

RESHAPING AND RE-STRUCTURING THE JUDICIARY- LAW AND ECONOMIC ANALYSIS*Krishna Agarwal¹***1. INTRODUCTION**

Rule of law is an important facet of Welfare State. The State is not an end in itself and an obligation is conferred on the State to meet the interests of the citizens.² Access to Justice is a basic Fundamental Right granted by the Constitution of India.³ However, its fruits remained confined to a few until the process of adjudication and justice delivery is streamlined in the country, keeping newer challenges in mind. A closer look will reveal that the Rule of Law is directly proportional to the economic growth of the country.

India ranked 63 out of 190 countries in the Ease of Doing Business Index, 2020⁴ while it ranked 69 out of 128 countries in Rule of Law Index in 2020.⁵ According to Institute for Economics and Peace, approximately 9 % of the GDP is cost to India due to lack of proper justice delivery system. Thus, it is important to have a discourse on how the legal rules and standards controlling adjudication affect the efficiency of the judicial system.

Indian judiciary in Pre-COVID times was already facing the problems of backlog, pendency, the inadequate proportion of judges, lack of infrastructure etc.⁶ COVID-19 can be seen as a negative externality as it has posed a serious crisis to the justice delivery system in India. Thus, a policy to

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² Harry W. Jones, *The Rule of Law and Welfare State*, 58 COLUM. L. REV. 143 (1958).

³ Anita Kushawaha v. Pushpa Sadan, AIR 2016 SC 3056.

⁴ *Doing Business in India*, THE WORLD BANK (Nov. 16, 2020), <https://www.doingbusiness.org/en/data/exploreconomies/india>.

⁵ *WJP Rule of Law Index*, WORLD JUSTICE REPORT (Nov. 16, 2020), <https://worldjusticeproject.org/rule-of-law-index/country/2020/India/>.

⁶ Madan B. Lokur, *India's Judiciary is Facing an Increasing Lack of Trust by Public*, OUTLOOK (Jan. 13, 2020), <https://magazine.outlookindia.com/story/india-news-indias-judiciary-is-facing-an-increasing-lack-of-trust-bypublic/302545> (Aug. 25, 2020).

address this concern must be such that the marginal benefit gained due to the introduction of the policy exceeds the marginal costs accrued due to its introduction.⁷

To combat COVID-19, India has adopted many measures and several amendments were done in various statutes. One can see that there exists a trade-off between the Right to Health and the Right to Access of Justice. The choices made by people will vary for different facts and circumstances. To deal with the issue, it was necessary that certain rules be set up for balancing the outcome of trade-off. On an optimistic note, COVID-19 has given an opportunity to strengthen the judiciary by negating the shortcomings present in the system.

The researcher has used the secondary data available through the Law Commission Report, India Justice Report, Daksh Report, Vidhi Legal Report and Supreme Court resources to attempt a quantitative analysis. The researcher has also taken reference from the works of Robert Cooter to comprehend the Law and Economic Analysis of Litigation and Out of court settlements. Further, the researcher has analyzed the situation of COVID-19 in India by referring to various Notifications, Circulars and the Ordinance released by the Government of India.

The research paper covers various perspectives to comprehend the working of judiciary, problems in the judicial system and some solutions to reshape and restructure judiciary. First, using microeconomics, law and economic analysis of litigation and out of court settlements is done to comprehend that how legal actors respond to incentives in the form of legislations, institution rules etc. Second part of the paper discusses the Public choice theory to comprehend the working of judiciary and its ancillaries. This will give a conceptual framework regarding the important factors that influence the delivery of public goods in the form of Access to Justice. The third part of the paper looks at some of the problems in the institution of judiciary with the help of facts, figures and graphs. The aggravation of the impediments in Indian judiciary which are reflected during COVID-19 is discussed in detail taking cue from Government Notifications, Court rules etc. The conceptual framework discussed in the first, second and third part of the paper compels us to think and develop solutions to restructure and reshape the judiciary during COVID-19. COVID-19 has thus given us an opportunity to re-look and re-visit the infrastructure, budgeting, conventional

⁷ Economic Analysis of Government Restrictions on Individual Rights During Covid -19, June 9, 2020 <https://youtu.be/orPzBjCI65M> (last visited on Sep. 5, 2020).

notions which has increased the social costs during COVID-19 due to lack of ex-ante preparations. At the end, the researcher has proposed few solutions based on the conceptual framework to make the Post-COVID-19 world more efficient.

2. LAW & ECONOMICS ANALYSIS OF LITIGATION

The role of the judiciary can be two-fold 1) Dispute resolution 2) set precedents. The instruments of economic analysis can prove to be an effective tool to comprehend the reason behind the need for adjudication between the parties in dispute.

In some situations, individuals might favor out-of-court settlements (bargain theory) and in some legal entitlements are necessary in the first place when the other party has not consented to the harm. For e.g. in the case of accidents, the driver has an option to take adequate precautions and lower the harm, but he may not do so if taking precautions in the first place is a costly affair. If the parties are able to bargain by maximizing their own surplus, then by virtue of the Coase Theorem efficiency can be reached by no intervention in the market. However, in the case wherein the driver hits a pedestrian the legal entitlement is necessary as the pedestrian didn't consent for a bargain. The pedestrian again faces a trade-off between litigation and out of court settlements. He has to calculate the immediate costs (hiring a lawyer, filing the case) and estimate the benefits in the future (victory, strengthened relationships). After this, an individual has to bargain with each other.⁸

A cooperative solution will yield an out of court settlement while a non-cooperative solution will lead to litigation or an adversarial trial as in India. While negotiating the allocation and distribution of the resources should be efficient. This is possible when the transaction costs are minimum,

⁸ Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J. ECON. LIT. 1067, 1074 (1989).

