

WILL VIRTUAL COURTS SYSTEM ENSURE JUSTICE AMID PANDEMIC? *

A pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.”¹ The chances of occurrence of such events cannot be banished altogether but awareness can be spread and mobility can be sort. Corona Virus has resulted in one such pandemic that has created distress in all spheres of life globally. It has brought all businesses, services and other activities to a halt and judiciary is no exception. The outbreak of the pandemic has pushed for several changes in the global working pattern. The unprecedented pandemic has created a global crisis which has distressed the functionaries of the governmental organs at a great extent and functions of judicial system have been severely impeded because of the public gathering. The compulsions of social distancing made physical hearings difficult for the bench, litigants, and interested parties. Resultantly, courts shut their premises to the people, however, a complete shutdown of the justice delivery mechanism is undesirable and unaffordable. The imposition of unprecedented consistent lockdowns has hampered the judicial working and resulted into exceptional increase in backlogs of cases despite substantial drop in crime rates.

The Supreme Court started conducting E-Court hearings on the 27th of March 2020. On 6th April 2020, a bench consisting of C.J. Bobde, Justices Chandrachud and L Rao issued regulations to all the courts to prohibit entry and maintain social distancing, along with other measures for preventing the spread of COVID-19. It also issued guidelines and a more concrete structure to switch to video conferencing. The courts across the country have been taking up cases listed as urgent via this mode. However, what exactly is an urgent matter is not appropriately defined, pointing towards the loopholes in the infrastructure currently in place. The subjectivity of urgent matter has raised a pertinent question on the criterion to be used for determining the urgency in any case. The pandemic has proven to be an opportunity to explore the application of technology

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¹ W.H.O., PANDEMIC, available at <https://www.who.int/bulletin/volumes/89/7/11-088815/en/#:~:text=A%20pandemic%20is%20defined%20as,are%20not%20considered%20pandemics> (visited on June 22, 2020).

to the courts in India. The virtual courts structured by the e-committee headed by Justice Chandrachud have done a commendable job. But the question is, whether these virtual courts are sufficient to deliver appropriate justice amidst this pandemic? To answer this, we must consider the below-mentioned points.

Albeit, the prevailing circumstances cause great hardships to the litigants and also the practitioners. Speedy & fair justice is needed in order to establish harmonious and stabilized living for citizens and society to keep working efficiently. Virtual courts are therefore advantageous in order to ensure the fundamental rights to provide access to justice in an expeditious manner. There could be possibilities of similar situations in future, this issue calls for a perpetual mechanism to ensure efficient and smooth justice delivery mechanism.

SC Advocate, Dushyant Dave² believes virtual courts will bring more transparency and will remove corruption and nepotism from the system.³ But on the other hand, he said, "in the present moment we have allowed the entire judicial system to stop breathing and choke people."⁴ This statement suggests that the idea of virtual courts has been accepted, but not been appreciated. In his view, it is believed to be far from satisfactory and deeply disappointing.

The principle of an open court hearing, which originated from the clause 40 of Magna Carta "To no one will we sell, to no one will we refuse or delay, right or justice..."⁵ is defined by the present method. Public access to hearings allows the prevalence of freedom of press and freedom of speech and expression. This core principle of natural justice is derived from Article 145(4) of the Constitution of India,⁶ section 327 of Code of Criminal Procedure, 1973⁷ and section 153B of Code of Civil Procedure, 1908.⁸ The current functioning of virtual courts allows on the interested parties and the advocate to access the proceedings. Does the judiciary have the power to completely abandon the core principle of natural justice without even considering various available alternatives like live streaming of hearings? The apex court directed⁹ that certain matters can be live-streamed, is a global pandemic not an exceptional circumstance where this advancement can be extended to all courts rather than completely doing away with the principle of open courts?

² Bhadra Sinha, Virtual courts system is pathetic, justice not being done: SC Bar body chief Dushyant Dave, The Print, available at <https://theprint.in/judiciary/virtual-courts-system-is-pathetic-justice-not-being-done-sc-bar-body-chief-dushyant-dave/437864/> (Jun. 25, 2020).

³ Ibid.

⁴ Supra 2.

⁵ Magna carta, clause 40.

⁶ The Constitution of India, art. 145(4).

⁷ Code of Criminal Procedure, 1973, s. 327.

⁸ Code of Civil Procedure, 1908, s. 153B.

⁹ *Swapnil tripathi v. Supreme court of India*, WRIT PETITION (CIVIL) NO. 1232 OF 2017.

The fundamental impediment found in the current virtual court infrastructure is a major fallout since it limits the freedom of press and freedom of speech and expression by preventing the public from accessing the proceedings to technical barriers. It was held by the apex court that “public hearing of cases before courts is as fundamental to our democracy and system of justice as to any other country.”¹⁰ It was held that “... A public trial in an 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.”¹¹ Hence, these types of hearings that are of closed nature may be considered as illegal. The pandemic may be considered as an exceptional circumstance and the hearings may be conducted, but this still calls for a more advanced technological approach that provides wider access to the hearing. This is important because an open court hearing ensures that the hearings are free of judicial arbitrariness and public belief in the principle of equality before the law is secured.

