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# Response of Courts to the COVID-19 Pandemic while Safeguarding the Rule of Law

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## ABSTRACT

*The outbreak of COVID-19 across the globe, including India, has laid importance on the immediate adoption of measures to make sure everyone is following social distancing so as to prevent spread of the virus. Courts around the globe have adopted measures and protocols to reduce the requirement of physical presence of lawyers, litigants, court staff etc. in courts to make sure that everyone can have access to justice while also staying safe. Access to justice is important to preserve the rule of law in any country. The challenges that have aroused by COVID-19 have to be found a solution to while also making sure that justice is delivered efficiently and every individual has access to justice. Hence, the author in this paper discusses and analyses the measures taken by Courts to respond to the COVID-19 pandemic effectively while also preserving the rule of law.*

## I. INTRODUCTION

The COVID-19 pandemic is asking courts, judges, lawyers and others, for instance, Alternative Dispute Resolution ('ADR') professionals, associated with the judicial structure to reassess how they function in an environment that is transforming at a great speed and which requires them to use innovation and technology to function and work remotely and use technical tools that are usually not developed to meet and satisfy the needs and requirements of those working in the judicial sector. Responses from the courts and ADR professionals vary considerably in various jurisdictions, and many responses are ad hoc or interim and a crisis management approach has been utilized. Many people and institutions are trying to understand how innovation and technology can increase efforts to make sure that the justice framework can continue to deliver prompt judgments without any delay and economic reconstruction regardless of the expected exponential increase in disputes, matters and issues.

Rule of law is a situation where the law of the land which has to be complied with is greater and superior than the government operating in the land. It is a legal concept that keeps in check

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the authority of the government, and this is done to make sure that the government doesn't resort to use of arbitrary power or utilize its authority in a wrong fashion to control the people of the land it is governing. Sir Edward Coke, who was the Chief Justice of England in King James I's rule was the originator of this concept. He propounded that even the King should be under the God and the Law, and he also established the superiority of the law against the executive. After him, Albert Venn Dicey (a British legal jurist and famous theorist) evolved the doctrine in his book, 'The Law of the Constitution' (1885).

As per the Rule of Law:

No man can be subjected to punishment except for breaching a law which is made by the normal legal procedure under the gaze of the ordinary courts. Only that which is established in the court of law can be implemented, no person can take the law in his own hands.

The Rule of Law explains the meaning of equality in the meaning of 'equal subjection', or equal opportunity of law provided to each and every citizen of the nation in its courts. Each individual should be subjected to the same law.

Dicey did not have belief in a written constitution. According to him, the law should be made on the basis of precedents made by the court. He stated that constitutional law is "the result of the judicial decisions determining the rights of private persons in particular cases brought before the courts."<sup>2</sup>

**"The best response is one that responds proportionately to immediate threats while protecting human rights and the rule of law."**

**-Antonio Guterres**

The COVID-19 pandemic has brought forward some important legal, social and political problems all over the world. As nations across the world are embracing some emergency measures to recognize the emergency created by the COVID-19 pandemic, it is vital that they uphold and protect the rule of law, preserve and respect universal norms and important principles of law, and the right of access to justice, remedies and due process. Access to justice is an important and determining factor before any of the other options are considered. Individuals can be wrongfully imprisoned when in reality they deserved bail, some need protection from eviction or dispossession from their properties, increased policies of the executive and other branches of the government should be curtailed which have an effect on their right to life, right to property and more such fundamental rights. To cite Justice John Paul

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<sup>2</sup> JEFFEREY L JOWELL & DAWN OLIVER, *THE CHANGING CONSTITUTION* 4-7(4d ed. 2000).

Stevens of the US Supreme Court, “It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”

To suggest and implement that courts will stop from functioning is an open invitation to anarchy, breakdown of law and order and a way to authoritarianism. The access to justice provided by a working judicial structure is important to preserve and safeguard the rule of law. The obligation of the courts to maintain social stability and uphold the rule of law is shown in many rules and guidelines for pandemic preparedness.<sup>3</sup>

## **II. HOW HAVE COURTS RESPONDED TO COVID-19? IS DIGITAL TAXONOMY THE WAY AHEAD?**

Governments around the world have asked their courts to make use of remote access to technology to make sure that principles of access to justice are safeguarded. If seen from this point of view, the COVID-19 pandemic is to some extent in coordination with use of technology in the judiciary for sometime, and has provided for levels of adaptability that were not possible earlier. Tania Sourdin had recommended three important ways through which innovation and technology have already rebuilt the judicial system.<sup>4</sup> The first set of technologies at the most basic level are ‘supportive’ technologies. These technologies attempt to inform, guide and advocate people concerned with the judicial system and include, for instance, online legal applications.<sup>5</sup> After ‘supportive’ technologies come ‘replacement’ technologies. These technologies act as a substitute to the activities carried out by humans and include, inter alia, online mediation services and e-filing processes.<sup>6</sup> ‘Disruptive’ technologies come at the last level and are most advanced. These technologies modify the way in which legal professionals work and include, for example, algorithm-based decision-making programs or artificial intelligence judges and this could completely change the legal system.<sup>7</sup> A judicial systems’ reply to COVID-19 can include any of these three technologies. Court can adapt to COVID-19 by adopting simple digitization of filing systems to the use of more advanced technologies for entirely reshaping or assisting the judicial system.

