

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 6

2020

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Indian Legal System and Access to Justice during COVID - 19

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ABSTRACT

Beginning with the evolution of access to justice in the backdrop of constitutionalism and international conventions, this paper moves on to analyse the impact of the unprecedented situation of COVID-19 on access to justice. While dealing with the legal impact of COVID-19 on different social groups it attempts to overcome the lacunas by critically analysing and giving suggestions for the accessibility of justice during COVID-19.

Keywords: Legal System, Access to Justice, Rule of law, Principles of Natural Justice, Article 14, Article 21, Video conferencing, domestic violence, judicial mechanism

To no one will we sell, to no one will we refuse or delay right or justice.

- Magna Carta, 1215

I. INTRODUCTION

COVID-19 is a global pandemic and has caused disruptions of life, work, movement, businesses and has taken away liberty from many. The Government of India in order to curb its spread imposed a nation-wide lockdown, suspending normal life, only allowing the essential services to operate. The Constitution which must be upheld at every cost, is in a state of limbo as constitutional challenge requires a free access to courts and lawyers, but the lockdown restrictions has not taken this access into account and restricted both. The lockdown though necessary to curb the spread has disproportionate adverse effects on the vulnerable sections of society. The prevalence of justice is needed now more than ever whether it might be the agony of migrant labourers, to check the conditions of hospitals/health care facilities or fundamental rights of the citizens. Though several measures have been taken to ensure justice but one must not forget that they should be accessible to all, especially by the weakest section of the society.

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II. LITERATURE REVIEW

During the course of study, researcher has referred to several judgements, articles, web sources and guidelines published by UNDP. However, out of these, the documents which are worth quoting are: Firstly, judgement of **Anita Kushwaha v. Pushap Sadan [(2016) 8 SCC 509]** has remarkably mentioned the connection between right to justice and article 21. Along with, essential facets of access to justice. Secondly, **an article written by Justice AK Ganguly** with the title ‘**Access to Justice**’, has emancipated the horizons of rule of law and the connection of notion of access to justice with constitutional ethos of rule of law and article 14. Thirdly, **Guidance note on Ensuring Access to Justice in the Context of COVID-19, Published by UNDP**, it can be viewed as a framework for guidelines which should be adhered to while meeting international commitments and safeguarding the rights of different social groups during COVID-19.

III. INDIAN LEGAL SYSTEM

Since eternity, Indian’s have given paramount importance to *Dharma*. This notion of righteous conduct was deeply embedded in the legal system of the dynasties which have ruled India. Any act of deviation from the established notions of society was liable to be punished. Unbiased and unprejudiced legal system for redressing civil and criminal disputes was considered as a stupendous characteristic of many dynasties (Mauryan – 321 to 185 BCE and Mughals – 16th to 19th century) which have ruled ancient India. Later, these essentials of an effective legal system became the basis for the common law system. The common law system - a system of law based on recorded judicial precedents, came into practice in more organized way with the advent of British rule in India². Accordingly, founding fathers of Indian Constitution, working on the same line of thought structured, an organised hierarchy of courts – Supreme Court, High Court and District Court³, which while pronouncing judicial verdict give utmost importance to the precedents and ethos of constitutionalism. The apex court of the land while administering the motto of “*Yato Dharmastato Jayah* – Where there is righteousness, there is victory” has pronounced several progressive judgements. The width and amplitude of this worded precept is wide. Consequently, while conforming to this canon of constitutionalism there is an emergence of “social justice paradigm”.

²Define of Common Law system, available at <http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/>, last accessed on 03-11-20

³Constitution of India Act, 1950; Art. 124 and 214

IV. INDIAN LEGAL SYSTEM DURING COVID-19

India has adopted a common law system wherein court functions through open hearing, in which every person is allowed to view court proceedings (barring few exceptions). Every day thousands of people approach the court with a faith that justice will be served to them. However, with closure of courts in the third week of March 2020, the complete Indian legal system came to a halt due to the unprecedented situation of COVID-19. Therefore, in order to meet up the legal needs of people, court by applying the findings of Supreme Court from **Swapnil Tripathi v. Supreme Court of India**⁴ moved towards “live streaming of proceedings” through video conferencing. The court was of concerned opinion:

“By providing virtual access of live court proceedings to one and all, it will effectuate the right of access to justice or right to open justice and public trial, right to know the developments of law and including the right of justice at the doorstep of the litigants. Open justice, after all, can be more than just a physical access to the courtroom rather, it is doable even virtually in the form of live streaming of court proceedings and have the same effect.”