The e-court structure allows using documents that are already filed following the e-filing procedure as evidences or submissions during the hearings. Though this establishes a strict procedure in order to dispose of the case in time, it might hamper justice as it prevents further substantial submissions from being made. Therefore, an alternative of either filing additional documents during the hearing or at any other stage should be evolved in order to make sure appropriate justice is delivered by virtual courts amidst pandemic. It is pertinent to note the questionable efficiency was evident in the Kerala-Karnataka border dispute when the counsel for Kerala government failed to appear before the bench due to technical issues (not receiving the meeting link) and thereby failed to provide additional substantial submissions that they could have done in the physical court.¹²

Another concern that attracts attention is credibility. Virtual courts enable examining and cross-examining witnesses situated at different geographical areas but the credibility of these testimonies is questionable. In an open court, the examination and cross-examination receive a touch of higher credibility due to the appearance and feel. The facial expressions, tone, language is assessed in order to assess the credibility of the testimony. The on-screen testimony is, therefore, devoid of the body language, facial expressions, and the tonal changes. This loss of in-person observation deprives the judiciary, and the practitioners the ability to judge credibility. Albeit, these hearings

¹⁰*Naresh Shridhar Mirajkar and others v. State of Maharashtra*, 1967 AIR 1.

¹¹*Ibid.*

¹²Public hearing fundamental to democracy: Lawyers on SC hearings via video conference available at <https://theprint.in/judiciary/public-hearing-fundamental-to-democracy-lawyers-on-scs-video-conferencing-proceedings/405094/> (last visited on June 18,2020).

make sure that the justice delivery system does not collapse altogether. But the risk of On-screen testimonies being tutored cannot be completely eliminated. There is a possibility that the witness is already being given specific answers or has a company that is feeding in the answers. Adding to this, the documents are also possible to be tempered while being virtually shared. These concerns about the credibility of testimony and documents make it difficult to believe that virtual courts are capable of doing any justice. However, using block chain technology, secured servers, and examining under supervision might prove helpful.

Another major concern is confidentiality. In the present structure, third-party software is being used to conduct the proceedings online. It is said that the hearings are not being recorded, but it is important to keep in mind that this software is governed by the privacy policy of the service providers. Hence, in an era where cyber-crimes are the new normal, it is unsafe to telecast sensitive data and confidential documents via third party software which might result in a breach of confidentiality in sensitive matters like divorce, rape etc.

