LEGAL LEGENDS

Exclusive interview with former CJI S Rajendra Babu



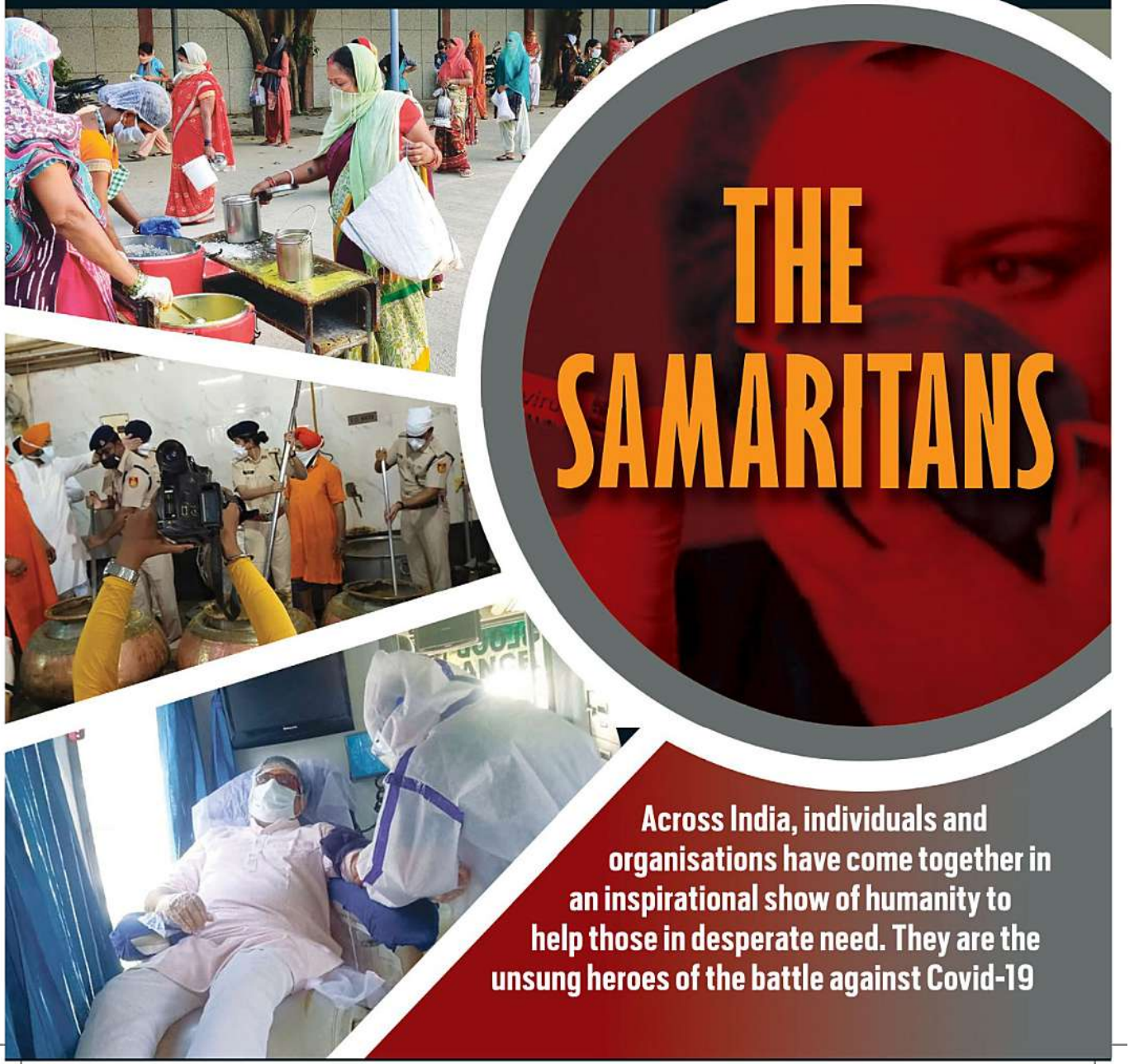
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INDIA LEGAL

STORIES THAT COUNT

May 11, 2020

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THE SAMARITANS

Across India, individuals and organisations have come together in an inspirational show of humanity to help those in desperate need. They are the unsung heroes of the battle against Covid-19

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A LITTLE SUNSHINE

Inderjit Badhwar

ON the bank of the Yamuna, in the middle of an obscure biodiversity park opposite Delhi's once bustling pre-Covid Sarai Kale Khan lies an Ayurvedic healing centre—Seva Dham Plus--run by Jains and monks of the charitable Manav Mandir Mission.

It is an extraordinary institution, whose patients include scientists and physicians from AIIMS, combining therapeutic massages, and alternative and traditional treatments administered by licensed, trained practitioners, combined with yoga and pranayam.

The fees go entirely to the maintenance of the spotlessly sanitised facilities as well as the housing, feeding, upkeep of orphans under the keen scrutiny of nuns who arrange for their schooling right up to college, as well as job training. This island of sanity in this mad metropolis exudes an aura of peace and tranquility. Ask anybody, journalists, doctors, teachers, businessmen, who has been there. The poor are treated for free.

So it comes as no surprise that Seva Dham, in the midst of the Covid chaos with its collateral damage of hunger and hopelessness for the capital's teeming poor, has emerged as a centre of hope, succour and nourishment. Already, with its own meagre resources as well as contributions from donors, the *ashram* is feeding three meals a day to some 2,000 people from surrounding slum clusters who have been rendered destitute by the Covid lockdown. If not from the virus, they may fall prey to death from hunger.

Selfless service is second nature to *ashrams* such as these. I choose to cite this particular example because I am personally familiar with its services. I am personally familiar, too, with the services of film-makers like award-winning environmentalist Arjun Pandey and his wife, Ambika, who live in Gurugram and have converted their Chinese cuisine carry-out kitchen, Shanghai Surprise, into a community kitchen where they now prepare free meals to feed hundreds of the wretched of the earth each day, teaching the needy social distancing, procuring, transporting and delivering the supplies on their own.

Unlike the government which boasts of and trumpets its "achievements" over paid propaganda even as the hungry hoards stand out in incongruous contrast to the godowns bursting at the seams with bulging sacks of stocked surplus food grains, these humanitarians seek no publicity, ask for no recognition. Which is precisely why magazines like *India Legal* should seek them out, salute their work and tell the world about them so that their support systems can thrive and become examples for wider emulation and contributions.

In a story that Senior Managing Editor Dilip

LEADING FROM THE FRONT
Shanghai Surprise, a Chinese cuisine carry-out kitchen, has converted itself into a community kitchen to feed the underprivileged during the lockdown



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A CENTRE OF HOPE Seva Dham Plus is feeding three meals a day to some 2,000 people from surrounding slum clusters who have been rendered destitute by the Covid-19 lockdown

Bobb has stitched together for this week's cover for *India Legal*, he calls these caregivers "Samaritans". Actually, in a tribute to this ancient land's innate humanism, they have mushroomed all over in this hour of crisis. Writes Bobb: "A range of individuals and groups has come together across the country in an extraordinary and uplifting show of humanity to help those in desperate need during the lockdown and pandemic spread. They are the unsung heroes of this seemingly unending battle. As a special tribute to these good Samaritans who are risking their lives to bring succour to those in need, we detail their stories of sacrifice and service."

Reporting from the field for this remarkable story were veterans Rakesh Dixit and Asif Ullah Khan. A recent Facebook post from a Delhi university teacher carried this account: "A school principal friend told me she had a bunch of face masks stitched and would I know where they might be used. I put this information out on a relief network and immediately got a request from someone working with the poor near Turkman Gate. They needed face masks desperately. The question was how to get the masks across to the relief workers... I searched through my phone book and found the number of a university student who had taken urgently needed diabetes medication across to a friend. This young lady's name is Anushka and she is an undergraduate who studies at Delhi University. Anushka sets out early from home every morning—sometimes as early as 4 am—to distribute food, rations and medicines all over the city.....Every day. On a Scooty. That evening, I met her outside my residential complex to give her the face masks. It was late, almost 9:30 pm. I asked her how long she had been out. 'Since 3:30 am,' she said....I ask Anushka when she ate last. Her answer is what I thought it would be. 'In the morning,' she said. She is not much older than those I teach. I try to tell her to please not be out so late. She smiles from behind her mask, that 'Yeah, sure' kind of smile that young people often give you...I am overwhelmed by her selflessness. I say a prayer for her protection and safety, and I thank God for her courage."

Courage is at a premium in these destructive and scary times, writes Bobb, but across India, hundreds of individuals and citizen groups are risking their own lives in relief efforts, whether distributing food to stranded migrants or helping senior citizens obtain life-saving medicines.

These are dark days, and when you come across stories about the widespread misery cutting an unrelenting swath across the land, you read and weep. But as you go through this issue's cover story, we hope you will be able to read and smile.

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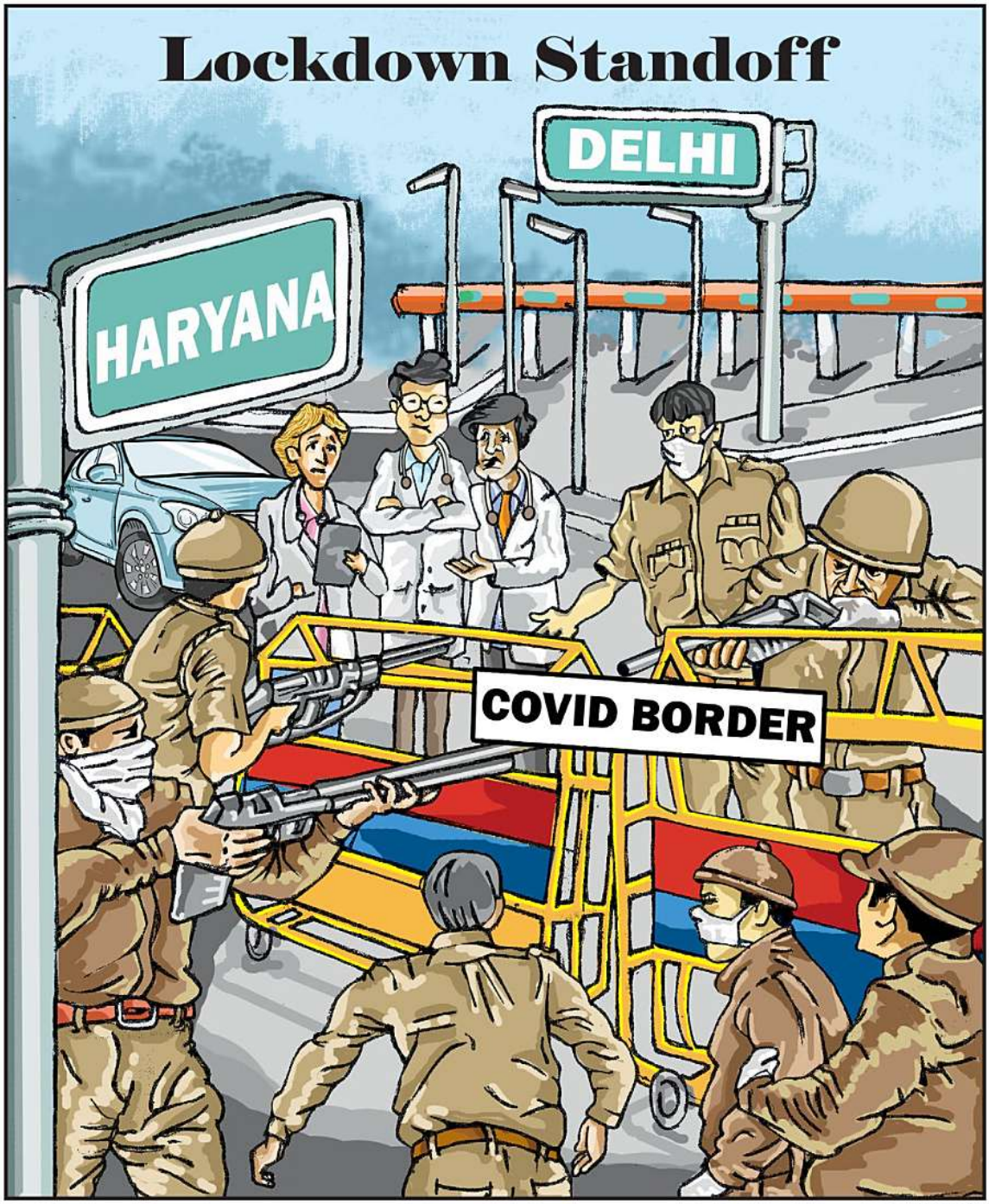
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RINGSIDE



Amitava Sen

NEET is the only exam: SC



The Supreme Court stated that the National Eligibility-cum-Entrance Test (NEET) will be the only examination for admission to the graduate and post-graduate medical and dental courses and institutions cannot be allowed to conduct their own separate exams over and above NEET.

The apex court held that the rights of religious or linguistic minorities to administer an institution under Article 30 of the Constitution "are not above the law and other Constitutional provisions" and that NEET is "regulatory" in nature and it is in "national interest" to improve the quality of medical education which, it said, has become a "saleable commodity".

Disposing of a bunch of petitions by Christian Medical College, Vellore, and others, the bench comprising of Justices Arun Mishra, Vineet Saran and MR Shah, while declining permission to conduct other exams, said that "the system is not yet out of clutches of unscrupulous devices and dubious means are adopted to defeat merit. The interest of education would further suffer and very purpose of centralised examination would be defeated".

The bench further said: "They have to cater to national interest first, then their interest, more so, when such conditions can be prescribed for recognition, particularly in the matter of professional education."

