



LAW MANTRA THINK BEYOND OTHERS

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WILL VIRTUAL COURTS SYSTEM ENSURE JUSTICE AMID PANDEMIC? *

INTRODUCTION

The outbreak of COVID-19 has been identified as a "public health emergency" by the World Health Organization on January 30, 2020.¹ It is rapidly spreading and posing serious health, environmental, economic and social challenges throughout the world. India, like its global counterparts was declared to be under a lockdown from 25.03.2020.² As a result, every activity except those relating to essential supplies came to a halt.

The justice delivery system has also been disrupted. The need to prevent the spread of the disease has left the courts and tribunals with no choice but to shut their premises. Courts are essential for any civil society to function properly. A complete shutdown of the system is undesirable and it's not feasible to conduct court proceedings in a physical setting. Therefore, courts have resorted to modern technology. They are functioning through online hearings via video conferencing, electronic filings and email mentions. The concept of virtual courts is aimed at eliminating presence of litigants or lawyers in the court and adjudication of the case online.³

In this paper, the author attempts to address the concept of virtual court system and analyze whether it would ensure justice amid the pandemic. Part I of the paper discusses the efforts of judiciary; Part II deals with the limitations of the system and part III analyses what the current situation demands.

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I. VIRTUAL COURTS: THE NEW REALITY?

ORDER

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- Satakshi Singh, Student, RGNUL-Punjab,

¹ World Health Organization (WHO), Novel Coronavirus (2019-Ncov) Situation Report 10 (January 2020).

² Government of India, Order Dated March 24, 2020 vide no. 403/20202-DM-I(A) (Ministry of Home Affairs, 2020).

³ Virtual Courts, available at [Http://Vcourts.Gov.In/Virtualcourt/](http://Vcourts.Gov.In/Virtualcourt/) (Visited on June 23, 2020)

The Supreme Court on 6.04.2020 issued an order addressing the issues of concerning functioning of courts during the lockdown. A bench consisting of CJI Bobde, Justices DY Chandrachud and L Nageswara Rao issued directions in *Re: Guidelines for Court Functioning through Video Conferencing during COVID-19 Pandemic*⁴ regarding measures to be taken by courts to reduce the physical presence of people within the court premises by following the social distancing guidelines and ensuring the uninterrupted dispensation of justice. The guidelines were issued by invoking Article 142 of the Constitution of India as an extra-ordinary jurisdiction.

The Supreme Court has directed as under:

- All High Courts shall ensure functioning of the judicial system through use of video conferencing. The courts shall decide the modalities for use of video conferencing technologies after considering relevant factors such as peculiarities of the judicial system in different states and the public health situation.
- District Courts in every state shall adopt video conferencing technologies prescribed by the appropriate High Court.
- Courts shall make video conferencing facilities available for those litigants who do not have access to these facilities by making video conferencing facilities available.
- Until appropriate rules are framed by the High Courts, video conferencing shall be employed for hearing arguments whether at the trial stage or at the appellate stage. Evidence will not be recorded via video conferencing unless both parties consent to it.
- The directions shall remain in force until further orders are passed by the Supreme Court.

The High Courts of Telangana⁵, Patna⁶, Gauhati⁷, Andhra Pradesh⁸, and Orissa⁹ have passed directions for conducting of hearings via video-conferencing during the period of COVID-19 lockdown.

⁴ *Suo Moto Writ Petition (Civil) No. 5/2020.*

⁵ Notification by Telangana Government dated 7 April 2020, available at http://tshc.gov.in/documents/admin_2_2020_04_07_12_48_07.pdf (Visited on June 23, 2020)

⁶ Letter dated 7 April 2020 addressed by Registrar General of the Patna High Court to all District And Sessions Judges of the State, available at <http://patnahighcourt.gov.in/pdf/uploaded/3562.pdf> (Visited on June 23, 2020)

⁷ Notification by the High Court of Gauhati, available at <http://ghconline.nic.in/general/notification-07-04-2020.pdf> (Visited on June 23, 2020)