It may be contemplated as a “next generation justice” however, many people from the legal fraternity itself are finding it very difficult to navigate a digital mode of judicial system. Bar Council of India (BCI) while addressing the issue relating to lack of technical skills of lawyers in one of its letters⁵ to Chief Justice of India (CJI) SA Bobde stated:

“I can emphatically state that 90% of advocates and Hon’ble judges through out the length and breadth of the country are themselves unaware about technology and about its nuances, maybe some of them can learn after proper training and maybe some of them would still find it a difficult task even with the training to make themselves self-sufficient in this regard.”

Virtual Courts are not easy for developing country like India. India has thousands of courts and many of them are situated in remote areas where broadband facility is not available. Thereby, making us ponder about the deplorable condition under which seven hundred (approx.) district courts will function where accessibility of internet is next to impossible. Because of a pandemic and advisory rule of social distancing, jail visits are stopped which in result is affecting the litigant’s legal right to fair legal representation. Since, the court

⁴2018 (11) SCALE 475

⁵Letter by chairman of BCI to CJI, available at <https://www.livelaw.in/top-stories/90-advocates-and-lawyers-unaware-of-technology-bci-chairman-writes-to-cji-advising-against-continuation-of-virtual-hearings-post-lockdown-read-letter-155917>, last accessed on 15-11-20

proceedings are done through video conferencing there is a possibility of cyber hacking which might undermine the confidentiality and privacy of parties concerned. Furthermore, under 'normal' circumstances, access to justice for most women is limited and outright unavailable in certain instances. As courts are adopting innovative system for hearing and restricting themselves to 'exceptional' or 'urgent' cases, it might be possible that gender related cases might not be considered of much importance⁶. Manifestly, it can be construed that Indian legal system during medical emergency of 2020 has missed the bus in more than one way.

V. ACCESS TO JUSTICE

Ubi jus ibi remedium is an age-old Latin maxim which means – where there is a right there is a remedy. Meaning to say, if an individual has committed a wrong against an aggrieved person then later has a right to ask for an appropriate remedy to undo the wrong caused to him by former, thereby, he can request for access to justice.

The notion of “access to justice” which is envisaged in the constitution of almost all the modern democratic societies of the world can trace its roots to the Art. 39 of Magna Carta. According to it:

“No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land⁷.”

It can be considered as an indispensable human right which rests upon a common law presumption that access to court can never be denied save by clear words in a statute⁸. In **R v. Secretary of State for Home Dept., ex p Leech, Steyn LJ**⁹ was of view:

“Access to justice is a basic right which could not be denied or diluted by any kind of interference or hindrance”

An aggrieved person cannot be left without the remedy and that access to justice is a human right and in certain situations even a fundamental right¹⁰. The surfacing of a new set of rights under the umbrella of human rights and fundamental rights can be viewed as an opportunity of imposing an obligation over the legislature, executive and judiciary to perform their

⁶Gendered Face of COVID-19, available at <https://www.unodc.org/dohadeclaration/en/news/2020/04/gendered-face-of-covid19-women-and-access-to-justice.html>, accessed on 4-11-20

⁷ Magna Carta, 1215: Art. 39

⁸ De smith, *Judicial Review of Administrative Action*, 5th edition, Pub.: Sweet & Maxwell, London, 1995

⁹ 1993 [4] All ER 539

¹⁰ *Tamilnad Mercantile Bank Shareholders Welfare Association v. S.C. Sekar and Ors.* (2009) 2 SCC 784

functions in a responsible way, so much so that rights of an individual can be protected. Such protection can be best assured by a workable remedy within the framework of the judicial system which purports to guarantee legal right through effective access to justice¹¹.

VI. ACCESS TO JUSTICE AND BASIC CONSTITUTIONAL PRINCIPLES

Many constitutional experts are of view that free, fair and unrestrained access to justice is in consonance with the notions of constitutionalism. The right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere; and it is zealously guarded by the courts¹².

