

VIRTUAL COURT ROOMS AND ACCESS TO JUSTICE DURING CORONAVIRUS PANDEMIC

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ABSTRACT

This paper reviews the system of virtual courts which have been put into use in the recent times owing to the COVID-19 pandemic. Specifically, the author has tried to contextualize the current changes brought up in the judicial system of the country. The author has also reviewed the guidelines which were put up by the apex court as well as the modifications and innovations implemented by various courts in response to the pandemic. It focuses on the challenges which are faced by the courts currently because of the shift in the work culture towards the virtual format. These challenges include accessibility of the technology used in virtual courts to the judges, litigants, concerned parties as well as other stakeholders involved.

The paper will also discuss whether the virtual courts violate the open court principle or the possibility of tampering of the evidence through video conferencing. The paper also mentions certain earlier precedents and judgments of the Supreme Court which will help us to gain a better understanding of the issues raised. Some light is also thrown on the worldwide scenario regarding the virtual court system as well as the possibility of continuing this practice in the future. The paper ends by providing a short conclusion and some recommendations which if put into use might enhance and improve the system of virtual courts.

Keywords: Virtual courtrooms, COVID-19, pandemic, video-conferencing, digitization, Supreme Court, Vidyo, Evidence, recording, technology

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INTRODUCTION

At the outset it is important to clarify the meaning of the terms, “Virtual Court Rooms” and “access to justice”. Virtual Court is a concept which was designed with an aim to eliminate the presence of lawyers and litigants in the courtrooms and promote the adjudication of the cases online.²⁵¹ It literally refers to a location where the matters relating to law are adjudicated upon provided the presence of well-qualified judges as well as a highly developed technical infrastructure. It is generally said that this system has the capacity to ensure easy and affordable access to justice. Now, this term “access to justice” can be defined by different people in different ways. In the restricted sense, it refers only to the formal ability of a person to appear in the court.²⁵² But when speaking in a broader manner, it includes the much wider context of our system of courts and the systematic as well as administrative barriers faced by different members belonging to a particular community.

The Covid-19 pandemic has completely disrupted the delivery of justice in a manner which was never seen before. Owing to the compulsions of social distancing as well as the lockdown directives, the courts and tribunals have shut their premises to the public. But since the complete shutdown of the system is undesirable, most of the judicial administrators have sought the help of technology to meet these sudden challenges. The apex Court on 6 April 2020²⁵³ passed certain directions for the manner of conduct of court proceedings through video conferencing. Through this move, the Indian courts have tried to function on the principle, which says *justice must not only be done but also seen to be done*.

Methodology Adopted

A plethora of information is available for the review of this topic as it is a current topic of interest in law and there are chances of it being applicable in the future as well. A lot of published as well as unpublished research papers and journals were used for conducting its research. The archives of trusted libraries as well as other documents were used. A number of earlier precedents are relied upon. Articles and reports of trusted newspapers such as ‘The Hindu’, the ‘Times of India’ and the ‘Economic Times’ were also looked into. The relevance and credibility of various sources were taken into account. The evaluation of resources was done keeping in mind the following criterion:

²⁵¹ Sidhanth Mor, Virtual Courts: The New Normal?, Latest Laws (17 July, 2020, 3:31 PM), <https://www.latestlaws.com/articles/virtual-courts-the-new-normal/>

²⁵² What is Access to Justice?, Alberta Civil Liberties Research Centre (16 July, 2020, 5:45 PM), <http://www.aclrc.com/what-is-access-to-justice>

²⁵³ In Re: Guidelines for Court Functioning through Video Conferencing during COVID-19 Pandemic

- a) How current is the resource used?
- b) Does it align with the questions which are being raised in the paper?
- c) And the credentials of the source's author.

A few researches are also taken from decade long work so as to establish the fundamentals of various concepts such as virtual court system, open court system, access to justice, etc.

CONCERNS RELATED TO ACCESSIBILITY

It can be argued that online proceedings would provide a much wider access to justice as provided under article 39A of the Indian Constitution. But this would only be true if each and every person involved in the case i.e. the litigants, advocates, judges, court staff as well as media is having access to internet and can engage in and understand the proceedings. Though the number of internet users has grown in the recent years and the digital revolution is sweeping in small villages and towns, the digital literacy in the country is still very low. Therefore, the system of virtual courts becomes difficult to adopt.

In India, E-Justice is an important organ of E-governance and the efforts regarding the computerization of courts have been made since 1990 in the form of Mission Mode Projects (MMP)²⁵⁴. E-Courts work as subsets to virtual courts as they are linked with several websites, components and mobile applications used in the functioning of virtual courts. The E-courts project is based on a report of 2005 submitted by the E-Committee of the apex court of India. The objective of the plan is to make the working of courts technologically advanced. The proposed activities under the plan consisted of two phases. Also, under this project, mobile applications like JustIS for judicial officers, eCourt services for the functioning of District and Taluka courts, have been made. Other achievements include websites like e-Filing with the help of which citizens can file their case sitting at home; check the status of the case as well as make the fee payments of the court via ePay facility.

