, unorganized labour would not be able to take recourse to the code for repayment of what they are owed, in lieu of these new amendments, even the pre-pandemic scenario would financially burden, and constructively disqualify unorganized workmen to pursue insolvency. Even trade unions can have a tough time pursuing and presenting their financial interests, as many states have passed ordinances awaiting presidential ratification,[24] which entail mass suspension of labour laws to attract foreign investors, a trope expected to revitalize the Indian economy at the cost of the fundamental rights of labour.

3. OPERATIONAL LEVERAGE AGAINST THE COMMITTEE OF CREDITORS

Keeping the corporate debtor's company an ongoing concern is one of the paramount objectives of the code, so much so that the chapter dealing with insolvency resolution made no

[19] The Insolvency and Bankruptcy Code, 2016, § 3 (23) (g), No. 31, Acts of Parliament, 2016 (India).
[20] The Trade Unions Act, 1926, § 8, 15 (c) No. 16, Acts of Parliament, 1926 (India).
[21] The Insolvency and Bankruptcy Code, 2016, § 3 (23) (b-f), No. 31, Acts of Parliament, 2016 (India).
[22] *See generally*, The Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India); The Indian Trusts Act, 1882, No. 2, Acts of Parliament, 1882 (India); The Partnership Act, 1932, No. 9, Acts of Parliament, 1932 (India).
[23] The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Form 5, *read with* Rule 6 (1).
[24] Salik Ahmad, *'Betrayal by Elected Govts': Activist Aruna Roy on Suspension of Labour Laws*, OUTLOOK INDIA, (May 09, 2020), https://www.outlookindia.com/website/story/india-news-betrayal-by-elected-govts-activist-aruna-roy-on-suspension-of-labour-laws/352425.

mention of the liquidation process,[25] which is covered by the following chapter,[26] until an amendment raised the minimum level of financial benefit that was to be ensured by the committee of creditors to operational creditors in the resolution plan.[27]

Though now explicitly mentioned,[28] the committee of creditors which has to assess the feasibility of the resolution plan submitted by the resolution applicant to keep the debtor's company an ongoing concern, cannot do so while ignoring operational debts like electricity dues,[29] as on non-payment of dues a key component needed to keep the corporate debtor an ongoing concern would not be available.

Similarly, workmen, especially in labour intensive industries like real estate, could pose significant hindrance in way of keeping the debtor's company an ongoing concern if their interests are not taken care of, therefore, treating the workmen fairly would become a priority of the committee of creditors who intend to keep the corporate debtor an ongoing concern.

The leverage that the workmen possess over the committee of creditors however, is purely physical in nature, in the sense that if the operations have been stayed due to a pandemic, and the workmen have reverse migrated to their villages, this leverage very conveniently disappears. Unlike electricity dues, which can be recovered by the force of the government, and statute, even during a pandemic, workmen just do not hold that kind of power in similar conditions.

4. PROTECTION AFFORDED TO WORKMEN DURING INSOLVENCY RESOLUTION

If an insolvency claim somehow qualifies as valid during the time of the pandemic, by fulfilling the up-scaled mandate of section 4, with respect to a default committed before March 25, 2020;

[25] The Insolvency and Bankruptcy Code, 2016, Chapter II, No. 31, Acts of Parliament, 2016 (India).
[26] *Id*., Chapter III.
[27] The Insolvency and Bankruptcy Code, 2016, § 30 (2) (b), No. 31, Acts of Parliament, 2016 (India). Subs. by Act No. 26 of 2019, § 6.
[28] *Id*.
[29] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 44.

can the code then, through its provisions, which are to be interpreted by the committee of creditors,[30] protect the rights of the workmen.

4.1. Statutory Safeguards Incorporated in the Code

The code is primarily an economic legislation; ideally, that should mean that private interests would triumph over public interests during insolvency proceedings,[31] while keeping priority classes to a minimum; but the interests of the workmen, who are vital to the operation of the corporate debtor, should be balanced carefully against the interests of other creditors.[32] Additionally, in a developing nation like India, the fundamental rights of the labour depend heavily on the minimal wages they earn.[33] Therefore, a policy oriented approach to the code would be in accordance with the constitutional promise of striving to secure for all workers, living wages, and conditions of work ensuring a decent standard of life.[34]

Accordingly, Section 36 (4) (a) (iii) of the code explicitly excludes the wages owed by the employer to the workmen from any welfare funds, from the ambit of the liquidation estate, and reserves it solely for the workmen, treating the funds as property which belongs to the workmen. Section 53 (1), which prescribes the placement of the various types of creditors in the liquidation waterfall, prioritizes the dues owed to the workmen by the corporate debtor over any other dues.

Further, the meaning of "workmen dues" in the code, is interpreted through section 326 of the Companies Act, 2013,[35] which is titled "overriding preferential payment", and defines what constitutes workmen dues,[36] and further buttresses the emphasis supplied to the placement of workmen in the liquidation waterfall; though section 326 places workmen dues as frontrunner in the event of liquidation, the *non obstante* incorporated in section 53, renders workmen dues

[30] The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India), *read with* The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39 (3).
[31] Leroy, Anne-Marie, and Gloria M. Grandolini, *Principles for effective insolvency and creditor and debtor regimes*, No. 106399, THE WORLD BANK, C 12.3 (2016).
[32] *Id*. C 12.4.
[33] Bandhua Mukti Morcha v. Union of India, (1984 AIR 802).
[34] INDIA CONST. art. 43.
[35] The Insolvency and Bankruptcy Code, 2016, § 53 (3) Explanation (ii), No. 31, Acts of Parliament, 2016 (India).
[36] The Companies Act, 1956, § 326, No. 1, Acts of Parliament, 1956 (India).

second only to the payment in full of insolvency resolution process costs, and the liquidation costs.[37]

4.2.Actual Application of Statutory Safeguards

The actual application of these safeguards however, are restricted to the advanced stage of liquidation. Section 30 (2) (b) of the code which prescribes a minimum amount to be paid to operational creditors during insolvency resolution, has been inserted to better aid the committee of creditors in lieu of the recent enabling of financial creditors who might not be able to assess the viability of a resolution plan.[38] It further reduces the scope of review by company tribunals in case the debt owed to an operational creditor has not been dealt with properly, as they would not be able to adjudicate the treatment meted out to operational creditors, so long as the minimum standard set by the code is met.[39]

Section 30 (2) (b) talks about operational creditors, and not specifically workmen; whenever the code intends anything for the benefit of the workmen, it explicitly refers to them as "workmen".[40] Further, Form C of Schedule II, of the Insolvency, and Bankruptcy Board of India (Liquidation Regulations) 2016, clearly negates the possibility of any familiarity between the claims of operational creditors, and workmen, and specifies another form, form F of Schedule II, which provides for filing of claims by employees, and workmen with the resolution professional, to avail benefit as a result of liquidation; as section 30 (2) (b) is just porting the applicability of section 53 (1) in terms of minimum benefit guaranteed to the operational creditors as a result of liquidation, there would be no significant benefit availed due to it by the workmen.

Therefore, though statutory safeguards preserving workmen's interests are present, they are confined to the advanced stage of liquidation, and during the resolution of insolvency, the code mostly depends on the operational leverage that the workmen possess over the corporate debtor, as they are necessary to keep his operation an ongoing concern. During a pandemic however, workmen would not be needed to keep the debtor's company an ongoing concern, and the committee of creditors can very conveniently ignore the dues owed to them.

[37] The Insolvency and Bankruptcy Code, 2016, § 53 (1) (a), No. 31, Acts of Parliament, 2016 (India).
[38] The Insolvency and Bankruptcy Code, 2016, § 5 (8) (f), No. 31, Acts of Parliament, 2016 (India).
[39] K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶45.
[40] *See generally*, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

Further, the scope of review of the company tribunals is explicitly circumscribed,[41] and as they are not supposed to act as courts of equity,[42] they would not be able to question the financial wisdom of the committee of creditors, as the committee has, through the approval of such a resolution plan, met the minimum standards set by the code, and its regulations, and kept the corporate debtor an ongoing concern.

[41] K. Sashidhar v. Indian Overseas Bank, 2019 SCCOnline SC 257 ¶ 39.
[42] K. Sashidhar v. Indian Overseas Bank, 2019 SCCOnline SC 257 ¶ 45.

