

Editorial

COURTS IN COVID-19:

EFFECTIVE JUSTICE IS VACCINE FOR VIRUS OF INJUSTICE

Justice delivery is as important as recovery from the virus. Like medicine, the timely justice is also highly essential. Various angles of justice delivery were deliberated in different articles.

During Covid19 lockdown, the justice delivery was truncated, delayed and access to justice became difficult, or sometimes impossible. The pendency and dockets exploded. The courts at higher level functioned like vacation courts, with limited hearings of urgent matters. Video conferencing with e-filing to avoid physical congregation and follow social distancing was adopted.

Virtual hearing in place of public hearing has cut down the huge time and travel costs of middle-class & poor clients. Though a great relief, it is associated with many disadvantages such as (a) most of the judges and lawyers are not well acquainted with technique and process, (b) the technical controls in some other's hands, (c) not verifiable because not recorded and accessible, and (d) if disconnected accidentally, or deliberately, one side may go unrepresented.

The virtual hearing is confined to apex court and a few High Courts, not fully extended to all the courts. The Jammu & Kashmir was under double lock-down (Article 370 and coronavirus), the 4G internet service was blocked, because of which Kashmiris could not secure their fundamental rights. This shows that the real control over technology is in the hands of Executive making internet-justice is un-independent. As virtual hearing does not allow people in general to watch proceedings, it will also seriously affect another principle- Openness of Justice or Public Hearing.

Government, people and courts also should have considered justice as essential service. Though all services were opened, paradoxically the first to unlocked was liquor flow, and justice was nowhere in the list of priorities

Background of virtual courts

While 60-day- lockdown rigour being relaxed, justice remained a non-essential service! The Supreme Court and the High Courts are hearing some urgent cases only through video conferencing. District and subordinate courts are mostly closed for two months. Regular justice is not being rendered. Can courts be replaced with virtual court? Is virtual court equal to real public hearing?

There are two major challenges to video justice. First, whether justice system sustains basic norm of openness. Second, will it make independent judiciary dependent upon technology, where the Internet is controlled by political Executive and the switch is remotely controlled by non-judicial bureaucracy. This is an attempt to discuss these two threats.

On May 3, the Supreme Court, in 38-page note, strongly defended its "virtual courts system", as that was needed to ensure the "administration of justice" does not crumble in the face of a pandemic¹. The advantages of the Virtual Court System, especially in terms of time, energy and money saved by the litigants and counsels in ensuring their presence before a court are innumerable and could be game-changers too," it said.

Referring to almost 23 countries like the USA, the UK and France, the SC said many nations have been using the virtual courts system, but India has been ahead in terms of the output. "Information available on court and other judicial websites would indicate that in nations hit hard by the COVID-19 pandemic like the USA, UK, EU, France, Italy, Germany, China, Canada, Australia, Singapore etc,

¹ Press Trust of India, SC defends 'virtual courts system' during COVID-19 pandemic, says it ensured justice, available at <https://www.newindianexpress.com/nation/2020/may/02/sc-defends-virtual-courts-system-during-covid-19-pandemic-says-it-ensured-justice-2138432.html>

judicial organs of the state carrying out administration of justice are mostly relying on virtual court methodologies and online case-management in place in their respective jurisdictions," it said.

SC does not allow recording or broadcast

Many advocates are not comfortable with e-filing. The SC directed the helpline of 1881 to be functional to help advocates in e-filing and virtual hearing. However, the proceedings by video conferencing is not allowed to be recorded or stored or broadcast, in any manner whatsoever, as recording/copying/ storing and/or broadcasting, by any means, of the hearings and proceedings before the apex court are expressly prohibited”.

The video hearing has been criticised by some quarters that the system does not adhere to the concept of "Open Courts". Lawyers have complained that they are facing varied problems from sending a PDF file of their applications to convincing the judge of the urgency of the matter and address their arguments through video link. In response this criticism, the SC note said the virtual courts system cannot be said to be negating the principles of fairness that are sacrosanct to the administration of justice nor is it failing to adhere to requirements of an 'open court' system”.

Sanjay Hegde, Senior Advocate, SC, in his article² called *Vidyo*, as infamous SC videoconferencing app. He narrated the experience and what he witnessed proceeding on migrant labour issue, saying ‘it was simply an isolated court, dealing with the matter in a routine way, a habit learned from a time before Covid-19’. He felt that never SC has socially distanced itself from the powerless. Sanjay narrated a hearing where the microphone of the petitioner lawyer was muted and locked out of hearing. In that PIL about migrant labour, the Bench imposed

² Social Distancing from the powerless, in the Hindu, dated May 19, 2020, page 6

costs of Rs 1 lakh to deter further arguments, later, Sanjay overheard that presiding judge instructed steno to delete costs. How can justice happen if voice is disconnected like this?