⁸ Notification by the High Court of Andhra Pradesh dated 8 April 2020, available at <http://hc.ap.nic.in/docs/guidl.pdf> (Visited on June 23, 2020)

⁹ Notice by the High Court of Orissa, available at <https://orissahighcourt.nic.in/important-notices-pdf-view/notification/192/> (Visited on June 23, 2020)

On 8 April 2020, the Bombay High Court issued directions in connection with live-streaming of matters listed for hearing on 9 April 2020.¹⁰

CONCERN FROM LAWYERS

The Chairman of Bar Council of India had addressed a letter to the CJI opposing virtual court proceedings post lockdown phase. It stated that *“90% of the advocates and judges are unaware of the technology and its nuances. The people sitting on elevated chairs are so distant from ground reality that is why they are advocating such thought process.”*¹¹ Many lawyers have also raised concerns regarding the principle of Open Court being compromised as facility of witnessing the virtual court proceedings is accessible only by the judges and the concerned counsels representing the parties. The Supreme Court has held in *Naresh Shridhar Mirajkar and Ors. v.State of Maharashtra and Ors*¹² :

“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.”

The principle of ‘Open Court’ is encapsulated in the Indian Constitution¹³, the Code of Criminal Procedure, 1973¹⁴ and the Code of Civil procedure, 1908.¹⁵

NOTE

The Supreme Court has released a note addressing the growing concerns.¹⁶ The court has strongly defended the virtual courts system stating that it was to ensure that the administration of justice does not crumble in the face of a pandemic. Further it said “Open Court system, in its physical manifestation, and Virtual Court System are not antithetical to each other; on the contrary, both

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¹⁰ Notification, available at http://114.143.193.164/ergo/directions_for_vc_hearing_before_justice_gs_patel.pdf (visited on June 23, 2020)

¹¹ Letter BCI: D: 1372/2020 (Council) dated 28.04.2020.

¹² *Naresh Shridhar Mirajkar and Ors. v.State of Maharashtra And Ors*, 1966 SCR (3) 744.

¹³ **Article 145(4), Constitution of India, 1950.**

¹⁴ **Section 327, Code of Criminal Procedure, 1973.**

¹⁵ **Section 153B**, Code of Civil Procedure, 1908.

¹⁶ Supreme Court of India, Note on Open Court Hearings, available at https://images.assettype.com/barandbench/2020-05/06c7b93c-c27a-4702-9b16-5a47841aa88f/Note_on_Open_Court_Hearing.pdf (Visited on June 23, 2020)

systems could definitely co-exist, delivering qualitative justice, wherever deployed in light of extant circumstances.”¹⁷

Court hearing through video-conferencing is not a novel concept. In 2003, the Supreme Court in *State of Maharashtra vs. Dr. Praful Desai*¹⁸ held that the term 'presence' cannot be interpreted to only mean the actual presence of a person in any court. Several subordinate Courts are known to have recorded evidence in a judicial proceeding through the video-conferencing mode.

The note mentioned that the principle of ‘Open Court’ is not an end in itself; it is a medium for fair adjudication. Also, open court does not imply that an “unlimited and unregulated” access has to be granted to public at large. Bodily presence is not required for the functioning of a Court of Law to be witnessed.

Referring to the USA, UK, EU, Italy etc it stated that as nations are in lockdown, the matters of governance, frontier medical research, justice-delivery etc can be easily carried out by relying on information technology.

The court backed its performance during the lockdown period with statistical data. The data shows, the court heard matters on 22 days until May 1. During this period, 116 benches assembled, which includes 73 benches for adjudicating review petitions and 43 benches for main matters. The total matters taken on board by the court during this period were 538 and 297 were connected matters.¹⁹

The note concluded by saying “The Judiciary of the Indian Republic is known and acknowledged as one of the most robust and progressive judicial institutions around the world, supporting and serving a democratic order. This statistics reveal that despite challenging circumstances the Supreme Court of India has ensured dispensation of justice in cases of urgency with highest number of hearings undertaken to alternative mode best suiting to the circumstances.”²⁰

STANDARD OPERATING PROCEDURE (SOP)

¹⁷ *Ibid.*

¹⁸ *State of Maharashtra v. Dr. Praful Desai*, AIR 2003 (4) SCC 601.