Anti Covid-19 drive in SC

The Supreme Court conducted a sanitisation drive in its campus in its attempt to contain the spread of Covid-19 following the pandemic's outbreak.

The drive came a day after an apex court staffer tested positive for Covid-19. The employee was working in the judicial section, and after conducting contact tracing, everyone including the security personnel who had come in contact with the infected employee, was asked to self-quarantine. The Court decided to undertake a sanitisation and fumigation process as required, and consulted expert bodies regarding the same.



Sources said that the entire Supreme Court campus is always sanitised on a regular basis. But after the outbreak of the novel coronavirus, the sanitation drive was being conducted in accordance with Covid-19 guidelines. The chambers of the lawyers along with the low-security zone were being sanitised.

The Supreme Court restricted its functioning from March 23, thereby limiting physical presence of advocates in the Court. It eventually started hearing urgent matters through video-conferencing.

Lawyers and other staff members have been asked to vacate the premises at 6 pm every day for regular sanitisation.

Kerala resorts to ordinance for scuttling HC stay

A day after the Kerala High Court stayed the state government's decision to deduct salaries of government employees, the state cabinet promulgated an ordinance to override the judicial stay.

The decision to deduct the salary of employees, ostensibly to help the state tide over the crippling financial crunch precipitated by the lockdown, had sparked a stormy political debate. The decision on the ordinance was taken by the cabinet on April 29. After the meeting, finance minister Thomas Isaac told the media that the government had decided to come out with the Disaster and Public Emergency Special Provisions Act which will give it the power to defer payment of salaries, upto 25 percent of all state government employees. "This is not against the High Court order, instead we have abided by it. We are not going to go in appeal against the stay order. The provision in the Act is clear as it says this can be done when a health emergency or a disaster strikes," said Isaac. The ordinance later got the governor's sanction too.



Kerala CM Pinarayi Vijayan

—Compiled by India Legal team

The Samaritans

A range of individuals and groups has come together across the country in an extraordinary and uplifting show of humanity to help those in desperate need during the lockdown and pandemic spread. They are the unsung heroes of this seemingly unending battle. As a special tribute to these good Samaritans who are risking their lives to bring succour to those in need, we detail their stories of sacrifice and service

By Dilip Bobb with Rakesh Dixit and Asif Ullah Khan



A recent Facebook post from a Delhi university teacher carried this account: "A school principal friend told me she had a bunch of face masks stitched and would I know where they might be used. I put this information out on a relief network and immediately got a request from someone working with the poor near Turkman Gate. They needed face masks desperately. The question was how to get the masks across to the relief workers... I searched through my phone book and found the number of a university student who had taken urgently needed diabetes medication across to a friend. This young lady's name is Anushka and she is an undergraduate who studies at Delhi University. Anushka sets out early from home every morning—sometimes as early as 4 am—to distribute food, rations and medicines all over the city.... Every day. On a scooty. That evening, I met her outside my residential complex to give her the face masks. It was late, almost 9:30 pm. I asked her how long she had been out. 'Since 3:30 am,' she said.... I asked Anushka when she ate last. Her answer was what I thought it would be. 'In the morning,' she said. She is not much older than those I teach. I try to tell her to please not be out so late. She smiles from behind her mask, that 'Yeah, sure' kind of smile that young people often give you... I am overwhelmed by her selflessness. I say a prayer for her protection and safety, and I thank God for her courage."

Courage is at a premium in these difficult times, but across India, hundreds of individuals and citizen groups are risking their lives in relief efforts—distributing food or helping senior citizens.

Courage is at a premium in these destructive and scary times, but across India, hundreds of individuals and citizen groups are risking their own lives in relief efforts, whether distributing food to stranded migrants or helping senior citizens obtain life-saving medicines. Some, like the Akshaya Patra Foundation, are well-known social organisations committed to providing food to those in need, but other individuals, like Anushka, have been so moved by the plight of migrants and the poor, that it has inspired them to rise above their own requirements. Like Asif Khan in Jaipur who is doing amazing work in providing food packets to homeless, destitute and migrant workers. As he told *India Legal*: "On the eve of the Janata ▶



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COVID RELIEF
(Left) The Akshaya Patra Foundation is providing food to thousands of people across India; members of the Arham Yuva Seva Group are also serving people food in Rajkot, Gujarat





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Jan Sampark Samuh

HEROES IN CRISIS
(Clockwise from left) The Indian Red Cross Society is offering various services, including a blood bank for plasma therapy; the Jazba team loads supplies for distribution; at one of the community kitchens run by the Jan Sampark Samuh

curfew, I went to an ATM to withdraw money and saw some hapless people sitting on a footpath. With all restaurants and *dhabas* closed, I wondered how they would survive." Back home, he discussed it with his mother, Nafisa Khan, who pledged to do whatever they could.

The next day, she made 100 packets of *pulao*, which were distributed among the migrants and poor.

When a friend, Aroob Abdul Aziz, a woman entrepreneur, heard about this, she decided to join in. Aroob started a WhatsApp group called Jazba (passion) and more people turned good Samaritans. Till last week, Jazba distributed food, rations, medicines, and even animal food, to more than 1.5 lakh people. The group has set up 25 kitchens and ten ration centres. As Asif

Bollywood steps up

They are the privileged and now are reaching out to the underprivileged. Actor Sonu Sood has opened up his Juhu hotel to accommodate medical workers and provide meals to the underprivileged in Mumbai. He will be delivering meals to 25,000 migrants living in Bhiwandi during the holy month of Ramzan. Actress Rakul Preet Singh and her family have been preparing and sending home-cooked meals to around 250 families living in a slum close to her home in Gurugram, twice a day. Actress

says: "Coronavirus has taught us love for humanity. I hope to continue this even after the pandemic has disappeared."

That is the same sentiment that inspired the Bhopal-based Jan Sampark Samuh, a conglomeration of public-spirited volunteers which includes journalists, teachers, artists and students. They quickly pooled their resources to set up community kitchens for the needy after the lockdown exacerbated the food crisis. Samuh volunteers reached out to vulnerable communities, including transgenders, commercial sex workers, homeless people in and around railway stations, people in night shelters, hospitals, bus stands, construction sites, domestic workers, students and children's shelter homes. The group's activities are mainly focused in old Bhopal which is still reeling under the impact of the gas tragedy in 1984.

Significantly, all the 10 deaths in Bhopal till April 27 occurred in the old city and the victims were gas tragedy survivors. The Samuh has set up 12 community kitchens and four collection centres which receive donations and food grains which go to the community kitchens. The group volunteers are dependent solely on contributions from among themselves and donations from their well-wishers.

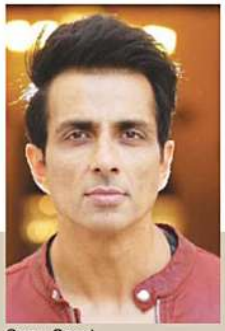
In over 90 percent of India's districts, Self Help Group women are producing face masks, running community kitchens, delivering essential food supplies and sensitising people on various issues.

From every crisis emerge new heroes, rising above caste, creed and community to help those crippled by the lockdown. In Delhi's Kalkaji neighbourhood, Kamal Kardam and Afzal Qadri feed migrant labourers every day. They cook vegetarian *pulao* for some 100 people, load the packets on their scooters and set out to feed those they can find. "We are not very rich, but till the time it's doable, we shall do it," says Qadri.

In Coimbatore, Seva Bharathi, a voluntary organisation, has been cooking and distributing food to 25,000 people daily since the lockdown. They operate out of a wedding hall (given free by the owner) and donors give food grains, vegetables and other ingredients. There are 1,200 volunteers helping in the preparation and distribution of food to the poor, especially migrant workers from other states, in 35 neighbourhoods of the city.

POOLING RESOURCES

The corona crisis and the challenge it poses have inspired many non-profit agencies to pool their resources to fight the war against hunger and deprivation. Organisations like SAFA, the Hyderabad-based social venture working with children and the urban poor, has tied up with NGOs like CRY and others to help distribute food and other necessities in Hyderabad, Bengaluru, Chennai, Gurugram, Delhi, Mumbai and North Karnataka. Akshaya Patra has also ramped up efforts to coordinate with other NGOs to implement food relief efforts across various locations. Cooked meals ▶


Sonu Sood


Rakul Preet Singh


Ayesha Takia and her husband, Farhan Azmi


Salman Khan


Shah Rukh and his wife Gauri


Varun Dhawan

Ayesha Takia and husband Farhan Azmi have turned their hotel in Colaba into a quarantine facility for police personnel serving in South Mumbai. Superstar Salman Khan has transferred funds into the accounts of daily wage workers of the film industry. Some 25,000 daily wage workers who had been badly hit due to the nationwide lockdown, have benefitted from his gesture. The other Khan, Shah Rukh, and his wife, Gauri, have offered their four-storey office space in Mumbai as a quarantine facility. Actor Varun Dhawan has collaborated with Tata Trusts to provide meals to people who have lost their jobs, and also to healthcare workers. Reel life to real life has proved an epiphany.





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have already been provided in Jaipur, Ajmer, Hyderabad, Pune, Bengaluru and Ahmedabad. As the implementing partner of the government's flagship Mid-Day Meal programme, Akshaya Patra is already committed to providing wholesome meals to children. The pandemic has allowed the organisation to expand its humanitarian efforts to an unprecedented level.

So too has the Indian Red Cross Society, which is an auxiliary to the government and armed forces medical services. The global agency's volunteers have tied up with local administrations to provide masks, food packages and dry rations to people in need.

The organisation is also running shelter homes, providing pick-up and drop facility for blood donors and facilitating home delivery of medicines to people suffering from chronic diseases. In Gujarat, the Red Cross branch has prepared a database of recovered Covid-19 patients who have consented to donate their blood for convalescent plasma therapy.

THE SELFLESS SIKHS

In every such situation, the first to offer their services is the Sikh community, and gurudwaras across the country have responded in a massive way to organise community kitchens (*langars*) and distribute food wherever it is needed. So selfless and unceasing have their efforts been that last week saw the remarkable sight of policemen on motorbikes and officers in patrol cars doing a motorised *parikrama* of the Gurudwara Bangla Sahib in Delhi where *langar* is being prepared for 50,000 people daily, as a salute to their humanitarian efforts.

Meanwhile, the Delhi Sikh Gurdwara Management Committee (DSGMC) has been serving *langar* to 1.25 lakh people every day in major gurudwaras in every corner of the capital. The DSGMC has also opened its guest houses to doctors and nurses facing accommodation issues.

In Hoshiarpur, each day, 32 vehicles set off packed with steaming hot *langar* to feed the poor and underprivileged in nearby villages. The Dhan Guru Ramdas Ji Langar Sewa has become the lifeline of the underprivileged and feeds as many as 1.5 lakh people daily. Run by a US-based NRI, the state-of-the-art equipment, special vehicles and machines imported from the US and Japan ensure that the *langar sewa* can produce fresh, hot meals for villages across Punjab.

The WhatsApp group called Jazba has already distributed food, rations, medicines, and even animal food, to more than 1.5 lakh people. The group has set up 25 kitchens and ten ration centres.

In Amritsar's Golden Temple, the Sikhs' holiest shrine, the Guru Ram Das Langar Ghar, the largest community kitchen in the country, is still serving food but with new restrictions in place—devotees maintain social distancing while eating or praying, and in the *langar* hall, only 600 people are allowed in at a time, compared to the 1,000 who would gather earlier.

Says a spokesman for the Shiromani Gurdwara Parbandhak Committee: "We cannot think of discontinuing the Langar Sewa because there are thousands of poor people who are dependent on us for their food."

WOMEN POWER

The other section of society that has emerged unhesitatingly to help in this crisis is women's groups. In over 90 percent of India's districts, away from the limelight and TV cameras, Self Help Group (SHG) women are producing face masks, running community kitchens,



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OFFERING THEIR SERVICES
(Far left) Delhi Police personnel preparing *langar* at the Gurudwara Bangla Sahib, New Delhi; doing a *parikrama* of the Gurudwara

delivering essential food supplies, and sensitising people about health and hygiene and combating misinformation. They are financed by the World Bank's $750 million support for India's National Rural Livelihoods Mission (NRLM), the flagship programme to reduce poverty by mobilising poor rural women into SHGs which is now one of the world's largest institutional platforms for the poor. Today, 67 million Indian women are members of six million SHGs and have set up community kitchens across rural India to feed the poor and migrants.

In Kerala, there is the Kudumbashree network, a community platform of women with 4.4 million members. They are running 1,300 kitchens across the state, while also delivering food to those in quarantine and the bedridden.

"Across the country, SHGs have risen to this extraordinary challenge with immense courage and dedication," said Alka Upadhyay, Additional Secretary in India's the Ministry of Rural Development, which manages the NRLM.

THE OTHER SAMARITANS

The list of corona heroes seems endless. Only in times of a crisis like the one caused by Covid-19 do we see and hear

In Amritsar's Golden Temple, the Guru Ram Das Langar Ghar, the largest community kitchen in the country, is still serving food but social distancing must be maintained while eating or praying.

of them. Some of these are:

Goong: The Delhi-headquartered social organisation has initiated a programme called "Rahat Covid-19" to ensure delivery of family kits of essentials, including dry rations and personal care materials, to areas where migrant labour has congregated.

MCKS Food for the Hungry Foundation: The Delhi-based non-profit organisation has delivered more than 1,00,00,000 meals to those in need, in partnership with local authorities across the country, since its inception. Now, they have increased capacity at the MCKS' kitchens to deliver over 60,000 meals each week, apart from distributing energy foods like biscuits, bread and rusk.

