

## **Digitization Of The Legal System: Virtual Courts During COVID**

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### **Introduction**

The novel coronavirus has claimed many lives, not only by death but also by throwing people out of jobs and onto the streets. The situation is especially dire here in India, a country with a population of 135 crores (1.35 billion). Among the many professionals, office workers, and daily-wage workers who have suffered, are the country's lawyers, who have lost clients and cases alike with the closing down of physical hearings early during the spread of the virus.

On March 23<sup>rd</sup> a Supreme Court bench under Chief Justice Bobde made the extraordinary but seemingly inevitable decision to shut down the Supreme Court premises and decided to only hear extremely urgent cases through a third-party video call app named 'Vidyo'<sup>1</sup>. Additionally, the limitation period for all cases and appeals across tribunals and courts was extended indefinitely. "Limitation period is the period in which a party can file a case within a specific number of days from the day of the dispute or an appeal to a higher judicial body against the order of a lower judicial body"<sup>2</sup>. In June a Supreme Court Committee of seven judges decided to continue with virtual hearings, given the alarming growth in cases<sup>3</sup>.

Yet, the decision does not come as a total surprise considering that countries like the United Kingdom had implemented online dispute resolution mechanisms back in 2015<sup>4</sup>. As early as February of 2020 there were talks of live streaming of court proceedings in India to improve accountability and transparency. These ideas came about as a result of the recommendations

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<sup>1</sup> *Coronavirus: Supreme Court to go on digital mode for social distancing*, THE HINDU (Mar. 23, 2020), <https://www.thehindu.com/news/national/coronavirus-supreme-court-to-go-digital-mode-for-social-distancing/article31144483.ece>

<sup>2</sup> Japnam Bindra, *COVID 19 Impact: SC allows summons, notices to be delivered through the digital medium*, LIVEMINT (Jul. 10, 2020), <https://www.livemint.com/news/india/covid-19-impact-sc-allows-summons-notices-to-be-served-through-digital-medium-11594390079508.html>

<sup>3</sup> *Supreme Court to continue virtual court system*, THE HINDU (Jun. 14, 2020), <https://www.thehindu.com/news/national/sc-to-continue-virtual-court-system/article31828053.ece>

<sup>4</sup> *Digitisation of the courts- bad news for advocates?*, LEXISNEXIS (Accessed on: Aug. 12, 2020, 4:20 PM), <https://www.lexisnexis.co.uk/research-and-reports/bar/digitisation-of-the-courts-bad-news-for-advocates.html>.

made by the 5<sup>th</sup> edition of Difficult Dialogues, an annual forum that examines issues of contemporary relevance across South Asia<sup>5</sup>.

To many people, however, this decision still came as a shock. This is not to be wondered at, since even photography and videography have rarely, if ever, been allowed in Indian courts. In fact, those caught taking videos or pictures have been promptly pointed out and accordingly reprimanded or punished.

In such a curious scenario, you might wonder what the impact of this special ruling has been on lawyers, clients, and judges. How have they adapted to the new systems and what problems have they faced? More importantly, is such a method of dispute resolution feasible as a long-term option in India? This article aims to answer those questions.

### **What are ‘Virtual Courts’?**

In India, after directions were issued in ‘Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic’ by invoking Article 142 of the Constitution of India as an extra-ordinary jurisdiction, judges have been hearing urgent cases sitting inside the courtrooms of our country’s apex court. Meanwhile, lawyers plead their cases on video conferences and make their submissions online sitting in their homes or offices. The court named this mechanism the ‘Virtual Courts’ system<sup>6</sup>. The court started hearing cases on video conferences as early as March and started serving summons and notices through the use of digital mediums (such as email and WhatsApp) since early June<sup>7</sup>.

### **Benefits of Virtual Courts during COVID**

As mentioned before, the Supreme Court was forced to make this abrupt decision due to the rising threat of coronavirus. This decision was commended, for the most part, hailed as a convenient method of solving the problem of dealing with urgent cases while practising social distancing and staying indoors.