- **Access to Justice and Rule of Law**

Democracy is considered as the rule of the people by the people and for the people. India being the largest democratic country in the world follows the principle of “rule of the law and not rule of the government”. The concept of rule of law was first propounded by Sir Edward Coke which was further developed on systematic and scientific lines by AV Dicey in his classic work *The Law and the Constitution*, published in the year 1885. According to him, rule of law is one of the elementary principles of constitutional law which includes in itself three essential components (1) Supremacy of Law (2) Equality before law (3) Judge made the Constitution. These when accumulated help in achieving the indispensable objective of rule of law i.e. Justice. In **M/s Central Coal Fields Ltd. v. M/s. Jaiswal Coal Co.**¹³ **Justice Krishna Iyer**, observed that:

“India is a Republic where equality before the law is a guaranteed constitutional fundamental and the legal system has been directed by Article 39A to ensure that opportunities for securing justice are not denied to any citizen by reason of economic... disabilities.” The learning Judge further held “that right of effective access to justice has emerged in the Third World countries as the first among the new social rights with public interest litigation, community-based actions and *pro bono publico* proceedings.”

Through this observation, it can be concluded that free, fair and unconstrained access to justice is an integral facet of sound and effective legal system which further exhibits the commitment towards rule of law.

¹¹ Prof. M. Cappelletti Rabel, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective (1978) Articles by Maurer Faculty 1142

¹² P.K. Tare v. Emperor, AIR 1943 Nagpur 26

¹³ AIR 1980 SC 2125

- **Access to Justice and Principles of Natural Justice**

The expression natural justice expresses the close relationship between the common law and moral principles and describes what is right and what is wrong. The aim of the principles of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice¹⁴. The right to free, fair and unrestrained trial are embedded in the principle of natural justice¹⁵. If the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly before the Court¹⁶. No civilized society can deny the right to fair trial as any kind of negation will consequently lead to violation of an inalienable right of access to justice.

VII. ACCESS TO JUSTICE AND CONSTITUTION OF INDIA

Professor Roscoe Pound, who is considered as the pioneer of sociological school of jurisprudence in his work has acknowledged the importance of justice by referring to the famous saying of Daniel Webster – “Justice is the greatest interest of man on earth”. The same was true of our founding fathers. In their arduous quest for justice during the National Freedom Struggle they felt the prime importance of framing a Constitution for a free nation where justice for its citizen becomes easily accessible¹⁷. Consequently, relevant provisions were incorporated in the Constitution of India.

- **Access to Justice under Article 14 of Indian Constitution**

The founding fathers of the Constitution of India in order to ensure egalitarianism in the Indian society envisaged Right to Equality under Part III of Indian Constitution. Since, an effective, fair and unbiased functioning of a society depends upon the notion of equality therefore, it is pertinent to call equality as “Mother of Justice”. If equality dissipates from the boundaries of legal system then “Justice is Orphaned”¹⁸. Due to this reason, “access to justice” is considered an indispensable part of fundamental rights. Access to justice is an intrinsic element of article 14¹⁹ of Indian Constitution which guarantees equality before law and equal protection of law. Access to justice cannot be denied by any authority or person, it can only be controlled by court of law within legal parameters²⁰. In case, any arbitrary restriction is imposed upon an individual while accessing the legal system then the equality

¹⁴ AK Kraipak v. UOI, AIR 1970 SC 150

¹⁵ Maneka Gandhi v. UOI, AIR 1978 SC 597

¹⁶ In Re Llewelyn Evans, AIR 1926 Bom 551

¹⁷ Justice AK Ganguly, Access to Justice, ILI Golden Jubilee 1956 -2006, Cuttack Conference, p. 62

¹⁸ *Ibid*

¹⁹ The state shall not deny to any person equality before law and equal protection of law.

²⁰ Indian Young Lawyers Association v. State of Kerala, (2016) 16 SCC 810

clause will lose its true worth as protection under article 14 is not meant only for the elite, but it is also for the butcher, the baker and the candlestick maker²¹.

- **Access to Justice under Article 21 of Indian Constitution**

According to article 21²²:

“No person shall be deprived of his life and personal liberty except according to procedure established by law.”

For the purpose of this art. “life” not merely means animal existence²³. Since, Maneka Gandhi case, judiciary through progressive judicial pronouncements have expanded the horizons of article 21. In **Francis Coralie**,²⁴ **Justice Bhagwati** observed that, right to life includes the right to live with human dignity and basic necessities of life. Highlighting the broader aspect of article 21 in the case of **Anita Kushwaha v. Pushap Sadan**²⁵ it was observed:

“If ‘life’ implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of ‘access to justice’ will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed under article 21.”