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<sup>3</sup> ‘Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts’, (Jun.17,2020, 10:04 AM) <https://biotech.law.lsu.edu/blaw/flu/bja-courts-roadmap-2007.pdf>; ‘How Did They Know? Exactly 1 Year Ago, This Legal Summit Taught Courts About Pandemic Preparations’, (Jun.17,2020, 11:20 AM) <https://www.law.com/texaslawyer/2020/05/22/how-did-they-know-exactly-1-year-ago-this-legal-summit-taught-courts-about-pandemic-preparations/>.

<sup>4</sup> Tania Sourdin, Bin Li & Tony Burke, *Just, Quick and Cheap? Civil Dispute Resolution and Technology*, 19 MACQUARIE LAW JOURNAL 17, 19 (2019); Tania Sourdin, *Judge v Robot: Artificial Intelligence and Judicial Decision-Making*, 41(4) UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 1114, 1118 (2018).

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

### III. THE INDIAN PERSPECTIVE

As per the Indian judiciary, hearings of courts in gatherings should be an “exception” during the “extraordinary outbreak” of COVID-19 pandemic and it is important that all courts adhere to the need of social distancing in order to make sure that they do not aid the spread of the virus as said by the Supreme Court of India. While issuing a great number of directions and guidelines for all courts across India, the Hon’ble Supreme Court of India stated that the apex court and all the high courts are needed to adopt measures that are needed to make sure the efficient working of the judicial system by utilizing video conferencing. By opining that “technology is here to stay”, the Hon’ble Supreme Court of India issued guidelines and directions by making use of its plenary powers available to it under Article 142 of the Constitution of India and states that all the measures that will be taken by courts to decrease physical attendance of parties within its premises “shall be deemed to be lawful”.

"Access to justice is fundamental to preserve the rule of law in the democracy envisaged by the Constitution of India. The challenges occasioned by the outbreak of COVID-19 have to be addressed while preserving the constitutional commitment to ensuring the delivery of and access to justice to those who seek it,"<sup>8</sup> was declared by a bench of the Supreme Court of India. The Supreme Court of India also declared that district courts in every district should adopt the method of video-conferencing as prescribed by the concerned High Court. The Hon’ble Supreme Court of India also stated that "The concerned courts shall maintain a helpline to ensure that any complaint in regard to the quality or audibility of feed shall be communicated during the proceeding or immediately after its conclusion failing which no grievance in regard to it shall be entertained thereafter."<sup>9</sup> The bench of the Supreme Court of India stated that courts will notify and give access to the facilities of video-conferencing for those litigants who do not have the means or access to these facilities. The Supreme Court of India also stated that “If necessary, in appropriate cases courts may appoint an amicus-curiae and make video conferencing facilities available to such an advocate," it added that "Until appropriate rules are framed by the high courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage."<sup>10</sup> The Supreme Court of India made clear the fact that in "no case shall evidence be recorded without the mutual consent of both the parties by video-conferencing".<sup>11</sup> It declared that the presiding officer shall have the power to

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<sup>8</sup> NDTV, <https://www.ndtv.com/india-news/coronavirus-india-supreme-court-issues-guidelines-for-courts-functioning-amid-covid-19-crisis-2207142> (last visited Jun.17,2020).

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

restrict the passage of people inside the courtroom or the places from which contentions are addressed by the lawyers. It stated that participation and cooperation by the other people, like judges, lawyers and litigants is important in proper execution of these guidelines and directions to make sure that the judiciary and the legal framework is able to take up the one-of-a-kind challenges arisen by the COVID-19 pandemic. The Hon'ble Supreme Court of India needs each individual and institution to participate and cooperate in the implementation of measures established to reduce the spread of COVID-19 and the reduction of conventional activities within the court premises that could otherwise lead to the spread of the virus.

The Constitution of India upholds and promotes the importance of equality in society. Many articles of the Indian Constitution promote welfare of the poor and people who need justice and special care. Article 39A of the Indian Constitution provides free legal aid to the poor, weaker and more vulnerable sections of the society and make sures that everyone gets justice. Article 39A guarantees that financial or any other disability, does not hinder the opportunities available to each person to access legal remedies and justice.

The National Legal Service Authority (NALSA) was established by Section 3 of the Legal Services Authorities Act, 1987 (the Act). The aim and object of NALSA is to control and supervise the provision of legal aid as laid down under Section 2(1)(c) of the Act. Section 12 of the Act lays down the class of individuals who are eligible for availing the legal services. NALSA also gives funds and grants to NGOs for implementing legal aid programmes and schemes.

The COVID-19 pandemic has created maximum problems for the poor and weaker sections of the society. These problems are related to availability of food and basic survival necessities, they had to face the worst situations. NALSA, in such situations, addressed the problems and concerns of the poor and weaker sections of society.

NALSA passed an order asking the State Legal Service Authorities (SLSA) to aid and provide legal assistance to those who need it. The importance of legal assistance during such trying times is important. In many countries, like South Africa and Kenya, legal assistance and services come under the class of "essential services," with the object that they should be given to all the individuals of the nation seamlessly.