Memunnam Seva Foundation: Started by a group of youngsters in Srikakulam district in Andhra Pradesh, they have been helping the poor by supplying essential commodities but also offering a free ambulance service to take people to hospitals and drop pregnant women at their homes. The vehicle belongs to one of the group members, three persons volunteer as drivers and other members provide funds for fuel.

Khushiyaan Foundation: Through its "Roti ghar" initiative, the foundation provides healthy and freshly cooked meals to street children. Since the Covid-19 outbreak, Khushiyaan has been providing meals to security guards, labourers and daily wage earners around Mumbai, Thane, Airoli and Bhiwandi.

Milaap: Based in Mumbai, Delhi and Chennai, it provides food to daily wage earners but also helps with medicinal and other basic necessities.

Rise Against Hunger India: Has stepped in to support daily wage workers, construction workers, contract labourers and street vendors who have lost the only source of their income and have no means to make ends meet or provide food for their families. In five days, they have served nearly 200,000 meals to 22,500 people and are looking to ramp up their humanitarian efforts.

Rasoi on Wheels: A mobile kitchen service that is providing packed meals to the less privileged in Delhi-NCR.

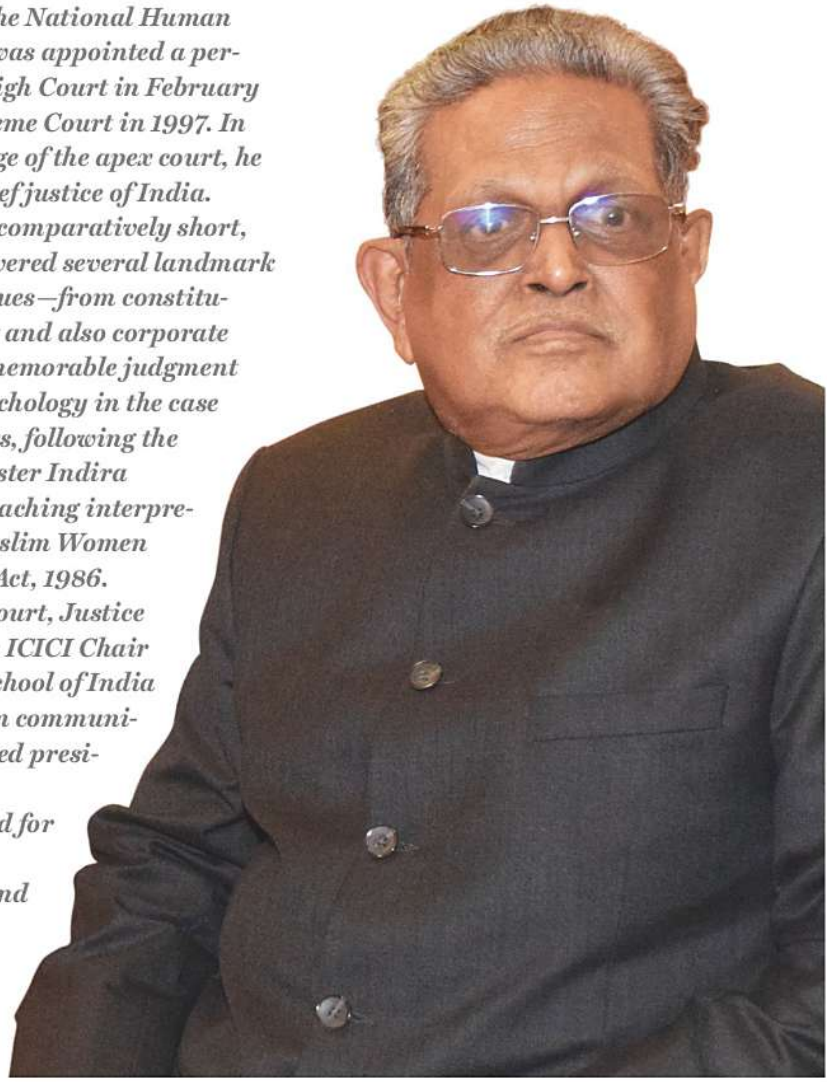
There are also global agencies like CARE, Oxfam and others who have an established presence and network across India, but it is the incredible number of local organisations and individuals who are fighting enormous odds to bring relief and hope to millions of poor and underprivileged. As much as frontline health workers, these individuals and organizations deserve our salute and eternal gratitude. ■

"In any emergency, the liberties of citizens can only be reasonably restricted and not trampled"

S RAJENDRA BABU *was the 34th chief justice of India. He also served as chairperson of the National Human Rights Commission of India and was appointed a permanent judge of the Karnataka High Court in February 1988. He was elevated to the Supreme Court in 1997. In May 2004, as the most senior judge of the apex court, he succeeded Justice VN Khare as chief justice of India.*

While his tenure at the top was comparatively short, as a Supreme Court judge, he delivered several landmark judgments on a broad range of issues—from constitutional matters to the environment and also corporate and taxation disputes. His most memorable judgment was his interpretation of mob psychology in the case relating to the 1984 anti-Sikh riots, following the assassination of then Prime Minister Indira Gandhi. He also delivered a far-reaching interpretation on the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Post retirement from the apex court, Justice Rajendra Babu was appointed the ICICI Chair (Professor) at the National Law School of India University. His abiding interest in community health led to him being appointed president of the International Nursing Services Association, a post he held for 25 years. In an interview with **RAJSHRI RAI,** *MD,* India Legal *and Editor-in-Chief,* APN NEWS, *he elaborated on contemporary concerns and his legal legacy. Excerpts:*



As India and the world tackle the Covid-19 crisis, people of your calibre have a special role to play. You have been giving training in community health work as president of the International Nursing Services Association. Can you tell us about your experience in this field?

When I was practising as a lawyer I came in contact with some officers and workers from Oxfam—a well-known social service organisation. They, in consultation with administrators, heads of social organisations and doctors, who worked in CSI Hospital, Vellore, met at the instance of representatives of funding agencies. They formed the International Nursing Services Association, or INSA, as a registered society with small infrastructure to give advanced training to rural health workers. I was invited to head the executive committee.

The nature of the programme would not enable it to deal with a pandemic like Covid-19 except to bring awareness of the disease, personal protection, etc. In fact, such an exercise was done in relation to HIV, AIDS, TB, and use of tobacco, malnutrition, infant mortality, hygiene and similar matters. The funding was done mostly by approving programmes of their liking. By 2005, the funding was very heavily controlled by law and I could not spare much time for financial details as by then I was in the teaching faculty of NLSIU. Also, I was sounded about moving out of Bangalore; hence I resigned from the president's post.

You have been the chairperson of NHRC. How do you draw a balance between protection of human rights and the need for the State to use police force to enforce lockdowns and quarantines?

NHRC is created by a statute for protection and promotion of human rights. No health protection duties were given to it; nor did I have any occasion to deal with any epidemic. I maintain a very low profile and I am not in public life or work as a social activist. The experience either at NHRC or INSA will not help me in the present situation.

What advice would you have for governments in dealing with the needs of health workers, especially during an epidemic? Have we learnt any lessons?

The pandemic we are facing has two aspects—public health and personal health. If personal health is properly taken care of, public health issues will not arise at all except perhaps from spreading to others. If everyone is careful, such a situation may not arise. However, on the basis that it is highly contagious, the government may like to take certain steps. Even if extensive testing is done, there being no cure, the only result is isolation. Isolation leads to psychological problems.

> "With complete lockdown, no agricultural, commercial or industrial activities can be carried on and the labour class dependent on them will have no wherewithal to live on. Lockdown has been imposed with no vision as to social or economic cost."



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In the three speeches made by the prime minister, all that was stated was what we have to do during the lockdown period. Nothing was elucidated as to the steps to be taken by his government.

In our country we do not have social security measures at all. With complete lockdown, no agricultural, commercial or industrial activities can be carried on and the labour class dependent on them will have no wherewithal to live on. They will have to seek shelter and alms for food. Lockdown has been imposed with no vision as to social or economic cost. I need not elaborate on these aspects as very good informative discussion is available in the media. In any emergency, the liberties of citizens can only be reasonably restricted and not trampled.

As India's 34th chief justice and as a judge of the Karnataka High Court, you delivered landmark judgments in civil, criminal, environmental, constitutional, taxation, corporate and IPR cases. If you were to choose the most challenging subject among these, which would it be and why?

I have discharged my functions as a judge to the best of my ability after interaction with stalwarts in the profession. I could retire with complete job satisfaction. The gap between law and justice must be bridged and law must be interpreted to render justice; for, courts are not courts of law but of justice. This is the real challenge for a judge.

In an important case, the Supreme Court ruled that the *Tandava Nritya* (dance) in public with skull and ▶



LISTENING INTENTLY
Justice Rajendra Babu in conversation with Rajshri Rai

trishul was not part of the Ananda Marga faith. Can you elaborate on this?
Ananda Margis wanted to perform *tandava* dance by holding a skull and a live snake while receiving their religious leader at airports or railway stations. In an earlier case, the Court held that this ritual was not part of their faith. Later on, this ritual was sought to be added by re-writing their faith which we held was not permissible and also such ritual was not an essential part of their religion.

You analysed provisions of the Muslim Women Act of 1986 in *Daniel Latifi vs Union of India*.
In *Daniel Latifi's* case, the issue was related to payment of maintenance to a divorced wife which was upheld in the Shah Bano case. The validity of the new law to overcome this decision was questioned before us.

We held that by a practical interpretation of the new law, divorce will not be effective unless adequate provision is made for the upkeep and maintenance of the wife without going into the constitutional aspect. We felt that the object of modifying the law had misfired. Incidentally, we examined the condition of women in India.

In today's India, sale of PSUs is a big controversy and debate. You passed many judgments, including disinvestment of government equity in HPCL and BPCL, after your elevation to the Supreme Court in September 1997. What are your thoughts on these matters now? Should the courts be involved in the issue?
We have to recall the history behind the law for acquisition of petroleum companies which were in the private sector. It was said that petroleum products are highly sensitive to defence and security of the state. After acquisition, PSUs thrived and became profit-earning companies. The government thought they could reduce their equity and allow privatisation.
We held that acquisition was made under a law and therefore privatisation should also be under a law. If any infrastructure is brought into existence by using government funds, it can be dismantled only by an appropriation act. No safeguards were provided to keep control of the company. So, we held that disinvestment was not permissible.

> "I have discharged my functions as a judge to the best of my ability. The gap between law and justice must be bridged and law must be interpreted to render justice; for, courts are not courts of law but of justice. This is the real challenge for a judge."

You can be quite harsh and outspoken in your judgments. In 2002, in *Natarajan vs Subba Rao*, you came down severely on the designated judge for "crippling" the freedom of a prosecutor. What was the main principle involved?
In *Natarajan vs Subba Rao*, the complaint was that the attorney general had given an opinion mala fide and in a biased manner. We held such an attitude cannot be attributed to him and in that context we might have made some observations.

You have also been an educationist as Chair (Professor), NLU. In your LLB in 1939, you stood first class first. What do you think of legal education in India today? Where does it need the most improvement? Are we becoming just degree factories?
My speeches on legal education, rights regarding life, liberty, equality, human dignity, women's rights, independence, accountability of judiciary are all in the public domain and easily accessible. I need not reiterate them.

You have a great interest in Vedic learning and Vedanta. What is the greatest lesson you have learned from the *Upanishads* that you would like to share with us?
I believe that contentment is the true happiness in life which leads to non-attachment or *vairagya*. *Vairagya* is the essence of Vedanta. Music is performed in the background of *shruti*. Without *shruti*, no music concert can be held but *shruti* does not interfere with music. That's how Vedanta will be in the background of life. ■



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The Problem of Prisoners



The pandemic and the resulting precautionary measures have exposed the unprecedented element of risk for everyone, but even more so for prisoners in jails who live in confined spaces.Social distancing is an impossibility, and it also raises questions of human rights

By Srishti Ojha

WHILE social distancing has been made mandatory in the outside world as an essential precautionary measure, it is simply not feasible for prisoners in India's already over-crowded jails. The protection of the health of these prisoners is required not only for containment of the Covid-19 virus, but also for preserving their human rights, including right to adequate healthcare and right against discrimination, among others. Iran was one of the first countries to temporarily release over 54,000 prisoners to combat the spread of coronavirus in crowded jails.

In one of the daily briefings of the World Health Organisation (WHO), Executive Director Michael J Ryan stated that prisoners cannot be forgotten in the current situation. They may be serving sentences, but they deserve no less protection under the law than others. WHO Director General Dr Tedros Ghebreyesus added this is everyone's problem and no one must be excluded. The head of the United Nations Commission for Human rights, Michelle Bachelet Jeria, also addressed the issue, stating that neglecting prisoners during the pandemic is potentially catastrophic as physical distancing and self-isolation in those conditions are practically impossible.

The Supreme Court took cognisance of the issue, and has directed each state and Union Territory to form a high powered committee to determine which class of prisoners can be released.

WHO published its guidelines titled "Preparedness, Prevention and Control of COVID-19 in Prisons and other places of Detention" which stated that such settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons. According to WHO, state authorities need to frame an up-to-date coordination system that brings together health and justice sectors, keeps prison staff well-informed, and guarantees that all human rights in the facilities are respected.