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<sup>5</sup> *Experts suggest digitization of legal records to ensure data privacy*, HINDUSTAN TIMES (Feb. 19, 2020), <https://www.hindustantimes.com/india-news/experts-suggest-digitization-of-legal-records-to-ensure-data-privacy/story-jBuo57uvc2JvmSVGsUtyQK.html>

<sup>6</sup> *Supra*, note 3.

<sup>7</sup> Bindra, *supra* note 2.

Also, at a time when all transport services had closed down and physical access to courts was not only dangerous but impossible for some people, this decision brought relief to many<sup>8</sup>. Finding online litigation cost and time effective (since it requires no travel), many people began endorsing it as a long-term solution to the Court's problems.

It has been stated that "cases filed annually in the Courts in India contain about 11 billion sheets"<sup>9</sup> of paper. Digitization of case files, transcripts, and legal documents could save tons of trees every year. It is also well known that Indian courts constantly battle with a piling backlog of cases. Speeding up the hearing process through virtual hearings and online litigation could also act as a remedy for delayed justice and reduce the pile of pending cases significantly<sup>10</sup>.

Reports and studies conducted on UK's online dispute resolution mechanism have found that digitization can certainly "increase access to justice while reducing costs, streamlining processes and improving quality"<sup>11</sup>, thus providing citizens with a method of "greater convenience and ease of access"<sup>12</sup> when it comes to the law. Many across India have cited these findings when advocating for the continuing push towards greater digitization and virtual court hearings in India.

However, neither is the virtual court equally accessible to all the sections of the population in India nor is it capable of fully replacing physical hearings. To explore this argument, let us look at some drawbacks of the virtual court system.

### **Drawbacks of Virtual Courts in India**

With a large proportion of the population living in poverty and an even larger proportion being uneducated, it is no surprise that access to things like the internet and laptop are privileges not afforded to most in India. While it is easy to cite examples of success that online dispute mechanisms have attained abroad, it is impractical to expect similar results in a country like

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<sup>8</sup> *Id.*

<sup>9</sup> Kaleeswaram Raj, *Transforming the courts during the pandemic*, THE NEW INDIAN EXPRESS (May 02, 2020), <https://www.newindianexpress.com/opinions/2020/may/02/transforming-the-courts-during-pandemic-2138096.html>.

<sup>10</sup> Ijaz Maqbool et al., *The Supreme Court is online: Pros, cons, and the way forward for hearings by video conferencing*, BAR AND BENCH (Apr. 20, 2020, 7:05 AM), <https://www.barandbench.com/columns/the-supreme-court-is-online>

<sup>11</sup> *Digitisation of the courts- bad news for advocates?*, LEXISNEXIS (Accessed on: Aug. 12, 2020, 4:20 PM), <https://www.lexisnexis.co.uk/research-and-reports/bar/digitisation-of-the-courts-bad-news-for-advocates.html>.

<sup>12</sup> *Id.*

ours. As a writer for the New Indian Express most eloquently put, “Acute poverty and illiteracy are antithetical to egalitarianism”<sup>13</sup>. Such is the case in our country where people do not have equal access to resources needed to make virtual courts an equitable resource that can be availed by everyone.

Meanwhile, concerns have been expressed over the risk of compromising confidentiality when using third-party software for video conferences. Many technical issues have also been faced by advocates about ascertaining the authenticity of witnesses and cybersecurity issues. Lawyers in India were especially disgruntled with the 5MB limit placed on the size of documents to be submitted for a case petition and the 2MB limit for submission of additional documents on the Supreme Court’s website<sup>14</sup>. Lawyers have also spoken about the difficulty of attaining the same confrontational value in a virtual questioning as afforded by a face to face interrogation. It is an impediment of justice when a lawyer cannot satisfactorily cross-question witnesses since “an inability to cross-examine properly increases the risk of error”<sup>15</sup>.

Jammu and Kashmir’s High Court has also spoken about the importance of internet access during COVID to ensure that the fundamental right of the people to avail justice is not impeded<sup>16</sup>.