In India, the Supreme Court, which is the supreme legal authority of the nation, asked state governments to consider releasing a few convicts on parole to solve the issue of overcrowding in jails. This order of the Supreme Court of India by the Chief Justice Sharad Arvind Bobde read as follows: "Each State/Union Territory shall constitute a High-Powered Committee...to

determine which class of prisoners can be released on parole or interim bail for such period as may be thought appropriate.” The High-Powered Committee of every state issued rules and guidelines, with the help of the respective State Legal Service Authorities, on who can be allowed to leave prisons on bail and what classes of convicts will remain in prisons. This class of convicts were mostly people who were on trial for offenses under the Protection of Children from Sexual Offenses (POCSO) Act, the Narcotic Drugs and Psychotropic Substances (NDPS) Act, and similar laws. The Government of Delhi and many other states decided to modify their prison rules and discharge convicts under trial to prevent overcrowding in the prisons. Also, in some states, prisoners that were indicted for non-heinous offenses were discharged on parole and furloughed to prevent overcrowding in prisons. With the help of their workforce of panel lawyers and paralegal volunteers, along with the continuous help of DLSA, NALSA is trying to channel efforts to give food to poor individuals and help poor migrant workers who are stranded and are left with no option to go back to their hometowns.

One of the common issues during the COVID-19 pandemic was the rise in the cases of domestic violence. To address this issue, NALSA asked all SLSAs to coordinate along with the One Stop Centers that are established by the Ministry of Women and Child Development. The paralegals and volunteers will aid the victims with legal aid by filing cases, affidavits and educating them about the rights with them. The helpline number 181 was issued to give help to women along with legal remedies and assistance.

Indian Courts have taken various steps to respond effectively during COVID-19. Some of them are as follows:

**1. The limitation period for preferring appeal before the Apex Court has been extended.**

One of the Supreme Court’s three judge bench had exercised its plenary power given under Article 142 read along with Article 141 of the Constitution of India and had extended the limitation period for filing petitions, appeals, suits and other proceedings in Courts and Tribunals so as to cope with problems created with the outbreak of the COVID-19 pandemic. Article 142 of the Constitution of India gives inherent power to the Supreme Court of India to pass any such order or decree which is required for providing complete justice in any matter or issue that is pending before it.

**2. Threshold for triggering insolvency has been raised to Rupees One Crore.**

The Central Government exercised its power given under the proviso to Section 4 of the Insolvency and Bankruptcy Code and has increased the limit of rupees one lakh for giving rise

to insolvency to rupees one crore. While considering the present situation, the Central Government took a step to provide relief to the companies who aren't in a place to take care of and pay their debts amidst this pandemic. This will help many companies who are facing financial issues from turning bankrupt and aren't able to pay off their debts that are less than Rs. 1 crore.

#### IV. THE REPERCUSSIONS OF COVID-19 IN SOUTH AFRICA

A recent judgment was passed by a court in South Africa that reprimanded the nation's police and military for their actions in implementing the nationwide COVID-19 lockdown. The case included the demise of a man, Collins Khosa known as *Khosa, Mphephu and Ors. v. Ministry of Defence and Military Veterans and 10 Ors.*,<sup>12</sup> in the High Court of South Africa (Gauteng Division, Pretoria), after he was severely assaulted by members from the South African National Defence Force, in Alexandra, outside Johannesburg. The military was utilized to enable the police to implement the lockdown.

Judge Hans Fabricius, in his judgment in the North Gauteng High Court in Pretoria, the nation's administrative capital, highlighted the "social compact" between the people and their government, set out in the South African constitution. He specifically referred to the founding values in section 1, including equality, human dignity, supremacy of the constitution and the rule of law. The court was requested for a declaratory order on the rules which apply to the military and the police. It was also asked to order them to carry out proper investigations of the incident, and suspend all those involved in the incident until the investigations were completed. The court granted all that it was requested for, and included that the police and military need to report back on their progress. As indicated by the court, individuals should be able to trust the government to preserve and follow the rule of law, make logical rules, and not infringe with the rights of those subject to the law. The judgment was exceptional for how limited it was by all accounts: it didn't state that the military or police were answerable for Khosa's demise; it didn't convict anyone for an offense; and it didn't grant damages to his family. All it did was to tell the defence forces and the police to comply with the law. This may appear insufficient on the face of it, yet, it is in fact profoundly important and significant. To discover why, we have to research upon the fundamental values referred to by the court: the rule of law. The rule of law is a famous term among academicians and politicians, and many people have an intuitive sense that it shields the individuals from arbitrary government action. However, it's more than

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<sup>12</sup> *Khosa, Mphephu and Ors. v. Ministry of Defence and Military Veterans and 10 Ors.*, (21512/2020) [2020] ZAGPPHC 147.



that: it's the most essential thing that makes law "work". It has eight specific characteristics, on which most legal scholars concur. Society will conform to the rule of law if

- there are uniformly applicable rules, and
- the applicable rules are publicised,
- coherent, and
- not retroactive,
- The rules are not contradictory in nature,
- generally consistent after some time,
- complying them isn't physically impossible, and
- the administration of law portrays the rules as publicised. This implies that the government has to give effect to the rules that have been publicised.

Numerous new lockdown guidelines and directives have been declared since April, from various government departments, and are published online in different government gazettes. They have been issues at such an increased rate, that even lawyers who are experts in this field are finding it difficult to keep track of the details. The government site tries to set out "consolidated" sets of the four primary guidelines from the Department of Cooperative Governance and Traditional Affairs, the department that is coordinating the lockdown. However, it does not include other departments which are authorised by the primary guidelines to issue directives along with the guidelines and regulations. The gazettes are not easily accessible to the most of the public who need to obey them. Thus, they are not adequately and correctly publicised. They are so extensive and complicated that not even legal experts can understand them.

