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***“Theme: Challenges to Justice Administration Vis-A-Vis Human Rights”.  
“Sub-Theme: Impact of Covid-19 On the Criminal Trial Procedure”.***

### **ABSTRACT:**

*“Criminal trial in a country plays a very vital role in the functioning of a civilized society and a free and fair trial without any delay in the process of justice would deem to be a proper factor of a criminal trial adjudication which is based on three major statutes the **Code of Criminal Procedure, 1973, Indian Penal Code, 1860 and The Indian Evidence Act, 1872**. Though the process of adjudication, and criminal provisions differ among countries following an inquisitorial system or an adversarial system and the motive behind these judicial systems result in the same and with a few undulations, the criminal trials more or less resulted in same even during the COVID-19 pandemic.*

*The due process of criminal trial starts with the initiation of an FIR and a charge sheet is filed in the police station after the accused being produced to the magistrate, the case either goes to trial or the convict is kept in a prison under judicial custody. A few major impacts hurdle almost every country faced during this pandemic was latency in the process of justice, technical difficulties and other major drawbacks, vulnerability of the witness being coerced, the attorney-client privilege being violated when the police tap the calls along with accused’s right to an attorney during their tenure of remand period (U/s 167 and 309 of Cr.P.C). Due to the norms of social distancing and other aspects, as virtual courts started to function, the proffering of witness and documentary and material evidences changed from old manner prevailing in the physical hearing to scanned versions of those evidences.*

*Throughout these instances, all the countries were driven by the intention to secure justice for the inmates or the accused but the implementation of these process was subject to different acts and statutes under different sections in both inquisitorial as well as adversarial system and I shall discuss how it impacted India by comparing with countries like United States, Germany, Switzerland, Iran.”*

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*Keywords: Criminal trial, COVID-19, lockdown, prison system, adverse effects, violation of prisoners' rights, virtual courts, criminal investigation, judicial custody.*

## **I. INTRODUCTION:**

In the midst of the COVID-19 pandemic, various issues are affecting the day-to-day life of a person and its impact on the judicial system and its functioning especially with regards to the criminal trial is unsurprisingly significant. In Indian legal system, a criminal offence committed by a person or a group of persons is treated as a public offence, i.e., an offence against the entire public and such accused will serve jail term or will be monetarily penalised under the relevant sections of the criminal statutes and the most important of them are The Indian Penal Code, 1860, The Code of Criminal Procedure, 1973 and The Indian Evidence Act, 1872. The Code of Criminal Procedure and The Indian Penal Code is often referred as the “twin sisters” of criminal law.

Both in civil and criminal trials, Indian judiciary follows the adversarial system and most of the western countries such as Germany, United States of America, the inquisitorial system of adjudication is followed which will be discussed in the later part of the paper. The difference between an inquisitorial and an adversarial system is that in the former, a judge has the power to inquire into the facts, investigate and also ask questions with regards to its procurement and other related queries whereas in the latter a judge acts as an impartial referee and adjudicates the matter in between the prosecution and the accused based upon the facts procured without having the right to investigate on those facts.

### **The following are the three types of cases prevailing in a criminal trial:**

- Warrant case<sup>1</sup>- imprisonment up to 7 years or more/ death penalty.

These cases consist of grave crimes. E.g., murder, assault, rape. the procedure of a warrant case is explained in the sections 154, 241, 313 of The Code of Criminal Procedure.

<sup>1</sup> Sec 2(x), The Code of Criminal Procedure Act, 1973.

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- Summons case<sup>2</sup>- imprisonment less than 2 years.  
The procedure of a summons case is explained u/s 2(w), 251-259 of the Code of Criminal Procedure.
- Summary case<sup>3</sup>- imprisonment for a period less than 6 months.  
The procedure of a summary case is explained u/s 260-265 of the Code of Criminal Procedure.  
The following are two types of offences and basing on them a case is decided to be warrant, summons or summary case.
- Cognizable offences<sup>4</sup>- These are the offences which are usually heinous such as rape, murder, kidnapping, homicide, etc., and there is no requirement for a warrant in order to arrest the accused if he's charged under these offences.
- Non- cognizable offences<sup>5</sup>- These are those types of offences which are not grave/heinous/serious and the accused is entitled to a bail as a right.

An accused can file his bail application as soon as he/she has been taken into the custody and the bail will be granted depending upon whether the crime committed by the accused is a cognizable or non-cognizable offence<sup>6</sup>.