Liabilities are imposed on the party who can bear it at the minimum costs while rights/resources should be allocated to the one whose utility will be maximized the most.⁹

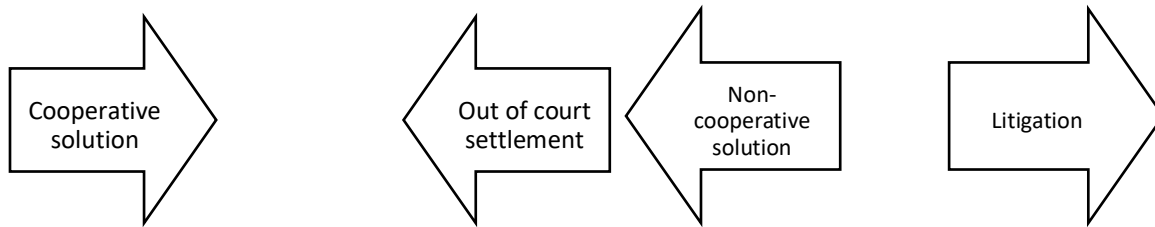


Fig. 1 Two options in dispute

The litigation can prove to be successful for the plaintiff only if $(X1-Y1) > (X2-Y2)$; ($X1$ =benefit in litigation, $Y1$ = costs ascertained in litigation, $X2$ = benefits in out of court settlements, $Y2$ = costs ascertained in out of court settlements). Thus if the Government wants to reduce the burden on courts then a mechanism should be developed where the benefits in out of court settlements are higher and the costs for the parties to choose out of court settlements lower. However, there might be scenarios when information asymmetry exists such as the parties have some vested interests in opting litigation (e.g. reputation, buying time) and the cooperative surplus although being positive, the parties not being satisfied with it opt for litigation.¹⁰

Law and Economic analysis reflect that when the recovery of advocate costs is made possible through law (Section 35¹¹, 35A¹² and 35B¹³ of Civil Procedure Code, Commercial Courts Act¹⁴, Advocate Rules etc.), the transaction costs are decreased and the Coase theorem can be applied. This mechanism incentivizes both the plaintiff and defendant to come up with honest litigation disputes and not frivolous claims which consumes the time and energy of the judiciary, in the scenario when both time and resources are in constraint.

This will further promote out-of-court settlements. This is because, if the probability of the defendant winning the case is low, he won't be interested in delaying the case or buying time because being a rational individual he will not want to lose the case and pay a hefty sum as advocate

⁹ *Id.*

¹⁰ COOTER, *supra* note 7.

¹¹ Code of Civil Procedure, 1908, § 35, No. 5, Acts of Parliament, 1908 (India).

¹² Code of Civil Procedure, 1908, § 35 A, No. 5, Acts of Parliament, 1908 (India).

¹³ Code of Civil Procedure, 1908, § 35 B, No. 5, Acts of Parliament, 1908 (India).

¹⁴ Commercial Courts Act, 2015, No. 4, Acts of Parliament, 2015 (India).

costs to the plaintiff. Similarly, the plaintiff will try to settle the matter as early as possible, and accepting the compromise/negotiating terms with the defendant will prove to be advantageous as the discounted gain will approximately be equal or greater, as the case may be.

The function of the judiciary is important to disincentivize the wrong-doers and create deterrence in criminals. This is possible only if the certainty and probability of punishment are greater than the harm imposed such as **Harm = Sanction/ Probability**.¹⁵ The wrong estimation of the courts or inadequate punishment, delay in proceedings decreases the probability of punishment, and the effect of law and justice is diminished. Thus, it becomes pertinent to re-shape the judiciary if the justice system is hampered.

3. WORKING OF JUDICIARY WITH RESPECT TO THE PUBLIC CHOICE THEORY

Public Choice Theory proves to be an efficient and systematic way to study the functioning of public institutions and the public policies present in the system. This theory assumes that the actors in the institution are governed by their own self-interest. Thus, in the delivering of justice as a public good the prominent actors are the judges, lawyers, legislature, police and the parties itself. Legislature main self-interest is to being re-elected to gain authority. Lawyers are interested in multiplicity of hearings so that they can charge a hefty amount from the clients. The police system has varied interests such as security, promotions, political vantage point etc.¹⁶ The Constitution of India provides in the article that judges should have a fixed salary, tenure, etc.¹⁷ Some concerns were raised that the judges might be influenced by future lucrative employments. Thus, to check arbitrariness and restrict the actors from pursuing their own self-interests, Doctrine of Separation of Powers was conceptualized. The Constitution of India cannot be merely considered a document having chapters, articles and doctrines but it is an institutional structure that generates social choices.

¹⁵ Nuno Garoupa, *The Scope of Punishment: An Economic Theory*, EJLE 10 (2010).

¹⁶ Frank B. Cross, *The Judiciary and Public Choice*, Hastings L.J. 50 (1999) (hereinafter "CROSS").

¹⁷ INDIA CONST. art. 124.