➤ **Public buy-in**

Lon L. Fuller, a legal philosopher, challenged the broadly held view that law was a different concept which is to be separated from morality by identifying the most important moral quality of law: it honours, recognises and relies upon the agency of individuals subject to it. If the eight necessities set out above are met sufficiently, then the individuals have a proper basis for planning their own conduct. Through law, individuals can make decisions about their own lives. This, in Fuller's view, creates "fidelity" to the law – what we could call "buy-in" or "legitimacy".

The government is aware of the fact that it does not have the buy-in of the public, since it

always tries to justify many of its arbitrary rules as measures intended to facilitate enforcement by police. In his judgment, Judge Fabricius takes note of the fact the soldiers were briefed in military terms, as if they were getting ready for a battle with invaders of law. This will not work. If the government needs to implement adherence with the law in this way, they don't have "buy-in". The manner in which these authorities have brutalized the individuals they were intended to protect, has only deteriorated the situation. The violence, resistance and confusion which is accompanying the lockdown are signs on the need of the rule of law.

## V. COVID-19 AND GLOBAL APPROACH TO FURTHER COURT PROCEEDINGS

### 1. United Kingdom: England and Wales

The Family Court and Family Division of the High Court in the UK, have established a 'Remote Access Family Court' to tackle issues created by the COVID-19 pandemic.<sup>13</sup> To promote the facility of online services by the Family Court, Justice MacDonald affirmed that 'wet' signatures are not needed on documents of Court and the Court cannot reject documents due to that requirement only.<sup>14</sup> This might give rise to a new model in coming times, with Justice MacDonald affirming the court's willingness to accept electronically signed documents and this is in compliance with recent cases, for instance, *Bassano v Toft*<sup>15</sup> and *Golden Ocean Group Ltd. v Salgaocar Mining Industries Pvt. Ltd.*<sup>16</sup>

Most of the civil court buildings are open, however civil hearings are presently being carried out remotely wherever possible. Physical hearings will only take place if a remote hearing cannot take place and if reasonable facilities can be given to ensure safety.

The London Court of International Arbitration (LCIA) stated that even though they are operational to resolve disputes but each interaction should be done online or via telephone whenever possible. With respect to hearings, the LCIA Rules mention a possibility that proceedings don't need to take place physically. Article 19 [Oral Hearings] states that "as to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)." In its Guidance Note for Arbitrators, the LCIA states that it might be suitable for hearings to take place by telephone or video conference rather than in person. The tribunal also needs to consider "where appropriate, whether some or all of those who must attend any meeting or hearing might do so by video conference, rather than in person (for example, if a

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<sup>13</sup> Courts and Tribunals Judiciary, The Remote Access Family Court (Version 3, 3 April 2020) [5.2.2]. (2020).

<sup>14</sup> *Id.*

<sup>15</sup> *Bassano v. Toft*, [2014] EWHC 377 (QB).

<sup>16</sup> *Golden Ocean Group Ltd. v. Salgaocar Mining Industries Pvt. Ltd.*, [2012] 2 All ER (Comm) 978 [32].

witness is unable to travel due to health issues).”<sup>17</sup>

## **2. The United States of America**

The Coronavirus Aid, Relief, and Economic Security Act, 2020 which became a law on March 27, 2020 gave something more than the fiscal stimulus, Section 15002 considers the utilization of video conferencing in certain judicial matters. USCourts.gov is a page created for Judiciary Preparedness for Coronavirus (COVID-19) which is updated from time to time to assess the individual measures being taken by respective courts. The Supreme Court, with respect to the general well-being of the public during COVID-19, postponed every single oral argument scheduled for March and April sessions.

While comparing the U.S. and Indian courts it is seen that the U.S. courts are being able to use the facilities of teleconferencing in a better fashion than Indian courts because of many reasons. The United States had already, to some extent, prepared for a pandemic, by acquiring various licenses for remote communication devices for virtual court hearings.<sup>18</sup> With a rule of law rating which is three times worse than the United States of America as indicated by the World Justice Report, India’s judiciary was slow to obtain teleconference licenses, irrespective of its efforts to speed up the public procurement systems in response to COVID-19.<sup>19</sup> “In response to the increasing volume of essential/emergency matters being brought before the New York City Family Court, the court increased its number of ‘virtual’ courtrooms from three to five” on April 9, 2020.<sup>20</sup> At the same time, the Jharkhand High Court allowed only two cuts of its twelve normally working courts to proceed in a virtual manner, due to problems of crashing its online system. While comparing the case disposal rates between the United States and India, India’s Supreme Court in ordinary conditions disposes nearly 3,500 cases each month. Urgent cases that are important to a huge number of India’s migrant workers are still pending in the Supreme Court of India. On the other hand, New York State courts settled 2,600 cases in their first seven day stretch of working remotely. But these comparisons aren’t accurate since the jurisdiction, type and nature of cases aren’t similar in India and the United States of America.

Theoretically, the number of cases filed are increased due to the pandemic. Cases rise usually due to government interventions for public safety to control and reduce the damage brought by

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<sup>17</sup> *Guidance for Arbitrators-Item 6.4 Meetings and hearings, Article 33*, (Jun.19,2020, 11:24 AM), <https://www.lcia.org/adr-services/guidance-notes.aspx>.