A warrant case cannot be converted to a summons case but in a summons case it is the other way around and it can, in fact, be converted to a warrant's case<sup>7</sup>.

***Usually, for the initiation of a criminal trial on the accused by a private party, the following is the process:***

- A complaint with an FIR on the accused should be lodged in a police station of the complainant's jurisdiction. The police then after checking the genuineness of the

<sup>2</sup> Sec 2(w), The Code of Criminal Procedure Act, 1973.

<sup>3</sup> Chapter XXI, The Code of Criminal Procedure Act, 1973.

<sup>4</sup> Sec 2 (C), The Code of Criminal Procedure Act, 1973.

<sup>5</sup> Sec 2(l), The Code of Criminal Procedure Act, 1973.

<sup>6</sup> Chapter XXXIII, The Code of Criminal Procedure Act, 1973.

<sup>7</sup> Sec 259, The Code of Criminal Procedure Act, 1973.

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complaint arrest the person and then, since the accused will be in the custody of the police, he/she will gain the right to apply for a bail when he/she is produced to the magistrate within 24 hours.

- When the accused is produced to the magistrate, the magistrate can deny his/her bail on the grounds that he/she finds the accused prima facie guilty and/or whether the accused meddles with any evidence.
- Once this procedure is done so, the police start the investigation by filing a charge sheet. During the trial, the police will show all the evidence incriminating the accused or for the acquittal of the accused and also the statement of the accused is taken and cross examination of the complainant, witnesses as well as the accused is taken into account.
- The final judgement would be passed deeming whether the person is acquitted or proven guilty.
- A person has a provision to apply for his bail in between the time period where the FIR was filed after preliminary investigation and before the filing of a charge sheet.

The above-mentioned procedure was for a criminal trial initiation through a complainant. If the government or any statutory body wants to initiate a criminal proceeding against a person it would amount to the same procedure as above but there won't be any involvement of FIR rather the particular statutory body of the government will file a charge sheet based on the preliminary investigation which leads the person to have committed the crime.

We would further learn how all this basic procedure of a criminal trial has been disrupted due to the COVID-19 pandemic in India and also in other countries.

## **II. NEGATIVE IMPACT OF COVID-19 IN THE TRIALS:**

### **II.I Latency in the Process of Justice:**

Usually in the normal physical in-house courtrooms, to pass a judgement for a particular case after thorough examination of the evidences, witness, question of law, the judgement for a trial takes a lot of time. If it is either a summon case or a summary case then the trial might be less



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period of time but in a warrant case it might extend till years. For e.g., the case of Nirbhaya. With all required resources and physical presence, if it takes the judiciary a lot of time in passing a judgement of a case then in a virtual hearing with buffer time, technical glitches, adjournments, insufficient resources and also to the lack of imprecision in the evidences and witness and other major required aspects will take years together. The fundamental right of a person under article 21 of the constitution demanding for speedy trial would be under stake.

## ***II.II Technical Difficulties and Other Major Drawbacks:***

Due to COVID-19, the Supreme Court of India has directed orders with regard to social distancing and other precautionary measures in order to conduct the trial as physical courts are not a possible resolution in the present situation. The main alternative that the apex court has decided is to conduct the trials in a virtual mode through different platforms as access to justice is a fundamental right of a person which cannot be denied at any cost under Article 14 and 21 of the Constitution<sup>8</sup>.

This new form of conducting trial has brought up a lot of positive aspects as well as repercussions and especially more of drawbacks as a huge issue pertains to be an unstable internet connection. As the courts have started to conduct trials in a virtual platform, every practicing advocate, judge, bailiff, courtroom clerk and every other people should be aware of using this virtual platform software.

It will also increase the manpower from the IT server rooms of the courts to maintain a hassle-free and a secure connection so that there is no discrepancy in the trial because of it being hacked by strangers. Another important drawback would be the charges of electricity in the particular counsel's office as the internet cost would hike along with the power charges and also for the monetary cost necessities for the gadgets.

<sup>8</sup> *Guidelines for court functioning through video conferencing during COVID-19 pandemic (dated April 6, 2020)*, available at [https://images.assettype.com/barandbench/2020-04/f7ab0aee-e4f1-4559-bf48-c72cbea89fd9/In\\_re\\_Guidelines\\_for\\_Court\\_Functioning\\_through\\_VC\\_during\\_COVID\\_19\\_Pandemic.pdf](https://images.assettype.com/barandbench/2020-04/f7ab0aee-e4f1-4559-bf48-c72cbea89fd9/In_re_Guidelines_for_Court_Functioning_through_VC_during_COVID_19_Pandemic.pdf).