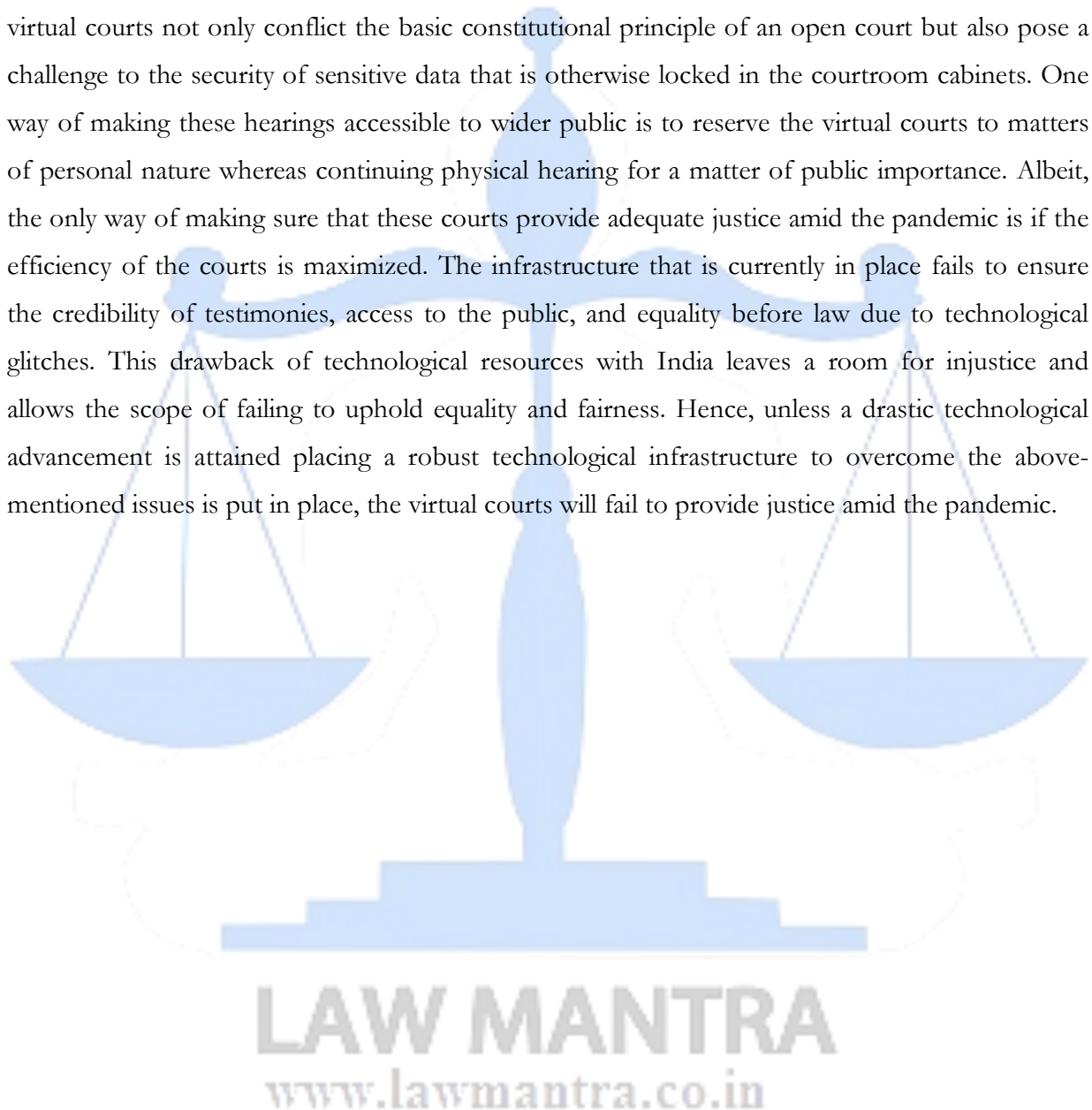
There are other practical concerns like lack of tech-savviness, internet connectivity issues, and limited access. Lack of good internet connectivity poses another hurdle in dispensing justice using virtual courts. It is pertinent to note that, according to 2017 statistics nearly 72% population does not have access to an internet connection.¹³ In order to access justice beyond the physical courts, a secured net connection is a must. Thus, it is evident that justice by this method is accessible only to a handful of people. Neither all geographic areas have high-speed internet nor all can afford such connections in order to facilitate uninterrupted video calling. It is evident from the TRAI data¹⁴ that urban India has a high rate of subscriptions, rural India which stands only at 27.57 of subscriptions per 100 people in 2019. There's also a yawning gap in connectivity between states depending on their network infrastructure and relative affluence. While Delhi and Mumbai assert about 2.20 crore and 1.5 crore Internet connections respectively, the complete North-East region has only about 4.3 lakh connections.¹⁵ It is too far-fetched to believe that such a drastically advanced justice mechanism will be accessible to all. Neither it is accessible equally nor it is easy to be operated by everyone involved in the justice system. The recent graduates and young lawyers are comfortable with the technology but the other lawyers find it difficult to understand the way of operating this software.

¹³ How many Indians have internet? available at <https://www.thehindu.com/business/how-many-indians-have-internet/article17668272.ece> (last visited on May 22 2020).

¹⁴ The Indian Telecom Services performance indicators, available at https://traigov.in/sites/default/files/PIR_08012020_0.pdf (last visited on May 13, 2020).

¹⁵ Virtual courts, a sustainable option? available at <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option> (last visited on June 22, 2020).

Virtual courts are a viable alternative to the endless delays that plague court dockets, but only if they succeed in making courts more efficient.¹⁶ It has been estimated that about 70 percent of all court and law firm business could be handled in an electronic or virtual context.¹⁷ This would help in clearing the backlog of the courts, which is partly due to justifiable reasons and partly the result of unnecessary filings of lawyers for personal benefits. But the question that arises is that these virtual courts not only conflict the basic constitutional principle of an open court but also pose a challenge to the security of sensitive data that is otherwise locked in the courtroom cabinets. One way of making these hearings accessible to wider public is to reserve the virtual courts to matters of personal nature whereas continuing physical hearing for a matter of public importance. Albeit, the only way of making sure that these courts provide adequate justice amid the pandemic is if the efficiency of the courts is maximized. The infrastructure that is currently in place fails to ensure the credibility of testimonies, access to the public, and equality before law due to technological glitches. This drawback of technological resources with India leaves a room for injustice and allows the scope of failing to uphold equality and fairness. Hence, unless a drastic technological advancement is attained placing a robust technological infrastructure to overcome the above-mentioned issues is put in place, the virtual courts will fail to provide justice amid the pandemic.



¹⁶ Edward H freeman, “Cyber Courts and the Future of Justice”, Information Systems Security, volume 14, 2005.

¹⁷Arthur M. Monty Ahalt, “Remaking the Courts and Law Firms of the Nation: Industrial Age to the Information Age,” 31 Texas Tech Law Review, 1151, 2000.