The Supreme Court in its note disclosed that it would hear urgent and all cases through video allowing the media as representative of the public to access and watch such proceedings. If this kind of video hearing be extended to all other courts, building technological capacity and giving controls over it to Judiciary is essential. Virtual hearing is an alternative during COVID19 type emergencies to maintain social distancing. This should be an additional mechanism if physical or financial distance of justice seeker is obstructing his access.

Former Judge of Supreme Court Justice BN Srikrishna advocated use of Article 141³ and 142⁴ for regularizing virtual hearing. This does not mean sacrificing the basic norm of open hearings. He said that it is time for India to think of virtual courts to take some pressure off the swamped justice system and ensure better outreach to people in far-flung areas⁵.

³ Article 141 says: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

⁴ Article 142 of Constitution of India "Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc" (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

⁵ Deblina Dasgupta, Lessons from Covid-19: Time for India to Think of Virtual Courts to Take Pressure off Justice System, Says Justice Srikrishna

‘Openness’ of Open Trial?

Jeremy Bentham said:

“publicity is the very soul of justice..... It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.”⁶

The principle of openness of judicial proceedings is also internationally recognized, of course, with certain important qualifications. Article 14(1) of the International Covenant on Civil and Political Rights incorporated right of everyone to fair and public hearing. Only on reasons of morals, public order or national security in a democratic society, to the extent necessary the press and public may be excluded from all or part of trial.

Australian Law Reform Commission

The Australian Law Reform Commission in its Report 127⁷ on ‘Traditional Rights and Freedoms – Encroachments by Commonwealth Laws’ emphasized that open justice remains one of the fundamental attributes of a fair trial⁸. It is fundamental rule of the

(11 May 2020) available at <https://www.news18.com/news/india/lessons-from-covid-19-time-for-india-to-think-of-virtual-courts-to-take-pressure-off-justice-system-says-justice-srikrishna-2615673.html>

⁶ Garth Nettheim, *The Principle of Open Justice*; 8 U. Tas. L. Rev. 25 (1984-1986) available at Justice<https://heinonline.org/HOL/LandingPage?handle=hein.journals/utasman8&div=9&id=&page=>

⁷ Australian Law Reform Commission, *Open Justice*, available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/10-fair-trial/open-justice/>

⁸ Open justice is ‘a fundamental aspect of the common law and the administration of justice and is seen as concomitant with the right to a fair trial’: Jason Bosland and Ashleigh Bagnall, ‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12’ (2013) 35 *Sydney Law Review* 674.

common law⁹ that the administration of justice must take place in open court. The rationale of this rule is that the court proceedings should be subjected to public and professional scrutiny and courts will not act contrary to the principle save in exceptional circumstances¹⁰. In *Russell v Russell*, Gibbs J said without public scrutiny, ‘abuses may flourish undetected’. Gibbs further says:

Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for ‘publicity is the authentic hall-mark of judicial as distinct from administrative procedure’. To require a court invariably to sit in closed court is to alter the nature of the court.

Jason Bosland and Ashleigh Bagnall have written that this ‘longstanding common law principle manifests itself in three substantive ways’:

*[F]irst, proceedings are conducted in ‘open court’; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.*¹¹

⁹ *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

¹⁰ *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹¹ Jason Bosland and Ashleigh Bagnall, ‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12’ (2013) 35 *Sydney Law Review* 674.

Exceptions to open court rule

At the same time, one should know that it is not an absolute right. This principle may be limited to protect secret technical processes, an anticipated breach of confidence, the name of the victim of black mailer, the name of police informant or the identity of an undercover police officer and national security¹².

Similar exceptions are prescribed in Article 14(1) of the ICCPR, which says:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The real open trial has suffered because of space and security limits. The entry is limited, screened and based on permission of authorities. Still either of the parties, their counsel and witnesses can watch each other's actions and words. The presence of media or any other person also makes the scrutiny purposeful. When the court switches over to video conferencing between two places separated by distances, there is every possibility of closure of openness. Limited presence of media and others may not make it fully transparent. If remote and virtual hearing is inevitable, only thing that ensures the transparency is live streaming of the proceeding world over.

¹² See *Hogan v Hinch* (2011) 243 CLR 506 French CJ.