However, Judiciary in India is considered as a sacrosanct institution and it is a notion that judiciary will give paramount importance to general welfare as compared to collective rent-seeking. Various public choice scholars have regarded that “*the best people to resolve issues are the judges*”. The access to justice is swayed in favor of the people having more of resources. The litigation of disputes involves additional costs such as the fees of the lawyer which is in turn directly proportional to the skill-set acquired by the lawyers. The court can be considered as a venue where each of the parties play their best foot but it strongly depends on their socio-economic status, the resources available to them etc. The decision of the judge is further dependent on the expert witness, participation of amicus curie etc. This augments the possibility that interest groups are more likely to succeed than the disadvantaged or minority groups owing to the lack of resources. The Indian judiciary works on the basis of hierarchy regulated by pecuniary, territorial and subject matter jurisdiction. From the cost-benefit analysis it might not be possible for each individual to file an appeal in the higher court due to constraint of resources.

One problem that may arise in the practical sense is that the defendant having excess resources might purchase the plaintiff’s pleader. This indirectly might affect the judge’s ruling as litigation in India is highly dependent on the working of precedents. Thus, purchasing of the pleader may lead to the purchasing of precedents. This will further defeat the ends of justice and prolong the continuation of case in the form of appeal, revision, review etc.

The Public Interest Litigation recognized by the Indian Judicial system takes care of the problem wherein the public welfare is given more importance than individual’s self-interest. Thus, the doctrine of standing as practiced in USA might have adverse consequences in India.

The Public choice theory can expound the controversy between the legislatures and the judiciary to set up a National Judicial Appointment Commission where both the stakeholders were governed by their own self-interest.

Judiciary in India plays a paramount role in the process of judicial review according to Article 13(2) of the Indian Constitution¹⁸. It attempts to restrict the self-interests of the legislature, the executives, bureaucrats to augment the access of public goods and maximize public welfare. The

¹⁸ INDIA CONST. art 13, cl. 1.

importance of judicial review is reflected when Part III of the Indian Constitution is violated. However, concerns had been raised that higher interference of the judiciary in the administrative law or judicial activism may defeat the legitimate concerns of public welfare by the legislature. Thus, the change in rules and the functioning of the institutions might change the incentives given to the actors present in the judicial system. Public choice theory enables us to choose between varying degrees of imperfect alternatives to maximize social welfare and optimize the distribution and allocation of public goods i.e. access to justice.¹⁹

4. MICROSCOPIC VIEW OF THE JUDICIARY

An Independent Judiciary is a prerequisite for the functioning of democracy and protecting the Fundamental Rights of the citizens. If the Fundamental Rights or Part III of the Constitution is violated one has the remedy to move to the Supreme Court of India directly. In the data collected, it should be noted that discrepancies may arise as there are different ways of tabulating data in different High Courts and Subordinate Judiciary (counting problems of interlocutory applications, traffics, e-challans) which makes it difficult to do a pan India analysis.

4.1 Vacancy

Court	Sanctioned Strength	Vacancy	Vacancy Percent
Subordinate Judiciary	22 677	5984	26.4
High Court	1079	395	36.6
Supreme Court	31	6	19.4
Overall	23787	6385	26.8

Table 1- Vacancy

Source: Daksh India Justice Report

¹⁹ CROSS, *supra* note 16.

Thus, from Table 1²⁰, we can see in the world’s largest democracy the overall vacancy in the judiciary (2018) is approximately 26.8%. The proportion of less number of judges varies from different states and across the hierarchy of judicial system. The vacancy of non-judicial staff is approximately around 20% of the approved working strength. The 245th Law Commission of India had raised concerns over the method to decide the sanctioned strength of judges. Several methods were discussed in the report such as the ideal caseload method (Total number of cases/ Ideal number of cases), time-based method [(avg time taken to decide a type of case * the number of cases of that type)/ number of judicial hours for a judge], rate of disposal method etc. According to the report to decrease the pendency and backlog, the additional number of judges required can be calculated as ((Avg institution/ Avg Disposal) - current number of judges).¹⁷

4.2 Trade-off between quality and quantity

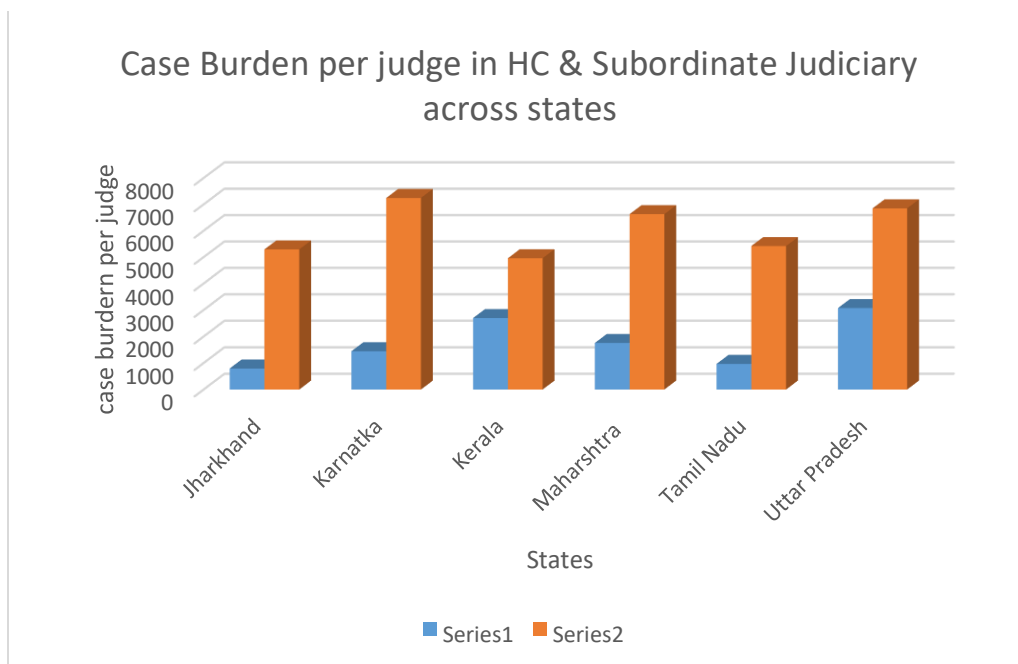


Chart 1 (Series 1- subordinate judiciary; Series 2- High Court)

²⁰ DAKSH, INDIA JUSTICE REPORT: RANKING STATES ON POLICE, JUDICIARY, PRISONS AND LEGAL AID (2019) (hereinafter “DAKSH”); LAW COMMISSION OF INDIA, REPORT NO. 245: ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER (2014) (hereinafter “REPORT”).