In the current scenario of COVID-19, Courts all across the country have resorted to an online-only, urgent-only mode with email mentions, electronic filing and, in exceptional cases, video calling facilities. In his book, "*Online Courts and Future of Justice*",²⁵⁵ Professor Susskind is of the view that the problem of global access to justice is to be solved by adopting the modern technology. He believes that- "In this digital age, it makes sense if much of the work of courts is conducted online." The notifications which were issued in various courts overnight during

²⁵⁴ Kashyap Joshi, Is it now Virtual Courts v. Open Court System?, Bar and Bench (Jun 5, 2020, 1:34 PM IST), <https://www.barandbench.com/columns/is-it-now-virtual-courts-v-open-court-system>

²⁵⁵ Richard Susskind, *Online Courts and Future of Justice* 1 (2019)

the pandemic demonstrates the fact that the courts can act fast as well as decisively. The courts also open-mindedly adopted the mobile applications like WhatsApp, Vidyo, and Zoom; and were not held back by the backlogs related to the internally developed infrastructure. Shri SA Bobde, the former Chief Justice of India remarked that, “Technology is here to stay”. The Delhi High Court passed bail orders and directed the accused to make a video call to the investigating officer and send pins through google maps. There was another incident where the Kerala Bar Council did the enrolment of the lawyers through online mode.²⁵⁶

DO VIRTUAL COURTS VIOLATE THE ‘OPEN COURT PRINCIPLE’?

In the start of May, the apex court issued a press release which stating that ‘virtual courts are not antithetical to the open court system’.²⁵⁷ In the following week, the court devised an e-filing procedure and a commendable and well-structured *Standard Operating Procedure* (SOP). Before moving further, it also becomes very important to understand the concept of open courts. The Black’s Law Dictionary provides that the open court is a system of courts where the public is given a right to be admitted.²⁵⁸ This idea is crucial to maintain public confidence and trust in the administration of justice.

The Indian Constitution too provides that no judgment shall be given by the apex court other than in the open court. It further prohibits the making of any report under article 143 other than the one in accordance with an opinion delivered in the open court. Section 327, CrPC and section 153-B, CPC makes mandatory open court hearings in all civil and criminal matters. The Supreme Court in *Naresh Shridhar Mirajkar v. State of Maharashtra*²⁵⁹, held that it is a universal principle that every case brought in front of the court, whether criminal, civil or others, have to be heard in open court. In the case of *Swapnil Tripathi v. Supreme Court of India*²⁶⁰, the three judge bench laid down that the open justice principle encompasses within it several aspects which act as a central point to the rule of law and fair administration of justice. The nuances of this principle were adjudicated in English courts as well.

The virtual court hearings had their existence in Indian courts, much before the COVID era. There are several judicial precedents which focus on maintaining privacy and confidentiality

²⁵⁶ Arijit Prasad, Virtual Courts- Can it Replace Open Court Hearings? , Latest Laws (Jun 21, 2020, 1:20 PM), <https://www.indialegallive.com/top-news-of-the-day/news/virtual-courts-can-it-replace-open-court-hearings>

²⁵⁷ Bhadra Sinha, Virtual Courts Won’t displace Open Hearings, but tech has potential: Justice Chandrachud, The Print (May 24, 2020, 9:21 PM IST), <https://theprint.in/judiciary/virtual-courts-wont-displace-open-hearings-but-tech-has-potential-justice-chandrachud/428575/>

²⁵⁸ Indian Const. art. 143

²⁵⁹ *Naresh Shridhar Mirajkar & Ors V. State of Maharashtra & Anr* [1966] INSC 64

²⁶⁰ *Swapnil Tripathi v. Supreme Court of India* (2018) 10 SCC 628

of the parties concerned. The Supreme Court issued certain guidelines in “*Re Guidelines for Court Functioning through Videoconferencing during COVID-19 pandemic*” providing the measures which have to be taken by the courts owing to social distancing. It passed a 7-page order providing the reasons for moving online. It issued the guidelines under article 142 of the Constitution through an extra-ordinary jurisdiction²⁶¹. Also, viewed from every aspect, it will be unfair to say that that the virtual courts violate the open court principle when it is the only option available at the time.