Broadcasting of court proceedings

The Supreme Court ruled in 2018¹³ that proceedings of cases of constitutional and national importance should be broadcast to the public. When some petitioners, arguing that such public broadcast would further the principle of open justice and open courts, the Supreme Court agreed and held that the ability to view live broadcasts of the Supreme Court proceedings flowed from the right of access to justice in the Constitution, but said that this right should not be absolute and provided a set of Model Guidelines which should govern the courts' discretion on when such broadcast should be used¹⁴.

Right to publish court's proceedings

This is based on another decision of the Supreme Court in ***Naresh Shridhar Mirjkar v. State of Maharashtra***¹⁵ holding that article 19 of the Constitution included the right of journalists to publish reports of court proceedings. The SC explained efficacy of open hearing:

“20..... It is well-settled that in general, all cases brought before the Courts, whether civil, criminal, or others, must be heard in open Court. 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. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad

¹³ Swapnil Tripathi v Supreme Court, <https://indiankanoon.org/doc/43629806/>

¹⁴ <https://globalfreedomofexpression.columbia.edu/cases/tripathi-v-supreme-court-india/>

¹⁵ [1966] 3 S.C.R 744

proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court room.

Jerome Bentham¹⁶ observed:

“In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity”

The Supreme Court further said in its 1966 decision:

Indeed, the right of access to justice flowing from Article 21 of the Constitution or be it the concept of justice at the doorstep, would be meaningful only if the public gets access to the proceedings as it would unfold before the Courts and in particular, opportunity to witness live proceedings in respect of matters having an impact on the public at large or on section of people. This would educate them about the issues which come up for consideration before the Court on real time basis.

Constitutional foundation of open court

The Article 145(4) of the Constitution of India says that such pronouncements shall be made in open Court. It says, ‘No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open court’.

¹⁶ Scott v. Scott [(1911) All. E.R. 1, 30]

The “open Court hearing” can be traced to Section 327 of the Code of Criminal Procedure, 1973 (CrPC) read thus:

“327. Court to be open.- (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them”.

This is followed by a provision for exceptions.

In Tripathi case, SC said: “Indubitably, live streaming of Court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of Courts; and would also provide them with a more direct sense of what has transpired”.

The Advisory Council of the National Mission of Justice Delivery and Legal Reforms on 26th noted that audio video recording of Court proceedings was proposed in the Policy and Action Plan Document for Phase II for the e-Courts Mission Mode Project.

Recording of Courts in foreign countries

Australia High Court allows the recordings of all full-court hearings and publishes it on its website, since 2013 retaining. Australia permits photos to be taken inside courtroom, when not in session for private purposes. It's quite understandable that Australia has expressly banned Audio video recording by private parties and imposed restrictions on re-broadcasting. Access is allowed subject to certain conditions.

China allows live streaming and recorded broadcasts of court proceedings across judiciary from the trial court right up till the Supreme People's Court of China. England's Supreme Court allows

media to broadcast court proceedings and hearings, which are live streamed and recorded that was a crime of contempt of court till 2005. The ECHR allows for broadcast of court proceedings, as a corollary of its court rules that say all hearings are public.

Germany has passed legislation allowing live broadcasting of court proceedings in the Federal and Supreme Courts, although actual instances of such broadcasts are rare because of strict restrictions imposed by that legislation. The ICC allows for live streaming of its proceedings with a 30-minute delay to allow for any necessary redactions of confidential information.

International Criminal Tribunal for the former Yugoslavia (ICTY) made Court proceedings available for viewing on their website. Supreme Court of Ireland (Northern), New Zealand, Scotland, South Africa and Israel allows live streaming, but Supreme Court of USA does not.

What is to be done?

The Supreme Court of India noticed that publication of its court proceedings is a facet of the status of SC as a Court of Record by virtue of Article 129 of the Constitution, whose acts and proceedings are enrolled for perpetual memory and testimony.

Finally, the bench of Dipak Misra CJI and AM Khanwilkar approved saying live streaming of court proceedings in the prescribed digital format would be an affirmation of the constitutional rights bestowed upon the public and the litigants without violating the dignity and majesty of the Court. It suggested framing of relevant rules expeditiously.

In its recent note the Supreme Court stated that recording of proceedings should be according to court's own decision and

notification. Does it mean that every time the court must spell out reasons for not recording and for not giving access?

Live broadcasting or recording with provision of access will ensure transparency that enables public hearings in virtual courts. Transparency through publicity improves the objectivity of video conference hearings. To conclude on the first part of article:

- a) Replacing the real courts with virtual hearing is not possible and not welcome also.
- b) There is no constitutional or legal obstacle to adopt video hearing technology.
- c) Video hearing need to be adopted to avoid injustice resulting from lack of physical access due to expense and distance.
- d) To avoid complaints, there should be recording of proceedings with access to it for review, if not live-web-streaming/broadcasting of the proceedings.
- e) The SC should consult experts and stake holders including Bar Council of India to make virtual hearings more open, accessible, web-live-streamed and transparent.