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### **II.III Vulnerability of the Witness:**

It is a basic protocol under section 231 of the Code of Criminal Procedure that the Judge under his discretion can permit the cross examination of a witness on the stand in order to testify for the case.<sup>9</sup> Being in a country like India there are a lot of backdated precedents and incidents where the use of undue influence is portrayed on the witness in order to meddle or tamper with them. Moreover, with the virtual mode of conducting criminal trial it will be a hassle-free task for the witness being coerced by the prosecution, complainant or the accused.

### **II.IV Attorney-Client Privilege Being Violated and the Denial of An Attorney to the Accused:**

As per the guidelines of the apex court for conducting the trial in the COVID-19 period, the client and the counsel are not allowed to meet physically but can have conversations regarding their case virtually. As mentioned above it is the right for an accused person to have access to their counsel under article 14 and 21 of the Constitution and there should be a confidentiality in the meetings.<sup>10</sup>

Before the pandemic there used to prevail a secrecy of information that is shared to the counsel of the accused but as discussions regarding the case has to be done virtually due to the denial of visitors in the prison from March 23<sup>rd</sup>, 2020 to 1<sup>st</sup> October, 2020.

So, the prison arranged virtual meetings with their counsel in an unsecured line where there were lots of chances for the police to over hear the meeting as no call other than the trial proceeding will be done in a secured line and before in the instances where an accused in the judicial custody and have to talk to his counsel will be allowed to meet his counsel for an allotted time period in order to discuss on the case, but now in the virtual mode it might provoke

<sup>9</sup> State of Kerala v. Rasheed, 2019 (13) SCC 297.

<sup>10</sup> Francis Coralie Mullin v. Union Territory of Delhi (AIR 1981 SC 746).



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them a sense of fear for the accused in communicating with his counsel as the police might tap the calls and find incriminating evidences against the accused.

This instances often occur during the remand period of the accused under section 167 and 309 of the Code of Criminal Procedure. The court will have no power of remand unless and until it is conferred by the law.<sup>11</sup>

## **II.V Proffering of Documentary and Material Evidences**

### **Thorough Digital Platform:**

U/S 207 and 294 of the Code of Criminal Procedure, the documents that are procured as evidences during the investigation period should be produced to the Magistrate during the trial. Due to the precautionary measures of COVID-19 and in the absence of physical hearings, it is mandatory that the police send its evidences of documents in a scanned manner whereas another drawback would be by producing the material evidences to the Magistrate through courier or physically.

The evidences collected by the police should be genuine and reliable.<sup>12</sup> There are a lot precedents where the veracity of the documents is not up to the mark and being in a virtual court house, double checking the accuracy of those documents would be a huge disadvantage as there are no physical presence. The verification of the exculpatory and inculpatory becomes even more difficult and it is right of the defendant to get the exculpatory documents to prove their innocence.<sup>13</sup>

## **II.VI Proffering of the Witness as An Evidence:**

It is a rule U/S 273 of the Code of Criminal Procedure that evidence must be taken with the counsel of the accused while they both are present along with magistrate physically. Due to the

<sup>11</sup> Natabar Parida Bisnu Charan Parida Batakrushna Parida Babaji Parida v. State of Orissa, 1975 (2) SCC 220.

<sup>12</sup> Shamsher Singh v. State of Haryana (2016) 15 SCC 485.

<sup>13</sup> Nityananda v. State of Karnataka, CRL.P. No. 6920/2018 (Karnataka).

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virtual platform, there is a high possibility of the witness being tampered or coerced as the witness will be present in the video conferencing along with his counsel and counsel might coerce with the witness accordingly in order to acquit them. It is also mandatory that the statement of the witness should be recorded in the due process U/S 280 of the Code of Criminal Procedure. The process of coercion can happen for incapacitated reason like unstable network connection, camera and mic issue and in the meantime the evidence being tampered and the witness can be coerced.

## **II.VII Reduction in the Population of Prison Inmates:**

India ranks up in the 4<sup>th</sup> position according to the World Prison Brief in terms of population of prison inmates. On March 23<sup>rd</sup> during the initialization of the lockdown period, India's largest prison the Tihar jail was planning on releasing almost 3000 inmates on parole and interim bail who were not accused of white collar and grave crimes.