EFFECT ON COLLECTION OF EVIDENCE

Through the process of video-conferencing, a lot of change took place even in the recording of evidence. Following is the procedure of recording evidence through virtual courts:

In case any witness has to be examined, the presiding officer has the power to appoint any official, whether it is oath commissioner/notary or court assistant as the coordinator at the remote point. The official ensures the minimum requirements for the purpose of video conferencing as well as the availability of the person to be examined. The same official at remote point also needs to that entry into the room is regulated and no other device than the camera is present in the room. The identity of the witness is confirmed with the help of the official at the time of recording. The procedure for this confirmation is different in civil and criminal courts.

Then, the evidence is recorded in writing at court point and is to be read to the witness at the time of proceedings to obtain his confirmation. The transcription of the recorded evidence is sent to the parties via an email. It may happen that the party is allowed to have a view of the master copy of the recording (audio video) on the filing of an application which has to be decided by the court taking into consideration the interests of justice. The recording needs to be downloaded by the Registrar soon after the proceedings. The court keeps a record of it in the form of an encrypted master copy. Another copy is retained at another safe location so that it can be used at the time of emergency.²⁶²

The Delhi High Court in *Tuncay Aluncas v. CBI*²⁶³ permitted the recorded of evidence through video-conferencing, the necessary corollary being that law can assimilate changes in the

²⁶¹ Sidhanth Mor, Virtual Courts: The New Normal?, Latest Laws (17 July, 2020, 3:31 PM), <https://www.latestlaws.com/articles/virtual-courts-the-new-normal/>

²⁶² Shambhu Sharan, Ambika, Recording Evidence by video conferencing, Lexology (June 23, 2020), <https://www.lexology.com/library/detail.aspx?g=a5002b89-1e19-4567-b5b8-b5fba1cf388c>

²⁶³ 2005 (3) AD (Del) 682

required technology so that the progress of society is in tune with the reality. There is a need to look into constitution and existing laws for the challenges that arise due to technological innovations. This dynamic has to be kept in mind while interpreting these laws. The apex court in *Milano Impex Private Ltd v. Egle Footwear Pvt. Ltd*²⁶⁴ made an extensive examination of various high court decisions in *Mrs. Gurnaam Kaur v. Pritam Singh Bhatia*²⁶⁵ and *Twentieth Century Fox Film v. NRI Film Production*,²⁶⁶ and at last permitted evidence recording via video conference. The Andhra Pradesh High Court, in the case of *Munnuru Shobha v. S. Mohan Rao and Ors*²⁶⁷ laid down certain guidelines for the recording of evidence through video-conference or skype.

WORLDWIDE SCENARIO

On April 24, Chief Justice of Singapore made an announcement regarding an extension of the virtual hearing to June 1, 2020 during which only urgent matters would be heard. On that same day, the Supreme Court, high courts as well as the family justice courts issued registrar's circulars on the extension. These important and urgent matters will be possibly heard using electronic means of communication. In Singapore, it is on the court's discretion to decide whether to conduct proceedings via video-conferencing in a physical manner in the court premises. If any issue is being faced by the solicitors, then they may write to the court within two days. Unauthorized audio or video recordings of the hearings are not allowed. The place where hearings are conducted through online mode, all court practices on dress as well as etiquette shall be applied. For many weeks, the courts there conducted majority of the hearings through remote communication technology such as Zoom.²⁶⁸

Since the beginning of the pandemic, in-person proceedings in the court have been limited to just 10 people. The local courts have been granted the permission to conduct hearings remotely starting from April 1. In Michigan, the residents can watch the court the proceedings of the court from their home using the new virtual Courtroom directory. It is a web page which has been launched by the Michigan Supreme Court so that they may search the virtual court

²⁶⁴ 2012 (188) DLT 202

²⁶⁵ CS (OS) No. 1350/1995

²⁶⁶ AIR 2003 Karnataka 148

²⁶⁷ MANU/HC/0498/2018

²⁶⁸ Laney Zhang, Singapore: Singaporean Courts Hear Only Essential and Urgent Matters During COVID-19 Outbreak, Largely through Zoom, Global Legal Monitor (May 1, 2020), <https://www.loc.gov/law/foreign-news/article/singapore-singaporean-courts-hear-only-essential-and-urgent-matters-during-covid-19-outbreak-largely-through-zoom/>

hearings by the name of the country, or the judge or hearing officer.²⁶⁹ Chief Justice Bridget M. McCormack mentioned in a statement that he was very proud of the country's commitment to innovation that is helping in transforming the judiciary, expanding the access of justice as well as strengthening democracy.

European Union too has a very strong set of existing practices relating to virtual courts. Austria has a centralized booking system for all the national courts for the purpose of video conferencing. This makes it possible to make direct bookings for the seats in courtrooms having the video conferencing equipment. Similarly, Finland too started installing various kinds of equipment so that the proceedings could take place in a virtual scenario. For the court sessions, there lays a complete set, having high definition HD quality pictures in cameras as well as screens. A separate set of meeting rooms is available for conducting preliminary hearings. For the purpose of hearing witnesses, a basic set consisting of camera, terminal and microphone does the work.