<sup>18</sup> *National Strategy For Pandemic Influenza-CDC*, (Jun.19,2020, 11:30 AM), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf>.

<sup>19</sup> *WJP Rule of Law Index - World Justice Project* (Jun.20,2020, 10:00 AM), [https://www.worldjusticeproject.org/rule-of-law-index-2020\\_](https://www.worldjusticeproject.org/rule-of-law-index-2020_)

<sup>20</sup> New York State Unified Court System, <https://www.nycourts.gov/>, (last visited Jun.20,2020).

the pandemic. In exceptional conditions, the government can breach liberties of individuals, for instance, eviction of farmers from their lands to reduce the spread of a disease. Government invasions and restrictions on private life may lead to public protests from angry citizens, which will mostly lead to a rise in public nuisance grievances. Secondary increase in the number of cases is due to the decline of the economy and related changed behaviour which is brought about because of the emergency. These cases consist of employment, insolvency, consumer protection, securities, public policy, entertainment and media, data privacy and cyber security.<sup>21</sup> The courts have been forced to turn imaginative in order to execute their duties. In the United States, some courts, for instance, the drug court of Daviess County, Kentucky, have tried drive-through orders before shelter-in-place orders were actualized. Other courts have also been trying for quite some time with different types of teleconferencing and video depositions instead of live witnesses. Despite a few cases (many in criminal courts), have been fixed for face-to-face hearings, three basic solutions have developed as alternatives to face-to-face proceedings: virtual courts, arbitration and pretrial negotiation.

➤ Virtual courts are currently the main venue for most of legal proceedings, in both, the United States as well as in India. They have the ability to reduce backlog cases. COVID-19 has improved the procedure of making courts less physically dependent upon personal appearances and increasingly open to remote and online options.<sup>22</sup> Obtaining innovation and technology and increasing access to the judicial services have been two of the seven main issues of the federal U.S. Judiciary for longer than 10 years.<sup>23</sup> Some are of the view that virtual courts are the way of the future, as “more people in the world now have internet access than access to justice.”<sup>24</sup>

➤ Online dispute resolution (ODR) and alternative dispute resolution (ADR) are a good solution. Parties who were required to wait for a considerable period of time while their cases are in backlogs of the court are now utilizing arbitrators to find a solution to their disputes. “Unlike a court, arbitrators, mediators, and other third parties cannot force the parties to a dispute to appear before them or to comply with the decision rendered. They must rely instead

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<sup>21</sup> *Eye of the hurricane - America Inc faces a wave of bankruptcies*, <https://www.economist.com/business/2020/05/16/america-inc-faces-a-wave-of-bankruptcies> (last visited Jun.20,2020).

<sup>22</sup> *Covid-19 shutdown shows virtual courts work better*, <https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a>, (last visited Jun.20,2020).

<sup>23</sup> *Strategic Plan for the Federal Judiciary - United States Courts*, <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>, (last visited Jun.20,2020).

*A Strategic Plan for the Federal Judiciary - Annual Report 2010*, <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary-annual-report-2010>, (last visited Jun.20,2020).

<sup>24</sup> Richard Susskind, *Online Courts and the Future of Justice - Oxford University Press*, (Jun.20,2020, 9:29 PM), <https://global.oup.com/academic/product/online-courts-and-the-future-of-justice-9780198838364>.

on the litigants' willingness to submit the dispute to them and respect the resulting decision."<sup>25</sup> ADR can also reduce the burden and workload upon courts, which is very important amidst a pandemic.

➤ Pretrial negotiations are a good solution to restrict the number of conventional trials at least. The plaintiffs and the defendants now try to avoid going for a trial. Negotiations before trial and sometimes even before filing a suit may turn out to be more effective in making agreements and compromises.<sup>26</sup> In the United States of America, judges are reprimanding lawyers who do not go for pretrial negotiations and confer process in good faith. Parties should at least try pretrial negotiations because "a question that would have been settled by sensible conversation between parties, or in any event altogether limited, burdens the court's assets."<sup>27</sup>

### 3. Singapore

Before the COVID-19 pandemic hit the world, the Singapore courts already had a system established that permitted lawyers to make applications through a video link. With respect to the Supreme Court of Singapore, hearings are still taking place. Since the spread of COVID-19, the Singapore Courts have implemented a justice continuity plan by dividing the High Court judges in two different teams, Team A and Team B. The Singapore High Court has taken steps to make sure that no judge from Team A will be in close contact of a judge from Team B. There are also times when court proceedings with a bench of three judges are conducted wherein one judge attends by means of a video link. For example, when two judges are from Team B and one judge is from Team A, the judge from Team A will attend through a video link. SIAC is working normally. Their staff was divided in two groups, wherein one group was working at the Center and one group was working from home. It requested notices of Arbitration to be filed electronically and applications for emergency relief to be recorded by means of email only. Payments of any amount that is to be paid to the SIAC was to be done electronically.