### **The Legal Community’s Concerns**

Out of the ones who can access the resources required to participate in online courts, not all find it particularly easy to tackle the technology efficiently. In a letter to the Chief Justice, BCI Chairman Manan Kumar Mishra has expressed concern over the floating ideas of continuing with online hearings even after the pandemic has subsided, labelling it as an “impractical thought”<sup>17</sup>. Mr. Mishra has rightly pointed out that the people advocating for this move are “oblivious to the ground realities of India”<sup>18</sup>. He has called to attention, the disparity in access

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<sup>13</sup> Raj, *supra* note 9.

<sup>14</sup> Maqbool, *supra* note 10.

<sup>15</sup> Doron Menashe, *A Critical Analysis of the Online Court*, 39(4) U. PA. J. INT’L L. 921, 946-950 (2018), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1967&context=jil>.

<sup>16</sup> Apoorva Mandhani, *E-connectivity necessary for access to justice amid Covid-19: Jammu & Kashmir High Court*, THE PRINT (Jun. 07, 2020), <https://theprint.in/judiciary/e-connectivity-necessary-for-access-to-justice-amid-covid-19-jammu-kashmir-high-court/437202/>.

<sup>17</sup> Shruti Mahajan, *Continuing Virtual Hearings after lockdown “impractical”, 90% lawyers, judges unaware of technology: BCI Chairman writes to the CJI*, BAR AND BENCH (Apr. 28, 2020), <https://www.barandbench.com/news/continuing-virtual-hearings-after-lockdown-impractical-90-lawyers-judges-unaware-of-technology-bci-chairman-writes-to-the-cji>.

<sup>18</sup> *Id.*

to required resources between the rich and the poor, or the people living in metro cities versus those living in rural areas. Additionally, he has pointed out the inequality in technical knowledge between people of various ages. Mr. Mishra has claimed that 90% of advocates and judges are not well-versed in the nuances of technology<sup>19</sup> right now, and not all of them may be equally adept at learning it all so easily and rapidly as some imagine.

Another letter addressed to the CJI sent by the Supreme Court Advocates on Record Association's President Shivaji M. Jadhav has voiced similar concerns, stating "Most lawyers (almost 95%) are not comfortable with the virtual court hearings. The common feedback seems to be that the lawyers are unable to present their cases effectively in the virtual medium and the same is acting as a major deterrent for lawyers to consent for such virtual hearings"<sup>20</sup>.

## **Conclusion**

A critical analysis of the online court system conducted by the University of Pennsylvania Associate Professor Doron Menashe thoroughly studied the pros and cons of the online court model, first implemented in the United Kingdom. In her report she concluded that the online court model should be first introduced as a "pilot program, dealing with civil proceedings which may be easily resolved and claims involving relatively small amounts of money"<sup>21</sup>.

Many have concurred to similar opinions, believing that a middle road approach would be best. In such an approach, online litigation and virtual hearings could be made optional<sup>22</sup> for a small breadth of cases. This would allow for gradual changes to be implemented in terms of additional training of lawyers, taking the time to understand flaws in technology and correcting them. Meanwhile, a greater effort should be undertaken to identify sections of the population vulnerable to the ill-effects of digitization and institute necessary reforms and building up basic infrastructure to ensure equitable and fair access to justice on an online platform.

Even with a middle road approach, it is important to understand that virtual cases cannot fully replace physical hearings due to inherent problems associated with a virtual environment that

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<sup>19</sup> *Id.*

<sup>20</sup> Murali Krishnan, *Supreme Court mulls allowing physical hearings after lawyers complain*, THE HINDUSTAN TIMES (Jun. 02, 2020), <https://www.hindustantimes.com/india-news/supreme-court-mulls-allowing-physical-hearings-after-lawyers-complain/story-VdkMjiMFo20a3prTK9XTQI.html>

<sup>21</sup> Menashe, *supra* note 15, at 921.

<sup>22</sup> Maqbool, *supra* note 10.

cannot be solved at present. What virtual courts can provide is temporary relief in the time of a pandemic. At the same time, digitization of parts of the legal process such as making digital case files viewable to the parties involved and allowing online plea submissions would be of great help. In this manner, the digitization of certain procedures can supplement physical hearings. But expecting virtual hearings to fully replace physical ones is injudicious at best, and unconstitutional at worst.