Further elaborating the prospects of article 21 vis a vis the right of access to justice and conferring duty to the govt. to safeguard the same, in the case of **Brij Mohan Lal v. UOI and Ors.**²⁶ it was observed:

“Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial.”

Therefore, it can be aptly deduced that a person’s access to justice is a fundamental right within the ambit of article 21. Non-compliance of this right may jeopardise the public confidence in the judicial system. Due to which people may look for “shortcuts and other forums” where they feel their grievances will be redressed quicker. In the long run, this may

²¹ Bidi Supply Co. v. UOI, AIR 1956 SC 479 at 487

²² Constitution of India Act, 1950

²³ Munn v. Illinois 94 US 113 (1877)

²⁴ AIR 1981 SC 746

²⁵ (2016) 8 SCC 509

²⁶ (2012) 6 SCC 502

shatter the trust of people towards judiciary and may pose a threat to the rule of law²⁷.

VIII. INACCESSIBILITY OF JUSTICE DURING COVID-19

The unprecedented condition of COVID-19 has imposed a wide array of restraints on indispensable rights of people including free, fair and effective access to justice. With the announcement of lockdown, there are restrictions on freedom of movement and civil liberties. The worst impact of crisis is on the vulnerable section of the society whose position in the society has further deteriorated.

- **Impact of COVID-19 on accessibility of justice to women**

Because of the mitigating measure of 'lockdown' women are forced to stay under one roof with their abusers. According to the official data published by National Commission for Women, there is an increase of at least 2.5 times in domestic violence complaints during lockdown²⁸. Unfortunately, the legal services provided by legal service authority of different states is not under the ambit of "essential services"²⁹ consequently, the victims of domestic violence are not able to access the legal aid clinics to get the legal advice. As they are confined within the precincts it becomes very difficult for them to seek proper legal remedy, in certain circumstances the conditions turn up, so worse that access to justice become a matter of 'life or death'. Due to lockdown they are unable to attend counselling sessions organised by NGOs. With the inaccessibility of justice, the populace has become powerless in both the public and private sphere. The mitigating measures have restricted physical contact with the outside world, because of which tormented might not be able to communicate their pain.

- **Impact of COVID-19 on access of justice to members of LGBTQ community**

The LGBTQ community is often ostracized and viewed as someone who is distinct. With the onset of the unprecedented situation of COVID-19, the already existing stereotypical and biased views towards them have increased. Though the government of India has declared several policies and schemes for different social groups but they have failed to include members of LGBTQ community under the ambit of these policies³⁰. Whenever, under

²⁷ *Imtiyaz Ahmad v. State of UP & Ors.* (2012) 2 SCC 688

²⁸ Data of domestic violence complaints released by NCW, available at <https://www.thehindu.com/news/national/ncw-records-sharp-spike-in-domestic-violence-amid-lockdown/article31835105.ece>, accessed on 4-11-20

²⁹ List of essential services, available at https://mofpi.nic.in/sites/default/files/mha_order_and_guideline_as_on_24.03.2020.pdf, last accessed on 15-11-20

³⁰ Exclusion of transgenders, available at <https://www.deccanherald.com/national/excluded-from-govt-schemes->

‘normal’ circumstances they approach the legal system they face agitation in the form of hate comments, but if they will access the judicial system in these ‘abnormal’ situations who can guarantee that they will not be discriminated against?

- **Impact of COVID-19 on accessibility of justice to prisoners**

Each and every individual including *detenu* has a right to life. With the increasing number of corona cases, there exists a huge possibility that any inmate may come in contact with corona virus through different sources, thereby exposing them to exceptional vulnerability of COVID-19, which in turn is endangering their lives. India's prisons have an average 114 percent occupancy rate, with the "under-trials" - people in custody awaiting investigation or trial - constituting nearly 68 percent of the prison population³¹. One of the major fears of overcrowding of prison is- the increased chance of spreading of infection. Consequently, on March 16, 2020 the Supreme Court took a *suo moto* action to “decongest the jails”. On March 23, 2020 they issued an order directing the government of every state and union territories to appoint “High Powered Committees” to make recommendations pertaining to release of certain under trials and convicts. On April 18, 2020 the committee for Delhi headed by Delhi High Court Judge Hima Kohli decided to grant interim bail to:

“those inmates who are kidney cancer and HIV patients, or suffer from tuberculosis and asthma. On May 18, the committee decided to further expand the scope of the 45-day interim bail to include undertrials accused of murder, culpable homicide and theft, among other charges, provided they had spent a certain number of years in jail. On June 20, this was further extended to those undertrials accused of domestic violence and dowry deaths³².”