### 4. Canada

As per Canada's Constitution Act, 1867, the authority in the judicial structure of Canada is divided between the federal government and the provincial governments. The federal government is the only authority that can enact criminal laws and the provincial governments have sole power over most of the civil laws, which consists of administration of justice in their

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<sup>25</sup> Messick, Richard E., *Alternative Dispute Resolution - When It Works, When It Doesn't*, (Jun.20,2020, 10:00 PM), <http://documents1.worldbank.org/curated/en/275371468337879626/pdf/337520premnote99.pdf>.

<sup>26</sup> **Heather Kliebenstein & James Beard**, *Best Practices for Managing Litigation During Pandemic*, (Jun.20,2020, 10:05 PM), <https://www.law360.com/articles/1265709>.

<sup>27</sup> Id.

territory. Deadlines for filing have been suspended or altered in light of the pandemic and limitation periods have also been altered in a few provinces. In Ontario, the Superior Court of Justice has continued its activities for “time sensitive and urgent matters”. For civil matters, urgent cases are those in which “immediate and significant financial repercussions may result if there is no judicial hearing”. The Court of Appeal had implemented Emergency Practice Directions (EPDs) which were to be in force until retracted. All issues presented before a single judge would be heard by way of telephone conferences and all applications and appeals presented before a three-judge bench would be heard electronically (by telephone or videoconferencing).

On April 6, 2020 the Superior Court of Justice began to hear other matters remotely by method of video conference or telephone, including select motions and pre-trial conferences. Judges required advocates to cooperate and be flexible to accomplish a fair, just and timely hearing. The court of appeal has executed Emergency Practice Directions (EPDs) which will stay in effect until retracted. All issues set down before a single judge will be heard by means of a telephone conference and all applications and appeals before a three-judge bench will be heard electronically (by telephone or videoconferencing).

## **5. Nigeria**

The number of awaiting trial (AWT) detainees in Nigeria consists of individuals charged of crimes other than capital offences, and misdemeanour and simple offences to a great extent. Most of these individuals should get bail and most of them are on bail. So, due to what reason are they the most of the AWT prisoners in Nigerian prisons?

Perfecting bail is one of the most important reason behind the great number of AWT prisoners in Nigeria. Perfecting bail is the way toward complying with the conditions of bail set by a court as per the satisfaction of that court. Research shows that complying with bail conditions is usually a difficult task for both the prisoners and their sureties. As the courts are preparing to reopen, creative solutions must be given to address this situations injustice. In fact, the chaos and the disorder that may entail as the courts reopen, may also act to help with the case of AWT prisoners. With the congestion that is expected in many courts, getting new dates might be an issue. While it will take great efforts to assign court dates for prisoners, one efficient and innovative way is to collect the data of AWT prisoners who have been in jail for more than the maximum term specified for their charge. It is believed that this will help the judiciary to manage the issue, and promptly and effectively discharge the prisoners who fall in this class. Addressing these issues in a short period of time requires the efficient implementation of the

provisions of the Administration of Criminal Justice Act, 2015 (ACJA) on Bondsmen. Section 187 of the ACJA allows the Chief Judge of the High Courts to issue a Regulation to manage the setting up and utilization of Bondsmen. Implementing these provisions will address major problems in the Nigerian bail system. The actual costs and procedure for perfecting bail will be more transparent, so that family members, philanthropists and individuals can help the AWT detainees. Obviously, this is the lacuna that hindered the government from reducing the number of AWT detainees in prisons during the lockdown.

## **VI. HOW FEDERAL COURTS ARE CHANGING CONSTITUTIONAL LAW TO UPHOLD UNCONSTITUTIONAL STATE ACTIONS GLOBALLY**

In the middle of the COVID-19 pandemic, federal courts have to a large extent failed to apply the strict scrutiny review standard to state activities. Courts have formulated a new standard of review specifically for state activities during a ‘public health crisis.’ Under this COVID-19 standard of review, courts can only reverse state activities that do not have a real or substantial connection to public health of that amount to a visible infringement of rights. This standard of review changes the burden of proof from the state to the individuals.

When a state doesn’t give its people fundamental liberties, the judiciary has the power to review the state's action under the strict scrutiny standard of review. Under this type of review, the state's action must be scrutinized carefully and serve a state interest. A fundamental part of strict scrutiny is that the burden of proof is on the state to show that their activities are justified.

Decisions passed by the court during COVID-19 have to a great extent not kept in mind the personal liberties of individuals. Instead, federal courts have upheld the constitutionality of the state’s actions during Covid-19 under a new method of judicial review, but there exist a few exceptions. As mentioned above, the burden of proof is shifted from the state to the individual in this new standard of judicial review, the state has total deference. This new standard of review was first declared by the Fifth Circuit on April 7,2020 in *In re Abbott’s* case. The court stated that when an epidemic which acts as a threat to the society comes up, a state can implement emergency measures that limit constitutional rights as long as the measures have some ‘real or substantial relation’ to the emergency and aren’t 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' Court’s can also enquire about whether or not the state’s emergency measures fall short of basic exceptions for ‘extreme cases’, and whether or not the measures are arbitrary or oppressive. But the courts won’t doubt the efficiency or logic behind the emergency measures. Ever since the Fifth Circuit established this new COVID-19 standard of review, various courts around the globe have used this standard

to wrap up COVID-19 litigation quickly.

The Supreme Court of the United States held that the due process clause prevents states from infringing the fundamental liberty interests except if the infringement happens for the reason of serving a compelling state interest. The strict scrutiny standard of review wants courts to give great attention and scrutinize actions where the government encroaches on constitutional rights or fundamental liberties of the people of the state.