5. EXTINGUISHMENT OF CLAIMS ON APPROVAL OF A RESOLUTION PLAN

5.1. Necessity of an Appeal Mechanism

Sub-classification in the two already divided classes of creditors (operational, and financial), depending on the number of classes identified, causes the process of insolvency resolution to be relatively more costly, and complex.[43] Special treatment however, is recognized as a need for certain classes who are due to their circumstances, heavily dependent on the outcome of the insolvency process, or in pursuit of a social, or moral objective.[44] In a developing country like India, the insolvency process cannot afford to be extraordinarily expensive, and should balance considerations of fairness towards special classes, against timely reinstatement of the corporate debtor, with balances tilting in the favour of the timely reinstatement if we pay heed to the objectives of the code.[45]

Therefore, through the imposition of a moratorium through section 14, a calm period is provided to the resolution professional, and the committee of creditors to swiftly reach a resolution plan which takes care of the interests of all creditors, complemented by an effective implementation scheme,[46] which would bind even the dissentient creditors.[47] As mentioned earlier, though the code recognizes social objectives, private interests supersede public interests, and the resolution plan is expected to reinstate the corporate debtor while adhering to the requirements of the code, and the regulations.

In light of the aforementioned observations, it is also pertinent to note that the adjudicating authority has to give in to the financial wisdom of the committee of creditors, and can only reject the plan, or suggest modifications if the plan majorly contravenes the mandate of the code. Further, the resolution professional is merely an administrative body tasked with providing *prima facie* opinions which serve as nothing but lubricant to the process of insolvency resolution.[48]

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[43] *Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, ,218 ¶ 20.
[44] *Id*., pp: 218 ¶ 27.
[45] *Preamble,* The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[46] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 38 (2).
[47] The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India).
[48] ArcelorMittal India Private Limited v. Satish Kumar Gupta, (2019) 2 SCC 1 ¶ 80.

Considering the explicitly circumscribed jurisdiction of the adjudicating authority,[49] and the resolution professional, who are inarguably the only non-biased entities involved in insolvency resolution, the need for providing special classes of creditors with an appeal mechanism is paramount, and strikes a balance between the timely reinstating the corporate debtor, and taking care of the interests of the special classes of creditors, like the workmen.

5.2. Extinguishment of Claims

However, the Supreme Court has held that the resolution applicant who raises to the occasion sufficiently, as evidenced by his response to the request for proposal, its subsequent approval by the committee of creditors, and the adjudicating authority, should be welcomed with a fresh slate,[50] as in, all claims before commencement of insolvency resolution, that were submitted through the resolution professional during insolvency resolution would stand extinguished on the approval of the resolution plan.[51]

Building upon that proposition, the Apex Court, shunned "mandatorily" from the composition of section 12,[52] and in light of judge law, which makes a strong case for directional nature of procedural timelines,[53] considered the word to be against the spirit of the constitution,[54] hence, providing the resolution professional with more time than that prescribed by section 12 of the code to settle all claims before passing a resolution plan by the adjudicator authority to effectively bind all creditors of the corporate debtor.[55] Therefore, all the claims arising as a result of default, prior to the commencement of insolvency resolution will need to be settled before the approval of the resolution plan, as after approval of a resolution plan, they would stand extinguished.

The aforementioned proposition was further buttressed by summoning the problematic history of the preceding trial legislations, and their errors which led to the dragging out of the resolution process through litigation pursued by dissentient creditors.[56] Further, a robust enforcement

[49] K. Sashidhar v. Indian Overseas Bank, (2019) SCCOnline SC 257 ¶ 46.
[50] State Bank of India v. V. Ramakrishnan, (2018) (9) SCALE 597 ¶ 22; *accord*, Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 86.
[51] The Insolvency and Bankruptcy Code, 2016, § 32-A (1), No. 31, Acts of Parliament, 2016 (India).
[52] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 108.
[53] Neeraj Kumar Sainy v. State of Uttar Pradesh (2017) 14 SCC 136 ¶ 29, 32.
[54] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 108.
[55] The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India).
[56] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 99; *accord*, Madras Petrochem India Limited v. BIFR, (2016) 4 SCC 1 ¶17-23.

mechanism which would bind dissentient creditors, and operational creditors, is in accordance with the universal mandate of insolvency laws.[57]

These constructions however, should be subject to the need for an appeal mechanism, especially in lieu of a pandemic where dealing with all classes equitably is of paramount importance. Therefore, Section 31 (1), which entails the approval of the resolution plan approved by the committee of creditors,[58] approved by the adjudicating authority,[59] and binds all creditors, should be harmoniously construed with the requirement of an appeal mechanism.

5.3. Extinguishment with respect to the Claims of Workmen

A plain reading of section 31 (1) brings to notice the attention paid to specifically naming each creditor which would be bound by the approved resolution plan, the relevant part of the provision reads:

"*…it shall by order approve the resolution plan which shall be binding on the* ***corporate debtor*** *and its* ***employees, members****,* ***creditors****, [including* ***the Central Government****, any* ***State Government*** *or any* ***local authority*** *to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as* ***authorities to whom statutory dues are owed****,]* ***guarantors*** *and other* ***stakeholders*** *involved in the resolution plan.*" (emphasis supplied).

Though the workmen have been classified as operational creditors,[60] to enable them to initiate insolvency resolution against the corporate debtor, the code has gone at lengths to specify their entity whenever a reference has been made to them in the code.[61] Further, whenever an explicit mention has been made to the "workmen", the code has ensured them a heightened level of security against other operational creditors, as they have been prioritized in the liquidation waterfall,[62] and the welfare funds owed to them by the corporate debtors have been excluded from the liquidation estate.[63]

[57] *See Legislative Guide on Insolvency Law*, United Nations Publication, and pp.: 226 ¶ 54.
[58] The Insolvency and Bankruptcy Code, 2016, § 30 (4), No. 31, Acts of Parliament, 2016 (India).
[59] *Id*., § 31 (2).
[60] J.K Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company, (2019) 11 SCC 332.
[61] *See generally*, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[62] The Insolvency and Bankruptcy Code, 2016, § 53 (1), No. 31, Acts of Parliament, 2016 (India).
[63] The Insolvency and Bankruptcy Code, 2016, § 36 (4) (a) (iii), No. 31, Acts of Parliament, 2016 (India).,

Therefore, their absence in section 31 (1), should also be given a purposive interpretation so as to exclude them from other creditors who are to be bound by the approved resolution plan, and accordingly, the reasoning employed by the Apex Court, which dictates that their shall lie no appeal with respect to claims against the corporate debtor after the approval of a resolution plan,[64] should not be applicable to workmen, who are a special class owing to their socio-economic standing.

Therefore, they should have the right to an appeal with respect to prior claims even after the resolution plan has been approved by the committee of creditors,[65] and passed by the adjudicating authority.[66] As the workmen need to be dealt with equitably, and the primary objective of the code is to speedily reinstate the corporate debtor, for which maximum reliance has been placed on the wisdom of the committee of creditors, which may or may not be able to equitably deal with the interests of the workmen.

Insertion of section 32-A (pandemic amendment) in the code however,[67] defeats the aforementioned construction, as it explicitly bars any claims with respect to offences committed by the corporate debtor before the initiation of the insolvency resolution process, on the approval of a resolution plan, even the claims of special classes, like the workmen. The care infused in this section with respect to mitigating collusion however, does provide space for accommodating a judicial innovation which might mitigate the effects of all the pandemic related, non-workmen friendly amendments made to the code.

6. REVERSE CORPORATE INSOLVENCY RESOLUTION PROCESS

6.1. Need for a Tailor-Made Process.

Labour intensive industries depend heavily on workmen to keep their operation an ongoing concern, as evidenced by the office memorandum circulated by the Ministry of Housing, and Urban Affairs,[68] which places emphasis on the reverse migration of labour to their villages, as

[64] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 88.
[65] The Insolvency and Bankruptcy Code, 2016, § 30 (4), No. 31, Acts of Parliament, 2016 (India).
[66] *Id*. § 31 (2).
[67] The Insolvency and Bankruptcy Code (Amendment) Act, § 10, No. 1, Acts of Parliament, 2020 (India).
[68] *Office Memorandum,* GOVERNMENT OF INDIA MINISTRY OF HOUSING & URBAN AFFAIRS, No. O-17024/230/2018-Housing-UD/EFS-9056405, (May 13, 2020).

one of the contributing factors to cause disruption in the real estate sector, as a result of which, *force majeure* under the Real Estate (Regulation, and Development) Act, 2016,[69] has been invoked, granting relaxation to builders with respect to projects due on or after March 25, 2020.