From chart 1²¹ it is clear that the burden of judge is higher in High Court as compared to Subordinate Judiciary. Therefore, the budget allocation to the High Court is more as compared to the Lower Courts. Appeals, Article 226 and 227 of the Constitution which discusses the writ and original jurisdiction explains the higher workload on the High Court. Despite the higher workload on the High Court, the vacancy in High Court (36.6%) is greater than that of Subordinate judiciary (26.4%). Thus this might incentivize the judges to evaluate their opportunity costs and compromise on the quality provided the stability given to them by the Indian Constitution.

4.3 Public Expenditure

The State or the Central budget allocated to the judiciary is quite meagre. Of the total budget share of the Union Government, only 0.08% is allocated to the judiciary whereas all the states cumulatively allocate 0.61% of the total spending by the States. The Fifteenth Finance Commission has calculated that approximately 564 lakhs per State is required to augment the use and efficiency of technology. The use of technology has got paramount importance during COVID-19.²²

²¹ DAKSH, *supra* note 20.

²² CENTER FOR BUDGET AND GOVERNANCE ACCOUNTABILITY, MEMORANDUM TO THE FIFTEENTH FINANCE COMMISSION ON BUDGETING FOR THE JUDICIARY IN INDIA (2018).

Institution, Pendency And Disposal Of Cases

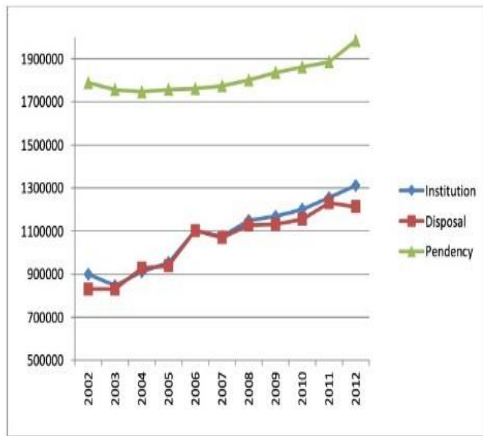


Figure 1: Institution, Disposal, Pendency in the Higher Judicial Service, 2002-2012.

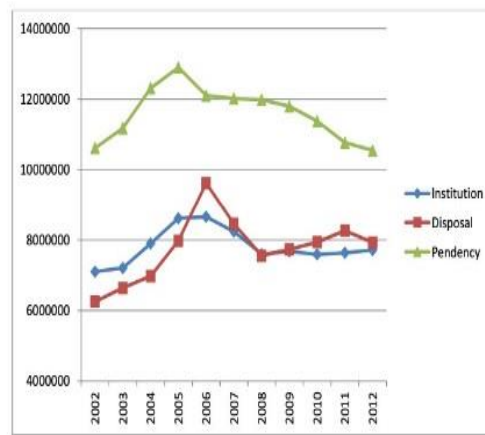


Figure 2: Institution, Disposal, Pendency in the Subordinate Judicial Service, 2002-2012.

Chart 2- Higher Judicial Services

Chart 3- Subordinate Judicial Services

Source: Daksh India Justice Report

The charts reflect the Institution, Disposal and Pendency in the Higher and Subordinate Judicial service from 2002 to 2012. The line graph in Fig.1 shows that in Higher Judicial Service, the rate of the institution of suits, the rate of disposal of suits is increasing and in the end, the rate of pendency took a dip. But the Rate of the institution of suits is much higher as compared to the rate of disposal of suits and rate of pendency. Fig. 2 shows the line graph of the Subordinate Judiciary, it can be seen that the rate of the institution of suits is decreasing and the rate of pendency and disposal of suits is remaining constant.²³ Thus, we can compare and analyze that the High Courts are facing more of pendency as compared to Subordinate judiciary.

4.4 Problems in Procedural Laws

Order XXI of CPC, 1908²⁴ discusses the procedure to be followed for the execution of the decree. The execution of the decree is a herculean task where the successful party again has to devote his time and resources to compel the unsuccessful party to execute the decree. This often requires the intervention of Courts in directing the judgment-debtor to pay the dues and is often done by the courts by imposing fine, attaching property, imprisonment, etc. which consumes the constraint

²³ REPORT, *supra* note 20.

²⁴ Code of Civil Procedure, 1908, § Order XXI, No. 5, Acts of Parliament, 1908 (India).

resources of the judiciary. Also, the lacunas present in Order IX Rule 13²⁵ relating to ex-parte decree further consumes time of judiciary and augments the number of appeals. The practical purpose of the Civil Procedure Code is not met as the maximization of the surplus of both plaintiff and defendant doesn't happen. Therefore, proper laws should be made keeping in mind the objective of celerity, efficiency, and utility maximization.