In United Kingdom, simultaneous interpreting system, is occasionally been inserted inside the video conference equipment so that it can be used in the proceedings where a number of people speak a foreign language. In the case of proceedings of the administrative court, the interpreters are involved via a video-conference link for the purpose of reducing courts. The virtual courts, when serving as a video link between the court and a police station, have made it easier to complete the first hearings within 2-3 hours of the charge in simple cases. It also has the potential to hear an impressive number of first hearings the same day. Speed of this process is an asset, especially in the cases dealing with domestic violence and there are expectations that a large number of witnesses and victims will receive even more accountable service.

THE WAY FORWARD

“Opportunities are found in adversity”, is a saying which is being realized a lot these days. The pandemic has given way to the digitization of courts, even without looking into its advantages or disadvantages. But, anyhow steps need to be analyzed and evaluated for securing the ends of justice without disruption. Various threats related to video conferencing in apps such as Zoom have come up in the recent days. Some of them are as follows:

²⁶⁹ Lauren Gibbons, Michigan residents can watch court proceedings across the state from their home with new virtual directory, MLive.com (May 19, 2020), <https://www.mlive.com/public-interest/2020/05/michigan-residents-can-watch-court-proceedings-across-the-state-from-home-with-new-virtual-directory.html>

- *Zoom Bombing*: in this, the hackers infiltrate into video meetings, usually shouting racial slogans and threats. This happens because of zoom meetings are accessible only to a short number-based URL, which could be easily generated or guessed by the hackers.
- *Keystroke recording*: it is not at all difficult for a skilled hacker to retrieve passwords by conducting a study of our keystrokes. This means that someone might view the way you type your information.
- *No end-to-end encryption*: Zoom has given a false advertisement of itself saying that it uses end-to-end encryption which is a system that provides security to a communication so that it is only read by the users involved.²⁷⁰

Since late March, 2020, efforts to this transition to the virtual environment have been provided aid by various NGO's such as the National Association of Court Management, the National Centre for State Courts, the Justice Management Institute and the Council on Criminal Justice. All of them seek to mitigate the pandemic's impact on the courts' administration of justice. The activities included sharing online resources that as well as conducting webinars to provide assistance to the courts and making them aware of the best practices and strategies for operating in the current environment. Though the courts' commitment to justice is laudable, a variety of challenges are being posed to the court personnel, parties as well as the general public.

CONCLUSION AND SUGGESTIONS

Most of the courts are not able to meet the safety guidelines when maintaining full operations or usual caseloads. Also, it is without a question that a pandemic will have a significant impact on the substantive and procedural part. Thereby, there must be an anticipation of a range of situations and issues which may arise as well as the means to properly address them must be devised. While doing so, the court must concern itself with the particular issue of minimal support from agencies essential to court operations. For example,

- The available staff from public defender, prosecutor, parole and probation officers, etc. will get severely reduced. The active participation of these agencies is required for achieving a successful emergency plan.

²⁷⁰ By ET Online, Zoom Video-Conferencing App is not a safe Platform, Home Ministry cautions Users (Apr 29, 2020, 11:54 AM IST), <https://m.economictimes.com/tech/internet/zoom-video-conferencing-app-is-not-a-safe-plarform-home-ministry-cautions-users/articleshow/75181094.cms>

- The court must engage in employing technology such as public access to computerized information systems, televised court proceedings as well as simultaneous court transcription for providing participants.
- The court shall review alternate court sites or some other means through which it can communicate with the court participants.
- The need for recordkeeping must be recognized so as to preserve the integrity of existing records and the ones created in the course of ongoing court activities.
- It would be of great help if the ongoing information to the public is sorted. There are chances that the typical manner of communication will be disrupted during such a crisis. Therefore, it is important to have a proper system of internal communication to minimize confusion. Such information is to generated by the court leadership and be consistently communicated by a single person representing the court. It is equally important to develop a line of succession for the court spokesperson position.

So, basically after analyzing all the points in such a detailed and comprehensive manner, one thing which can be said with surety is that every crisis does bring a new opportunity. That is the opportunity to upgrade ourselves and boost our immunity to the hindrances which we might face in the coming times. Similar is the case with the system of virtual courts. There are various reasons as to why has still not developed a full-fledged system of virtual courts such as the lack of updation of National Judicial Data grid (NJDG), and thereby defeating the purpose of accountability in the country's judicial system.. Also, most of the times, we tend to separate the court system from our legal fraternity which includes, litigants, judicial officers, and every staff member working in this arena. This is because for the development and improvement of one system, it is imperative that the others upgrade themselves.