Although, financial creditors have been tasked with deciding the fate of the corporate debtor, and his company, due to their vested interest which goes beyond immediate financial implications; creditors who would be incentivized to vote for liquidation, and those who cannot assess the viability of a resolution plan,[70] might hurt the objective of the process, which calls for a tailor fit approach to insolvency in labour intensive industries,[71] so that the interests of operational creditors, labour, organized or unorganized, and the corporate debtor, do not stand defeated at the hands of the rogue interests of financial creditors.

Therefore, taking in consideration the fact that the company tribunals do possess supervisory jurisdiction,[72] which includes the power to give directions, and make modifications in schemes which contravene the mandate of the code, the same can be used to the benefit of corporate debtor, and all his creditors, in an event where the financial creditors cannot be relied on to deal fairly with all creditors, or in case of overriding circumstances, like the pandemic, where the financial creditors would be incentivized to overlook the interests of a certain class of creditors. Especially since the offences of the corporate debtor prior to the commencement of the insolvency resolution process are to stand extinguished on approval of a resolution plan,[73] unless the management is under a promoter or a similar entity who might have abetted in the commission of the aforementioned offences.[74]

6.2. Reverse Corporate Insolvency Resolution Procedure

Reverse Corporate Insolvency Resolution Procedure (Reverse CIRP) is a judicial innovation of the National Company Law Appellate Tribunal,[75] which eases the burdens of following the procedure of insolvency resolution when a real estate allottee files a claim of insolvency

[69] The Real Estate (Regulation, and Development) Act, 2016, § 6, No. 16, Acts of Parliament, 2016 (India).
[70] Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT 42, ¶8.
[71] *Id*. ¶25.
[72] Mihir R. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 571 ¶ 28, 29.
[73] The Insolvency and Bankruptcy Code, 2016, § 32A, No. 31, Acts of Parliament, 2016 (India).
[74] *Id*. (2)
[75] Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT 42 ¶25.

resolution under section 7 of the code. The objective of adopting such a process, as stated by the NCLAT:

"'Reverse Corporate Insolvency Resolution Process' can be followed in the cases of real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which ***provides employment to large number of unorganized workmen****."*[76]

To adopt Reverse CIRP however, the parties to the insolvency resolution including financial creditors need to waive their right to decide the fate of the corporate debtor, and his company, which would be unlikely where all faith has been lost in the corporate debtor's operation. Further, Reverse CIRP is tailor made for pursuing insolvency in the real estate sector, which is restricted to a single project of the corporate debtor, for which the real estate allottees have initiated insolvency resolution. Nevertheless, this judicial innovation on adoption can possibly resuscitate the financial health of the despondent workmen in the labour intensive real estate industry.

6.3. Protecting the Interests of all Creditors.

Reverse CIRP revolves around a tripartite arrangement between the Adjudicating Authority, the Resolution Professional, and a promoter of the corporate debtor for the benefit of the corporate debtor;[77] it entails the issuance of directions by the Adjudicatory Authority, ensuring excessive implementation of the corporate debtor's assets to keep the corporate debtor's company an ongoing concern, while paying heed to the varying interests of the different creditors of the corporate debtor.

Much like normal insolvency resolution process, Reverse CIRP prioritizes keeping the corporate debtor's company an ongoing concern, but does not require the involvement of the resolution applicant,[78] as the plan that is needed to keep the debtor an ongoing concern is substituted by the directions issued by the adjudicating authority, which is an unbiased entity, and would be able to take into consideration the interests of all classes of creditors, including special classes like workmen.

[76] *Id*.
[77] *See generally*, *Id*.
[78] *See generally*, *Id*.

The Promoter is tasked with discharging necessary funds to ensure the smooth functioning of the resolution process,[79] which alleviates the financial burden of pursuing insolvency resolution for special class of creditors like workmen. Further, the financial wisdom of the committee of creditors can aid the adjudicating authority by nudging them in the correct direction as, and when the need arises.

On adopting Reverse CIRP, there is no need for passing of a resolution plan, as the function of the resolution applicant is fulfilled by the adjudicating authority, therefore, an appeal mechanism for creditors, including workmen, is still preserved, as pre-insolvency commencement claims are not to be extinguished if a promoter like entity resumes the operation of the corporate debtor on successful resolution of insolvency.[80]

6.4. Additional Benefits of Adopting Reverse CIRP

Further, the code does not ensure job security to the workmen, the *non obstante* incorporated in the code makes it clear that the code would override any other law inconsistent with the code,[81] which would mean that the provisions of the Industrial Disputes Act, 1947, which assure a body of more than 100 workmen working in a company, a consequential say in the closure, retrenchment, and transfer of ownership,[82] providing job security to the workmen, would not be paid heed unless an actual court of law harmoniously construes the provisions of the code, and the Industrial Disputes Act, and ensures security to the workmen, which can certainly be done if Reverse Corporate Insolvency Resolution Process is adopted. The adjudicating authority is an unbiased entity, and would pay heed to the interests of the workmen, and would be able to provide them job security while ensuring that the corporate debtor's company remains an ongoing concern.

7. CONCLUSION

The desperation of the government can be gleaned through the excessive steps taken to cushion the impact endured by the economy due to the pandemic; retrospective amendments have ensured that micro, small, and medium enterprises are out of the clutches of the code. The nexus between these amendments, and the objectives of the code lies in the refinement of the

[79] *Id*. ¶13.
[80] The Insolvency and Bankruptcy Code, 2016, § 32A (2), No. 31, Acts of Parliament, 2016 (India).
[81] The Insolvency and Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India).
[82] The Industrial Disputes Act, 1947, Chapter V-B, No. 16, Acts of Parliament, 1947 (India).

economy, but the situation calls for a balance. Practical functioning of any company relies not only on its financial creditors, but also on those special classes that put in their labour to ensure that the company remains an ongoing operation.

Therefore, the rejuvenation of the economy should not come at the cost of diluting the financial interests of special classes like workmen, who have suffered enough at the hands of the pandemic, and the state governments who turn a Nelsonian eye to their basic fundamental rights.[83] Therefore, if explicit provisions cannot be incorporated for the benefit of the workmen, special mechanisms like reverse CIRP need to be adopted, which take into account the interests of the workmen, while paying heed to the objectives of the code, and enable the process to be laced with the warmth of equity, which in current conditions, is the need of the hour.

[83] *Supra* note 24.

PANDEMIC AND THE ANECDOTE OF INDIA'S WELFARE STATE

Siddhant Dubey[1] *and Shrishti Natani*[2]

1. INTRODUCTION

A total of 198 workers lost their lives during all the 4 phases of lockdown.[3] As per a report of the International Labor Organization [**'ILO'**] and Asian Development Bank [**'ADB'**], 41 lakh Indian youth lost their jobs owing to the Pandemic.[4] Human Rights Watch reported that more than 1.5 billion students are out of school already.[5] Incidents of communal violence and religious discrimination in the country have ballooned since the outbreak of coronavirus. This pandemic came at the time when India was already among the most hunger struck countries in the world, corroborated by the Global Hunger Index [**'GHI'**] ranking India 102 among 117 countries.[6] Besides all this, India is a country with the 3rd most number of deaths in the world, and its healthcare infrastructure is failing the citizens.[7]

These facts very aptly ingeminate the gravity of the mishap India is witnessing. COVID-19 has brought almost every essence of life to a halt. Managing Director of International Monetary Fund Kristalina Georgieva has already declared that the world has entered a recession as bad or worse than 2009.[8] In this sweeping human, social and economic disaster, there lies a widespread belief that the state's welfare spending is paramount in not only recouping the economic damage but also to efficiently combat the pandemic. By assuring timely supplies of