Internet and Independence of Judiciary

First challenge - whether justice system sustains basic norm of openness was discussed in first part. Second challenge- will it make independent judiciary dependent upon technology, where the switch is remotely controlled by non-judicial bureaucracy is examined in this part.

The Virtual Courts in COVID19 days, serious threat to justice through virtual hearings is the real political control over the internet technology. The burning example of the *en mass* denial of rights through banning the internet in Jammu and Kashmir.

If the virtual hearings should happen in every court during and post Covid19 days, all stake holders should have enough bandwidth on internet, besides having proper connectivity.

The SC communication on May 3, says that since smooth functioning of the video conference is squarely dependent upon and subject to the connectivity (signal-strength/bandwidth) available at the end of the remote user(s), and hence it is expected that any party joining a video-conference hearing shall ensure robust connectivity and bandwidth are available at their end – in this regard, parties may also ensure that no other device or application is connected to or using the bandwidth when the hearing by video conferencing is progressing on the video enabled computer”.

Executive controls

While TRAI is a regulator of internet communication, the complete control over technology is in the hands of political Executive, which factor is proved in the present-day status of Jammu and Kashmir. The 4G connectivity of internet is taken away by the Union Government citing the need to control terrorism. With the lack of 4G enabled connectivity, the victims of abuse of power in J & K are not able to seek justice by enforcing Article 32, which is not specifically suspended today. It is not possible to have hearing on their habeas corpus petitions in the Supreme Court from J & K, which is under lockdown since 5 August 2019.

This ban on high-speed 4G internet has resulted in additional difficulties in hearing of cases through video conferencing. On April 28, a bench had to adjourn a case “on account of poor connectivity” and “non-availability of proper video conferencing facility¹⁷”. Ban

¹⁷ Sofi Ahsan, Despite internet issues, court has done well during Covid crisis: Chief justice of J&K High Court, 17th May 2020 available at <https://indianexpress.com/article/cities/chandigarh/despite-internet-issues->

imposed by the Union government is the real control that could deny the access to justice.

Is Article 32 suspended?

It is unconstitutional to deny any person from using Article 32. If a Bench of HC or for same reason, if the SC cannot connect to petitioner in Kashmir or his advocate, its serious interference with the judicial functioning apart from denial of constitutional rights of the people without any formal suspension. Its atrocious. Several habeas Corpus petitions and PILs from Kashmir could not be taken up because of this technology denial.

Chief Justice of J & K Gita Mittal said in a webinar recently: “Now I had to hear lawyers and parties-in-person sitting in Srinagar as well as in Jammu. So, on any particular day of hearing, I have at least 15 parties in the matter — so I have about 8 people on the screen before me and all the others who have difficulties in hearing are joined either by video call or WhatsApp call or on a landline. I have had to innovate but we have done very well in Jammu & Kashmir”. She also had hearing matters over phone calls. Justice Mittal also said that people also need to talk about trials courts in context of virtualisation of courts. The CJ further explained: “That is where justice has to be delivered and that is where the common man and woman go first for justice. That is where there is a huge infrastructure deficit.¹⁸” Thus, political denial and infrastructure deficit stops justice from reaching the needy whether during or after Covid19.

court-has-done-well-during-covid-crisis-chief-justice-of-jk-high-court-6413540/

¹⁸ Ibid.

The Supreme Court accepted that the government has violated its order in *Anuradha Bhasin case*¹⁹, but unfortunately did not apply the relevant principles laid down in that case. It has spelt out its decision upon the constitutional validity of the internet suspension but asked a “Special Committee” – composed of members of the executive to take appropriate decision²⁰.

Besides the democracy, life, civil liberties, the judicial functioning will also become totally dependent upon the decision of that Government’s Special Committee on internet restrictions in J & K.

Two norms of *Bhasin case* not followed are: a) the minimal requirement for any suspension order to be lawful is that it must list the reasons for imposing restrictions, b) any restrictions on the freedom of speech must satisfy the “proportionality” test – which means the restrictions must be a proportionate response to the aim sought to be achieved through the restrictions.

Thus, this is a judiciary vs executive challenge that could prevent ‘independent’ judiciary from discharging constitutional obligation without clearance from the Government. One important state is suffering because of the ban on internet.