A few cases are as follows:

**1. Hartman v. Acton<sup>28</sup>**

In *Hartman*, the operator and owner of a bridal shop in Columbus, Ohio, challenged the Stay at Home Order of the state, which required the shutting down of all “non-essential business” and operations. The bridal shop owner requested that the United States District Court grant a temporary restraining order and a permanent injunction preventing Ohio from implementing the Stay at Home Order against her business and a class of similar businesses. The owner of the bridal shop claimed that the Stay at Home Order infringed her due process rights. While dismissing this claim and upholding the Stay at Home Order, the court referred to the case of *Jacobson*. It stated the standard of judicial review iterated in *In re Abbott*, which was decided in April, 2020. In *Jacobson*, the Supreme Court had reiterated the fundamental rule that “persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.” No doubt, a state's capacity to legislate in this area has restrictions and is viewed as unconstitutional if it “has no real or substantial relation to [the goal of protecting public health or safety], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” Here, the Director's Stay at Home Order is obviously identified with curtailing the spread of the virus. The court's irrational reasoning is clearly visible. The court upholds the order on the grounds that, in its view, the Stay at Home Order is “related to stemming the spread of the virus.” Here, the court's reasoning depends on the presupposition that “stemming” the spread of COVID-19 is within the authority of the government and that the Stay at Home is an effective method for achieving the objective of “stemming the spread.” Firstly, “stemming the spread” of COVID-19 isn't under the authority of the government in light of the fact that only individuals have the authority to make personal health care choices important to avoid getting infected with COVID-19. Besides, at the time of this decision, in light of the testing done in South Korea, it was realized that 99% of those testing positive for the coronavirus were asymptomatic. Also, a Stay at Home Order

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<sup>28</sup> *Hartman v. Acton*, [2020] WL 1932896 (S.D. Ohio April 21, 2020).



will just postpone exposure to the virus. Staying at home can't substitute as a vaccine. Its advantage just lasts as long as an individual doesn't wander out in public. Immunity doesn't exist. In view of these facts, there is no reason to believe the effectiveness of a Stay at Home order. Giving a justification for infringing the liberties based on mere assumptions in favour of the government without legitimate judicial diligence is despicable.

## **2. Cassell v. Snyders**<sup>29</sup>

In Cassell, the Beloved Church, by means of its pastor, challenged Illinois' stay-at-home order, which precluded the church from praying, worshipping, gathering, and singing in person. In the claims brought against the state government, the church claimed that the stay-at-home order abused the First Amendment's Free Exercise Clause, which is a fundamental right ensured by the U.S. Constitution. Unfortunately, the Illinois United States District Court showed its partiality towards the government and disregard for the interests of liberty of the individuals in the first paragraph of its judgment. With no supporting evidence, the court expresses that the Governor's stay-at-home orders have "already saved thousands of lives[.]" Unsurprisingly, the court proceeds to rule against the church and upholds the governments stay-at-home order.

## **3. Maryville Baptist Church, Inc. v. Beshear**<sup>30</sup>

In Maryville Baptist Church's case, the church brought an action claiming that the Kentucky Governor's executive order forbidding mass gathering in light of COVID-19 violated the First Amendment. Kentucky's executive order required organisations that aren't "life sustaining" to close. As per the order, the religious organisation was not viewed as life-sustaining. Maryville Baptist Church held a drive-in Easter service. Gatherers parked their vehicles in the parking lot of the church and heard a sermon through a loudspeaker. Kentucky State Police showed up in the parking lot and issued notices to the gatherers that their participation at the drive-in service amounted to a criminal offence. The officials recorded the gatherers licence plate numbers and sent letters to vehicle owners asking them to self-quarantine for 14 days or further sanctions would be imposed on them. Maryville Church contended that the government's action abused the free exercise of religion as ensured by the First and Fourteenth Amendments to the U.S. Constitution. The Sixth Circuit held in favour of the Church and prohibited the State from enforcing the order. In the following section, the court contemplates what each reasonable individual has been thinking about throughout the COVID-19 pandemic:

"We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread

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<sup>29</sup> Cassell v. Snyders, [2020] WL 2112374 (N.D. Ill. May 3, 2020).

<sup>30</sup> Maryville Baptist Church, Inc. v. Beshear, [2020] WL 2111316 (6th Cir. May 2, 2020).

of the virus or his authority to protect the Commonwealth's citizens. And we agree that no one, whether a person of faith or not, has a right to expose the community to communicable disease. But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.”<sup>31</sup>

The court's reasoning in this case could have and ought to have been applied to all COVID-19 state actions. If the state can't give substantive evidence backed responses for why they have denied people their fundamental liberties, they shouldn't be authorised to implement such actions.

➤ **Republic of Cyprus: A case study**

The constitutional legal order has been for quite some time disturbed by the law of necessity following the 1963 constitutional emergency and the 1974 Turkish invasion and control of territories of the Republic. After the withdrawal of the Turkish-Cypriot community from various posts in 1963, the Supreme Court of Cyprus gave a margin of maneuver for the continuation of a State that functions under the doctrine of necessity in the *Mustafa Ibrahim case*<sup>32</sup> in 1964. From that case onwards, the doctrine of necessary purportedly permits to 'restore' order within the nation. In the midst of the COVID-19 pandemic, the case of the Republic of Cyprus highlights the difficulties surfaced by COVID-19 pandemic to the Rule of Law.