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[1] Student, Institute of Law, Nirma University.
[2] Student, Institute of Law, Nirma University.
[3] THE NEW INDIAN EXPRESS, *Most migrants died during COVID-19 lockdown 3.0: SaveLife Foundation*, https://www.newindianexpress.com/nation/2020/jun/03/most-migrants-died-during-covid-19-lockdown-30-savelife-foundation-2151565.html (last visited June 3, 2020).
[4] PTI, *41 lakh youth lose jobs in India due to COVID-19 pandemic: ILO-ADB Report*, The Economic Times https://economictimes.indiatimes.com/news/economy/indicators/41-lakh-youth-lose-jobs-in-india-due-to-covid-19-pandemic-ilo-adb-report/articleshow/77613218.cms?from=mdr (last visited Aug 18, 2020).
[5] INDIA TODAY, *Covid-19 Lockdown: Impact of global pandemic on education sector*, https://www.indiatoday.in/education-today/featurephilia/story/covid-19-lockdown-impact-global-pandemic-on-education-sector-1698391-2020-07-08 (last visited Jul. 8, 2020)
[6] Andrea Biswas Tortajada & Cecilia Tortajada, *How COVID-19 worsens hunger in India, the world's largest food basket*, THE CONVERSATION (Jul. 29, 2020), https://theconversation.com/how-covid-19-worsens-hunger-in-india-the-worlds-largest-food-basket-142300.
[7] WORLD HEALTH ORGANIZATION, *WHO Coronavirus Disease (COVID-19) Dashboard*, https://covid19.who.int/?gclid=Cj0KCQjw7sz6BRDYARIsAPHzrNKF9w982B5wc9v9cibN3hDKacrs-mmHbhPU72V5LoXu9ZJ3gM3yk6kaArn3EALw_wcB (last visited Sep 15, 2020).
[8] PTI, *IMF chief Kristalina Georgieva: We have entered recession*, The Economic Times https://economictimes.indiatimes.com/news/international/business/imf-chief-kristalina-georgieva-we-have-entered-recession/articleshow/74852225.cms (last visited Mar 28, 2020).

basic essentials and income support, the government can lessen the chances of people volunteering outside, therefore containing the outbreak of the virus.

Deliberating on various economic and social issues, the authors in this article will further discuss how the Indian welfare state failed to deliver amidst the pandemic. The article will also moot on the role that the media plays in paving the welfare of the state and how this pandemic can change the course of a welfare state in the coming years.

2. BACKGROUND

A welfare state is a phenomenon of government where the state plays a vital role in safeguarding and promoting the economic and social well-being of all its citizens. This concept is based on the principles of equitable distribution of wealth, equality of opportunity, and public responsibility for those who are incapable of availing minimum provisions for a good life. The origin of this concept can be traced back to the early 1840s when the first Chancellor of Germany, Otto von Bismarck established the modern welfare state by fabricating a culture of welfare programs in Prussia.[9]

The historic intention to create a welfare state was to abate the market generated inequalities that existed between the different groups of people. It is often believed by theorists that India is more of an interventionist and developmental state with a touch of welfare. This essence of welfare is sobserved in Part IV of the constitution i.e the Directive Principles of State Policy [**'DPSP'**] which aims at providing adequate standard of living to its citizens.[10]

This article describes the current paradigm of the Indian welfare state. These 5 months, since the pandemic has been declared, the country has seen the greatest number of breaches in the welfare-oriented legislations. This indicates how unprotected the vulnerable communities of India have become. The mere existence of the concept in the constitution is not enough to make a country a welfare state. There must be deeds and actions done which do reflect this aspect.

[9] SOCIAL SECURITY, *Otto von bismarck - social security history*, https://www.ssa.gov/history/ottob.html.
[10] INDIA CONST. part IV.

3. CHALLENGES AMIDST THE PANDEMIC

Considering the present-day catastrophe of all the sectors, the welfare provisions of the state seems to be imperative for the basic survival of the vulnerable. Though with the advent of the globalized world order, there have been several apprehensions in the past concerning the rolling back of the welfare measures by the state. However, the increasing prominence of the welfare societies seems to reign relentlessly, despite all the defiance. Amidst this pandemic, every nation-state regardless of the form of government has witnessed numerous challenges and pertinently the state has come up with specific reparative measures. However, till what extent those measures really served their purpose or were merely a political hoot is a different story.

3.1 Migrant Workers

The prime minister of India, while addressing the nation declared the implementation of total lockdown just four hours before its imposition. There is no doubt about the fact that this declaration sent shock waves all around the country. However, the most affected were the employees of the informal sector especially the migrant workers whose source of living came to a halt. Ever since then, they have been suffering both economically and socially. They have lost their jobs, they are out of money and are also homeless. These workers have to struggle daily for even as basic necessities as food and shelter. As a result, the laborers started marching barefoot to their native places in search of social security, and around 200 died in this process.[11]

There are several substantial international documents that obligate the Indian state to arrange basic necessities like food and shelter for its citizens. The Universal Declaration of Human Rights ['UDHR'] enacted 3 years after the genesis of the United Nations General assembly is regarded as one of the most significant documents concerning human rights. Article 25(1) of the document guarantees the right to food and the right to housing to every being.[12] Further, Article 11(1) of the International Covenant of Economic, Social, and Cultural Rights ['ICESCR'] also recognizes being free from hunger as a fundamental right.[13] These treaties and covenants which are ratified by India very aptly underline the responsibility of the

[11] Kabir Agarwal, *Not Just The Aurangabad Accident,383 People Have Died Due To The Punitive Lockdown*, THE WIRE (May 10, 2020) https://thewire.in/rights/migrant-workers-non-coronavirus-lockdown-deaths.
[12] Universal Declaration of Human Rights (1948), art. 25.
[13] International Covenant on Economic, Social and Cultural Rights (1976), art. 11.

government in providing these homeless migrant workers with food and shelter. Apart from these international accords, the Constitution of India too guarantees the migrant workers Right to life and personal liberty under Article 21.[14]

In the matter of Chameli Singh v. The State of U.P., the court held that the right to life can be acquired only if a person is provided with sufficient opportunities that would add up to his personal growth and development.[15] Also in one of the most landmark judgments of the Indian judicial history Kesavananda Bharati, S.M. Sikhri J. observed that 'freedom from starvation is as important as the right to life.[16] The supreme court, by way of referring to the number of decisions, explained the wide scope of article 21 where the word 'life' does not denote 'mere animal existence' but 'right to live with human dignity', hence the quality of life is a paramount feature of the right to life.[17] Besides this, there have been continuous images of police brutality against these helpless migrant laborers.

Article 39 of the constitution of India provides for the state to strive towards providing adequate means of livelihood.[18] Also, Article 47 asserts that the State has to try to raise the level of nutrition.[19] Even though these clauses are under the DPSP and are not justiciable, they still reflect upon the duties and aim of the state. Keeping aside this unprecedented situation, even under the simpler circumstances India failed to provide sufficient meals to its citizens, and rank of 102 out of 117 in the 2019 GHI further corroborates it.[20]

Additionally, the Inter-State Migrant Workmen Act, 1979 provides the statutory rights to migrant workers where the employer needs to register each of its migrant workers,[21] and besides ordinary wages, every employer is obligated to pay for his employees' journey back to his residence.[22] Considering how the laborers are jeopardizing their lives and transgressing the

[14] INDIA CONST. art. 21.
[15] Chameli Singh v. State of Uttar Pradesh, 1996 (2) SCC 549.
[16] Kesavanand Bharti v. State of Kerala, (1973) 4 SCC 225.
[17] P . Rathinam v. Union of India, AIR 1994 SC 1844.
[18] INDIA CONST. art. 39.
[19] INDIA CONST.art. 47.
[20] PTI, *India slips to 102nd rank in Global Hunger Report 2019*, The Hindu Business Line https://www.thehindubusinessline.com/news/india-slips-to-102nd-rank-in-global-hunger-report-2019/article29698494.ece. (last visited Oct. 16, 2019)
[21] The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, sec. 6
[22] The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, sec. 15

lockdown guidelines, it is apparent that their employers did not pay them the required wage and allowance. Though the Labor Ministry of India issued an advisory saying that the employers should refrain from laying off their staff. However, a government enterprise such as All India Radio itself flouted these guidelines and laid off its general staff.[23]

There might be some employers who are intentionally disregarding the state's guidelines, but many other employers are genuinely not capable enough to pay their employees for a long time with the business being shut. The reason behind this is that the business specifically the informal sector has been performing really substandard for the last couple of quarters. The Indian economy registered a very low rate of GDP i.e. 5% in 2018 - 19.[24]

Later the government did introduce a 20 crore lakh rupees relief package which was claimed to be 10% of the country's total GDP.[25] However, taking a closer look into this package one would realize that the maximum benefits provided in the relief package were either already a part of this year's budget or provided as collateral-free loans.[26] Out of 20 lakh crore relief package, 8.74 lakh crore was already rolled out by the reserve bank of India.[27] The amount given was the part of RBI reserves and not the state's budgetary expenditure. Hence, as per Barclays and CARE rating, actually, the whole package was merely worth 1.75 to 2.3 lakh crore which amounts to 0.75 to 1.3 % of the country's GDP.[28] Even the economy as small as Pakistan has provided a relief package amounting to 3.34% of its GDP.[29]

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[23] Anusuya Som, *All India Radio ignores Government advisories, puts casual staff out of work*, NEWSLAUNDRY, (Apr. 21, 2020) https://www.newslaundry.com/2020/04/21/all-india-radio-ignores-government-advisories-puts-casual-staff-out-of-work.