In India, the Supreme Court took cognisance of the issue, and has directed each state and Union Territory to form a high powered committee to determine which class of prisoners can be released



UNI

DECONGESTING PRISONS
Prisoners being released from Sabarmati central jail in Ahmedabad

on parole or interim bail for such period as may be thought appropriate. The Court had made the following suggestions:

- Determine prisoners who should be released depending on the nature and severity of offence, the duration of sentence and any other factor relevant according to the Committee.
- Transfer of prisoners from one prison to another and physical presence of undertrail prisoners before court be avoided while resorting to video conferencing, to ensure maximum possible distancing among the prisoners.
- Directed formation of response plans to be made specific to each prison and in consultation with medical experts, along with monitoring teams to be set up at state level to ensure the compliance.
- Ensure creation of isolation wards, quarantine of new prisoners, preliminary examination of prisoners, availability of medical assistance, scanning of staff, sanitisation and cleanliness of prison campuses and wards, supply of masks, barring or limiting of personal visits for prisoners and suspension of group activities.





WHO Director General Dr Tedros Ghebreyesus and head of the UN Commission for Human Rights Michelle Bachelet Jeria (left) have expressed concern about the health of prisoners.

The apex court, while hearing a petition on the issue of release of prisoners above 50 years of age or with pre-existing ailments, gave them the liberty to make representation before the appropriate government which must deal with the same on a case-to-case basis, while saying that general directions cannot be passed for all prisoners in this regard. After the Supreme Court's directive to stop prisons from becoming fertile grounds for the spread of Covid-19, the states also came up with various measures.

The High Powered Committee, headed by Delhi High Court judge Heema Kohli, decided to grant eight weeks of bail to around 1,500 inmates and also to quarantine fresh foreign national inmates. It called for isolation of inmates with symptoms of flu or fever, medical tests of inmates, special remission to prisoners left with six months or less jail term, and release of prisoners on emergency bail. It barred physical meetings of prisoners with their families.

Meanwhile, the Delhi Government informed the Delhi High Court that it was going to amend its Prison Rules to provide for special parole and furlough to prisoners. The government, through a notification from the Delhi Home Department, has amended the Delhi Prison Rules, 2018, to introduce the ▶

provision of "emergency parole", to be granted for up to eight weeks, in addition to the regular parole. The Delhi High Court's most recent order while hearing three bail applications, came up with a new way for convicts to mark their attendance through WhatsApp video calls and through Google Maps. The condition of furnishing of surety to get bail has also been removed. The Court has allowed all undertrial prisoners to be released on furnishing a personal bond if they are unable to fulfil the condition of furnishing a surety bond.

Advocate Ajay Verma, Convenor, National Forum for Prison Reforms, while talking to *India Legal*, stated that courts have taken measures for decongesting and social distancing. "In Delhi, around 3,600 prisoners have been released since March 23, but not all prisoners are getting similar treatment. An important concern right now are those prisoners who are not covered under the recommendations of the High Powered Committee of Delhi, and are in constant panic. These include those charged with economic offences, Prevention of Corruption Act, CBI cases, foreign prisoners, prisoners who have their appeals pending before the High Court, and so on, and these bail applications are being decided by the courts on a case-to-case basis," he said. According to him, the High Court has been doing a wonderful job, and it would be helpful if the courts function more.

Tihar Jail, the largest prison complex in the country, decided to release 3,000 inmates to avoid overcrowding, after screening them and considering each case before the final release. Meanwhile, a source from Tihar Jail informed *India Legal* that new prisoners are being allowed inside only after screening and medical check-up and are being kept in separate wards to avoid risk of infection. The staff are being screened daily and anyone suspected is being quarantined. Use of masks and sanitisers has been made compulsory for both the staff and the prisoners. No



Advocate Ajay Verma, Convenor, National Forum for Prison Reforms, while talking to *India Legal*, stated that courts have taken measures for decongesting and social distancing.

Covid-19 case has been registered there yet.

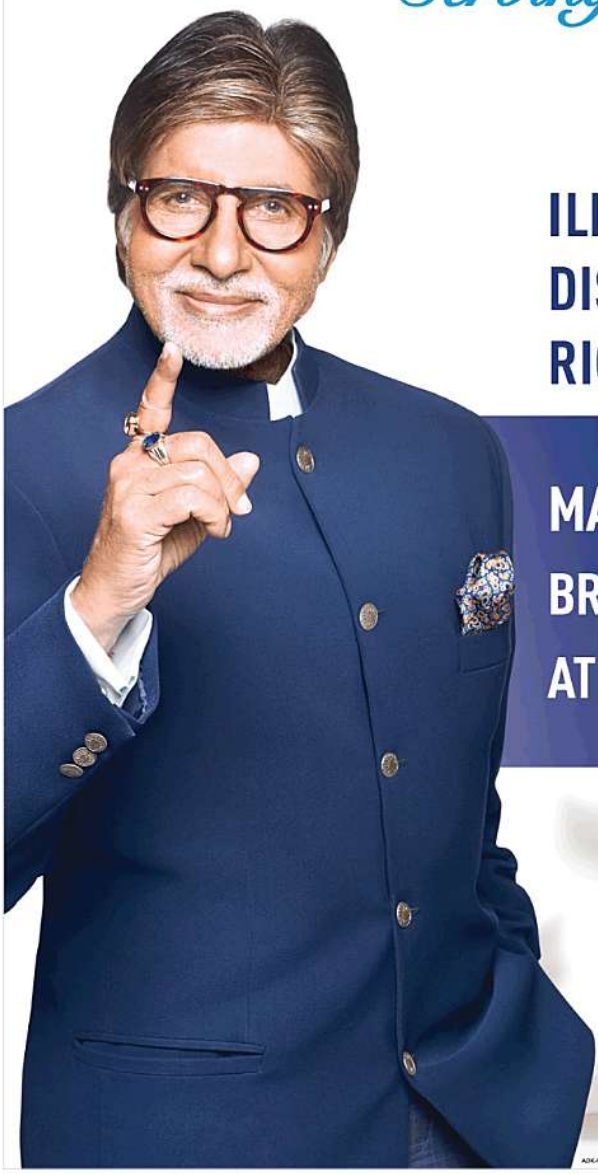
Other states have unveiled their own strategies for prisoners, or have been directed to by their respective high courts.

- The Chhattisgarh High Court decided to release undertrial and convicted prisoners on interim bail or bail, and has ordered transferring the inmates from where there could be a problem of overcrowding to other jails with more space.
- In Jammu and Kashmir, around 65 prisoners, including 22 who were arrested under the Public Safety Act (PSA), have been released.
- The Haryana government has decided to give bail to prisoners with a record of good behaviour who are not facing trial in other cases. It also allowed release of convicted prisoners who have served up to seven years of their sentence. They have been given parole or bail for 45-60 days, in order to decongest prisons.
- The Madhya Pradesh government decided to release around 5,000 convicts on emergency parole of 60 days and around 3,000 undertrials on interim bail of 45 days. The Uttar Pradesh government has also decided to free 11,000 prisoners lodged in 71 jails in the state.
- In Maharashtra, the Bombay High Court has directed the government to expedite the process of releasing prisoners and undertrials identified as qualified to be freed on temporary bail or parole. Approximately 11,000 prisoners were to be released on emergency parole for 45 days. So far 4,060 prisoners have been released.
- The Bihar Government, however, moved the SC praying for modification in its previous order, to allow the state to refrain from releasing its prisoners. The apex court, on April 13, clarified that its order was not compulsory for every state to follow, and did not direct the states to mandatorily release prisoners, but only asked them to assess the situation. The court added that no prisoner with Covid-19 will be released, and the released prisoners will be provided with transportation in full compliance with rules of social distancing.
- The court also directed the release of those foreign detainees in Assam who have been lodged in detention centres for two years or more, relaxing its previous condition of not releasing such prisoners before three years, and also reducing the amount of personal bond from Rs 1 lakh to Rs 5,000 in the wake of the pandemic.
- The Union Home Ministry, in a recent development, has written to all states where foreign nationals are being held in detention, ensuring that they be allowed to meet visitors via eMulakat, and medical equipment and kits to screen foreign detainees be available.

The basic idea, as directed by the courts, is to protect prisoners by following strict sanitation protocols, increase their immunity by ensuring nutritional food items are included in their diet. Directions have been issued for arranging masks and sanitisers for prisoners along with clean toilets, and counselling facilities for those whose mental health may have been affected. Exceptional times call for exceptional measures and the regard being given to human rights of prisoners is reassuring, considering the conditions in over-crowded prisons. ■

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Doctors in Distress

The repeated attacks on medical personnel amidst the pandemic have led to the amendment of the 123-year-old Epidemic Diseases Act. Will this be enough to protect them in future?

By Gautam Mishra



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DEMANDING STRICT ACTION
Doctors in Prayagraj protest against attacks on medical professionals

IN recent days, there have been shocking instances of violence against doctors and healthcare workers—the Corona Warriors—as they performed their duty in trying times. Videos of healthcare workers being attacked as they went to collect samples from suspected cases or while taking care of these patients in hospitals are a sad testimony to the fear and ignorance of those who don't want to be isolated in case they are Covid-19 positive. All these incidents finally led the government to amend the Epidemic Diseases Act, 1897.

Dr KK Aggarwal, president, Heart Care Foundation of India, and President-elect, Confederation of Medical Associations of Asia and Oceania, rightly said in an article: "If doctors and other healthcare staff are under constant threat, they will not be able to treat patients. If nothing is done immediately to curb this, a time will come when there will be very few doctors. As of now, even the brightest students prefer non-clinical practice."

While the violence against healthcare workers who are risking their lives is an eye-opener, such assaults have taken place in the past too. An ongoing study by the Indian Medical Association (IMA) reports that 75 percent of doctors in India have faced violence at some point of time in their lives, and mostly it is verbal abuse.

After much persuasion, in 2015, under pressure from the IMA, the government constituted a committee to examine this issue of violence. The report of the committee, finalised on March 23, 2017, recommended the following measures:

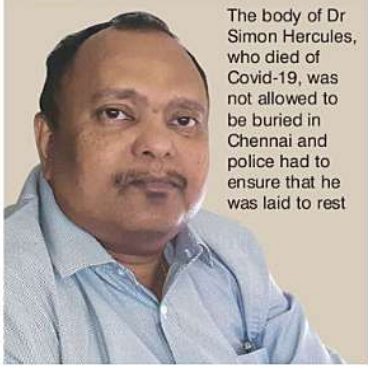
- The ministry of health shall suggest to all states which do not have specific legislation to protect doctors/health professionals to consider enacting one.
- The ministry shall write to all states to strictly enforce the provisions of the special legislation wherever it exists and/or enforce the IPC/CrPC provisions with vigour.
- The ministry shall explore the possibility of initiating the process to bring a central act on the issue in line with those in vogue in some states.

However, nothing came of these recommendations as the government did nothing. This has exposed these workers to real physical danger in these times. Acting on the violent incidents, the IMA wrote to its state presidents, local branch presidents, past national presidents, national office-bearers and CWC members that they demand a central law by ordinance against violence on doctors, nurses and healthcare workers.

The IMA letter said: "Our legitimate need for safe workplaces has to be met. Abuse and violence should stop immediately. Doctors and medical professionals across the country will light a candle at 9 pm on April 22 as a protest and vigil against the violence and abuse. The next day, doctors across the country will work

Mindless attacks

- On April 19, Chennai-based neurosurgeon Dr Simon Hercules died of Covid-19. He was not allowed to be buried at a cemetery as locals protested and the ambulance carrying the body was attacked by a mob with stones and logs. He was later buried with police security with just a friend and two people to help in the burial.
- In Indore on April 18, a medical team of three health workers who had gone to Vinoba Nagar for a Covid-19 survey was attacked by a man following an argument. He snatched the mobile phone of a health official and damaged it. This took place days after other health workers were pelted with stones by locals after they tried to screen residents of a locality for coronavirus.
- On April 15, in Moradabad, UP, a team of doctors and medical staff in an ambulance was pelted with stones as they tried to take two suspected cases of Covid-19 from the area. Stones were also pelted on the police van which came to rescue the health workers. UP CM Yogi Adityanath has ordered the police to book 10 people.
- On April 14, a doctor in Osmania General Hospital was allegedly assaulted by the son of a man under quarantine following a quarrel after two others in the ward tested positive for the infection. The man managed to give the slip, but was traced later.



The body of Dr Simon Hercules, who died of Covid-19, was not allowed to be buried in Chennai and police had to ensure that he was laid to rest



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VIOLENCE UNLEASHED
Doctors in protective suits running to save themselves from a mob attack in Indore

with black badges and declare it a 'Black Day' if the government fails to enact a central law on violence against doctors and hospitals." It also stated: "The IMA has maintained utmost restraint and patience despite extreme provocation. Doctors have been abused, beaten up, denied entry, and residence. Obstruction to cremation is the last straw that the IMA can bear." It also considered the incidents to be a white alert for the medical fraternity.

A recent PIL filed by Nagpur-based doctor Jerryl Banait led a Supreme Court bench led by Justice DY Chandrachud to seek the centre's response on April 1 regarding the availability of WHO-approved protection gear for all health workers not only in metros but also in Tier-2 and Tier-3 cities. The petition said: "In the case, where the hospitals and health centers are not provided WHO standardised masks and gowns, medical staff mortality will exponentially increase and the situation will spiral out of control in the absence of sufficient medical assistance." It sought hazmat suits and personal protective equipment, including sterile gloves, starch apparel, medical masks, goggles, face shields, respirators, shoe covers and coveralls to all health workers. This included doctors, nurses, ward boys and other medical and paramedical professionals treating these patients.

On April 8, the Court gave an observation on certain incidents of violence against doctors. One of these took place on April 2 in Indore's Tatpatti Bakhal area where medical staff which had gone to screen some people for coronavirus was attacked and stones pelted on them. Another incident took place in Ghaziabad where some patients misbehaved with medical staff.