The separation of powers doctrine is closely related with adopting emergency measures in the midst of an emergency. In Cyprus, the separation of powers is present in its constitutional fabric where different parts of the Constitution delimit the role of each branch of the government. The executive branch, comprising of the President and the Council of Ministers, is seen as exceptionally powerful. The legislative branch, conducted by the House of Representatives, is seen as 'interdependent' and relatively weak as compared to the executive, as political parties always follow party principals and/or government agendas. The relative authority of the

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<sup>31</sup> Id.

<sup>32</sup> *Republic v. Mustafa Ibrahim*, [1964] CLR 195.

legislature can be shown through landmark case-law such as *President of the Republic v. House of Representatives*<sup>33</sup> which explains that the legislature has the exclusive right to legislate, yet, in times, where the substance of an act has its center of gravity in the executive branch, the power is given only to the executive branch. Hence, in the midst of an emergency certain measures can be taken directly by the executive as 'Acts of Government', which may not comply with certain constitutional and/or fundamental democratic methods of control and scrutiny, while the Parliament assumes a subordinate role. As an EU and Eurozone member, the Government, financial establishments and essential services of the nation likewise have access to EU backing and resources to fight the emergency, which is surrounded by increasing debate around the legitimacy, accountability and/or adequacy of some of these measures. By and large, the Republic of Cyprus has authorized and actualized through laws, decrees, regulations and other acts and measures, special COVID-19 protection protocols in accordance with the direction and guidance of its Government, the EU organizations and agencies, and the WHO. These include postponement of all unnecessary international travel to and from the island and following the applicable quarantine and self-isolation recommendations. Such measures are reviewed periodically based on requirements and levels of emergency. One of the issues raised while executing the crisis measures in Cyprus was the requirement to acquire a health certificate before entering the Republic. This was applicable to Cypriots and non-Cypriots but affected certain groups of people of Cypriot origin as well as permanent residents of Cyprus, temporarily residing or studying abroad. In general term, a citizen's right to enter their nation is a human right which can only be subject to proportionate limitations for overriding interest purposes, for example, public order and safety, danger to life, physical integrity, and so on. Article 14 of the Constitution (no resident will be ousted or excluded from the Republic under any conditions) doesn't give the option to any government to impose any limitations as well as arbitrary conditions with respect to the entrance of its citizens in their own country. But the exercise of that right with regards to the COVID-19 pandemic may not be an unlawful restriction to rights of individuals.

The judiciary seems to be, by all accounts, the most independent branch of government, exercising judicial control on the constitutionality of the measures undertaken. But if no adequate safeguards are set up for the time being, the circumstance may give rise to a situation of 'denial of justice' increased by the pandemic. On 16 March 2020, the Supreme Court of Cyprus suspended the activity of the courts in the Republic of Cyprus in all cases until 30 April 2020 or until further notification, aside from extremely urgent issues as might be mentioned in

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<sup>33</sup> *President of the Republic v. House of Representatives*, [1992] 3 C.L.R. 109.

the relevant regulations or where leave of the Court is obtained prior for the filing or the hearing of an issue within the said period. Accordingly, trials scheduled were by default deferred, bringing about additional delays in the framework and hampering by and large access to and the administration of justice. Upholding the Rule of Law in the midst of emergency, including during a worldwide pandemic, comprises a worldwide challenge to be tended to through multi-level, coordinated and inclusive democratic responses supported by scientific proof and based on shared fundamental principles and values.

## **VII. CONCLUSION**

Despite the fact that the courts have been shut down, the Hon'ble Supreme Court of India has made a decision to take up urgent issues by means of virtual means so that the parties and advocates don't need to show up physically in the court in this current situation. The Hon'ble Supreme Court of India has likewise guided the respective lower courts to promote e-filing and virtual proceedings. The Courts are Suo-moto, taking cognizance of the difficulties being faced by the advocates to be present before the Court physically for filing of appeals, petitions, and so on and has extended the limitation period until its further order, and with this, plans to fight against the COVID-19 pandemic and put a stop to its widening territorial jurisdiction.

Virtual courts are not a fool proof solution. They present numerous difficulties and impediments, including data security and privacy issues, the requirement for digitized documents, connectivity problems, and the danger of decreased accountability if court watchers are not permitted equal access. Another issue which merits examination is the effect of the absence of emotional connection in a socially distanced court. While the initial period of any new framework may face hindrances, a solution that is less perfect is better than no solution at all. The rule of law may wear away without the adjudicating presence of the courts during a pandemic. Virtual courts are vital for stability during a pandemic and present a feasible option to keep on increasing disposal rates even during ordinary times.

There will be parties who exploit the current pandemic to unnecessarily postpone hearings in courts or arbitrations. Hence, applications for permission to continue by method of video or phone conferencing may become important and common place. If litigants are not taking this step themselves, or there is wrongful opposition to a request of this kind, Courts or Tribunals are for the most part within their powers to make the requisite orders to allow this. The current emergency will create inevitable disturbance to some dispute resolution procedures. Video-conferencing is an innovation accessible to reduce some of that disturbance while posing minimal prejudice to the parties. The law for the most part provides it and innovation makes it

possible. The only option available to parties is to accept its utilization and dispel the impression of its inadequacy.

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