¹⁹ *Ibid.*

²⁰ *Ibid.*

The Supreme Court has issued a SOP for hearings before the court via video conferencing.²¹ The SOP details the procedure for listing and other modalities for Video Conferencing. The circular has stated that fresh matters that were due to be listed but could not be listed due to the pandemic will be listed first. Once this pool of matters is exhausted, the short category matters will be listed.

The circular has required the Advocate-On-Record or the parties to specify whether they would be joining the hearing from their own devices or by availing the facilities provided by the Supreme Court. Further, the petitions and applications must be duly filed preferably through e-filing and an application for mentioning may be sent via email in case urgent hearing is sought.

JUDICIAL PRECEDENTS IN RELATION TO VIRTUAL COURTS

1. *Krishna Veni Nagam v. Harish Nagam*²²

The Supreme Court acknowledged the difficulties faced by the litigants living beyond the local jurisdiction and held:

"It is appropriate to use videoconferencing technology where both the parties have equal difficulty due to lack of place convenient to both the parties. Proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person, wherever one or both the parties make a request for use of videoconferencing,"

2. *Santhini v. Vijaya Venketeshr*²³

The Veni Nigam's case was overruled by the Supreme Court of India by a 2:1 majority. Chief Justice of India, Dipak Mishra and Justice AK Khanwilkar held that "in transfer petition, video conferencing cannot be directed". However, Justice DY Chandrachud wrote the judgement in favour of the use of modern technology and video conferencing. Justice Chandrachud in the dissenting opinion highlighted the following pros of video conferencing:

- a. "The Family Courts Act, 1984 was enacted at a point in time when modern technology which enabled persons separated by spatial distances to communicate with each other face to face was not fully developed. There is no reason for court which sets precedent for the nation to exclude the application of technology to facilitate the judicial process."

²¹ Supreme Court of India, Standard Operating Procedure for Ld. Advocate/Party-In-Person for e-filing, mentioning, listing and video conferencing hearing, available at https://main.sci.gov.in/pdf/lu/16052020_123951.pdf (Visited on June 23, 2020).

²² Transfer Petition (Civil) No. 1912 OF 2014.

²³ Transfer Petition (Civil) No.1278 OF 2016.

- b. "Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice."

3. *M/S Meters and Instruments vs Kanchan Mehta*²⁴

The Supreme Court held:

"Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts.

II. LIMITATIONS

Various judicial and quasi-judicial bodies have resorted to virtual hearing. However, while these measures are laudable, they've their own limitations.

1. Lack of uniformity

The virtual system of functioning has not been adopted by all judicial and quasi-judicial institutions across the country. Institutions that have adopted this system have only been employing it for selective matters i.e. to hear and dispose of urgent matters.

2. Delay in disposal of cases

The rate of disposal of cases will shrink as judicial officers and clerks are introduced to new technologies. They will have to undergo intensive training for the same.

3. Lack of accessibility

Practical issues like poor internet connectivity, power cuts and outdated equipments are bound to occur. A large number of Indians find technology difficult, given low literacy level and technological familiarities. A lot of people cannot afford proper internet facilities. Also, in places like Kashmir, virtual system of functioning seems impossible due to suspension of internet and low bandwidth.

A report of the Internet and Mobile Association of India 2019 reveals that only 36% of Indians have access to Internet.²⁵ The lack of technical infrastructure in various parts of the country makes virtual court system more metro-centric.

²⁴ Criminal appeal no 1731 of 2017 arising out of Special Leave Petition (Crl.) No.5451 of 2017.

4. Demeanor and false evidence

There is a significant difference between virtual testimony and in-court testimony. The latter provides greater opportunity for the court to evaluate the witness by way of his testimony along with the demeanor. Physical presence serves important functions during stages such as cross examination. Evidence recorded virtually may distort some crucial non verbal cues.

5. Defeating the objective of punishment

The punishment given to an offender must act as deterrent so that people refrain from committing the crime. This is not possible in a virtual setup as only the concerned parties will be part of the hearing.