5. COVID-19- IN DIRE STRAITS

COVID-19 has affected the judiciary in a severe manner. Due to the negative externality imposed by COVID-19 and a higher degree of Pigouvian model opted by the Government of India, several modifications were made in the conduct of hearing. This has affected the efficiency of judicial system severely as the rate of disposal of cases has decreased. The graph below depicts the trend of disposal of cases from the year 2000-01 to 2020-21.

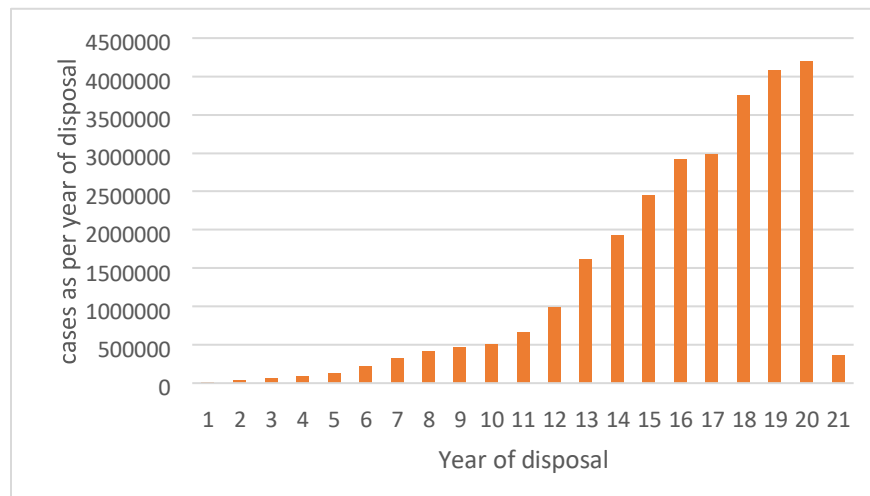


Chart 4- Year of disposal

Thus, we can see that the rate of disposal of cases was increasing from 2000 to 2019-2020²⁶, and till September 2020, the rate of disposal of cases has not crossed even the half of cases disposed previous year. (rate of disposal of cases of 2020-21 < rate of disposal of cases of 2019-20).

²⁵ Code of Civil Procedure, 1908, § Order IX Rule 13, No. 5, Acts of Parliament, 1908 (India).

²⁶ DAKSH, *supra* note 20.

Supreme Court of India has resorted to virtual hearing of the cases on priority basis from March 23, 2020.²⁷ Usually, the Supreme Court of India disposes approximately 3500 cases per month but from March 23 to April 24, 2020; SC had disposed of only 215 cases. The total number of sittings from March 23 2020 to August 9 2020 was 879. 686 writ petitions filed under Article 32 of the Indian Constitution were dealt and 12748 matters were heard by the Hon'ble Supreme Court of India.²⁸

The COVID-19 Pandemic has increased the number of cases filed and the number of disputes. The cases have increased due to the uncertainty, increase in restrictions, violation of rules, etc. in society. COVID-19 has severely affected businesses as the economy of India is facing a problem both in demand and supply of products. The supply chain of essential commodities is broken and the small producers are worst affected.

Due to the uncertainty and the high opportunity costs when one has to trade-off between the Right to Health and Right to Livelihood, the demand for products has diminished. This eventually leads to an increase in disputes as people refrain from performing their existing contractual duties. The various disputes can be divided into few categories-

1. **Force Majeure** - It has been contended in many cases due to the pandemic, the force majeure clause of the contract should be invoked. Vide Government notification on 19-2-2020²⁹ stated that

“A doubt has arisen if the disruption of the supply chains due to the spread of coronavirus in China or any other country will be covered in a force majeure clause. In this regard, it is clarified that it should be considered as a case of natural calamity and force majeure clause may be invoked whenever considered appropriate, following due procedure.” The Ministry of New and Renewable Energy³⁰ has allowed the invocation of force majeure on

²⁷ Supreme Court of India (Mar. 26, 2020).

²⁸ *Supreme Court virtual functioning amid COVID-19 over 1500 matters heard*, Bar and Bench (Aug. 20, 2020), <https://www.barandbench.com/news/litigation/supreme-court-virtual-functioning-amid-covid-19-over-1500matters-heard>.

²⁹ Ministry of Finance, Force Majeure Clause, No. F. 18/4/2020-PPD (Feb. 19, 2020).

³⁰ Ministry of New & Renewable Energy, Force Majeure Clause, No. 283/18/2020-GRID SOLAR (Mar. 20, 2020).

account of disruption due to coronavirus with respect to projects related to Renewable Energy. However, despite the restrictions by the Government, in most cases, the invocation of the force-majeure clause will depend on the contractual provisions. Thus the uncertainty related to force-majeure increases the litigation and thus the burden on the court.

2. **Fraud-** The nature and amount of fraud have changed and augmented during COVID-19. The uncertain times of COVID-19, disruption of supply chains, limited essential goods incentivizes the businessmen to commit fraud on delivering its financial statement. The current use allows crimes such as phishing, zoo bombing, and vishing. The risks of leakage of confidential information have also increased.
3. **Merger and Acquisition-** The unprecedented times of COVID-19 has compelled people for the re-examination of the clauses related to the acquisition agreement. One has to properly see and allocate the risks. More prominence will now be given on force-majeure clauses, warranties, etc.³¹
4. **Insolvency-** By the introduction of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, The Corporate Insolvency Resolution Professional was suspended when the default is done after 25th March 2020 by virtue of Section 10A of the Ordinance. Section 7, Section 9, and Section 10 of the IBC are suspended till 6 months which may be extended to one year depending on the circumstances.³² However, the confusion still remains related to the initiation of proceedings against the personal guarantor. There remain several ambiguities in the construction of Section 10-A which the researcher refrains from discussing in this research. The Govt of India has also increased the threshold limit of the default by the corporate debtor from 1 lakh to 1 crore.