[24] PTI, *India's GDP growth rate for 201-20 estimated at 5% against 6.8 % of FY19*, BUSINESS STANDARD (Jan. 7, 2020) https://www.business-standard.com/article/economy-policy/gdp-first-advance-estimates-predict-economic-growth-at-5-in-2019-2020-120010700990_1.html.

[25] PTI, *Rs. 20-lakh cr stimulus package: At 10 % of GDP, Narendra Modi's Atma-nirbhar Bharat Abhiyan ranks among biggest in world*, FIRSTPOST (May 13, 2020) https://www.firstpost.com/business/rs-20-lakh-cr-stimulus-package-at-10-of-gdp-narendra-modis-atma-nirbhar-bharat-abhiyan-ranks-among-biggest-in-world-8364191.html.

[26] BQ Desk, *Covid-19 economic package: MSMEs Get New Definition Collateral Free Loans And Other Funding Support*, THE ECONOMIC TIMES (May 13, 2020) https://www.bloombergquint.com/economy-finance/covid-19-economic-package-msmes-get-new-definition-collateral-free-loans-and-other-funding-support.

[27] PTI, *Economic stimulus package includes Rs. 8 lakh crore liquidity measures by RBI:FM Sitharaman*, THE ECONOMIC TIMES (May 17, 2020) https://economictimes.indiatimes.com/news/economy/policy/economic-stimulus-package-includes-rs-8-lakh-crore-liquidity-measures-by-rbi-fm-sitharaman/articleshow/75786026.cms.

[28] Sunita Natti, *Centre's outgo on stimulus package less than 3 lakh crore*, THE NEW INDIAN EXPRESS (May 18, 2020) https://www.newindianexpress.com/business/2020/may/18/centres-outgo-on-stimulus-package-less-than-rs-3-lakh-crore-2144720.html.

[29] Deepankar Basu & Priyanka Srivastava, *COVID-19 in South Asia: India Lags Behind Pak on Stimulus, Lanka on Overall Performance*, THE WIRE (May 19, 2020), https://thewire.in/political-economy/covid-19-in-south-asia-india-lags-behind-pak-on-stimulus-lanka-on-overall-performance.

3.2 Healthcare Infrastructure

India's healthcare infrastructure was never in the best of shape and certainly, this pandemic has put a period to that debate. Even the poshest cities of the country saw patients jamming outside their hospitals waiting to be treated. The lack of beds,[30] doctors,[31] and para-medical staff[32] has uncloaked the inefficiency of the healthcare system. Several families have lost their loved ones, as they say, not because of the virus but because of the ill-treatment.

Umesh Tamaichi, a lawyer from Ahmedabad, died after 5 days of showing symptoms of COVID. All these days his family scuffled from one hospital to another in search of a bed and treatment, but the system failed them.[33] Devi, after days of struggle, finally managed to get a bed, but later died due to a delay in treatment.[34] 35-year-old V Ravikumar left his father a video message before breathing his last breath in the hospital. He claimed that despite having difficulty in breathing, the hospital removed his ventilator, and for hours he begged for oxygen but to no avail.[35]

Considering these events, one can just visualize the hardships of the patients in rural areas, where active cases of corona are soaring and let alone healthcare facilities, even electricity is a buzzword. Ironically, 75% of the country's healthcare infrastructure is dedicated to urban areas where only 27% of the country's population lives. As per Dr. Anup Sadhu, "The villagers have

[30] Joanna Slater & Niha Masih, As pandemic intensifies, many in India die due to shortage of hospital beds, the seattle times (June 13, 2020) https://www.seattletimes.com/nation-world/as-pandemic-intensifies-many-in-india-die-due-to-shortage-of-hospital-beds/.
[31] Priyankaraj, *Poor Health Care Infrastructure, Lack of Doctors has Made COVID-19 Pandemic so Worse in India*, INVENTIVA, https://www.inventiva.co.in/stories/priyankaraj/poor-health-care-infrastructure-lack-of-doctors-has-made-covid-19-pandemic-so-worse-in-india/.
[32] *Id.*
[33] BBC, Coronavirus: India's healthcare system failed my family, (June 17, 2020), https://www.bbc.com/news/world-asia-india-52990324.
[34] Cheena Kapoor, *COVID-19: Is Indian healthcare system heading for collapse?,* AA (last visited June 10, 2020), https://www.aa.com.tr/en/asia-pacific/covid-19-is-indian-healthcare-system-heading-for-collapse/1871871.
[35] Brut India*, 35-Year-Old Covid-19 Patient, V Ravikumar, Left His Father A Video Message Before Breathing His Last In A Hyderabad Hospital* (June 30, 2020), https://twitter.com/BrutIndia/status/1277990394010140672.

to travel long distances to the nearby hospital in case of emergencies and the only transportation available is private transport which many cannot afford."[36]

A witty diplomatic denial excusing the unprecedented nature of the pandemic cannot hide the systemized incompetency of the government. India had faced several epidemics such as the Spanish Flu, SARS, and Swine Flu from 1918 to 2015 to alarm the bureaucrats about the healthcare facilities.[37] The global health security index (2019), ranked India 57 in terms of ability to handle the crisis.[38] Another study revealed that fatalities from contagious diseases in India are much higher than the global average.[39] The country's healthcare investment being 1.3% of its GDP,[40] effectively explains these stats and establishes the incautious conduct and unpreparedness of the Indian government in handling the outbreak.

The Supreme Court of India in the matter Bandhua Mukti Morcha v. The Union of India has held that the right to live with human dignity defined in Article 21 of the Constitution of India derives from the directive principle of state policy, and hence includes the protection of health.[41] Similarly, in the State of Punjab v. Mohinder Singh Chawla, the court established that the right to health is an indispensable part of the right to life and the government has to provide adequate healthcare facilities.[42]

Several international documents also vouch for safeguarding the right to health. Article V of the Alma-Ata Declaration states that "the government has a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures."[43] Further article 12 of general comment No. 14 of ICESCR, "health facilities, goods, and services have to be accessible to everyone without discrimination."[44]

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[36] Rural Healthcare Sector : A Challenge Yet To Be Resolved, Smile Foundation India.org (2020), https://www.smilefoundationindia.org/Media/rural-healthcare.html,
[37] Arfa javaid, *COVID-19: History of Epidemics in India Since the 1900s*, JAGRANJOSH (23 march 2020) https://www.jagranjosh.com/general-knowledge/history-of-epidemics-in-india-since-the-1900s-1584627562-1.
[38] Global Health Security Index, GHS index (2019), https://www.ghsindex.org/wp-content/uploads/2019/10/2019-Global-Health-Security-Index.pdf
[39] Surbhi Bhatia, Covid-19 Shows Why We Need A Healthcare Reboot For India (2020), https://www.livemint.com/politics/policy/will-covid-19-prompt-health-reboot-11585497828527.html.
[40] *supra* note 23.
[41] Bandhua Mukti Morcha v. Union Of India & Others, 1984 SCR (2) 67.
[42] State Of Punjab & Ors v. Mohinder Singh Chawla, (1996) 113 PLR 499.
[43] Declaration of Alma-Ata, art. V.
[44] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, Art. 12.

Also, Article 25 of the UDHR bestows the right to a "standard of living adequate for the health including medical care and the right to security in the event of sickness, disability, or other lack of livelihood in circumstances beyond his control."[45] However, the current situation in India blurs the implementation of these international covenants and it's healthcare establishment has been tattered.