The Court directed: "The Government of India, respective States/Union Territories and respective Police authorities are directed to provide the necessary Police security to the Doctors and medical staff in hospitals and places where patients who have been diagnosed COVID-19 or patients suspected of COVID-19 or those quarantined are housed. Necessary Police security be also extended to Doctors and other medical staff who visit places to conduct screening of people to find out symptoms of disease."

Finally on April 22, the government cleared an ordinance that was aimed at ending such attacks and amended the Epidemic Diseases Act, 1897. This made such acts of violence as cognizable and non-bailable offenses and provided compensation for injury to healthcare service personnel or for causing damage or loss to property. The ordinance will help protect healthcare personnel and their living/working premises against violence.

While talking to *India Legal*, a doctor who did not wish to be identified, said: "It is disheartening to watch such discrimination. Several doctors have been tested positive and it is not a point to prove how tough our job is. I hope the amendment brings some positive change in the situation."

An attack on doctors will create a severe dent in the fight against Covid-19.■

A Test of Faith

The traditional fasting and communal feasting during the holy month has taken a beating because of the lockdown. Will Muslims follow the strict norms of social distancing or indulge in old habits?

By Asif Ullah Khan



Photos: UNI

RAMZAN during Covid-19 is one of the most severe tests for over 200 million Indian Muslims. Acts of omission or commission of the Tablighi Jamaat have already pushed the hate campaign to a new crescendo. Suddenly, the entire community has been painted as the villain of the piece with the media unleashing the most vicious vilification campaign ever seen.

Although the Indian media paints all Muslims with the same brush, it's not aware that they are not a homogeneous group and are deeply divided by sectarian and religious beliefs. This is the reason why no political or religious leader can claim to be the true representative of Muslims. Given these circumstances, the holy month of Ramzan has brought new challenges—politically, socially and economically for Indian Muslims.

Post-2014, when the BJP came to power at the centre, Muslims have been at the receiving end from all quarters. However, a perceptible change has now come about and for the first time, they seem to be coming out of the stranglehold of the clergy. The Shaheen Bagh protest was one such example. The Tablighi Jamaat fiasco, where many of the attendees of a meet in Delhi were found Covid-19 positive, further loosened this hold as ordinary Muslims realised that more lethal than this disease was the vilification campaign against them. It not only threatened their lives and property but their livelihoods too as there were instances of hospitals refusing to admit Muslims and customers not wanting to buy products from them or sell to them. For the first time, survival became more vital than religious rituals.

Surprisingly, it was the ghettoised Muslims who first realised this. The clergy too recognised that if they showed rigidity now, the surging wave of Hindutva would hit the community so hard that it would be rendered irrelevant. So even before the clergy could issue a general call, Muslims all over India stopped congregational prayers with a few exceptions. Strict implementation of the lockdown by state machinery also left them with no choice.

Better sense seems to have prevailed and Muslim religious leaders of all sects and schools of thoughts issued a joint appeal asking the faithful to offer *taraweeh* (special evening prayers during Ramzan) in their homes and refrain from organising community *iftar* parties in homes and mosques.

Abdul Rashid, a member of the managing committee of a mosque in Jaipur, told *India Legal* that Ramzan is primarily about fasting, worship and piety but one can't separate economics from any religious festival in India. There is a common misconception that the dawn-to-dusk fasting brings down productivity and impacts business activity. Rashid said that one thing most people don't understand is that apart from being a month of self-abstinence and piety, Ramzan is a month of celebration which culminates in Eid-ul Fitr.

> Ramzan during Covid-19 is one of the most severe tests for over 200 million Indian Muslims. It has brought new challenges—politically, socially and economically—for them.

In the western world, people spend billions during Christmas which gives economic stimulus to the economy. In the same way, he said, commercial and social activities are also attached to Ramzan. This is the time economic activity sees a sharp surge. For example, the sale of Rooh Afza sherbet and dates



PRAYERS AMID SAFEGUARDS
Muslims offering *namaz* with social distancing during Ramzan in Ahmedabad

shoots up as these two are inextricably linked with Ramzan. Though it is a fasting month, food consumption from the time of *iftar* early morning to *sehri* (midnight meal) exceeds normal consumption patterns. Not only do food bills double but the majority of families also change their consumption habits during this month. It is estimated that food consumption during Ramzan accounts for 15 percent of a family's annual expenditure on food.

Yusuf Khurram, a cultural anthropologist, told *India Legal* that Ramzan is observed with a different mindset. "People wait for this month all year long. It's like Diwali or Christmas and many Muslim households repaint or refurbish their houses during this auspicious month. Making new clothes and wearing them on Eid is part of the culture. So it is a busy time for tailors, shops selling bangles and beauty products and doing *henna* work which is a must for women. Shops selling *sewaiyan* (vermicelli), dry fruits and special sweetmeats like *sheermal* start sprouting in Muslim neighbourhoods," Khurram revealed.

Even before the clergy could issue a general call, Muslims all over India stopped congregational prayers with a few exceptions. Strict implementation of the lockdown left them with no choice.

Restricting entry into mosques, which are mostly a male preserve in ▶





LEFT WITH NO CHOICE
(Left) Muslims offering *namaz* at their homes during the lockdown in Kolkata; giving *zakat* during Ramzan is another challenge

India, is just one part of how the lockdown has affected the community and this is quite daunting for it. It will take some time for the "new normal" to be absorbed.

Shakil Khan, an entrepreneur who is an avid follower of the customs of fasting and obligatory praying, told *India Legal* that under the extraordinary circumstances of today, Islam gives many relaxations. "Of course, we miss the camaraderie seen during Ramzan as the number of people in mosques rises substantially. Even people whom we call "cultural Muslims" become "practising Muslims" now," he said.

But the lockdown has hit the poorest of the poor among Muslims, who get financial help during Ramzan through charity known as *zakat*. "It is like a modern-day income tax. Every Muslim who meets the necessary criteria has to donate 2.5 percent of his income annually. There is no restriction of time or period but most Muslims prefer to do it during Ramzan," he said.

It is estimated that Indian Muslims distribute Rs 50,000 crore among the poor during Ramzan as *zakat*. Rashid said that this generosity by the well-off empowers the poorer segments of the community. "In some Muslim countries, *zakat* has been institutionalised and the State is responsible for the collection, development and distribution of it. Some countries such as the UAE, Iran and Lebanon have established a voluntary system. In India, Muslims give *zakat* on an individual basis. This presents another challenge now—how to reach out to the needy during this lockdown."

A Muslim Congress leader said on condition of anonymity that for the first time since Partition, Muslims in India were staring at an existential crisis. "The Congress had always tried to woo Muslims through the clergy. And their narrative of 'Islam in danger' was lapped up by common Muslims. But instead of it doing any good, it has harmed them more. From Shah Bano to Babri Masjid, Indian Muslims have remained entangled in these emotional issues without realising the importance of socio-economic issues such as employment and education despite the fact that they are the most backward sections of society," he said. Celebrating Ramzan during the time of the lockdown was challenging, he said, but it is also a godsent opportunity for Muslims to take charge of their destiny.

Restricting entry into mosques is just one part of how the lockdown has affected the community and this is quite daunting for it. It will take some time for the "new normal" to be absorbed.

A joint appeal by religious leaders of all Muslim sects and schools of thought such as the Deobandis, Barelvis, Shias, Ahle-hadith, Bohras, seminaries like the Darul Uloom, Deoband, Nadwa, Ala Hazrat Academy and organisations like the Jamaat-e-Islami, Jamiat Ulema-e-Hind, Majlis Ahle Hadith, etc. is a welcome step, he said, but Muslims must realise that it is the same leadership which divided the community.

"Without any official or social sanction, these religious leaders portrayed themselves as the sole leaders or spokespersons of the community. Some became the darlings of TV channels for their provocative and polarising comments without realising that their 15 minutes of fame did irreparable damage to Muslims who were at the receiving end post-2014," he said.

In these digital times, he said, Muslims don't need any kind of guidance from these religious scholars as any information regarding Islam, the Quran or the Hadith (sayings and traditions of Prophet Muhammad) is just a click away.

Hopefully, the post Covid-19 phase will usher in an era of Muslim self-empowerment. ■

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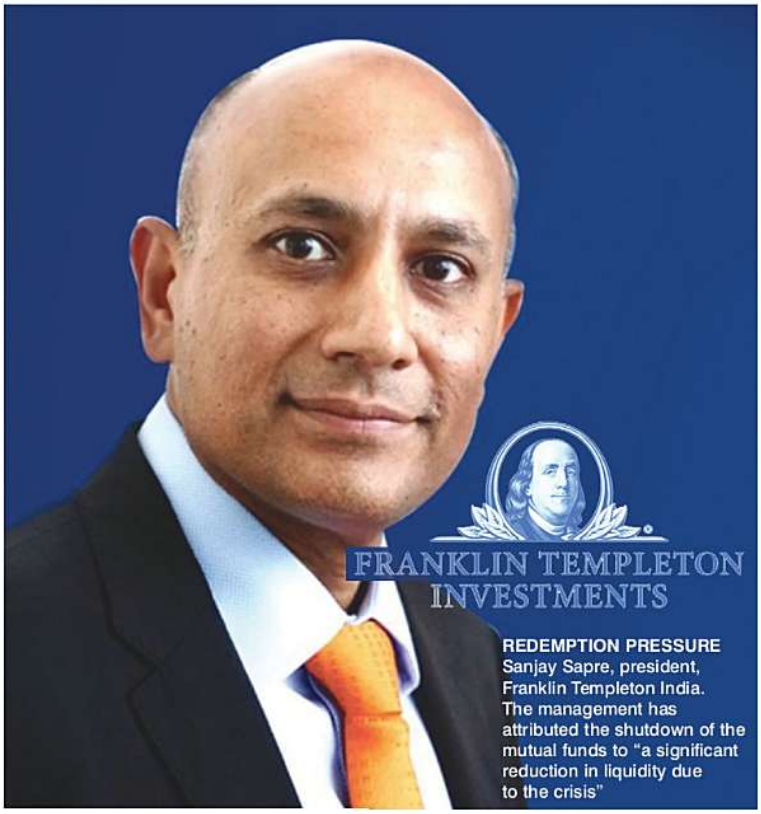
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Credit Risk Contagion Hits Markets

The closing of six debt funds by the large mutual fund company could affect other funds. With corporate defaults expected to rise, the weakness in India's credit markets will be exposed

By Sanjiv Bhatia



REDEMPTION PRESSURE Sanjay Sapre, president, Franklin Templeton India. The management has attributed the shutdown of the mutual funds to "a significant reduction in liquidity due to the crisis"

THE first signs of strain in Indian capital markets are starting to show. Franklin Templeton (FT), a large mutual fund, recently decided to close six of its debt funds. These funds invested in corporate and government debt and are generally considered and sold as reasonably safe investments.

This will have significant repercussions not only for the thousands of investors who trusted FT with their money, but also for India's capital markets. It is also a wake-up call for the government and regulatory authorities to start focusing on financial markets and to recognise their critical role in helping push India's economic development.

FT's management attributed the shutdown of these funds to "a significant reduction in liquidity due to the crisis". Let's put that in simple language. Markets allow buyers and sellers of different products to find each other, and demand and supply forces establish market-clearing prices. So, when demand for a product goes up, its price goes up, and conversely, when supply increases, the price falls to allow the markets to clear. But if, for some reason, sellers can't find buyers the market is said to be illiquid. This happened recently when oil futures prices dropped below zero because no one wanted delivery of oil. Similarly, in the bond market, if there are no buyers for a particular type of bond, the illiquidity can significantly reduce the price of those bonds.

That's what happened to FT's bond funds. They had invested heavily in the bonds of companies like Yes Bank and Vodaphone, and had significant marked-to-market losses. The economic lockdown put further pressure on the prices of the bonds in their portfolios. This created significant redemption pressure from investors (to the tune of Rs 25,000 crore, according to some industry estimates).

Initially, FT borrowed money to cover these redemptions—SEBI regulations allow mutual funds to borrow up



to 20 percent of their assets under management to meet redemptions. But soon the pressure from these redemptions overwhelmed their willingness to borrow and FT was forced to start selling its portfolio holdings. Normally, funds first get rid of their losing positions when faced with redemptions. In FT's case, almost 70 percent of its holdings were lower-rated/higher-risk corporate bonds. Demand for these higher-risk bonds dropped precipitously due to the rising risk of default following the economic lockdown.

This meant that FT had to sell its losing investments in a market that did not have the capacity to buy these instruments—the liquidity problem. As a result, the market value of their positions declined even further. Now faced with the prospect of eventually having to sell their good holdings at below their "fair" market value, FT decided to close down the fund, stop further redemptions and allow for an orderly liquidation of investments.

Think of the FT closing its funds as a lockdown—it buys time for the fund managers and allows them to liquidate the holdings in a more orderly manner. During this lockdown period, no new money will be taken and all redemptions will be put on hold, with the goal of eventually paying back the investors in a staggered fashion. The FT fund closures doesn't mean that all the money is gone, although there will certainly be losses as its investments are marked-to-market in a low-liquidity environment. As is normally the case in these circumstances, the assets currently under management in the fund will probably stay invested until all holdings are sold. The final payout to investors would include these gains and losses too.

Markets are driven by greed and fear. Currently, fear rules and investors are running to the safety of cash. The closure of debt funds by Franklin Templeton should be an eye-opener for policymakers.