The Private Schools Association, Jammu & Kashmir (PSAJK) filed a PIL contending that the lack of 4G connectivity for internet in Jammu and Kashmir is infringing the fundamental right to education. The PSAJK is an association of over 2,200 schools and the plea has been preferred challenging Government Orders dated 18.01.2020,

¹⁹ *Anuradha Bhasin vs Union Of India*, WRIT PETITION (CIVIL) NO. 1031 OF 2019 (10 January, 2020)

²⁰ Good Analysis of this judgment can be accessed here: <https://indconlawphil.wordpress.com/2020/05/11/the-supreme-courts-4g-internet-order-evasion-by-abnegation/> 11 May 2020

24.01.2020, 26.03.2020 and 03.04.2020 which led to the imposition of restriction(s) on Internet Speed²¹.

A web portal news magazine commented: 2G internet was first restored in parts of the region on January 14, but only “whitelisted” sites were permitted to be accessed over the network. The number of whitelisted websites was gradually increased through the seven subsequent orders, until all websites were finally made accessible over 2G on March 4. Is it not similarly possible to selectively allow 4G access to some websites while permitting 2G access to others?²²

While this situation is specific to Kashmir, generally the ‘control’ over the technology really decides the judicial process, which is not constitutionally acceptable. The ‘ban’ has its repercussions in Supreme Court. Even if the apex court lists a PIL or Habeas Corpus petition, it cannot hear because of this denial of internet and the person in illegal incarceration will have no remedy. This atrocious power in the hands of technology is cause of wholesale or bulk denial of human/Constitutional rights of the people in Kashmir.

Should we allow internet controller to control the justice delivery? Besides this, non-availability of required broadband speed or bandwidth or 2G or 4G enabled net connectivity will also control the access to justice.

Capacity to use technology to access the Supreme Court in Delhi is either deficient or connectivity is distributed across the nation unequally. In February 2018, the average broadband speed of fixed-

²¹ Monitor News Desk, Lack of 4G internet ‘dismantles’ Right to Education, PSAJK petition in SC(April 10, 2020)<https://www.thekashmirmonitor.net/lack-of-4g-internet-dismantles-right-to-education-psajk-petition-in-sc/>

²² Shrutanjaya Bhardwaj, Supreme Court Verdict on 4G in Jammu and Kashmir Undermines the Rule of Law, 14th May 2020 available at <https://thewire.in/law/supreme-court-4g-jammu-and-kashmir> 14 May 2020

line connection in India was 20.72 Mbit/s, which is less than the global average download speed of 42.71 Mbit/s²³. In terms of mobile internet speed, India performed quite poorly, with average speed of 9.01 Mbit/s when compared with global average mobile broadband speed was 22.16 Mbit/s.

As of December 2017, according to Internet and Mobile Association of India, the Internet penetration rate in India is one of the lowest in the world and only accounts for 35% of the population compared to the global average internet penetration is over 54.4%²⁴. Another issue is the digital divide where growth is biased in favour of urban areas; according to December 2017 statistics, internet penetration in urban India was 64.84%, whereas internet penetration in rural India is only 20.26%²⁵.

Supplement, should not supplant

Even after normalcy in post-Covid19 times, this technology should be allowed to remove disadvantages of geographical distance-based inaccessibility as supplemental tool. At least in substantive number of cases the unending orality should diminish, and new norm of precious written submissions should prevail. By minimizing

²³ PTI, India ranks 67th in fixed line, 109th in mobile broadband speed: Ookla (26th March 2018) at <https://economictimes.indiatimes.com/tech/internet/india-ranks-67th-in-fixed-line-109th-in-mobile-broadband-speed-ookla/articleshow/63471893.cms>

²⁴ Surabhi Agarwal, Internet users in India expected to reach 500 million by June: IAMAI (28th February 2018) <https://economictimes.indiatimes.com/tech/internet/internet-users-in-india-expected-to-reach-500-million-by-june-iamai/articleshow/63000198.cms>; Internet Usage in India, <https://www.internetworldstats.com/stats3.htm>

²⁵ Surabhi Agarwal, Internet users in India expected to reach 500 million by June: IAMAI (28th February 2018) <https://economictimes.indiatimes.com/tech/internet/internet-users-in-india-expected-to-reach-500-million-by-june-iamai/articleshow/63000198.cms>

crowding, wastage and dirt, the courts can reduce the transmission of any infection.

Another ground that makes it impossible to replace real with virtual courts is that with the control, the judiciary may have to lose complete independence over its constitutional functions under Article 32.

The political bans and restrictions on the internet utility service provision in general, on one hand, and specific power of Court Master or some such officer to control the microphone while hearing the case through video, on the other, will make it impossible to render satisfactory justice to both the parties of litigation.