The doctor to population ratio as mandated by the WHO is 1:1000. However, India's ratio as of February 2020 was 1:1404.[46] Further, as per National Health Profile 2019 this ratio, in rural areas, was as low as 1:10,926.[47] The situation is even more deplorable in terms of hospitals and bed count. Around 55,591 people are dependent on a single hospital and there is a single bed for every 1,844 people.[48]

In Karnataka, medical college students who were working day and night in COVID wards went on strike since the authorities have denied their stipend for the last 16 months. Hoping them to be allegiant after the distress they are posed within these extreme circumstances is unrealistic.[49]

3.3 Education

The nationwide shutdown called for schools and colleges to shut down at a very crucial time for the students for the reason that most of them were either about to appear or appearing for their board examinations. Additionally, it was the time for the entrance examinations of various institutions to begin so as to start with the admission process for the academic year. The lockdown was so sudden and abrupt that these educational institutions did not even have the time to plan their future. Furthermore, the shutting down of schools caused the traditional method of teaching to come to an end resulting in problems for both students but for the teachers as well.

There occurred a shift in paradigm since the mode of teaching shifted from offline to online. The right to education is a fundamental right and to ensure the same was not being violated,

[45] *supra* note 2.
[46] *supra* note 23.
[47] *Id.*
[48] Online FE, *Can National Essential Diagnostics List Alone Fight India's Healthcare Battles?*, THE FINANCIAL EXPRESS (Aug.1, 2019), https://www.financialexpress.com/opinion/can-national-essential-diagnostics-list-alone-fight-indias-healthcare-battles/1662314/.
[49] Jamal N, *Karnataka: Resident Doctors on Indefinite Strike over Unpaid Stipend for over 16 Months*, INDIA TODAY (July 3, 2020), https://www.indiatoday.in/india/story/karnataka-resident-doctors-on-indefinite-strike-over-unpaid-stipend-for-over-16-months-1696670-2020-07-03.

steps were taken up by the Ministry of Human Resource Development (MHRD). It included having arrangements including online portals and educational channels through Direct to Home TV, Radios for students to continue learning.[50] Although steps were taken to mitigate the losses that the educational sector suffered, its benefits could not reach the neediest.

The problem ranges from the discrepancies in the network and technology to the teachers and the people who are unable to access applications because of numerous reasons. There exists a great digital divide between urban and rural people[51]. This divide includes not having access to a smartphone, having a lack of knowledge as to how the device is to be used. There also exist issues regarding the vernacular content that only suits the English-speaking students hence ignoring the schools which teach in regional languages.

Article 26 of the UDHR[52] recognizes the "Right to Education" and considers it as one of the basic needs of every human being. Moreover Article 13 and 14 of ICESCR[53] states that countries should provide primary education free of cost. There shouldn't be any discrimination based on caste, race, or culture when imparting education.

The Right to Education was included as a fundamental right in the case of Mohini Jain vs the state of Karnataka[54]. However, this fundamental right is being averted for the poor and the rural children during the pandemic. The Indian government has failed to ensure this right to the most vulnerable group. The lack of technological accessibility makes it impossible for both, the children to attend classes as well as the schools to conduct classes.

In the case of Bandhua Mukti Morcha vs UOI[55], the court held that the state must ensure that the facilities and opportunity to children are provided as under Article 39(e)[56] and (f)[57]. In furtherance of this, it was observed by the court in the Shyam Sundar case[58], that there should

[50] India Report Digital Education, Ministry of Human Resource Development (June 2020), https://www.mhrd.gov.in/sites/upload_files/mhrd/files/India_Report_Digital_Education_0.pdf.
[51] Kundan Pandey, *COVID-19 highlights India's great digital divide*, DOWNTOEARTH (July 30,2020), https://www.downtoearth.org.in/news/governance/covid-19-lockdown-highlights-india-s-great-digital-divide-72514.
[52] Universal Declaration of Human Rights (1948), art. 26.
[53] International Covenant on Economic, Social and Cultural Rights (1976), art. 13 and art. 14.
[54] Mohini Jain v. the state of Karnataka,1992 SCR (3) 658.
[55] *supra* note 33.
[56] INDIA CONST. art 39(e).
[57] INDIA CONST. art 39(f).
[58] Shyam Sunder Agarwal & Co v. Union Of India,1996 SCC (2) 471.

be quality education without any discrimination based on the child's economic, social and cultural background. The current scenario violates all these principles.

Another problem that did arise due to the lockdown is the end to the mid-day meals, the only source of nutrition for the poor students. It acted as an incentive to encourage students to attend school. In the PUCL VS UOI[59], the supreme court directed the government to distribute these meals in government schools. The lockdown resulted not only in problems in education but also directly affected the health of these students who depended on the mid-day meals for their subsistence.

Looking at all these issues, it surely makes one doubt the principles of the welfare of the country. The fundamental rights are being violated, duties are not being followed and the cost of all this is being borne by the most vulnerable section of the society.

3.4 Unemployment

The virus took everyone by shock and its impact was felt by all sectors of the economy. The initial pictures of the lockdown were not of the hospitals or ventilators or of the frontline workers, but of the migrants, lugging their belongings and heading back to their hometown.[60] The informal sector was badly hit because more than 85% of Indians are employed in this sector.

The plight of the formal sector due to the pandemic was no less. Their issues were overlooked due to the safety net that they have. Although during the current pandemic that did not save them. While some of them lost their incomes completely, others saw a drastic fall in their earnings. The present situation has created a state of limbo for them.[61] The reason they chose salaried jobs over any informal employment was to have a sense of assurance of social security. However, this argument was nullified when a lot of them were abruptly terminated. The woes

[59] People'S Union Of Civil Liberties v. Union Of India (Uoi) And Anr., AIR 1997 SC 568.
[60] Maurice Kugler et al., The impact of COVID-19 and the policy response in India, Brookings (July 13, 2020), https://www.brookings.edu/blog/future-development/2020/07/13/the-impact-of-covid-19-and-the-policy-response-in-india/.
[61] Koustav Das, *Coronavirus: Economic slowdown leaves India's aspiring middle class in limbo*, INDIA TODAY, (Aug.21, 2020, 12:04 PM), https://www.indiatoday.in/business/story/india-economic-slowdown-middle-class-income-salaried-population-coronavirus-1713544-2020-08-21.

of the formal sector are increasing each day, ranging from salary cuts to company layoffs and delayed increments.

One of the most evident examples is of Reliance Industries[62], wherein it was observed that the employee expenses have reduced to 14.68% which is the highest amongst India's most valuable companies. All industries ranging from automobiles to aviation have witnessed a decline in the number of employees. This downfall in the number of formal employees has created a ripple effect on the economy. The household income has been falling since April 2020.[63] This resulted in a shortage of savings with each day passing and hence forcing people to spend less. When the spending power decreased, it led to a decrease in the nemesis of purchasing power. This resulted in the loss of jobs of people from the informal sector. Consequently, the entire economy came under the wrath of the virus.

The Labor Force Participation Rate (LFPR) which is an estimate of both the employed and the ones looking for a job has declined to 35.5% in the second week of April.[64] This indicated that people stopped looking for a job. One of the reasons for the same is that for a middle-class person the cost of investing in education wasn't leading to the same amount of returns during their employment. This prevented them from looking for a job in the formal sector. The pandemic accelerated this process. This, in the long run, would result in people abstaining from attaining formal education. Their reason for the same was to obtain a job and now despite having qualifications they are still not getting appropriate employment or the desired salary. Thereby leading to a shift from the formal to the informal sector. (Informalization)

Additionally, the Employees Provident Fund Organization (EPFO), which manages a corpus built on mandatory contributions for salaried people and their employees, observed withdrawal of about Rs. 30,000 crores in 4 months starting April.[65] This exhibits the lack of money and a savings for discretionary spending among people employed in the formal sector, forcing them

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[62] Piyush Pandey, *Reliance cuts employees' salary by 10-50%; Mukesh Ambani to forgo full expenses for this year*, THE HINDU, (April 30, 2020. 07:01 PM), https://www.thehindu.com/business/Industry/coronavirus-reliance-cuts-employees-salary-by-10-50-mukesh-ambani-to-forgo-salary/article31473075.ece.

[63] *Id*. at 33.

[64] Faraz Khan et al., COVID-19 impact: Informal economy workers excluded from most govt measures,be it cash transfers or tax benefits, Firstpost (May 11,2020, 09:13 AM), https://www.firstpost.com/business/covid-19-impact-informal-economy-workers-excluded-from-most-govt-measures-be-it-cash-transfers-or-tax-benefits-8354051.html.