Though the initiative taken by the judiciary for the protection of lives of inmates was commendable but it failed to acknowledge the challenges which the released prisoners might face in the society in the form of lack of livelihood and place to live in. Additionally, with application of mitigation measures like social distancing, jail visits are stopped therefore affecting the prisoner’s right to seek fair legal representation. Furthermore, with the usage of “Vidyo Application” for virtual hearings, there are chances of privacy infringement of prisoners through data hacking. Later, due to “unforeseen linkage issues” other international

during-lockdown-transgenders-demand-special-package-830945.html, last accessed on 4-11-20

³¹Overcrowded prisons, available at <https://www.aljazeera.com/indepth/features/india-long-lockdown-led-breakdown-criminal-justice-system-200602103810110.html>, last accessed on 15-11-20

³² Why Indian jails remain overcrowded during pandemic, available at <https://scroll.in/article/965796/why-indias-jails-remain-overcrowded-during-the-pandemic-even-as-prisoners-are-released-on-parole>, accessed on 15-11-20

applications for video conferencing are allowed, which raises the concern of “sovereignty and security”³³. In this regard, an application³⁴ was filed by KN Govindacharya, which says:

“It is true that a unique situation requires unique solutions, but the same cannot be at the altar of Rule of Law. It is submitted that most of the Video Conferencing Software being used are products of foreign internet companies, with their terms of use mandating transfer of data outside India as well as its commercial exploitation.”

Nonetheless, the biggest challenge to access to justice is, how will witnesses and litigants access the internet for video conferencing, when possession of mobile phones is considered a luxury in a country like India?

- **Impact of COVID-19 on accessibility of justice to migrant workers**

The COVID-19 crisis has highlighted the precarious and pathetic condition of migrant workers. With nationwide lockdown imposed in third week of March, many migrant workers lost their source of livelihood, which is considered as an essential facet of right to life³⁵. Under the Migrant Labour Act, all the migrant labourers including daily wage workers are required to be registered but due to lack of information they are not able to comply the statutory requirement. Since, there are no exact official statistics pertaining to inter-state migrants in the country, some estimates for 2020 have been made by Professor Amitabh Kundu of the Research and information System for Developing countries. For the purpose of calculation, he took into account the 2011 Census, NSSO Surveys and Economic Survey of India. In his report he found that:

“There are at least 65 million inter-state migrants. By conservative estimates, 30% of them are casual workers and another 30 per cent work on a regular basis but in the informal sector.”³⁶

A study by the Centre for the Study of Developing Societies and by Azim Premji University in 2019 estimates that 29 per cent of the population in India’s big cities are daily wage labourers. This is the number of which, logically speaking would want to go back to their

³³ Unfortunate Opportunity to modernize, available at <https://scroll.in/article/958271/the-coronavirus-pandemic-is-an-unfortunate-opportunity-for-indias-judicial-system-to-modernise>, last accessed on 15-11-20

³⁴ Application filed in Supreme Court for NIC based infrastructure, available at <https://www.barandbench.com/news/litigation/application-filed-in-supreme-court-for-provision-of-nic-based-infrastructure-for-video-conferencing-by-judiciary-and-government-officials>, last accessed on 15-11-20

³⁵ Olga Tellis v. BMC, AIR 1986 SC 180

³⁶ COVID 19 and Supreme Court, available at <https://www.bloomberquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court>, last accessed on 15-11-20

native states³⁷.

Because of minimal source of income and inter-state border closure they are not able to go back to their hometown and are left in afflux without any place to live in, thereby denial of accommodation, an infringement of article 21.³⁸ In regard to this deplorable condition of migrant workers catena of petitions were filed however, the statements like – “If the migrants are being fed why do they need money” shake the common consciousness of the seekers of justice. With the Supreme Court restricting itself to “urgent matters” and adopting “pick and choose policy” for selecting the same, it is very difficult to predict whether the issues relating to migrant workers will fall under the ambit of “important” and “urgent” matters?