³¹ Cameron Adderley, *Worldwide: Covid-19 Merger And Acquisition Update*, MONDAQ, <https://www.mondaq.com/hongkong/maprivate-equity/938078/covid-19-merger-and-acquisition-update> (Sep. 1, 2020).

³² The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, § 2 (Jun. 5, 2020).

5. **Domestic Violence/ Divorce-** The incidents of violence against the women have augmented after the imposition of lockdown and ‘stay at home’ policy. According to the National Commission of Women (NCW) 100% rise has been there in the cases of domestic violence.³³ The rate of divorce has also increased in many parts of the country.

The above-listed are some issues that have raised the amount of litigation during COVID-19 in India.

It becomes highly difficult to decide which case should be brought up in urgency. In times of crisis, it is necessary that justice should be accessible to all the people but the most vulnerable sections or issues of the society should be given more preference. The decision of the courts to list a particular matter as urgent should be done in a way where the Marginal Benefits outweigh the Marginal Costs of that decision.

The researchers have compared the data available for April 2019 and April 2020.³⁴

S.No	Variables	Apr-19	Apr-20
1	Fresh applications	5197	218
2	Judgement	59	57
3	civil cases	7581	75
4	criminal cases	2554	86
5	Fresh applications (SLP civil)	52	3
6	Fresh application (SLP Cr)	40	8

³³ Mansi vora, Barikar C Malathesh, Soumitra Das & Seshadri Sekhar Chatterjee, *COVID-19 and Domestic Violence Against Women*, NCBI (2020).

³⁴ Shreya Tripathi & Tarika Jain, *Supreme Court Case-Loads During COVID-19 (April 2020)- A look at the numbers*, VIDHI CENTER FOR LEGAL POLICY, <https://vidhilegalpolicy.in/research/supreme-courts-caseload-during-covid-19-april-2020-a-look-at-the-numbers/> (Sep. 6, 2020).

7	Fresh applications WP (civil)	9	5
8	Fresh applications WP (criminal)	1	2

Table 2- Comparison of cases in SC in April 2019 and April 2020

Source: Vidhi Legal Report

Thus, we can make the following conclusion from the data listed above-

1. The number of fresh applications decreased by 95.805%
2. During COVID-19, one can see that criminal cases are given more prominence as compared to civil cases. The ratio of criminal to civil cases has changed from 0.336 to 1.14.
3. The ratio of the fresh application of SLP Criminal to SLP Civil has changed from 0.76 to 2.67.
4. The decrease in the number of writ petitions filed in the Supreme Court as fresh application has not decreased significantly. However, one can clearly observe that Writ Petitions pertaining to criminal cases has increased whereas those of civil cases has decreased.
5. The number of judgements given in April 2019 and April 2020 has not decreased significantly despite lockdown.

The pendency rate in the Supreme Court is alarmingly high and the rate of disposal of cases has decreased. Thus, for the first time, the Supreme Court of India amended its rules and has allowed the single bench to hear transfer petitions and bail matters.

The Supreme Court has allowed e-filing of cases 24*7 and the court fees are paid through an online payment.³⁵ However, the problem arises due to the lack of digitized documents and evidence

³⁵ Bhadra Sinha, *Covid pushes Supreme Court to fast-track reforms, justice delivery could get smoother*, The Print (May 22, 2020), <https://theprint.in/judiciary/covid-pushes-supreme-court-to-fast-track-reforms-justice-deliverycould-get-smoother/426443/>.

which has to be presented in the Courts. The online proceedings are also prone to a cyber- attack or breach of data privacy.

Several scholars have criticized the lack of open-hearing or live-streaming of proceedings which questions the accountability of the judiciary. The Bar Council of India (BCI) has argued that approximately 90% of the lawyers are not tech-savvy. The '1881' helpline is started by the court to help the advocates to effectively use the technology during proceedings. It is pertinent that a fair, transparent system with adequate infrastructure is developed for the success of virtual litigation.³⁶ A proper watchdog mechanism will ensure that a judge follows the protocol of 'veil of ignorance' and no 'Market of Lemons' arises.

The subordinate judiciary is the worst hit during the COVID-19. The lack of proper connectivity, data security risk in case of foreign apps such as Zoom, access, and transmission of documents and evidence electronically, ineffective emotional, or social contact with the judges are some of the impediments of the online system.³⁷ In various courts, the stance for the urgency of matters is related to remand, bail, recording of statements under Section 164 of CrPC, and important matters necessary for the investigation by the police.³⁸

However, Virtual courts are necessary to preserve the 'Rule of Law' and the Fundamental Rights of the parties. One should overcome the shortcomings by working on the infrastructure of the judiciary by allocating a larger amount of budget to it. For adjudicating certain types of cases Virtual courts in the Post-COVID time could be a possibility to decrease the burden on courts.

6. CONCLUSION AND RECOMMENDATIONS

COVID-19 has proved to be a negative externality in the system which has increased uncertainty, litigation, and scarcity of resources. At the same time, it provides an opportunity to think about the flaws in the system and overcome it. The lack of ex-ante preparation in the past has aggravated the

³⁶ *The Arguments for and Against Virtual Courts*, DT NEXT (May 12, 2020), <https://www.dtnext.in/News/TopNews/2020/05/12004038/1229593/Editorial-The-arguments-for-and-against-virtual-courts.vpf>.