[65] Yogima Sharma, *EPFO withdrawals during April-July hit Rs.30,000 cr as 8 mn dif into retirement fund*, THE ECONOMIC TIMES (July 29,2020, 12:09 PM), https://economictimes.indiatimes.com/news/economy/indicators/epfo-withdrawals-during-april-july-hit-rs-30000-cr-as-8-mn-dig-into-retirement-fund/articleshow/77210709.cms.

to use their savings to such extreme limits. This rate of withdrawal of money by the middle class will only increase in the coming days.

The changes in the social life results in the changes in their problems. With every change, a new solution has to be resolved. The necessity for this pandemic calls for the welfare state to step in. The current measures that are taken by the government are targeted to cash transfers and tax benefits which exclude the vast army of the informal sector. Instead of this, there is a need for a universal self-targeting welfare scheme which would ensure that the individuals from all sectors are covered under the scheme. For millions of people, unemployment means lack of food, security, and of course the future. If we don't find a solution to this, the enterprises would slowly perish and it will become very difficult to revive them back then.[66]

4. COVID-19 AND THE WELFARE STATE'S REPARATIVE MEASURES

The Indian economy squeezed to -23.9% in the second quarter of 2020.[67] This is India's biggest drop on record, ensuing multiple coronaviruses lockdown halting the maximum of the country's economic activities. However, the problem of this battered economy will note fade even after the pandemic ends. After this, we will be facing a high level of unemployment and very little to non-existent economic growth. Pertinently, when the horrors of this pandemic abate there will definitely be hollers of curtailing the welfare measures provided by the government. Following are some of the measures taken by the welfare states to battle through the pandemic.

4.1 Monetary policy, credit, and loan forgiveness

Almost every major[68] central bank[69] has announced its readiness to provide whatever assistance is required from their end to confront the pandemic. Similar measures were rolled out at times

[66] As job loses escalate, nearly half of global workforce at risk of losing livelihoods, INTERNATIONAL LABOUR ORGANISATION, (April 29, 2020), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_743036/lang--en/index.htm.
[67] Udit Misra, India GDP growth contracts 23.9%: What is the economics behind the math?, THE INDIAN EXPRESS (Sep.6, 2020), https://indianexpress.com/article/explained/gdp-contraction-23-9-the-economics-behind-the-math-6578046/.
[68] Reuters, Coronavirus: Bank of England cuts rates to 0.1%, ramps up bond-buying, BUSINESS STANDARD (March 20, 2020),business-standard.com/article/international/coronavirus-bank-of-england-cuts-rates-to-0-1-ramps-up-bond-buying-120031901664_1.html.
[69] Christopher Condon et. al., Fed unveils unlimited QE and aid for businesses, states, THE ECONOMIC TIMES (March 23, 2020), https://economictimes.indiatimes.com/markets/stocks/news/fed-unveils-unlimited-qe-and-aid-for-businesses-states/articleshow/74779808.cms?from=mdr

of the Great Recession of 2008 as well, by the name "quantitative easing". These measures, during that time, were heavily criticized for it might lead to inflation. However, when there is no motivation to invest, the fear of a spike in inflation is absent. This holds true for 2008 and today as well.

Besides this, there are many interesting policy actions around the world. The European Central Bank [**'ECB'**] in March of this year announced that they would be removing previously self-imposed limits on the sum of any one nation's debt it would hold.[70] This measure will allow the ECB to increase the amount of money they can print.

Another measure employed to alleviate the pain of consumers and small business was the declaration of loan moratoriums. The Reserve Bank of India recently proclaimed that the consumers will have the alternative to a 3-Month moratorium on the EMIs.[71] On the other hand, the United States declared that students with a loan from federal sources can delay their payment until September 30th, with an interest waiver.[72] Prime minister of France, Emanuel Macron declared the suspension of rent as well as utility bills for small enterprises.

These measures are supremely unprecedented because of them being against the primary building block of capitalism. As per the logic of the free market, once the loan is taken, the effectiveness of the economy or the market is ensured via timely repayments of the capital granted through the loan. Here it's argued that due to the lack of repayments to capital, the economy could witness a steep in the investment, growth, and also unemployment. However, considering the status quo no economy is higher than the health and well-being of its citizens.

4.2 Income and Consumption Support

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[70] Balazs Koranyi & Francesco Canepa, *ECB primes money-printing gun to combat coronavirus*, REUTERS (March 26, 2020), https://in.reuters.com/article/health-coronavirus-ecb-qe/ecb-primes-money-printing-gun-to-combat-coronavirus-idINKBN21D0L8.

[71] Pragati Kapoor, *What 3 month moratorium on repayment of term loans means for borrowers*, THE ECONOMICS TIME (Apr.28, 2020), https://economictimes.indiatimes.com/wealth/borrow/lending-institutions-to-allow-3-month-moratorium-on-all-term-loans/articleshow/74840850.cms

[72] Danielle Douglas-Gabriel, *Worried about your student loans? Here's what the government is, and is not, doing to help*, THE WASHINGTON POST (Mar.27, 2020, 11:27 PM), https://www.washingtonpost.com/education/2020/03/27/federal-student-loans-coronavirus/.

With the help of the public distribution system, India is expanding its allocation of food, whereas Hong Kong provided 10000$ to each of its residents in order to fight the pandemic.[73] Further, the US provided its unemployed workers with an added benefit of 600$ per week apart from the regular benefit provided by the state.[74] However, this move faced criticism on the ground that it would incentivize the workers to quit their jobs.

This is one of the most familiar and established arguments against providing or increasing unemployment benefits. Though there are several other arguments against this criticism too, for one, if there is a fear of workers quitting a job due to increasing unemployment benefits then one must think why the wages of employment are so less. In India, the relief has reached the vulnerable through increased food support, where ration card holders are entitled to an extra 5kg of wheat and rice in addition to their existing free benefits and extra kg of pulse for 3 months besides other reparative measures.[75]

Even after these welfare measures of the government, there remains certain issues in the current scenario which are still unanswered. For e.g.: how can the workers who are not in their place of origin excess the benefits of the scheme? Will the coverage be impeded for the needy due to misplaced concerns about the efficiency and the issues with authentication technologies? Although these concerns are genuine, there is no doubt that this is a positive move taken by the state to mitigate the troubles of hunger amidst these difficult scenes. But the horrors of hunger are not isolated to just this pandemic. Food Corporation of India [**'FCI'**] always has the buffer stock which could be utilized any time to attenuate hunger. The people must ensure that this generosity of the government continues post COVID, when weak economic activities creates food insecurity for the vulnerable.

5. FUTURE OF A WELFARE STATE

[73] That's GBA, Hong Kong to Give HK$10,000 to Every Resident Amid COVID-19 Outbreak, That's (Feb.26, 2020), https://www.thatsmags.com/china/post/30829/hong-kong-is-giving-hk-10-000-to-every-resident-amid-covid-19-outbreak.

[74] Caitlin Emma & Jennifer Scholtes, *Here's what's in the $2 trillion stimulus package — and what's next*, POLITICO (Mar.25, 2020, 7:30 PM), https://www.politico.com/news/2020/03/25/whats-in-stimulus-package-coronavirus-149282.

[75] ENS Economic Bureau, Rs 1.7 lakh cr package targets farmers & informal labour, includes existing schemes, The Indian Express (Mar.27, 2020, 5:59 AM), https://indianexpress.com/article/business/coronavirus-relief-package-farmers-informal-labours-nirmala-sitharaman-6333622/.

This pandemic has made clear that a society with prominent inequality will pay the most to get out of the crisis posed by the coronavirus. This implies more no. of deaths and greater level of impoverishment for the vulnerable. So, ameliorating the issue of increasing income inequality is now more than just a social policy. For several decades there have been talks of imminent fall down of welfare states. However, what we have witnessed during this pandemic could be termed as the renaissance of state paternalism.

More and more nation states are now taking extreme measures to take care of their citizens and enterprises. From lowering of taxes and dipping into the policy of stabilization to providing collateral free loans, thus amplifying public debt, states are doing something which seemed completely impossible prior to this pandemic.

Does this imply that all the debates concerning the uselessness of the welfare states will end after the pandemic ends? As soon as the risk of mass death retreats, and economic stress escalates, the states will again start pressing on the need to curtail social spending, limit the accessibility of welfare programmes, lower the benefits and allocate them in a choosier way, all of this in the name of battered economy. How strict these curtailments of benefits will be, largely depends on the respective countries' pre-pandemic development and how effectively they managed to battle through the pandemic. Pertinently, nations who suffered heavy fatalities and greater loss of income and job will be stricter in the curtailment of benefits in order to pull themselves out of the economic crisis.

