



WILL VIRTUAL COURTS SYSTEM ENSURE JUSTICE AMID PANDEMIC? BY CHARVI YADAV*

INTRODUCTION

In the midst of every crisis, lies great opportunity.

-Albert Einstein

The unprecedented Covid-19 pandemic has certainly caused crisis to various sectors of the economy and has affected many institutions of the country like never before and one such is the institution of justice, the judiciary where justice delivery should never stop to maintain peace and harmony. Now to cope with in such a situation and to create opportunity out of it the Supreme Court and High Courts of various states are conducting judicial proceedings through virtual courts on urgent matters. Virtual court is a concept aimed at eliminating presence of litigant or lawyer in the court and adjudication of the case online¹. To help aid the proceedings through virtual courts and video conferencing IT infrastructure is being installed at various courts so that the clients and legal representatives can be virtually present. But the real question lies is that whether this shift from physical hearing to virtual hearings is hindering access and quality of justice and just and fair administration of justice can be done through these IT enabled courts or not. To get answer to this question various parameters are being examined and analysed.

1. OPEN COURTS

The concept of open court finds its origin way back in 1215 Magna Carta, clause 40 which provides that not only the litigants have a right to resolve a case by court but also the public has a right to attend legal proceedings which implies that public including media has free and fair access to court proceedings. The basis of this is also found in freedom of speech and expression and freedom of the press under Article 19 of constitution of India that protects a wide scope of

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¹About *Virtual Courts*, VIRTUAL COURTS (2019), <http://vcourts.gov.in/virtualcourt/>.

activities enabling the public to attend court hearings as a spectator, reporter or partaker². Later this concept was envisaged under various provisions and judgements of the Supreme Court also.

Article 145(4) of the Constitution of India also provides for open courts by stating that no judgement shall be delivered by the Supreme Court save in open courts, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open courts. Section 327 of Code of Criminal Procedure, 1973 and Section 153-B of Code of Civil Procedure, 1908 also provides for open courts proceedings in all matters whether criminal or civil. However the same is obliterated by virtual court proceedings and the very essence of administration of justice gets broken as open courts are fundamental to it.

The Supreme Court in the case of *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Ors*³ also stated that “... *Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice.*” Therefore public trials in open courts becomes an important aspect for dispensing of justice and for maintaining public faith and withdrawal of the same is acting as a defiance in administration of justice and the very nature of public trials stands compromised which even becomes more problematic when courts are hearing on extremely urgent matters only.

2. ACCESS TO TECHNOLOGY

Accessibility to technology is one of the greatest contributor in curtailing access to justice as it is severely lacking .The statistics suggests that till 2017 nearly 72% of the population in India does not have access to Internet and to rest 28% there exists a digital divide as according to TRAI urban India has a high rate of subscriptions while rural India is only at 27.57 of subscriptions per 100 people in 2019.⁴ The rates are alarming to technological accessibility and even if it is there it rests with privileged class only. Unlike in metropolitan areas where technological accessibility and broadband infrastructure is sufficiently built greater challenged is posed towards courts in rural India or about 700 district courts where foundational litigation starts. In such a scenario e-filing facility at district courts stands less inhibiting. The highest number of pendency of cases also rests

²Pramod Kumar Dubey, *Virtual Courts: A sustainable option?*, BAR AND BENCH (Apr. 12, 2020, 11:44 AM), <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option>.

³*Naresh Shridhar Mirajkar v. State of Maharashtra*, (1966) 3 SCR 744: AIR 1967 SC 1.

⁴Dubey, *supra* note 2, at 2.

with district courts with 3,14 crores while supreme court with 56,867 cases and high courts with 44.75 lakh cases as of November 2019⁵.

Furthermore the problem does not rest here because there is existence of digital divide between various states also. Metropolitan cities like Delhi and Mumbai has about 2.20 crore and 1.5 crore Internet connections respectively while on the other hand the whole North-East region has only about 4.3 lakh connections.⁶ So how virtual courts will do in north eastern region has become a thing to see.

However the problem to access to technology does not end with its access, in addition to it becoming digitally literate is also important because for there to be tech-enabled judiciary there has to be tech-enabled Bar ⁷. So there has to be training of all judicial officers, advocates, and other court staff including those in charge of filing and presenting files before the appropriate court with user friendly soft-wares.