So, should investors in other debt mutual funds be worried after the FT move? Yes, they should be, because credit risk affects all debt funds. With a significant economic slowdown staring the country in the face, corporate defaults will undoubtedly increase and anyone invested in corporate debt will be affected.

Will FT's shutting of these funds have a contagion effect and could it be a harbinger of things to come? Could it create panic and force redemptions in other funds? It is a real possibility, given the systemic fear and the strong aversion to risk among investors in the current climate. Some analysts have pointed out that FT may be an outlier because it is known to have taken on more credit risk than the average debt mutual fund. But that should be of little comfort because credit risk gets magnified for all funds during a systemic crisis.

Three things determine the return in a fixed income or debt fund: interest rates, credit risk and manager risk. When interest rates go down, the price of bonds increase and a bond fund does well. Conversely, when rates go up, bond prices fall. In the current climate, with the Reserve Bank injecting liquidity into the system, one can reasonably expect interest rates to decline in the future. This is good for debt funds.

But countering that is credit risk, also known as default risk, which is the risk that a bond issuer will default on payments of interest and principal. As credit risk increases, bond prices drop to persuade investors to take on the added risk. Corporate bonds are particularly vulnerable to credit risk, since defaults rise during times of a systemic economic slowdown. Even if there is no default, it is almost a certainty that many companies will face a credit rating decline and that too will reduce the price of their bonds. This is the risk investors in debt funds currently face.

AMFI (Association for Mutual Funds in India), fearing a ripple effect, has stepped in and tried to calm investors by stating that this is not an industry-wide phenomenon. But markets are driven by greed and fear. Currently, fear rules and investors are running to the safety of cash.

FT's move also signals deeper trouble for India's banking sector. Banks lend to the same companies whose bonds are bought by mutual funds like FT. As corporate defaults increase with the economic lockdown, there will be further stress on an industry already reeling from a bad loan crisis.

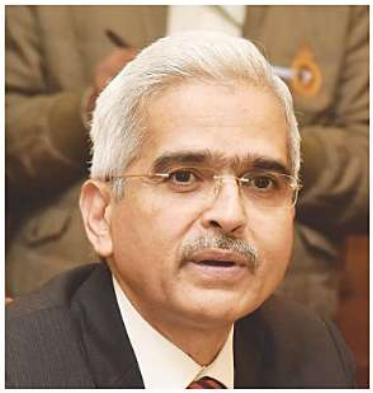
But aren't many debt mutual funds ▶

invested in "high" quality debt? They are, but the definition of high-quality debt is a little dubious in the Indian context. Bonds of companies that have a high rating—AAA, AA and A rating—are considered investment-grade debt. In India, because of lax controls on credit-rating agencies, almost 93 percent of companies have been given an investment-grade rating compared to less than 10 percent in the US. Nearly 65 companies in India have been given the highest rating (AAA) compared to only two companies in the US and no companies in Germany or the UK. The exacting standards of "high quality" observed in other countries are missing among domestic companies.

It is, therefore, buyer beware as was evident in recent debt defaults of high-rated companies like IS&FL, DHFL and Zee Group. There are many others like these and the numbers will only increase with the economic lockdown.

The closure of debt funds by a high profile global fund company like Franklin Templeton should be an eye-opener for policymakers. India's capital markets need a major policy overhaul if they are to help promote India's economic growth. Stable and free capital markets are a necessary condition for economic growth. They bring together users of capital and savers at low intermediation cost. This process happens efficiently and without state intervention. Buyers who need money for longer-maturity projects use bonds, while banks finance shorter-term capital needs. And higher risk projects get funded by equity. Risks also get transferred to those best able to bear them instead of always falling on commercial banks or the government.

Liquid and healthy capital markets also provide clear signals about which companies and sectors are doing well, which allows for a better allocation of resources in the economy. Funds are taken away from underperforming areas and reinvested in innovative and sunrise sectors. And importantly, a stable and robust credit market allows for the quick and efficient transmission of RBI



In the current climate, with the Reserve Bank under Shaktikanta Das injecting liquidity into the system, one can reasonably expect interest rates to decline in the future. This is good for debt funds.

interest rate changes into the real economy. Currently, this is a massive problem in India and creates inefficiencies and illiquidity in credit markets. The blame lies entirely with the current regulatory regime.

There have been many expert reports over the years on how to improve liquidity in Indian capital markets. But most of these reports get shelved. And instead of opening up markets and allowing for the creation of new innovative financial products, bureaucrats come up with myriad regulations, structures, incentives and staffing requirements that impede the development of new financial products and the participation of firms and individuals in certain markets. For example, foreign buyers are restricted to a maximum investment of 6 percent in government securities (G-secs) and 15 percent in corporate bonds. (Only after the Covid-19 crisis, in response to the need for massive capital infusion, has the government opened up restrictions on "some" G-secs.)

Overall, these restrictions significantly reduce the liquidity in these markets and serve no useful purpose in a modern economy. It is hard to understand why they remain in place and why government after government has not found it appropriate to remove these burdensome and meaningless regulations which do nothing but impede the country's economic growth.

Indian capital markets are also dominated by a few large firms that meet the very restrictive requirements on size and ownership structure imposed by government regulators. New, innovative, financial services companies have to jump through innumerable hoops which make it virtually impossible for them to enter the market. The restrictive requirements on asset management companies by SEBI, for example, ensure that much of this business flows to a few select fund management companies. Similarly, regulatory restrictions, designed to favour existing companies, keep innovative credit rating agencies out of Indian credit markets.

Then, there are bizarre taxes that cause frictions and impede the price discovery process. The revenue raised from these taxes is insignificant compared to the damage they do to market efficiency and liquidity. Regulations and taxes together add significant costs to the capital allocation process. As a result, India has among the highest intermediation costs of around 550 basis points. It is, therefore, no wonder that India's capital markets have liquidity problems.

The Covid-19 crisis has caused significant additional damage to an Indian economy which was already reeling from poor policy decisions and overregulation before the crisis. Glaring structural weaknesses in the Indian economy will now be exposed, and maybe, just maybe, the Franklin Templeton debt fund closures will be the canary in the coal mine that provides a wake-up call to policymakers.

The need to overhaul India's weak credit markets is urgent and critical. ■

—The writer is a financial economist and founder, contractwithindia.com



Shaan Katari Libby

Freedom at What Cost?

The pandemic has resulted in a curbing of various rights that impinge on the autonomy, liberty and dignity of people. Courts should ensure there is no overstepping of authority by the State



UNI

PANDEMIC PANGS
Migrant workers at a shelter lodge in Lucknow

EVER since the world went into lockdown, the entire concept of freedoms has changed drastically. We are scared to step out of our homes lest the police question us, we worry about bringing in the groceries or whether we will be able to buy any toothpaste. What about human rights?

A little known Act, the Epidemic Diseases Act, is now in force. As per this, the centre has sweeping powers. When, for instance, it is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent its outbreak or spread, the centre can take measures and prescribe regulations for the inspection of any ship or vessel or of any person intending to sail, it says.

The penalties too are strict. Any person disobeying any regulation or order under this Act shall be deemed to have committed an offence punishable under Section 188, IPC. The authorities have wide protection so no legal proceeding shall lie against any person for anything done or in good faith intended to be done under the Act. The measures referred to include the inspection of persons travelling by railway or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of those suspected by the inspecting officer of being infected with any such disease.

There are international regulations too such as International Health Regulations (2005) which govern how 196 countries and the WHO collectively address the spread of disease and avoid unnecessary interference with international traffic and trade.

Terms are bandied about today that just a few months ago were little known—contact tracing, social isolation and quarantine. These methods invariably impinge on the autonomy, liberty and dignity of individuals. We allow these intrusions for the State to be able to act in the interest of the population at large. The laws, however, are silent on how citizens are to be treated during this crisis.

A quick look at some worrying occurrences presents a picture that we in the legal fraternity should keep an eye out for. The UN in various articles has articulated these concerns. The disease seems to have scared people and resulted in abuses and stigma. Stark disparities have also come into focus—between those who are fortunate to have a roof over their heads and migrants who are starving or on their long walk back home.

This can be seen in countries abroad too. In the UK, there was news of an Uber driver who was barred from entering his rented accommodation and eventually dying. Hungary is barring transpeople from having any rights. Laws are being passed whilst the focus is elsewhere. In Brazil, the federal police chief and the health minister who supported isolation as a tool to contain the spread of the virus were fired.

If this is truly a shift in the way we will exist in future—with strict safeguards on hygiene, sanitation, social distancing and so on—then should we accept that we also need to modify our freedoms? Human rights may end up changing piecemeal. For now, we need to be vigilant and courts around the globe should ensure that there is no overstepping of authority. UN Secretary-General Antonio Guterres was right when he said that the pandemic is "a human crisis that is fast becoming a human rights crisis". ■

— The writer is Barrister-at-Law, Honourable Society of Lincoln's Inn, UK, and a leading advocate in Chennai. With inputs from Praveen PK and Tarun N



India's New Mini-dictators

With greater powers, committees of housing colonies are arbitrarily enforcing various bans in the time of the pandemic. The middle class has little option but to fall in line

By Neeraj Mishra

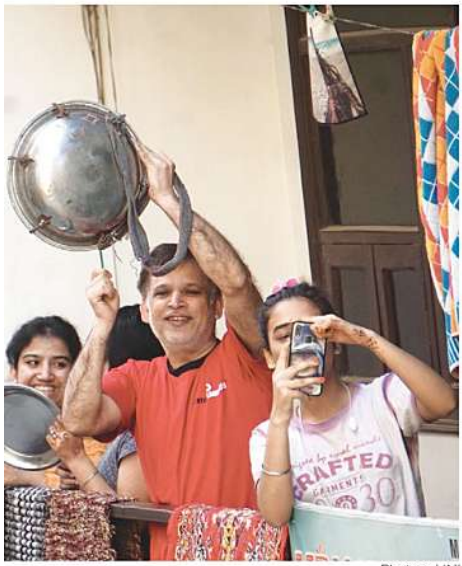
AT a multi-storey gated complex in Hyderabad, residents fought over a father playing basketball with his son inside the campus. In gated communities in Raipur, arguments ensue over allowing in maids. And in Delhi, Noida and Gurugram, RWAs have exerted control over the movements of everyone with a list of dos and don'ts longer than war-time controls. It's the same story across all cities. Committees and RWAs have taken control of middle class lives while the poor continue to struggle with either reverse migration or prolonged unemployment.

The irony is that both the middle class and lower income groups have celebrated the *thaali bajao* and *diya jalao* appeal of Prime Minister Narendra Modi with equal fervour in their own inimitable styles. The middle class did so from their balconies and the poor in festive processions on roads. However, the anti-corona efforts of the government have been absorbed and displayed by the middle class more than anyone else. Modi's addresses have also given the impression that the India that needs to fight corona lives in homes with balconies and which have electricity and piped water.

A flurry of administrative orders by district administrations all over the country has also cemented the impression that it's an urban-centric war against an unseen enemy. The Raipur SSP passed an order after the extension of the lockdown on April 14 that made all RWA presidents and secretaries special police officers till May 3 to control and report on government-mandated lockdown guidelines. No one, of course, reported on the cracker bursting and Diwali-like celebrations in all towns across India as if a war had already been won against the virus.

In one gated colony in Gurugram's Phase 1, an ex-army officer who heads the RWA passed arbitrary orders for residents to come together periodically to sing patriotic songs from their balconies—he provides a list of these and in which order they should be sung along with precise timings. Other apartment complexes in Mumbai and elsewhere have banned any resident from going for a walk inside the complex even if there is a jogging track. These are the new mini-dictators with their mini-empires.

Section 188, a long-forgotten section of the IPC which calls for a fine of Rs 200 and a maximum prison term of one month, has suddenly become the war cry of district authorities. It relates to citi-



Photos: UNI

LOCKDOWN SCENES
Guards outside a gated complex clap for frontline workers; residents responding to the *thali bajao appeal* of the prime minister

zens not following an order of the government. It has been made non-bailable in most places. The government also announced the intention of extending the Epidemic Diseases Act, 1897, and the Disaster Management Act, 2005, to the entire country. DMA is usually applied in times of natural disasters like cyclones and earthquakes in limited zones, but it is the first instance of it being applied across the country. Under DMA, the powers of administrations are multiplied several times. The lockdown itself is a result of the application of DMA. Under Sections 35, 62 and 72, the central government can issue orders overriding any Act. It effectively concentrates all the powers in the hands of the prime minister as the head of the National Disaster Management Authority. Then it flows down to state and district DMA authorities headed by the CM and DM.

The Epidemic Diseases Act, 1897, was promulgated to contain the bubonic plague in Bombay but has been used several times against the spread of cholera and malaria in the early decades after Independence. It was amended in April through an ordinance after there were frequent attacks on doctors and health workers. It has provisions for a prison sentence of seven years for those found guilty of attacking health workers.

All this information was made available to citizens through mobile phone apps. In this time of national distress, the mobile phone and WhatsApp groups have emerged as everyone's clear favourite. Most gated communities had stopped newspaper vendors from entering the colonies and the police administration prevented other vendors from roaming the streets.

In the eagerness to follow administrative orders, RWAs took over. Every gated colony and RWA has a closed WhatsApp group now and it has become a battleground of ideas, informative posts and threats. Every order issued by the home ministry or state government has reached almost every group like newspaper PDFs.

The worst-case scenario is that municipal acts which have never been followed either in letter or spirit have become the new war cry. Spitting can cost one Rs 100 and roaming without a mask, Rs 200. Shops and establishments not registered with municipalities can't open even during the regulation time of four hours almost everywhere. WhatsApp groups also do not have any dearth of demonstrative videos of lockdown violators getting caned. Most involve lower middle class people out on work or hunting for rations or vegetables. But they sent chills down middle class spines and serve as warnings. Of course, we also have the unique ability to laugh at ourselves in the worst of times, so sharing of jokes is an acceptable by-product.