Like a speaker of Lok Sabha or anchor of private tv channel no authority should cut the microphone of a lawyer while arguing his case. In physical hearing of the case, a lawyer can see his rival advocate's movements, observe modulations, can interfere and highlight a point with strong emphasis, which can be easily put off by switching off the entire link.

An advocate from Chennai said while he was representing a case in Supreme Court, through video from his office, to defend a favourable order of Madras High Court, the link was snapped at Delhi end. After counsel for one respondent presented his case, others were waiting for their turn, but the judge 'stayed' the order, without hearing others, by disconnecting the link. This is the problem, if you switch over to virtual hearing, switch off by someone is the real threat to justice. Such a snap or slap cannot happen in real hearing'.

If anchor like Arnab kind puts off the mike of a discussant of a tv channel, who doesn't agree with his view, damage may not be serious. If an opposition leader's mike is snapped while he was criticising the

Government, there could be some damage. But if a court's non-judicious officer snaps the mike, advocacy suffers, and justice denied. Courts should follow the principle of natural justice – *audi alterum partem* = hear the other side. Virtual Courts are expected to be different from and above the level of a private tv channel.

Though hearing through video conferencing is an emergency-substitute to real hearing, if it completely replaces it will rattle with this dependency. Even if it is adopted as a supplement, these threats should be removed. Viral tragedy should not be allowed to make justice a casualty in virtual court. Without freeing internet-bandwidth from clutches of state or private hands, judiciary cannot depend on it. To conclude the second part:

- a) Virtual hearing cannot replace the court room hearings, without establishing infrastructural equality in terms of internet connectivity and bandwidth, removing the disparity of technology haves and have-nots.
- b) Hearing through video conferencing could be an additional or supplementary as that cannot supplant existing real process of public hearing.
- c) Even for hearing through video conferencing, the judiciary must have complete control and it should not be dependent upon the Political Executive for permission or allowance to use technology for access to justice either during normal days or Covid19 days.
- d) Political ban on internet will seriously undermine judicial independence and deny the people the fundamental right to use Article 32, which is the heart of Indian Constitution and imaginative creation of Dr B R Ambedkar. The ban on

Jammy & Kashmir is a blot on democracy as that snaps several fundamental rights including article 32.

- e) Non-judicial officer's control over video conferencing could result in denial of principles of natural justice and end up without hearing the two sides. This has to be completely prevented. If not, it will become ridiculous tv debate where anchor will not allow other point of view, or debate in legislature where speaker prevents opposition from speaking.

About this Journal and Contributors

When we proposed publishing a journal on impact of Corona Virus on Judiciary during 2020, response from students was good. Following is brief account of authors and their ideas in brief. I appreciate their enthusiasm, hard work and articulation in these articles.

Jayanta Boruah and Sarthak Aryan in their article on ***“Impact of CVOID-19 on the Justice Delivery System for Legal and Illegal Migrants of Assam”*** attempted to understand efficiency of the justice delivery system in dealing with the plight of such migrant workers and will also try to find out certain possible solutions to this issue. Due to lockdown, these illegal immigrants have lost their livelihood too and with the ever-growing ethnic tensions in Assam, their survival is becoming harder every passing day. After the final citizenship draft, some of them were declared as suspected foreigners and were sent to detention camps where living conditions are alleged to be inhumane. The government of Assam is facing several crises at currently. They suggested: “The government needs to attract more investment and industries from outside by labor reforms, tax benefits, incentives, and reform towards ease of doing business in

India²⁶. The rights of the labor and union should also be kept in mind by the government while reforming labor laws.²⁷ Law reforms at both the Center and State level will be required to tackle the labor crisis and immigrants' issue especially in the case of Assam.

Issues of Video Conferencing

The Article by Kush Kalra and Surya Saxena ***“Functioning of Courts and Justice Delivery in India During COVID-19 Pandemic”*** found the video conferencing is an advancement in science and technology which permits one to see, hear and communicate with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. They wrote: Faced with the unprecedented and extraordinary outburst of a pandemic, it is essential that the courts at all levels react to the call of social distancing and make sure that court premises do not contribute to the spread of the virus. This is not a matter of discretion but a duty. Indeed, Courts throughout the country, particularly at the level of the Supreme Court and the High Courts have employed video conferencing for dispensation of Justice and as guardians of the Constitution and as protectors of individual liberty governed by the Rule of law”. They concluded that while corporations can benefit heavily from private and public online dispute resolutions systems, courts especially at district level still require a breakthrough in making the first point of judicial contact with general public more accessible and seamless during pandemic-like situations.