Challenges are also posed in front of persons with disability with respect to virtual courts and technology and eventually their access to justice remains a question unanswered.

3. FAIR TRIAL

Right to fair trial is a norm of international human rights law⁸ and is also enshrined under Article 21 of the Constitution of India. It is one of the pivotal concerns of criminal justice system is to provide fair trial to the accused and the same is shaken in court proceedings through virtual courts when crucial elements like demeanour and facial expression or gesture of a person are overshadowed by glitches in video streaming.⁹ Moreover when the witness gives the testimony from the comfort of his home he lacks tension like in courtroom while taking the oath in front of judge which sometimes becomes necessary to reveal the truth. Cross – examinations also gets affected because of this which ultimately takes away the opportunity of the court to evaluate the witness by way of his testimony along with their demeanour¹⁰. Also there is no guarantee that the witness is coming out with the information voluntarily as same cannot be recorded in video conferencing. So Authenticity of the evidence remains at stake.

⁵The Wire Staff, *Over 3.5 Crore Cases Pending Across Courts in India, Little Change in Numbers Since 2014*, THE WIRE (Nov. 27, 2019), <https://thewire.in/law/pending-court-cases>.

⁶Dubey, *supra* note 2, at 2.

⁷Meera Emmanuel, *Virtual Courts an effort of the Indian judiciary to tell our citizens that we realise that time has value: Justice DY Chandrachud*, BAR AND BENCH, (June 15, 2020), <https://www.barandbench.com/news/virtual-courts-justice-dy-chandrachud-inauguration-kerala-high-court-eprojects>.

⁸Swati Duggal, *Concept of fair trial*, LAWTOPIUS, (Aug. 7, 2017), <https://www.lawtopus.com/academike/concept-fair-trial/>.

⁹Dharvi Vaid, *How coronavirus is propelling the rise of online courts in India*, DW, (June 11, 2020), <https://www.dw.com/en/how-coronavirus-is-propelling-the-rise-of-online-courts-in-india/a-53774109>.

¹⁰Dubey, *supra* note 2, at 2.

All these may lead to non discovery of truth or witness giving false statement defeating the very purpose of it.

Furthermore questions are also posed towards impartial judiciary with regard to listing of urgent matters which may be preferred to a handful of class of privileged advocates only.¹¹ Additionally how will a litigant in jail access lawyers when jail visits are stopped and remand appearances are happening through video conferencing.¹² Moreover power cuts and technological glitches may lead to adjournments of proceedings hampering speedy and fair trial.

4. CONFIDENTIALITY AND PRIVACY OF DATA

Ensuring confidentiality and identity of the victim becomes a problem when it comes to digital databases and video conferencing especially in relation to rape trials, sexual assault, child abuse or in domestic violence cases where the identity of the victim should not be disclosed. Right to be forgotten should not be forgotten in such matters as every data is stored in repository. Moreover, there can be issues regarding leaking of proceedings through Vidyo app or other. To maintain confidentiality and to secure privacy of data least which can be done is to purchase a dedicated platform with a confidentiality agreement.¹³

THE OTHER WAY AROUND

If we look at the other side of the coin there are some advantages as well with respect to virtual courts and making things technologically viable like e-filing can be done remotely from anywhere in India and at any time of the day as it is available 24/7. So anyone who was not able to file a complaint earlier in physical presence can now file it at ease by sitting at comfort of their home promoting access to justice .Virtual court proceedings also save time, money and energy of the litigants and counsels as the parties no longer have to travel miles to physically appear before the courtrooms. Moreover court fees can be paid online, rectification of any error in filing can be done online and digital signature makes the procedure effective and ensures accountability and transparency. Artificial intelligence within the system has also made judiciary more linguistically inclusive by translating English documents, orders or judgements into nine distinct vernacular languages. The huge pendency of the cases can be reduced through digitalisation. Supreme Court

¹¹*Resume Physical Hearing from June 1st in all Courts, Virtual Courts confined to privileged Advocates', BCI writes to CJI, LATEST LAWS (May 27, 2020), <https://www.latestlaws.com/latest-news/resume-physical-hearing-from-june-1st-in-all-courts-virtual-courts-confined-to-privileged-advocates-bci-writes-to-cji-read-letter/>.*

¹²Ketaki Goswani and Sidharth Luthra, *Access to justice lost*, Times of India (Apr. 24, 2020, 12:49 PM), <https://timesofindia.indiatimes.com/blogs/voices/access-to-justice-lost/>.