³⁷ Blake Candler, *Court Adaptations during COVID-19 in the World's Two Largest Democracies*, SSRN (May 24, 2020).

³⁸ District Court- Chamoli, Gopeshwar, *During COVID-19 Lockdown Urgent Matter*, 08-2020 (Apr. 15, 2020).

problem during COVID-19. Thus, proper public policies should be devised to maximize social welfare.

The researcher proposes to develop a general rules and standards of certain types of disputes which can be availed by judges. These rules and standards have to be developed scientifically. The increased certainty in the system given the socio-economic of status of India will increase predictability and decrease the amount and time for litigation. If one analyses, it becomes clear that one needs to increase the strength of judges at priority basis.

Some concerns had also been raised that a country should have disinterested adjudicators (due to stability of employment) or competitive adjudicators. According to the researcher keeping the independence of judiciary intact, certain level of competition should be introduced in the system so that the judges are incentivized that a proper balance between the quality and quantity of the judgement delivered is maintained. A periodic review of the working of the judiciary should be done in a timely manner so that the problem of asymmetric information and incomplete information is cured.

The vacancies in the judiciary should be filled timely and the retirement age of judges in Subordinate Judiciary should be increased. Also, the increase in strength of the judiciary at Subordinate and High Court level will not suffice if there is no increase in infrastructure, staff proportionately. Better infrastructure, use of time-based frames, skillful training of judges, and new technology can help one to deal with the problem.

Many countries such as the USA are now focusing to develop ODR (Online Dispute Resolution) and Alternative Dispute Resolution (ADR) which can prove to be an effective way of reducing the backlogs. The use of mediation will help in reducing the transaction costs between the parties and achieve an optimal efficiency by the application of the Coase Theorem. Arbitration is time and cost-effective which can reduce the pendency and backlog in courts. Lok Adalat can also be an efficient way to deal with petty civil cases. However, presently the infrastructure of ADR is limited in India and is used only in certain cases. Lok Adalat doesn't have proper infrastructure and not well-qualified lawyers participate in it. The success of ADR is highly dependent on the priorities

and rational choices made by the parties to maximize their own gains. Thus, the legislative framework of ADR in India should be made more robust so that parties are incentivized to adopt ADR mechanism than opt for litigation.

Another method to deal with the dispute can be pretrial negotiations and in case of disputes of insolvency, pre-packaged insolvency can prove to be a better alternative. Proper training should be provided to judges for using online resources and COVID-19 related disputes.

Time frames are necessary with little flexibility in limited circumstances to make the procedural laws effective. Civil Procedure Code, Criminal Procedure Code, Limitation act, etc. provides a time frame wherein certain processes in the suit have to be completed in a time frame. But it doesn't mention the time frame to complete the entire proceedings by the court. IBC has come up with the provision of completing the proceedings in 330 days, however, it is generally not implemented in letter and spirit. A Case-specific time table can be made to decide the allocation of resources which in long run maximize the allocative efficiency.³⁹

At, the time of crisis it is necessary that given the availability of resources, proper allocation and distribution of resources should be made. The judiciary of India is already facing many shortcoming, COVID-19 has given us an opportunity to look at the working of judiciary in the light of public choice theory. The rebuilding of judiciary as envisaged by Hon'ble Mr. Justice (Retd.) Ranjan Gogoi, Former Chief Justice of India has become pertinent during COVID-19. The discipline of Law and Economic analysis can be done to amend the shortcoming of judicial system in India so that the delivery of public goods (access to justice is optimal. The optimal functioning of the judicial system can be achieved when Marginal Benefits outweighs the Marginal Costs.

³⁹ REPORT, *supra* note 20.

ANNEXURE

April 2020- Supreme Court Cases. The data has been collected by the researcher through the SC website.

Date	Case number	nature of proceedings	Is it a covid19 related case?	civil/criminal	name of judges (bench)	point of contention
Apr 29	C.A. No.002377-002377 / 2020	SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 27	C.A. No.007231-007231 / 2012	APEEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	HOUSING
Apr 24	C.A. No.006076-006076 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	WILL
Apr 24	CONMT.PET.(C) No.-000034000034 / 2016	WRIT PETITION (CRIMINAL)	NO	CRIMINAL	JUSTICE MR SHAH	CONTEMPT OF COURT
Apr 1	CrI.A. No.001120-001120 / 2010	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE S. ABDUL NAZEER	TADA
Apr 1	C.A. No.001526-001526 / 2016	APPEAL	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE M.R. SHAH	NGT

Apr 24	C.A. No.006110- 006110 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE N.V. RAMANA, HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, HON'BLE MR. JUSTICE B.R. GAVAI	INCOME TAX
Apr 27	CrI.A. No.000989- 000989 / 2018	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE N.V. RAMANA, HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, HON'BLE MR. JUSTICE B.R. GAVAI	CORRUPTION
Apr 17	C.A. No.002813- 002813 / 2017	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	VACANT POSITION OF TEACHERS
Apr 15	C.A. No.002236- 002236 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN, HON'BLE MR. JUSTICE A.S. BOPANNA	RETIRAL BENEFIT
Apr 24	C.A. No.009775- 009775 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME RETURNS
Apr 29	C.A. No.002379- 002379 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	COMPANIES ACT
Apr 22	CrI.A. No.000722- 000722 / 2017	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE ARUN MISHRA	NARCOTICS
Apr 27	C.A. No.006398- 006398 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CUSTOMS ACT