IX. INTERNATIONAL PERSPECTIVE TOWARDS ACCESS TO JUSTICE

India is the largest democracy in the world, which gives paramount importance to the dignity and human rights of its citizens. To achieve the objectives of internationally laid ideals of humanity, dignity and liberty of its citizens it has ratified several international conventions. Accordingly, **Universal Declaration of Human Rights** with a view to grant access to justice through fair trial has incorporated certain provisions.

Article 8:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 10:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Since, these international covenants are ratified by India, they are binding to the extent these are not inconsistent with the provisions of domestic law of the country concerned³⁹. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law⁴⁰. As, there exists no contradiction between international convention and right to access justice embedded under articles 14 and 21. Therefore, being a responsible member of the international community, these conventions will hold an authoritative value.

³⁷ *Ibid*

³⁸ *Shantisar Builders v. Narayanan Khimalal Totame*, (1990) 1 SCC 520

³⁹ *Safai Karamchari Andolan v. UOI* (2014) 11 SCC 224

⁴⁰ *PUCL v. UOI* (1997) 1 SCC 301

Global Scenario of Access to Justice during COVID-19

With the imposition of patriarchal paradigm on women, they since ages are being victim of domestic abuse, sexual and gender-based violence. Many feminists are of view that incidents of violence against women take a drastic increase during crises and disasters. This view is further substantiated by researches done during Ebola (2014-16) and Zika Epidemic (2015-16). Similarly, under condition of quarantine or stay at home measures, women and children who live with violent and controlling men are exposed to considerably greater danger⁴¹. Since they are confiscated in homes it becomes very difficult for them to access justice. Furthermore, different nations across the world are adopting different mitigating measures which have a tendency to impact the social, political and economic rights of individuals. Therefore, in these conditions it becomes very difficult to uphold the constitutional ethos of rule of law and principle of natural justice. Since, there is an absenteeism of constitutionalism and primary focus is upon the health care sector the entire legal system across the world has come to a standstill, thereby, very difficult for an aggrieved individual to access the legal system for redressing the grievances.

X. CRITICAL ANALYSIS

On January 30, 2020 World Health Organization declared COVID-19 as a public health emergency. As a result of this, Indian government adopted certain mitigating measures to ensure the well-being of its citizens, one of these was the imposition of “lockdown”. Consequently, in consonance of this, Indian judiciary decided to go virtual. While applauding the new system, CJI SA Bobde said:

“There is no looking back and the way forward will be a combination of virtual courts and physical courts, the new and the old.”

However, it is indispensable to note that usage of video conferencing as an alternative to traditional justice delivery system is based upon a presumption that everyone is “tech savvy” and has an “access to internet”. In the case of **Anita Kushwaha v. Pushap Sadan**⁴² The honourable court listed four main facets which are considered as essential ingredients of access to justice. These are:

- “The State must provide an effective adjudicatory mechanism
- The mechanism so provided must be reasonably accessible;

⁴¹COVID-19 and gender equality, available at <https://www.weforum.org/agenda/2020/05/what-the-covid-19-pandemic-tells-us-about-gender-equality/>, last accessed on 4-11-20

⁴² *Supra* note 24

- The process of adjudication must be speedy; and
- The litigant's access to the adjudicatory process must be affordable”

- **The State must provide an effective adjudicatory mechanism**

One of the essential requirements under this component is that the mechanism provided should be such which is able to redress the grievances of individuals in an effective manner. The adjudicatory mechanism should be “just, fair and objective in its approach”. Due to the COVID-19 crisis there is a shift from open courts to e-courts. With the usage of video conferencing for court hearings, the parties involved share their details through online hearings. This might infringe the privacy of concerned parties as the system *per se* may get hacked which in turn undermines the justness and fairness of adjudication. Also, there are many people from the legal field itself, who are not well versed with peculiar technicalities of online video calling, thereby, questioning the effectiveness of the alternative system of adjudication.

- **The mechanism so provided must be reasonably accessible**

The mechanism must be reasonably accessible for justice. Due to pandemic, courts have switched from open common law system to video conferencing for case hearing. Using internet and broadband sourced technological methods is not a very viable option for a country like India where possessing mobile phones is considered as luxury. There are many villages and towns in India where there is no internet connectivity, thereby affecting the right of access to justice.