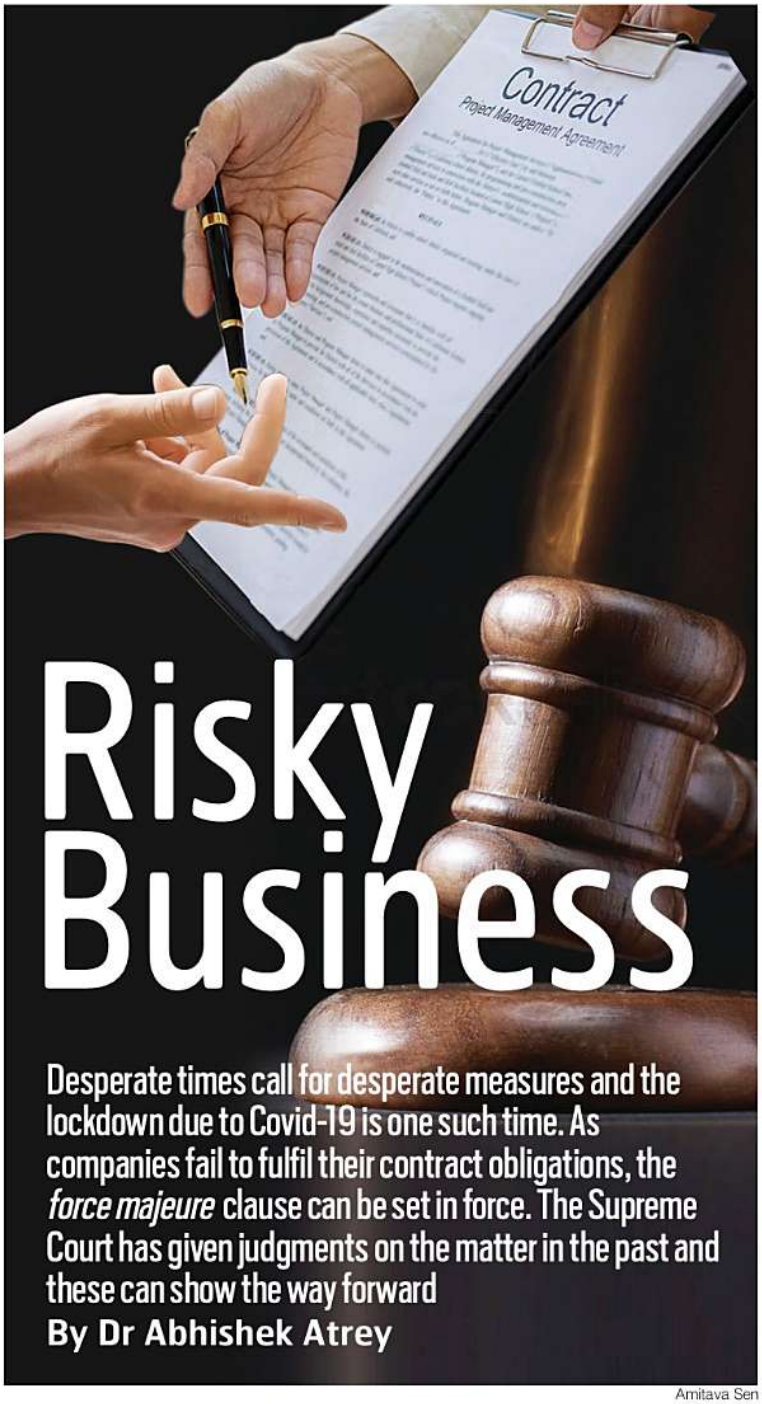
The *thali bajao* programme was a clear evidence about how WhatsApp has taken a hold over the middle class. There are roughly 40 crore WhatsApp users in the country. Apart from its political use, it was also used for the first time to spread awareness about lockdown orders. Everyone had access to the following:

- What is supposed to be done or not done during the lockdown
- Where one is allowed to move with precautions
- List of hospitals, shops, establishments which will be open
- Which trades are allowed to be plied as restrictions ease
- Containment zones and restrictions on pillion riding, traffic routes, etc.

As middle class India received these instructions on TVs and mobiles, it largely followed them while worrying about the next salary. The home ministry's order about full pay to all employees during the lockdown has been challenged in the Supreme Court, but almost no employer has followed it in spirit, citing various compulsions. The fear of losing jobs to corona is real and pink slips are being circulated and being noted like never before.

Even as strict enforcement of the lockdown was seen everywhere, in Chhattisgarh a piquant situation arose in the Revenue Board after it became apparent that certain government offices would open after April 20 even if there was only one-third strength. Lawyers approached the president of the revenue board, CK Khaitan, requesting him to defer it till May 4 when the second round of lockdown ends. Their plea was that even if the Board starts functioning, clients would not be able to reach Raipur because of the ban on inter-district travel. Khaitan accepted the plea but also felt that the way forward was to connect all the courts in Bilaspur, Jagdalpur and Raipur through video conferencing so that the revenue system would not suffer. That may be the way forward for our civil and criminal court system as well. RWAs too need an infusion of humaneness in the time of Covid-19. ■

Section 188, a long-forgotten section of the IPC which calls for a fine of Rs 200 and a maximum prison term of one month, has suddenly become the war cry of district authorities.



Risky Business

Desperate times call for desperate measures and the lockdown due to Covid-19 is one such time. As companies fail to fulfil their contract obligations, the *force majeure* clause can be set in force. The Supreme Court has given judgments on the matter in the past and these can show the way forward

By Dr Abhishek Atrey

Amitava Sen

THE doctrine of frustration or *force majeure* is a common law doctrine which also finds place in the Indian Contract Act, especially in Sections 32 and 56. This doctrine means that a person cannot be compelled to fulfil his obligation under a contract if the performance of it becomes impossible due to unforeseen circumstances and such a contract becomes void at the occurrence of such an event. The present lockdown due to Covid-19 is surely an unforeseen circumstance which will make it impossible for several people and companies to fulfil their obligations under contracts as the entire business of the country has come to a standstill.

And during this lockdown, *force majeure* is a most searched term in Google among the legal fraternity. It is a French term which means superior force and is commonly used in contracts of big companies. Ordinary people see this term being used in insurance policies or builder agreements. During the present epidemic, builders and insurance companies will sparingly invoke this clause against the public when the issue of paying for medical bills or delivery of real estate units in time or other obligations on their part come up.

The Latin maxim, *lex non cogit ad impossibilia*, also expressed as *impotentia excusat legem*, means that the law does not compel a man to do that which he cannot possibly perform. Thus, there ought always to be an invincible disability to perform the obligation and the same is akin to the Roman law maxim, *nemo tenetur ad impossibile*.

DOCTRINE OF FRUSTRATION IN INDIAN CONTRACT ACT

Sections 31-36, Chapter III of the Indian Contract Act, 1872, deal with contingent contracts. Section 31 defines a "contingent contract" as that which is based on the happening of any event attached to that contract. For example, A contracts to pay B Rs 10,000 if B's house is burnt. This is a contingent contract. Section 32

deals with the impossibility of a contract. According to it, when the performance of the condition attached with the contract becomes impossible, the contract becomes void. For example, A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void on the death of C.

Section 56 of the Act deals with agreements to do an impossible act and says that an agreement to do an act impossible is in itself void. Also, if the act for which the contract was made becomes impossible or unlawful in future, such a contract becomes void. There can be various examples of this. For example:
(a) A agrees with B to discover a treasure by magic. The agreement is void.
(b) A and B contract to marry each other. Before the time fixed for it, A becomes mad. The contract becomes void.
(c) A contracts to take in cargo for B at a foreign port. A's government afterwards declares war against the country where the port is situated. The contract becomes void.

The present lockdown is also one such unprecedented situation and makes the performance of contracts impossible and Section 56 can be invoked.

SUPREME COURT ON DOCTRINE OF FRUSTRATION

• In 1916, in the case of *FA Tomplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. ((1916) 2 A.C. 397)*, Lord Lorebum stated:

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

This theory would mean that the Court has an inherent jurisdiction to go behind the express words of the contract. The House of Lords in the appeal from that decision (reported in 1952 A.C. 166), discarded the theory. Thereafter, the theory of a change in the obligation has come to be more and more generally accepted. Lord Radcliffe, the author of this theory, in *Davis Contractors v. Fareham U.D.C. (2)* formulated it in the following words:

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would Tender it a thing radically different from that which was undertaken by the contract."

In fact, it is not hardship or inconvenience or material loss which brings the principle of frustration into play. There must be a change in the significance of the obligation that the thing undertaken would, if performed, be different from that which it was contracted for.

In independent India, the doctrine of frustration came for the first time before the Supreme Court in *Ganga Saran vs Ram Charan Ram Gopal (AIR 1952 SC 9)*, decided on November 1, 1951.



• In independent India, the doctrine of frustration came for the first time before the Supreme Court in *Ganga Saran vs Ram Charan Ram Gopal (AIR 1952 SC 9)*, decided on November 1, 1951, in which the Court held that:

"We agree with the reasoning of the Privy Council, and it seems to us that the considerations which prevailed with them must govern the construction of the agreement with which we are concerned in this case. The agreement does not seem to us to convey the meaning that the delivery of the goods was made contingent on their being supplied to the respondent firm by the Victoria Mills. We find it difficult to hold that the parties ever contemplated the possibility of the goods not being supplied at all. The words "prepared by the Mill" are only a description of the goods to be supplied, and the expressions "as soon as they are prepared" and "as soon as they are supplied to us by the said Mill" simply indicate the process of delivery. It should be remembered that what we have to construe is a commercial agreement entered into in a somewhat common form, and, to use the words of Lord Sumner in the case to which reference has been made, "there is nothing surprising in a merchant's binding himself to procure certain goods at all events, it being a matter of price and of market expectations." Since the true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards, it is unnecessary to refer to what the parties ▶

have said about it. In these circumstances, this is obviously not a case in which the doctrine of frustration of contract can be invoked."

- Thereafter, in 1968 in *Naihati Jute Mills Ltd. V. Khyaliram Jagannath (AIR 1968 SC 522)*, the Supreme Court held that:

"Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promiser could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promiser must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by s.56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible. Courts in England have however evolved from time to time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties to it had no control."

- In *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd. (2002 (5) SCC 54)*, the Supreme Court on the issue of frustration of contract held that it applies only in the case of a genuinely unexpected and unanticipated event, which could not reasonably be said to have been contemplated and which makes it impossible to carry out the terms of the contract. The words of the contract have to be carefully considered. A right conferred by a contract of guarantee is an independent right recognised by the statute and cannot be diminished without a just cause. Nationalisation of a textile company did not result in discharge of contract of guarantee on account of frustration of contract.
- In *DDA V. Kenneth Builders & Developers (P) Ltd. (2016 (13) SCC 561)*, the grievance of the DDA was that even though the project land was "residential", yet the High Court held that if construction activity is not permitted by the Delhi Pollution Control Committee, the developer (Kenneth Builders) would be entitled to a refund of the entire amount deposited with the DDA pursuant to the acceptance of the developer's bid in an auction, along with interest. The DDA proposed a public-private partnership project for the development of an area of 14.3 hectares of prime land at Tehkhand in South Delhi for the construction of 750 premium residential flats in a self-contained community to be sold by private real estate development on a free sale basis. In addition, the developer would have to construct 3,500 resettlement houses for the economically weaker sections of society, with each house having a super area of 26 sq m. These resettlement houses and the developed common facilities relating thereto would be handed over to the DDA for allotment. The Supreme Court held that:

Force majeure means a person cannot be compelled to fulfil his obligation under a contract if the performance of it becomes impossible due to unforeseen circumstances. The contract then becomes void.



"33. The interpretation of Section 56 of the Contract Act came up for consideration in *Satyabrata Ghose vs Mugneeram Bangur & Co.* It was held by this Court that the word "impossible" used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, "there can be no case of frustration because the



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THE MAGIC CLAUSE
An office complex in Mumbai. *Force majeure* will come into effect, specially in contracts involving big companies

basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

"34. In so far as the present case is concerned, the DDA certainly did not contemplate a prohibition on construction activity on the project land which would fall within the Ridge or had morphological similarity to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance."

• In *Energy Watchdog vs Central Electricity Regulatory Commission and Ors. (2017 (14) SCC 80)*, the Court summarised the principle of impossibility of contract and held that abnormal rise or fall in the prices of fuel or mere incidence of expense or delay or onerousness is not a *force majeure* event and not sufficient to invoke the doctrine of frustration. The term impossibility is different from the term "radically difficult". In this matter, it was nowhere written in the contract that the coal was to be purchased only from Indonesia at a particular price. From the agreement it was clear that the price for supply of coal was to be borne by the person who would set up the power plant.

The present lockdown is one such situation which is unprecedented and makes the performance of contracts impossible and Section 56 of the Indian Contract Act can be easily invoked.

LOCKDOWN AND FUNDAMENTAL RIGHTS

In the present scenario, it is necessary to understand the law under which this lockdown is declared by the central and different state governments curtailing several fundamental rights which are guaranteed by Articles 19 and 21 of the Constitution and acknowledged by the Supreme Court in different judgments. These rights include right to life and liberty, right to live a life with human dignity, right to privacy, right to freely travel in India and abroad, right to trade, right to run a business of one's choice, right to expression and speech, right to education, right to peaceful gathering.