**The following are the grounds and guidelines that the SC of India deemed to all the prison on what basis and ground can a prisoner be released<sup>14</sup>:**

- Prisoner charged for the offences which have punishment for less than 7 years can be granted an interim bail or parole.
- Prisoner who are under remand/undertrial can avail bail if they have been in the prison for a period of 3 months.
- Prisoner who has served a year in the prison can avail parole or bail with subject to the intensity of the crime committed.

Different states in India like Maharashtra, Kerala, Uttar Pradesh have released large number of prisoners on these grounds. The counsels of the inmates and their families were also denied to visit them but Tihar Jail has come up with an initiative of video conferencing with their families

<sup>14</sup> Constitution of High-Powered Committee in each state/union territory for release of prisoners on parole or interim bail (dated March 23, 2020), available at [https://images.assettype.com/barandbench/2020-04/645dab4c-830f-4ede-a99d-634a42d07894/In\\_re\\_Contagion\\_of\\_COVIC\\_19\\_Virus\\_in\\_Prisons.pdf](https://images.assettype.com/barandbench/2020-04/645dab4c-830f-4ede-a99d-634a42d07894/In_re_Contagion_of_COVIC_19_Virus_in_Prisons.pdf).

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over digital platforms. One of the main reasons why many jails from states like Uttar Pradesh wanted to release their prisoners were because of the overcrowded population. The population of Tihar amounts to 12,000 (approx.) whereas the accommodating capacity was 5,000 inmates. Also, the percentage of funds that the prison used on medical assistances were just 4% whereas on food, clothing other facilities were being accommodated in the remaining percentage.

The prisons which were in the outskirts of a city did not have proper in-house doctors in the prison to treat the patients during emergencies and neither were they trained to handle complex situations as they are general physicians. There was a sense of fear for the prisoners as the vulnerability for prisoners getting affected with COVID was very high as they have to stay along with the jailer, guards, superintendent, cleaners, doctors who go out and come inside the prison for their duty without they knowing that they are affected.

An example of the prison not allowing bail or parole for grave offenders<sup>15</sup> were in the case of Mr. Varavara Rao who was sentenced in the Bhima Koregaon case currently serving his time in Bombay prison. He was also a very prominent figure being caught for many issues.

In spite of him being affected with COVID, the court denied him bail and made sure that he gets proper health assistance in the jail itself with proper isolation. The police did take him to Nanavati Hospital in Bombay for his preliminary checks and testing's and then brought him back to the prison. Apparently, the wife of Varavara Rao had approached the Bombay High Court seeking his immediate release on bail on medical grounds.

### **III. POSITIVE IMPACTS OF COVID-19:**

In case of a physical hearing, the requirements for resources will be very high and the people to witness the case would also be very large in number thus causing congestions and no social distancing. The virtual platform even though has a lot of drawbacks and disadvantages, the

<sup>15</sup> <https://www.hindustantimes.com/india-news/no-bail-but-doctors-to-examine-varavara-rao/story-kh1XqH1b138jrgUE3lpFhK.html>.

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positive impacts are the vital ones that are essentially required protocols during this pandemic. Neither will there be any fuel cost for the lawyers nor a tiresome day in the court running to different places for different purposes like adjournments, court halls etc.

The advocates can also attend any number of cases a day according to their schedule as there won't be any time constraint. As this a virtual trial, law students and Junior Advocates who are interning with their senior can also sit nearby and hear the court proceeding and get an idea about what's the procedure. There was also a proposal where the telecasting the open house court proceedings to the general public in the televisions so that they can have access to the judiciary which is their right under article 21 of the constitution.

#### **IV. IMPACT OF COVID IN OTHER COUNTRIES OTHER THAN INDIA:**

As mentioned above earlier, the civil and criminal cases in countries following inquisitorial system; the precedents, statutory acts under which it is implemented and sections differ but ultimately the due process would be the same.

##### **IV.I United States of America, Germany, Switzerland, Iran:**

##### **IV.I.I Introduction:**

Whenever there would be a hearing in the court, the parties, witnesses and other concerned officials who are subpoenaed to come to the court would create a latency to show their appearance due to the fear of COVID-19. During the period of lockdown, the Department of Justice of the respective countries initiated to stop the judicial proceedings (civil and criminal proceedings) for a year as it was a national emergency.

The COVID pandemic has reduced the physical presences of advocates, judges, 16 jury members for different cases and other court officials in the court. People who come to witness the case are also denied entry and there will be no public in the open court house hearings.