Apr 29	C.A. No.005749- 005749 / 2012	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 22	C.A. No.003609- 003609 / 2002	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MS. JUSTICE INDIRA BANERJEE, HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE	RESERAVATION
					MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	
Apr 27	C.A. No.002217- 002217 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CENTRAL SALES TAX ACT
Apr 17	C.A. No.003240- 003240 / 2011	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	SENIORITY IN RESERVATION
Apr 24	C.A. No.002368- 002368 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	VACANCIES
Apr 13	W.P.(C) No.- 000439 / 2020	WRIT PETITION	NO	CIVIL	HON'BLE DR. JUSTICE D. Y. CHANDRACHUD, HON'BLE MR. JUSTICE AJAY RASTOGI	GOVERNOR/ASSEMBL Y
Apr 6	SMW(C) No.- 000005 / 2020	SUO MOTO WRIT	YES	CIVIL	CJI	VC

Apr 27	SMC(Crl) No.000002 / 2019	SUO' MOTO WRIT	NO	CRIMINAL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	CONTEMPT
Apr 29	C.A. No.002378- 002378 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	ARBITRATION
Apr 17	C.A. No.002250- 002252 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	POST OF DIRECTOR
Apr 27	C.A. No.007649- 007651 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	ELECTRICITY

Apr 3	C.A. No.006875- 006875 / 2008	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	PROPRTY
Apr 3	C.A. No.002229- 002229 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	DISASTER MANAGEMNT
Apr 24	CrI.A. No.000640- 000641 / 2016	APPEAL	NO	CRIMINAL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	KIDNAPPING, DEATH
Apr 24	C.A. No.003545- 003545 / 2009	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX

Apr 24	C.A. No.002847- 002847 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	INCOME TAX
Apr 17	C.A. No.004594- 004594 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	MORTGAGE
Apr 13	C.A. No.002230- 002230 / 2020	APPEAL	NO	CIVIL	HON'BLE DR. JUSTICE D.Y. CHANDRACHUD, HON'BLE MR. JUSTICE AJAY RASTOGI	DRUGS AND COSMETICS ACT
Apr 22	C.A. No.002256- 002263 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	INDUSTRIES
Apr 22	C.A. No.007508- 007508 / 2005	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE M.R. SHAH	SUGARCANE
Apr 3	C.A. No.- 002228 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	ELECTRICITY
Apr 24	C.A. No.002376- 002376 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	ARBITRATION

Apr 3	C.A. No.001008- 001008 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE L. NAGESWARA RAO, HON'BLE MR. JUSTICE DEEPAK GUPTA	INCOME TAX
Apr 29	W.P.(C) No.- 000936 / 2018	WRIT PETITION	NO	CIVIL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	RAJASTHAN JUDICIAL RULES
Apr 17	C.A. No.002237- 002237 / 2020	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	TOWN PLANNING
Apr 8	C.A. No.001641- 001641 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ASHOK BHUSHAN, HON'BLE MR. JUSTICE S. RAVINDRA BHAT	RETIREMENT
Apr 24	C.A. No.002375- 002375 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	RENT AND EVICTION
Apr 17	C.A. No.006216- 006217 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDA R, HON'BLE MR. JUSTICE R. SUBHASH REDDY	PLOT
Apr 24	C.A. No.002374- 002374 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR.	DELHI JUDICIAL SERVICE

					JUSTICE DINESH MAHESHWARI	
Apr 27	CrI.A. No.000779- 000779 / 2010	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	MURDER

Apr 27	C.A. No.004499- 004501 / 2010	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE DEEPAK GUPTA, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	LAND REFORMS
Apr 8	C.A. No.002103- 002103 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ASHOK BHUSHAN, HON'BLE MR. JUSTICE S. RAVINDRA BHAT	STAFF SELECTION
Apr 22	C.A. No.000667- 000667 / 2012	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE M.R. SHAH, HON'BLE MR. JUSTICE ANIRUDDHA BOSE	NAFED
Apr 24	C.A. No.006146- 006146 / 2019	APPEAL	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	PROPERTY
Apr 24	CrI.A. No.000413- 000413 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	EMPLOYEMNT
Apr 15	C.A. No.002235- 002235 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN, HON'BLE MR. JUSTICE A.S. BOPANNA	INSURANCCE
Apr 24	CrI.A. No.000414- 000414 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR. JUSTICE DINESH MAHESHWARI	QUASHING OF FIR
Apr 24	C.A. No.002373- 002373 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE A.M. KHANWILKAR, HON'BLE MR.	DRT

					JUSTICE DINESH MAHESHWARI	
Apr 24	MA-003082 / 2018	APPEAL WITH SLP	NO	CIVIL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	HOUSING
Apr 24	C.A. No.002366-002367 / 2020	APPEAL WITH SLP	NO	CIVIL	HON'BLE DR. JUSTICE D. Y. CHANDRACHUD, HON'BLE MR. JUSTICE M.R. SHAH	CONSUMER
Apr 29	CrI.A. No.000417-000418 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE UDAY UMESH LALIT, HON'BLE MR. JUSTICE DINESH MAHESHWARI	HOUSING
Apr 29	T.C.(C) No.000098-000098 / 2012	TRANSFERRED CASE	NO	CIVIL	HON'BLE MR. JUSTICE ARUN MISHRA, HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE M.R. SHAH	MEDICAL
Apr 24	CrI.A. No.000416-000416 / 2020	APPEAL WITH SLP	NO	CRIMINAL	HON'BLE MR. JUSTICE VINEET SARAN, HON'BLE MR. JUSTICE HEMANT GUPTA, HON'BLE MR. JUSTICE M.R. SHAH	STRIDHAN