¹³Debayan Roy, *Doors of justice being closed for the poor, questions on confidentiality: Lawyers on the Supreme Court's video conferencing hearings*, BAR AND BENCH (Apr. 18, 2020, 5:10 PM), <https://www.barandbench.com/columns/from-doors-of-justice-being-closed-for-poor-to-questions-on-confidentiality-lawyers-weigh-in-on-scs-hearings-via-videoconferencing>.

also stated while defending virtual courts that, "There cannot be divergent views about the fact that justice cannot be spoon-fed. Justice delivery, even at the door-steps of the stakeholders, requires the stakeholders of the ecosystem to diligently discharge their role and duties, prescribed and required in the scheme of things."¹⁴

CONCLUSION AND ROAD AHEAD

When we look at the overall picture and compare the advantages with the disadvantages, the latter overpowers the former. Access to justice is quintessential to rule of law and should not be compromised at any point of time and switching from physical courtroom hearings to virtual hearings requires time to become adaptive to the technology and to build IT infrastructure which cannot happen in a week or so.

In a press statement also BCI stated that the council has received several complaints about virtual hearing, due to poor internet connection and other technical problems which are a common phenomenon.¹⁵ It further stated that "Some of the biggest Bar Associations and several Advocates of Supreme Court and High Court, some people are trying to take undue advantage of lockdown and the legal profession is gradually being attempted to be hijacked by a few blessed lawyers and selected Law-firms who have high- level connection."¹⁶ In such a scenario justice is not even being provided to justice provider, justice to common man is too far-flung then. The pandemic and lockdown should come as a responsibility to uplift the less privileged rather than treating it as an opportunity to overpower the less privileged.

However virtual court hearings do have some legit advantages from saving time and money to reducing backlog of cases in long run but to extract most out of it and to ensure justice to the highest possible level physical court hearings are to be combined with virtual hearings. Cases which do not necessitate physical presence can be virtually heard. A young judge and lawyer can be appointed in those cases on the presumption that they are more tech-enabled. Lengthy proceedings including question of law and proceedings including cross- examination should better be heard in physical presence.

Physical court hearings can never be done away with as D.Y. Chandrachud in a webinar organised by Nyaya forum also stated that virtual courts cannot replace open courts hearings as it constitutes

¹⁴Press Trust of India, *Top Court Says "Virtual Courts System" Will Ensure Justice Amid Pandemic*, NDTV (May 3, 2020), <https://www.ndtv.com/search?searchtext=Top-Court-Says-Virtual-Courts-System-Will-Ensure-Justice-Amid-Pandemic>.

¹⁵Gloria Methri, *BCI to seek suggestions on resumption of regular court hearings amid virtual hearing woes*, Republic World (May 21, 2020, 10:07 AM), <https://www.republicworld.com/india-news/general-news/bci-to-consult-advocates-on-resumption-of-regular-hearings-in-courts.html>.

¹⁶ *Id.*

the spine of the judicial system. He further added that “Our court procedures are tardy and unintelligent to common people”. When proceedings are being held virtually our long in the tooth existing procedural laws and evidentiary law becomes inadequate and fails to address many issues and hence needs to be re visited.

Nonetheless to take something out of this worst health crisis of Covid-19 is to introspect where we lack and try to improve it so that we can be ready to fight any unprecedented situation in future beforehand.

Looking at the present condition we surely lack in technological infrastructure which is one of the biggest reasons why justice is not served and ensured to its fullest. From district court to the apex court IT infrastructure should be installed with assurance of good connectivity and manageable soft-wares. To ensure public trust and confidence in judiciary courts should be open to public for that justice to be done it should be seen to be done. Transcript of the court proceedings should be provided. Slowly and gradually, not only urgent matters but all matters should be heard to widen dispensing of justice. Proper platforms should be used to safeguard data privacy and to enable client and lawyers to confer in private¹⁷. At last, access to justice should never become a luxury rather should always remain a necessity, easily available.

¹⁷Roy, *supra* note 13, at 5.