Now, apart from fiscal perception of the welfare state, there are several vital lessons learnt from the current crisis which can sway the functioning of the future welfare states. The primary thing that seems obvious owing to the specific nature of the crisis is urging demand for a new model of medicine and new model of aging. This pandemic has unfurled a number of shortcomings in the country's health sector and has seriously tested the state's ability to respond to such emergencies. The increasing rate of fatalities of people with coronavirus compiled with other chronic disease questions the efficacy of the existing approach in place to increase life expectancy. In today's scenario, it is not all enough to stretch the lives of the people with critical health conditions. Whereas, the state must try to treat the genesis of the disease and ensure the health of its citizens to the maximum age possible. Hence, demand for anti-aging medicine will definitely gain an impetus in the near future as an important factor of development.

Second and the most important concern this pandemic has raised is the glaring social cost of inequality. It is definitely apparent that coronavirus does not discriminate before entering the individual's body, the virus has been contracted by the most famous politicians to the most famous athletes and stars. However, here is when this social inequality comes into play, out of all the people who contracted the virus maximum to die from the virus belongs to the lower strata of the society.

There are various reasons behind this, Firstly, greater economic inequality usually accompanies significant health inequalities. This means, people of lower strata are more exposed to or rather catch chronic disease at an early age as compared to those of people with sufficient access to healthcare facilities from childhood. Second, maximum of the workers of lower strata are the employees of an informal sector, for eg: taxi drivers, catering business, house keepers, local vendors or nannies. Amid the pandemic, these people have to either continue working, hence exposing themselves to the risk of infection, or leave the job which will kill their only source of earnings. On the other hand people of upper strata have their own spacious housing with rainy day savings and option of work from home. Therefore, the society who will allow such high degree of social inequality will suffer the most and pay the highest price while battling such crises or emergency situations.

Now, what is crucial for the future of the welfare state is that this pandemic has brought light to the risk rising from limited social support measures and unequal health services. This pandemic will definitely increase demand for universal medical coverage and minimum social guarantees.

6. MEDIA REPRESENTATION IN A WELFARE STATE

It is very much evident that many states have become generous in their welfare program to help the citizens and small enterprises come out of the crisis. However, how long will this generosity last totally depend on the citizens itself. If the electorate believes that this pandemic poses a persistent risk to their livelihood and the livelihood of their loved ones, they will subsequently vote for the government which will ensure their welfare and safety of income. If sufficient voters feel that a crisis of such type in the future might again hit their income unexpectedly, pertinently there will be demand for increased social insurance payments, and the government will be forced to deliver on such demands if they want to win the elections.

Now, In whose hands lies the responsibility of making the populous realize the fact that they themselves have the power to decide the fate of their future welfare. Considering the present predicament, when most of the population is trapped isolated in their own homes, the deference of traditional media and social media has spiraled up exponentially. Before the lockdown happened, average time spent on social media was 150 minutes per day, however the first 7 days of lockdown saw a sudden surge from 150 to 280 minutes per day. A study claims the users of social media has increased by 75% owing to the pandemic.[76] It is apparent that today the media holds utmost potential in shaping the minds of the people, and considering this prowess media must try to be allegiant to its profession.

Here is when a book "Manufacturing Consent: The Political Economy of the Mass Media" written by Noam Chomsky and Edward S. Herman seems utmost relevant. In this book they asserted that most of the government policies are accepted by the people based on a blurred picture presented to them by the mass media. The aim of this blurred image is to deny the people alternate views which might make them confront the government's policies.[77]

Similar is the situation of Indian journalism. The media today is using the deference of the people to mold the definition of welfare as per the beliefs of those in power. Ramit Verma, a youtuber with a quirky handle "Official Peeing Human" kept a record of 202 debates happening till october 19, 2019 on 4 prime hindi news channels of india. Seeing the study of Ramit Verma, it can be easily conferred that in India nationalism has overpowered logic and rationalism. He monitored four major hindi news channels namely Aaj Tak, India TV, Zee News, and India TV and following is the tally:[78]

- **Attacking Pakistan**: 79 debates
- **Attacking the Opposition (including Nehru):** 66
- **Praising Modi and the BJP/RSS**: 36
- **Ram Mandir**: 14

[76] BusinessToday.In, Coronavirus: 87% increase in social media usage amid lockdown; Indians spend 4 hours on Facebook, WhatsApp, Business Today (Mar.30, 2020), https://www.businesstoday.in/technology/news/coronavirus-87-percent-increase-in-social-media-usage-amid-lockdown-indians-spend-4-hours-on-facebook-whatsapp/story/399571.html.
[77] Comeforo K, Review Essay: Manufacturing Consent: The Political Economy of the Mass Media, 6 Global Media and Communication 218 (2010), https://journals.sagepub.com/doi/10.1177/1742766510373714
[78] NHS Bureau, 14 debates on Mandir, 66 attacking opposition but none on the economy, National Herald (Oct.31, 2019, 2:00 PM), https://www.nationalheraldindia.com/india/14-debates-on-ram-mandir-66-attacking-opposition-but-none-on-the-economy-four-hindi-news-channels.

- **Bihar floods:** 3
- **Chandrayaan Moon Mission**: 2
- **Rape case against Swami Chinmayanand:** 1
- **PMC Bank scam**: 1
- **Economy**: 0
- **Unemployment**: 0
- **Education**: 0
- **Healthcare**: 0
- **Public infrastructure**: 0
- **Farmers' distress**: 0
- **Poverty and malnutrition**: 0
- **Women's safety**: 0
- **Environmental protection**: 0
- **Mob lynchings**: 0
- **Questioning any government decision or policy**: 0

These stats not only depict the deviant nature of Indian Media but also infringes upon several rights of Indian people. Prasar Bharti (Broadcast Corporation of India) Act, 1990[79] positively asserts that "it is the duty of the public broadcaster to present a fair and balanced flow of information including contrasting views without advocating any opinion or ideology of its own." Besides this, there are other significant international covenants like Resolution 59 of the UN General Assembly[80] and Article 19 of UDHR,[81] which observes Right to Know and Freedom of Information as an innate part of the fundamental right of freedom of expression. As per these international accords, freedom of expression implies the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers. Currently, Indian Journalism through its biased reporting is transgressing upon people's fundamental right to know.

Information about the policies of those who govern us is paramount for the development for the scientific temper of a person which enables the capability of questioning the existing ethos

[79] Prasar Bharti (Broadcast corporation of India) Act, 1990, chapter III.
[80] United Nations General Assembly (1946), Resolution 59
[81] Universal Declaration of Human Rights (1948), art. 19.

and coming with their own ideas and confrontation. These questions and confrontation is something which will shape the present and the future of the welfare state.

7. WAY FORWARD

The unexpected arrival of COVID-19 is serving as a reality check for all the welfare states around the world. This pandemic has posed countless challenges towards the welfare state and till now the government has struggled to deliver in response to these challenges. Lakhs migrant workers were deprived of the most basic of necessities such as food and shelter. Thousands of covid patients died not because of the virus but inefficient healthcare infrastructure.

Though the welfare measures were taken by the different nation states to ameliorate the effect of coronavirus. However, the applicability of these measures remains the big question. India's welfare state has always been paranoid of being over inclusive in its supplying of welfare measures to the people. Therefore, in order to supply social security only to the eligible people, the government usually neglects a huge number of poor people who lack proper documentation. Similar is the situation of covid social security distribution. Coronavirus has revealed the inadequate, fragmented and exclusionary nature of India's social welfare regime.

This crisis has restated the want of a sturdier welfare state in order to lessen peculiarities of current unequal society, though in a limited manner. Also, it has set forth the need of concurrent development of both the dimensions of a welfare state in India. On one hand, there is an exigency of developing a robust public health infrastructure, only then can the people of economically weak sections can battle such a health crisis. On the other hand, India needs to adopt a more inclusive approach while distributing the material social welfare so that the vulnerable section could sustain and survive such dreadful circumstances. The current situation not only questions the effectiveness of the government's policies but also attenuates the meaning of WE, ingeminated in the preamble of Indian Constitution as WE THE PEOPLE OF INDIA.[82]

[82] INDIA CONST. Preamble.