- **The process of adjudication must be speedy**

There is an age old saying – “Justice delayed is Justice denied”. Due to the unprecedented situation of COVID-19 the entire legal system is working at a very slow pace. They are dealing with the cases of utmost importance. It totally depends upon the discretion of judges on what they consider to be an “important” or “urgent” case. It is very skeptical to determine whether they will consider gender-based issues or issues relating to rights of migrant workers as “urgent” matters.

- **The litigant's access to the adjudicatory process must be affordable**

Access to justice will be confined merely to “paper work” if the adjudicatory mechanism is not economically viable to the litigant. Because of video calling as a mode of court proceedings, justice is restricted only to those elite sections of society who can afford the expense of internet connection. A large number of women are economically dependent upon

their husbands, so even after filing a complaint, they will not be able to access the internet connection due to paucity of economic resources. Furthermore, there are many migrant workers who are poverty stricken and possession of mobile phones is a luxury for them, forget about internet connection for video conferencing.

Therefore, after the careful scrutiny of aforementioned essential ingredients for “access to justice” and prevalent “unprecedented situation” it can be deduced that people from vulnerable sections of the society are not able to access justice in an effective manner. The ease with which we have given up rule of law is deplorable.

XI. SUGGESTIONS FOR BETTER JUSTICE DURING COVID-19

Undoubtedly, the prevailing conditions are unprecedented in which collective belongingness of each and every section of society is required. Justice must not become the casualty to the pandemic. Any measure enforced under statutory requirement must adhere the principles of constitution.

- **Holistic and Inclusive strategy**

India is a country wherein people of different social backgrounds live together. For the overall development of a country those initiatives should be taken which can ensure the protection of rights of each and every individual of a society. For ensuring access to justice during COVID- 19, such pragmatic steps should be taken which can ensure and safeguard the justice to each and every individual belonging to any economic background.

- **Establishing criteria for prioritization of cases**

Developing a strategy for prioritization of critical cases, while continuing to protect the rights of defendants, should be part of the of COVID-19 response planning and preparation. For example, priority should be given to cases involving child offenders (and detention of children should be a last resort for the shortest time); crimes against children; violence against women and children; accountability for serious crimes; and where the statute of limitation may apply⁴³.

- **Adopt alternative judicial mechanism keeping in mind the special needs of children, women, migrant workers and transgenders**

During the unprecedented situation of COVID-19 the vulnerable section of society which majorly comprises children, women, migrant workers and transgenders are subjected to different kinds of violence. Since, women and children are confiscated in homes with their

⁴³ Guidance note on Ensuring Access to Justice in the Context of COVID-19, Published by UNDP on May 2020

perpetrators therefore such mitigation measures must be adopted which can ensure hassle free access to justice. Also, the economic situation of migrant workers should be taken into consideration while opting for an alternative judicial mechanism

- **Adopt alternative judicial mechanism keeping in mind the legal rights of detenus**

Due to emergency measures of social distancing, jail visits are restricted due to which client and counsel meetings are usually arranged through video conferencing thereby, infringing fair legal representation as there is a threat to confidentiality. Therefore, such legal mechanisms must be adopted that can ensure the fair and proper justice to detenus.

XII. CONCLUSION

India as a country is facing unprecedented times in the form of COVID 19 pandemic. The lives of the citizens have been altered with restrictions on liberty and freedom of the individuals in an attempt to curb the spread of the virus. These are testing times for humanity around the globe but India as country with such a large and diverse population has to be stronger than ever. Pillars on which democracy rests must function impeccably to guide us through these rough times. Judiciary's role is more pivotal than it has ever been. It needs to safe guard citizens' rights and maintain justice system while punishing the malefactor. Courts have been operating in the virtual manner. Lower courts have been judging remand cases while the Supreme Court and High Courts are hearing urgent cases (though the process of selecting urgent cases is bit dubious). The courts have given several directions to the state governments and the central government regarding migrant's crisis, testing policies, condition of quarantine facilities, but were these efforts enough remains to be adjudged by the future generations. The virtual courts have a limited access and depends on the availability of internet and infrastructure. The accused must have an opportunity of proper representation and lawyers to establish a rule of law. CJI SA Bobde said:

“There is no looking back and the way forward will be a combination of virtual courts and physical courts, the new and the old.”

These times might give rise to a new normal as way forward but one must be cautious of what we are accepting as normal. The new normal must be accommodating to all and should work towards inclusion of even the weakest sections of the society.
