

## **Schadenfreude during Public Health Emergencies:** *Professionalising Public Procurement during Coronavirus and Beyond...*

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### **Introduction**

*Schadenfreude* is a German word that originated sometime around 1868 and is composed of *Schaden* ("damage") and *Freude* ("joy"), literally meaning **one person finding pleasure in another person's misery**. Defence professionals worldwide are therefore already all too well-aware of war-profiteering opportunities in times of battle – when many international arms and munitions manufacturers can unashamedly rig public procurement systems, working in tandem with unscrupulous government officials, traders, middlemen and stockists in order to create artificial shortages and to ramp-up prices for munitions, spare parts and maintenance services just when war-fighting governments need them the most.

It is unlikely that similar "merrymaking" opportunities will not arise in the due course with public procurement of medical kits and equipment worldwide, just as national governments gear up to fight the coronavirus pandemic at an unprecedented scale in the midst of extensive global supply chain disruptions in raw material and labour. A war-like *schadenfreude* during the coronavirus emergency would therefore have to be skillfully identified

and mitigated for the public good, using all possible legal, policy and nudge tools that may be available to interested governments and to their regional and international networks. And all of this would need to be executed in a manner that balances stakeholder interests to the fullest possible extent, resulting in **collaboration rather than conflict** – genuine *but sometimes* competing interests ranging from those of consumers, regulators, manufacturers, importers, retailers, researchers, innovators and health care providers

### **India Gears Up for COVID-19**

Indian private marketplaces were beginning to see a drying up of supply and massive surges in prices of essential masks, coveralls, and hand sanitisers; and both Central and state governments have responded strongly to many of these developments. Recently, on the 20<sup>th</sup> of March, the Ministry of Consumer Affairs, Food and Public Distribution in the Government of India (GoI) capped retail prices of masks and hand-sanitisers effective till June 20<sup>th</sup>; but that means the battleground will now move to proper implementation of the directive, as well as ensuring the proper ramp-up of production; reinvigoration of closed or underutilised manufacturing facilities; public and private investing in development of quick-results testing kits and drug-alternatives; and such like.

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## Adopting an Epidemic Act-PLUS Approach

A number of state governments across India have already brought into force notifications under (1897-vintage) **The Epidemic Diseases Act**, a century-old legislation that enables initial-steps in combating the pandemic, and covers inspection of suspects, allowing for their segregation, providing for their accommodation and (by the Central Government) inspection of ships and vessels and temporary detention of persons using such modes of travel and transport.

But unless checked properly, the *schadenfreude* in public contracting for coronavirus pandemic can happen through a number of interesting ways, ranging from artificial scarcity of essential medical supplies, as well as possible bid-rigging of public procurement systems through artificially-high pricing and avoidance of liabilities for late/ delayed supplies or non-supplies. All this can be too easily achieved by clever use of elementary tactics such as playing one public procuring agency against the other, or one state government being preferred over others in these emergent times of need; and then moving on to more complex mechanisms such as influencing technical specifications of medical kits being procured, or use of change of law/ force majeure contract clauses for arm-twisting public procurement officials to drop penalties against government contractors for delayed/ non-deliveries.

A more holistic approach to managing the coronavirus pandemic at a reasonable cost to the public *and* to the public exchequer will therefore necessarily involve an “**Epidemic Act-PLUS**” approach in India and elsewhere, through proper shoring-up

of domestic production using elements of legislations such as the **Industrial (Development and Regulation) Act, 1951** (the IDRA) that allows for nudging and, wherever necessary, taking over of parts of industrial management and production, as well as proper use of **state and national procurement frameworks** that allow for agglomeration of quantities and enhancement of competition, such as **The Rajasthan Transparency in Public Procurement Act, 2012** and similar legislations in **Assam** (2017) and **Punjab** (2019).

The latter approach – through agglomeration of quantities that discourages suppliers from rigging prices by propping one agency requirements against another agency’s needs – has already been initiated by the Ministry of Textiles in GoI a few days back when it took a policy decision on March 18<sup>th</sup> to nominate HLL Lifecare Limited as the sole procurement agency for Central and state government hospitals. Of course, agglomeration of quantities is once again only a beginner’s step; and it will necessarily be followed up by extremely high levels of efficiency and timeliness in organising sourcing, production and distribution logistics by HLL, both as a production agency as well as a procuring agency. This theatre of efficient sourcing, manufacturing and distribution of essential drugs, kits and equipment is where the action will now surely shift to and will have to be monitored carefully, and will necessarily involve the making of both strategic and tactical choices in use of a large number of legal, policy and nudge instruments available under various national and state legislations in India.

The range of tools for government use in India for the purpose is mind-

boggling indeed for any student of public law and policy: from fostering industrial development through the IDRA and procurement efficiency using Central/ state public procurement frameworks as discussed earlier; to (should, God forbid, the need arise for) potentially using elements of consumer protection under **The Consumer Protection Act 2019**; anti-bid rigging measures under **The Competition Act 2002**; ensuring delivery of essential services through **The Essential Services Maintenance Act 1968**; and price and stock caps through **the IRDA and The Essential Commodities Act 1955**.

All these measures, of course, will necessarily be aided and impacted by clever use of some extremely recent and evolving **“Make in India” initiatives** such as procurement preferences and indigenous content obligations, possibly by skillful and targeted rule-making in the short-run – focusing on ensuring certainty of supplies until the pandemic stays strong – and suitably modifying such measures in the longer-run – shifting focus to domestic manufacturing of kits, drugs and equipment once the pandemic subsides to a more manageable degree.

This amazing range of interventions, together with **export caps and restrictions** (such as the ones on surgical masks, ventilators and textile raw materials that came into force on March 19<sup>th</sup> recently) coupled with **smart and foresightful international/commercial diplomacy** (such as relaxing certain item exports in February this year when other countries needed them more, with a clear eye on obtaining reciprocal supplies for India in her present times of need) make the handling of this pandemic a formidable and

challenging task indeed for *both* public procurement *and* public management officials alike.

Implementation of all these measures, of course, will have to be timed and sequenced properly and carefully, and will need to be undertaken on a strictly “need to do” basis given India’s political/ administrative sensitivities and complexities, in order to **avoid a panic situation within a difficult pandemic situation**. If the ringing of bells and blowing of conches yesterday throughout the country at the behest of India’s political leadership is any sign, then it surely was a very inspiring signal to the effect that India’s people and her public institutions and leaders are standing up united against the coronavirus pandemic, thus far and well beyond.