III. NEED OF THE HOUR

The pandemic has created opportunities for digitization and computerization. By adopting new methodologies such as e-filing and video conferencing, the judiciary is gradually developing visions of virtual courts into reality.

India has been preparing for this leap for a very long time. The e-Committee of the judiciary in December 2004, established by the Government of India, witnessed the adoption of electronic infrastructure by Indian courts. The e-Courts Project was conceptualized on the basis of the “National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary – 2005” submitted by e-Committee, with a vision to transform the Indian Judiciary by ICT enablement of Courts.²⁶

A complete shift towards a digital system of courts ignoring the issues pertaining to accessibility and familiarity with technological advancements isn't advisable. Accessibility is the core function of the justice delivery system. The quality of adjudication is of no use if justice cannot be accessed by public.

²⁵ Internet and Mobile Association of India, India Internet 2019, available at <https://cms.iamai.in/Content/Researchpapers/D3654bcc-002f-4fc7-Ab39-E1fbeb00005d.Pdf> (Visited on June 23, 2020).

²⁶ E-courts: About us, available at https://services.ecourts.gov.in/ecourtindia_v6/static/about-us.php (Visited on June 23, 2020).

Justice Chandrachud stated in a webinar, “A healthy mix between the uses of technology for court hearings in areas where technology is well suited is required, along with Open Court hearings, which constitute spine of the Indian Constitution.”²⁷

In a circular issued on 20.06.2020, the Delhi High Court Rules for Video Conferencing for Courts 2020 permitted public viewing of court proceedings. The circular said, “In order to observe the requirement of an Open Court proceeding, members of the public will be allowed to view Court hearings conducted through video conferencing, except proceedings ordered for reasons recorded in writing to be conducted in-camera. The Court shall endeavor to make available sufficient links (consistent with available bandwidth) for accessing the proceedings.”²⁸

Virtual court system will give relief to people with lack of financial means, physical disabilities, and those in other unavoidable circumstances. It will be cost and time efficient. It would save litigants the hassle of making long treks to courts and enhance the purity of legal discourse. Technology driven filing, written arguments and case management would ensure speedier disposal of cases by preventing unnecessary grounds for adjournments. It would enhance public participation through online live links especially in matters concerning public interest. Furthermore, it would help in optimal utilization of resources such as paper and other stationary items.

In the long run, the system should be based on certain parameters having a case specific approach. The petitioner should be given an option between virtual or physical hearing, subject to the nature of the litigation and court’s calendar. The advocates for the parties should specify whether video-conferencing is feasible with special reference to factors like accessibility of resources, income of parties etc. Also, the courts should be more careful towards any disparities between the parties to the litigation, in order to protect their interests.

The need of the hour is to protect the justice delivery system from getting disrupted amid the ongoing pandemic. Access to justice is fundamental to preserve the rule of law in the democracy envisaged by the Indian Constitution. This can only be done by resorting to the modern technology. Virtual court system ensures functioning of courts in consonance with norms of social distancing. However, it should not be mistaken as a permanent replacement for the physical courts. It is not antithetical to the traditional Open Court system. Both could co-exist for delivery

²⁷ Webinar organized by ‘Nyaya Forum’ of NALSAR University of Law on the topic ‘Future of Virtual Courts and Access to Justice in India’.

²⁸ Circular by High Court of Delhi dated 20 June 2020, available at http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_VHTTKW9Q8XL.PDF (visited on June 25, 2020)

of qualitative justice. The Virtual Court system ensures justice amid the pandemic by paving way for smooth functioning of the courts; thereby ensuring continued dispensation of justice.

CONCLUSION

The pandemic has necessitated immediate adoption of measures to prevent the transmission of the disease. In these unprecedented times, virtual courts system comes to the rescue of the judiciary. Currently, there are many difficulties with the practical implication of virtual courts. Problems are bound to occur in navigating a digitalized justice system. However, merely on the basis of some negative aspects, a system that has potential for many short and long term advantages cannot be torn out.