All these rights have been curtailed by the centre and state governments by invoking powers given in the Epidemic Diseases Act, 1897, Disaster Management Act, 2005, and Essential Services Maintenance Act, 1968. The Epidemic Diseases Act, 1897, has been recently amended by the Epidemic Diseases Ordinance 2020, dated April 22, 2020, which includes imprisonment and fine for attacking healthcare personnel.

The lockdown across India has been ordered by the Ministry of Home Affairs, Government of India, while invoking its powers under Section 10 of the Disaster Management Act, 2005, which deals with the powers and functions of the National Executive Committee headed by the cabinet secretary, which, in turn, works under the National Disaster Management Authority, headed by the prime minister.

CONCLUSION

It is, therefore, clear that both the central and state governments have enough powers to impose several restrictions during Covid-19 and different notifications, circulars and guidelines issued by the Union home ministry or the National Executive Committee under the Disaster Management Act are well within their powers to do so.

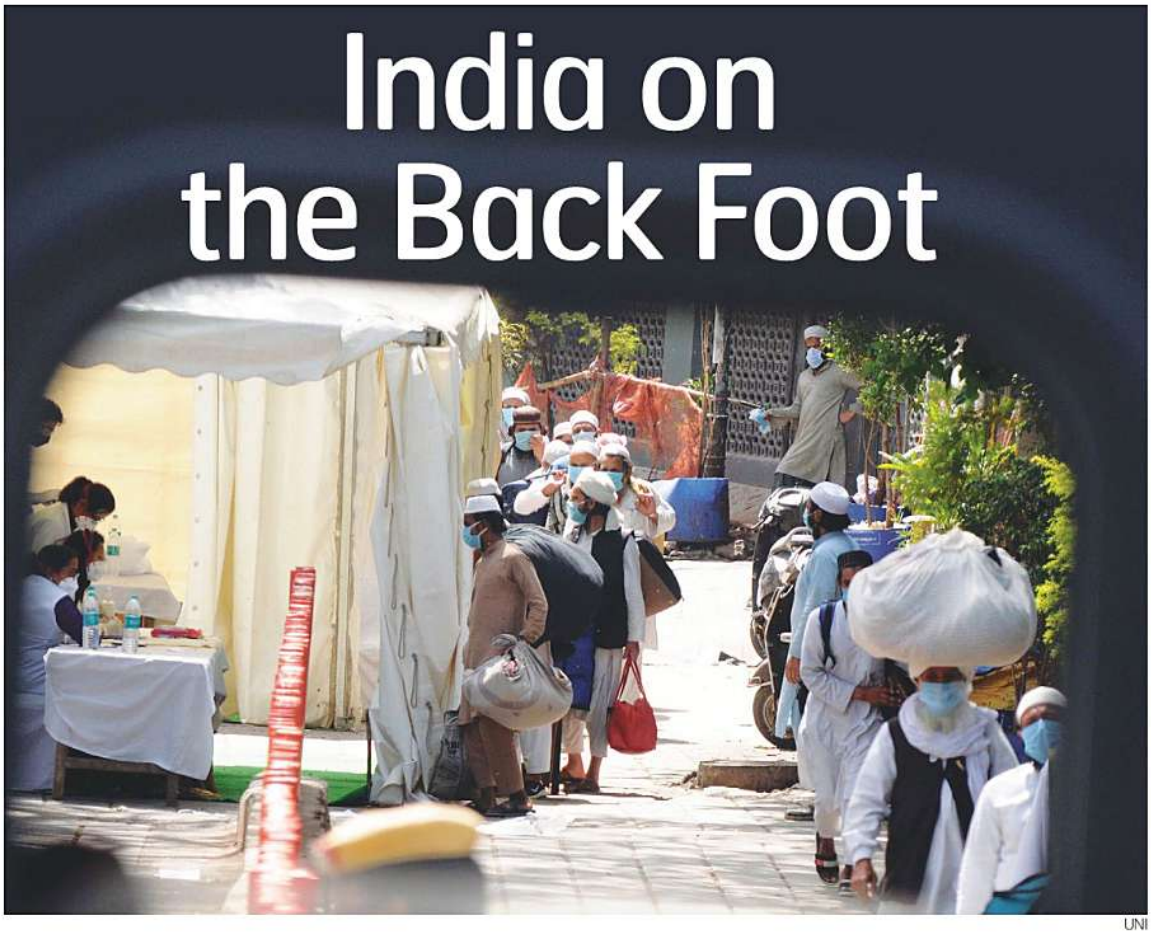
Apart from this, the centre also has powers under Article 360 of the Constitution to impose financial emergency and this can be declared if the lockdown continues. Today, India is facing the worst time of its economy. All industries, railways, airlines, buses, Metro, malls, restaurants, hotels, tours and travel and any kind of movement except for essential services are shut. The effect of one and a half months of lockdown will cost the Indian economy in years. Even when life resumes after the lockdown, certain industries and businesses are not going to open for 2-3 years, such as cinema halls, malls, tour and travel, etc.

The virtual world will take shape and people will begin a new era of work from home through video-conferencing. E-filing has already started in courts and arguments are being done through video-conferencing. It requires a little more push and the entire concept of traditional practice in courts may come to an end. However, one wonders if criminal trials through video conferencing will retain their sanctity. This is because the atmosphere of courts has a psychological impact on those coming to court, either as a witness or an accused. This cannot be got through video conferencing.

Anyway, there is no doubt that several industries and companies are going to suffer heavy losses and may not be able to perform their obligations. They will try to invoke the doctrine of frustration against the general public, but the law as settled by the Supreme Court is sufficient to take care of people. ■

—The writer is Advocate On Record, Supreme Court of India

India on the Back Foot



UNI

Anti-Muslim rhetoric and attacks in India seem to have affected diplomatic ties as a US panel and some countries in the vital Gulf region have slammed the government for the rising Islamophobia

By Seema Guha

AT some time or the other, the hate mongering rampant in India had to catch up. At home, the government can maintain a stony silence. But when there are signs of it affecting India's diplomatic relations, there has to be a course correction. The time for that has come now considering what is at stake.

Recently, a US government panel called for India to be placed on a religious panel blacklist. Earlier, the Organisation of Islamic Cooperation (OIC), headed by Saudi Arabia, had called out India. Moreover, a UAE princess, as well as the Kuwaiti government, made remarks on Islamophobia that has gripped India.

IN THE EYE OF THE STORM
Muslim worshippers at Nizamuddin mosque being shifted to an isolation centre in Delhi

Anti-Muslim sentiments and vigilante attacks on the community have been reported since 2014. These intensified after the BJP returned to power with a massive majority in 2019. Since the pandemic, much of the hate

remarks were triggered by the Tablighi Jamaat meeting in Delhi. Many from the congregation had unknowingly spread the virus across the country. The general public, goaded by some TV anchors, pointed fingers at the entire community for the spread of the virus. Social media exploded with accusations of Muslims deliberately setting out to spread the disease. While all this is a reaction to fear of an unknown virus, as well as latent anti-Muslim sentiments in a section of Indians, India needs to get its act together if it has to retain its image as a multi-ethnic, multi-lingual country where major religious groups live in harmony. The co-existence of different religious groups took a major hit with the Delhi riots, which happened on the second day of US President Donald Trump's India visit in February. The riots were widely covered in the foreign media.

The reactions soon started coming. First, the United States Commission on International Religious Freedom (USCIRF), an independent bipartisan US federal government commission, slammed India, just like it did in 2019. It said the Citizenship Amendment Act (CAA) was discriminatory. The amendment allows minority Hindus, Sikhs, Christians, Buddhists and Jains living in Afghanistan, Pakistan and Bangladesh to get Indian citizenship to escape religious persecution. The glaring omission is of Muslims who are also often targeted, especially Shias in Pakistan. What is more, the panel called for placing India on a religious freedom blacklist over a downturn in religious freedom since Prime Minister Narendra Modi took office.

In its annual report published recently, it said that India should join the ranks of "countries of particular concern" that would be subject to sanctions if they do not improve their records. Three members of the panel disagreed with the decision to include India in the list.

It is highly unlikely that the US will slap sanctions on India for religious intolerance. This can only happen when relations between India and the US deteriorate to such an extent that the latter goes ahead with sanctions. India's ties with the US have improved tremendously since the civil nuclear deal was signed in 2006 by George W Bush and Manmohan Singh. Ties underwent a dramatic change since then. This has been carried forward by Modi and US President Donald Trump.

India, naturally, refuted the USCIRF allegations. "We reject the observations on India in the USCIRF annual report. Its biased and tendentious comments against India are not new," Anurag Srivastava, the ministry of external affairs (MEA) spokesman said. "But on this occasion, its misrepresentation has reached new levels....We regard it as an organisation of particular concern and will treat it accordingly."



"We reject the observations on India in the USCIRF annual report. It's biased and tendentious comments against India are not new."

— Anurag Srivastava, ministry of external affairs spokesman

In an incident which could have no relation with the USCIRF report, Trump unfollowed Modi on Twitter. This might seem strange considering that after his ego-boosting trip to India in February, where a stadium full of people welcomed him in Ahmedabad, he followed Modi.

Trump also unfollowed Indian President Ram Nath Kovind, the PMO and the Indian embassy in the US. The reason for this behaviour is not known. Perhaps with presidential elections in November and the Christian right a part of Trump's support base, he is being extra cautious. Right-wing Christian groups have always spoken out against religious intolerance in India. Whether this is merely Trump being his usual whimsical self is unclear.

But of much more significance to India is the criticism coming out of the Gulf region, which is pivotal to the Indian economy. Over six million Indians live and work out of the oil-rich Gulf kingdoms. These workers send back valuable remittances which fuel the economy of states like Kerala, Andhra Pradesh and Telangana. India's political ties with the Gulf countries have always been good. But in the last few years, the centre tried to invest much more political capital in the region—be it foreign minister Jaswant Singh's visit to Saudi Arabia during the Vajpayee years, Manmohan Singh visiting Saudi Arabia or Modi pushing the envelope even further.

Modi was honoured with the highest civilian award by UAE last year. Even the scrapping of Kashmir's special status and abrogation of Article 370 did not get much traction in the Gulf. Despite Pakistan's best efforts, Saudi Arabia and the UAE, the two most powerful economies in the region, remained non-committal. In fact, there was commentary in the Pakistani press that ▶



Abdullah al-Shoreka, a minister in Kuwait's Ministry of Awqaf and Islamic Affairs, tweeted that it was time for Muslims to speak up against the persecution of their co-religionists.



In a unique development, a member of the Sharjah royal house, Sheikha Hend Al Qassemi wrote a front-page opinion piece in *Gulf News*, titled: "I pray for an India without Islamophobia".

Prime Minister Imran Khan could not depend on the Muslim world to back his country's efforts to highlight the plight of Kashmiris. But that could well change if the government continues to allow its followers to push the communal narrative.

In a statement on April 27, Kuwait appealed to OIC to look into the rising Islamophobia in India. The OIC is a group of 57 Muslim countries meant to look after the interests of member states. The General Secretariat of the Kuwait Council of Ministers expressed its "deep concern" about the treatment of Indian Muslims. It asked the OIC to take "necessary and urgent measures" to "preserve the rights of Muslims there". Abdullah al-Shoreka, a minister in Kuwait's Ministry of Awqaf and Islamic Affairs, tweeted that it was time for Muslims to speak up against the persecution of their co-religionists.

But India has denied this. The MEA said in a statement: "The government of Kuwait has assured us that they are deeply committed to friendly relations with India. They do not support any interference in the internal affairs of India." Srivastava also noted that India had sent a Rapid Response Team of doctors and medical supervisors to assist Kuwait fighting Covid-19. "During its two weeks' stay in Kuwait, the team rendered valuable medical assistance in testing and treatment of afflicted persons and training their personnel." The MEA is doing damage control at home. But perhaps more important is to stop the growing public statements being made by BJP party MLAs and workers asking for boycott of Muslim vegetable vendors in UP and Gujarat.

In the past too, the OIC had regularly come up with anti-India statements. Successive governments in Delhi have not paid attention, mainly because the MEA would informally tell reporters that individual nations always told Delhi to ignore the OIC statements. They often went along with the prepared texts and said yes, but would not let any of this ruin ties with India. This was decades back. Whether the same rules hold today is another question.

Somehow things seem different now. Earlier, the Independent Permanent Human Rights Commission, which is part of the OIC, tweeted about "unrelenting vicious #Islamophobic campaign in #India maligning Muslims for spread of #COVID-19 as well as their negative profiling in media subjecting them to discrimination & violence with impunity". And again, in another tweet: "#OIC-IPHRC urges the #Indian Govt to take urgent steps to stop the growing tide of #Islamophobia in India and protect the rights of its persecuted #Muslim minority as per its obligations under int'l HR law."

To top it, Saurabh Upadhyay, an Indian working in the UAE, tweeted abuse about members of the Tablighi Jamaat. He referred to them spitting on people as a "new form of jihad". He also called for "Death to radical Islamic tablighi (sic) terrorists and other radical Islamic sons of satan." Then, in a unique development, a member of the Sharjah royal house, Sheikha Hend Al Qassemi responded to this tweet. Recalling her family's close ties with India, she said: "... your rudeness is not welcome. ... You make your bread and butter from this land which you scorn and your ridicule will not go unnoticed". She then quoted UAE laws prohibiting hate speech by citizens and non-citizens. She followed up with a front-page opinion piece in *Gulf News*, titled: "I pray for an India without Islamophobia".

That would be the best way forward for India. ■



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BY SANDEEP NARANG

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