²⁶ Rishi Ranjan Kala, Thrust continues on ease of doing business reforms, Financial Express (May 18, 2020, 11:44 AM), <https://www.financialexpress.com/economy/thrust-continues-on-ease-of-doing-business-reforms/1962262/>.

²⁷ Alok Rajan & Ishani Tikku, Labour Reforms Necessary, But Hold No Meaning If They Take Away Labourers' Rights, Outlook India (May 21, 2020, 11:56 AM), <https://www.outlookindia.com/website/story/opinion-labour-reforms-necessary-but-hold-no-meaning-if-they-take-away-labourers-rights/353237>.

Revamping Justice Delivery

In article “***COVID – 19 Crisis and Digitization: Towards Revamping the Justice Delivery System***” the authors Nandini Garg and Vasu Manchanda wrote that though corporations can benefit heavily from private and public online dispute resolutions systems, courts especially at district level still require a breakthrough in making the first point of judicial contact with general public more accessible and seamless during pandemic-like situations. They suggested that, (1) instead of ADR clause, there could be an ODR clause or a virtual hearing clause for ADR in all contracts – not just commercial one and (2) Unattested affidavits could also be allowed with a condition of submitting the attested one shortly as the situation normalizes, (3) Bar Council of India (BCI) must look forward to provide video conferencing facilities to the lawyers. It must be considered that law colleges, bars and courts have a collaborative role to play.

Catastrophe for Migrant workers

Aniket Dutta in her article “***The Migrant Workers’ Catastrophe during COVID-19 Pandemic: Appraising Governmental Actions and Conceptualizing A Plausible Course of Action***”, has dealt with ongoing dilution of the labour laws prompting a critical shift in the manner the situation of the migrant labourers in the foreground of the COVID-19 caused lockdown. They attempted to critically examine the migrant labourers’ predicament from the constitutional and labour laws perspective and endeavours to provide a practical solution considering the interest of the migrant labourers in resuscitating the economy through an economic analysis. She says: The COVID-19 pandemic has forced most of the legislations to become obsolete, especially the labour legislation and has put the

governing principles of a constitutional democracy like India under grave uncertainty”.

Virtual Courts

Animesh Puneet Gupta and V. Adharsh in their article ***“Virtual Courts: The Forced Evolution of the Indian Justice System”***, referred to a baffling fact revealed by the Census 2011, every day, 2000 farmers are giving up farming²⁸, and that India is undoubtedly under the need to energise this sector to revive the economy as it strikes at several problems at the same time, being, unemployment, lack of income and food. The authors found one major red flag to online courts presents itself in the form of threat to privacy and data. Mainly dedicated to the use of personal or financial information for personal gain, the number of global identity theft cases is increasing rapidly. The documents and information of any given case are sensitive in nature. Generally, if this information is collected by other actors for a different context, it is subject to protection or confidentiality, they concluded.

Digital courts- foreseeable future

Dr. Kamaraju Chitrapu and Ms. Rituka Mane in their article ***“COVID-19 and Justice Delivery System: Challenges and Way Forward: Digitalisation of Indian Courts- A Foreseeable Future”*** tried to recognize the adversities tormenting the current Indian legal regime and address the absence of measures being implemented to handle the same. This paper highlights the advancements that can be made by the use of technology in the judiciary and the role that has been played by the Supreme Court in adapting to the pandemic, through the utilization of Information

²⁸ Jitendra, How to inspire India’s youth to take up farming? Agriculture, (Jan. 25, 2017), <https://www.downtoearth.org.in/news/agriculture/how-to-inspire-india-s-youth-to-take-up-farming-56849>.

Technology tools. The authors concluded that Unless the fundamental issues plaguing the judicial system are eliminated, no magnitude of technological influx would prove effective. Technology must constructively be introduced at all the levels of the judicial system, from Trial courts to the Supreme Court, and tribunals to make them easily accessible, affordable and equitable.

District Virtual Courts

In ***“Application of Virtual Hearing on District Courts of India”*** the authors Teesta Mishra and Laiba Ahsan referred to problems of virtual hearing of District Courts, which are not as technologically advanced as the higher courts of the country. Virtual hearings, even though the need of the hour, come at the cost of some fundamental attributes of the legal system. They concluded: “This pandemic acted as a reality check for the judiciary and gave it a chance to assess its position in terms of technological advancement. It is a brave new time for the law, and for lawyers and the entire legal fraternity. Our response to the questions of justice that arise in these testing times could set the tone for justice delivery for the indefinite future”.