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#### **IV.I.II The Alternative Measures and Protocols for the Court Proceeding:**

The initiation of virtual court hearings started to occur where the Southern District of New York came up with an initiative for its state to accommodate the grand jury is a secured conference call where this technology is helping the participation of the jury in the cases.

#### **The same drawbacks that India is facing are faced by the US judicial system in terms of the virtual hearing;**

- where there is a sense of fear of the calls to be tapped,
- tampering of the evidences and coercion of witnesses.

Some more of the important aspects amount to the examining the credibility of the witness physically through their actions and behaviour which will not be possible in case of a virtual hearing. Whereas the same process was followed by the courts in Germany as well as Switzerland.

#### **IV.I.III Latency in Procuring A Speedy Trial:**

Just like the article 21 of the constitution which guarantees a person for a speedy trial; in the US constitution, the Sixth Amendment rights<sup>16</sup> states them and procuring a speedy trial will not be possible with respect to a virtual hearing because for a physical hearing itself, the justice system takes a lot of time in passing the judgement.

So, the judiciary of the US suspended the rights to speed trial under further notice for the time period. The procedure is the same but instead of sixth amendment Germany and Switzerland has its own statutory sections under which it is enacted.

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<sup>16</sup> 18 U.S.C. § 3161. Time Limits and Exclusions.

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#### **IV.I.IV Attorney-Client Privileges, Delay in Trial Process and Right to An Attorney:**

The defendant's right to an attorney is being neglected by the state in the meanwhile of following social distancing. The accused who are incarcerated in the prison during the remand period are denied their right to meet their counsel and have discussions about the case. Starting from March 13, 2020, The Federal Bureau of Prison of Germany, Switzerland and the US allowed no counsels to meet the accused for the next 30 days by issuing an action Plan just like the Indian Prison protocol where even they suspended visitors including families and counsels from March 23 till October 1, 2020<sup>17</sup>.

Another advantage that the US, Germany and Switzerland Judicial System provided was that the accused were allowed to make calls to their counsel which were done through a secured lane whereas in India there was no provision of that sort and at times in hypothetical instances the counsel were allowed to meet the accused after going through a complete screening just like a prison staff. If the attorney and the client have to converse during the trial, they don't have the option of secure personal break out rooms which are available in the physical hearing during recess rather the client have to be called or texted by the counsel to join back the call and moot out things and there are high prospects of the calls being hacked.

#### **IV.I.V The Decrease in the Population of Prison Inmates:**

By April 20<sup>th</sup>, 2020 almost 495 prison inmates were infected with covid-19 amounting to 22 deaths. As the prison's inmates are very much in a vulnerable position of being infected with COVID-19 the Attorney General of US and other concerned authorities of Germany, Switzerland had issued a statement saying that as the vulnerability of prisoner being affected with COVID-19 is very high, the judiciary allows temporary release of the inmates of their respective countries if there is a need in order to prepare the defence of the accused along with

<sup>17</sup> Federal Bureau of Prisons COVID-19 Action Plan, available at [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp).



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their attorney. In New York also the same was established for the release of a prisoner in order for the preparation of the accused's defence for his trial or for any other relevant reason.<sup>18</sup>

The low-level offenders were granted a cash bail and the persons who committed white collar crimes were put in home confinements after the order passed by the Attorney General with this regard under the CARES Act because if they were released on parole or for another reason due to the worldwide lockdown travelling might not be feasible, so home confinements would be an apt choice.<sup>19</sup>

The New York Governor released almost 1,100 parole violators as the reason for their confinement was not that serious. Countries like Iran released 85,000 prisoners whereas California has released almost 5% of its prison population in 3 weeks.

Just like in India the main reason behind this drastic step in other countries too was because of the overcrowded population which are more than its accommodating capacity and also due to the lack of social distancing between inmates as brawls regularly take place between inmates which will lead them to be prone to COVID-19.

## **V. CONCLUSION:**

Though the relevant legal provisions of the criminal trial, sections, precedents and other relevant aspects of a criminal trial are different, the due process and intention of every country's government on the precautionary and other measures with regard to COVID-19 were the same in both inquisitorial as well as an adversarial system of adjudication.

<sup>18</sup> U.S. v. Avenatti, 8:19-cr-61-JVS (C.D. Cal. Mar. 27, 2020).

<sup>19</sup> United States v. Garlock, No. 18-CR-00418-VC-1, 2020 WL 1439980.