K. Prajna Kariappa says in ***“The Plague of the Shadow Pandemic: Analysis of India’s Socio-Legal Obligations”*** that the domestic violence cases have ‘horrifyingly surged’ in gender-based violence cases all over the world and the United Nations has called for a ‘ceasefire’ to curb its rise.²⁹ As reported by the National Commission for Women, India has also transpired to this violence wave.³⁰ The reason for this rise lies in the root causes of stress, anxiety, distress,

²⁹ U.N., *UN chief calls for domestic violence ‘ceasefire’ amid ‘horrifying global surge’*, (Jun 22, 2020, 05:21 PM) <https://news.un.org/en/story/2020/04/1061052>.

³⁰ National Commission for Women, *Reports*, (July 12, 2020, 10:20 PM) <http://ncw.nic.in/publications/reports>.

masculinity and other values that are imbibed in the patriarchal system.³¹ She suggested monitoring and strengthening the implementation of the Domestic Violence Act by exercising due diligence and respond to the complaints that have been reported. The failure of doing so must result in a penalty or sanction of some form.

Covid-19 Impact on Contracts

Contractual Obligations

In the article “*Impact of Pandemics and Epidemics on Contractual Obligations and Ease of Doing Business in India: A Case Study of COVID-19 Situation*” Abhyudaya Yadav and Yashika Goplani dealt with the question as to whether the current situation will enable the parties to a contract to alter their obligations with non-compliance of terms neither being regarded as a "default committed by any party" nor a "breach of contract". The authors studied the effect on India's ranking in “Ease of Doing Business Index” because non-performance of contract seriously affects the order of ranking and its measures to mitigate the risk and in cases it may lower India's ranking as well. There is a thinking in this paper regarding invocation of Doctrine of force majeure and frustration in this situation along with blurred legal position about concepts of these doctrine under Indian law governing contracts, suggesting that invocation of these doctrines should be a fact specific determination, depending on case-to-case basis”. However, they say, one problem will still remain that in all this chaotic situation India's performance in Ease of doing business will be compromised because of these commercial disputes. Indian civil courts will take years to resolve this which will severely affect process of contract enforcement.

³¹ Radhika Chopra, *From Violence to Supportive Practice: Family, Gender and Masculinity in India*, UNIFEM, SOUTH ASIA REGIONAL OFFICE (2002).

Enforceability of Lease Deeds

The Article by Abdul Samad Khan and Raj Nandini Singh, on ***“Enforceability of Lease Deeds in COVID-19 and the Dilemma of Landlords in India”*** highlights the terms like novation, rescission and alteration in the Indian Contract Act, 1872 as an alternative from rent obligation in the midst of the outbreak of COVID-19. The young authors concluded that the doctrines of force majeure clause, doctrine of frustration or doctrine of suspension of rent need to be thoroughly examined before applying them to a contract in terms of Covid19 pandemic. They say the tenant-landlord arrangement can get a relief to sustain in such a pandemic by invocation by novation, rescission and alteration in the lease deeds enshrined under Section 62 of the Indian Contract Act. Novation of contract means to create a new contract while terminating the old one. Writers opined that the newly substituted agreement should be valid and fulfil all the conditions of a valid contract as per Indian Contract Act, 1872.

Ridhi Suri and Vidushi Sinha in their article titled, ***“The thin line of difference between commercial hardship and frustration of contracts: Need for Legal Reforms in light of the COVID-19 Pandemic”*** emphasized upon the importance of a clear distinction between an event of commercial hardship or inconvenience in performance of a contract, and frustration of a contract, as the former is not sufficient to dispense the parties from performing contractual obligations, the latter renders the contract impossible to perform. Writers thought about paving path for permitting partial frustration of contracts and lay emphasis on the alternate relief of re-negotiating the contractual terms by parties, in order to cater to the problem at hand and to aid the shift of economy from survival phase to the revival phase. The parties while drafting the clause may seek reference from the ICC Force Majeure Clause, which was designed in

March 2020. Such a clause facilitates the drafting process for companies and their lawyers. It adequately provides a safety net provision and places a distinct criterion for commercial transactions which may classify as *force majeure* events. The general structure of the clause is to provide contracting parties both with a general *force majeure* formula as well as with an exhaustive list of *force majeure* events.³² This would enable contracting parties to classify distinct categories of force majeure events and not heavily rely upon courts for interpretation, which is the need of the hour especially for long-standing commercial contracts, they suggested.

I hope this journal evokes enough interest and enthuse the young students and faculty members to think about burning issues and come up with research articles. It is for the readers to judge.

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³² *ICC Force Majeure and Hardship Clauses*, INTERNATIONAL CHAMBER OF COMMERCE, (Nov. 29 2020, 07:47 PM), <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>