

THE JURAT INTERNATIONAL LAW JOURNAL**VIRTUAL COURTS: TO BE OR NOT TO BE?****K.HEMA****UNIVERSITY SCHOOL OF LAW AND LEGAL STUDIES, GURU GOBIND SINGH
INDRAPRASTHA UNIVERSITY (GGSIPU), DELHI****ABSTRACT**

The COVID-19 pandemic has had a significant impact on our fundamental rights, especially the right to seek redressal from courts. Keeping in mind the need for social distancing, the entire justice system shifted online from the confines of the physical courtroom. This shift was facilitated by the digitization initiatives undertaken by our judiciary over the past decade. It is undeniably one of the biggest steps taken with regard to integrating technology with the judicial process, a goal the judiciary had been inching towards, albeit a bit slowly. The unprecedented yet valuable experience of virtual courts has helped us to understand the pros and cons of employing information technology in the court system. Cutting across the barriers of time and space, virtual courts have proved to be extremely useful in the current situation and may just be the solution for reducing the pendency of cases. But along with the use of virtual courts has come the realization that we are not yet well equipped to tap its maximum potential due to lack of digital infrastructure. These 'closed' courts have posed a number of other constitutional, legal and practical issues. Focusing on such a relevant subject, the present article not only lists both advantages and disadvantages of virtual courts, but also seeks to draw its own inferences to determine the utility of virtual courts and its importance vis-à-vis physical courts. In the end, after considering all aspects, it is concluded that while virtual courts can be a viable alternative for certain kind of court proceedings, it cannot, in any way, replace the physical courts.

INTRODUCTION

It was only a few months ago when the courtrooms and its corridors were full of the hustle-bustle of judges, lawyers and litigants. Till the pandemic and the subsequent lockdown brought everything to a standstill. However, the Hon'ble Apex Court soon realized that even if the nation and the society reach an impasse, the justice delivery system cannot afford to do so. And true to the saying 'Adversity presents Opportunity', the Indian courts took this opportunity to use advanced technology by substituting physical hearings with virtual courts. Ever since then, litigation has undergone a sea change, presenting to us both the advantages and disadvantages of virtual courts.

DIGITIZATION OF COURTS: A NEW PHENOMENON?

Operation of courts by means of video conferencing is the latest addition in the list of initiatives taken by our judiciary towards the digitization of courts.¹ Making the legal process up-to-date with the information and communication technology was a project which was proposed as long back as 2005. Based on the 'National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary- 2005', the e-courts Integrated Mission Mode Project was started.² Under this project, software named Case Information System (CIS) was developed for the District courts and the High Courts, which allows the litigants to check the present status of their case and access daily orders and judgments, from any part of the world.³ Video-conferencing was also introduced in certain courts and jails to facilitate communication.⁴ In the year 2015, National Judicial Data Grid was launched, which contains consolidated data regarding the cases pending in the district courts all over the country, leading

¹ In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic, Suo Moto Writ Petition (Civil) No. 5/2020, para 6

² Dignath Raj Sehgal, 'Future of Virtual Courts in India after COVID-19 crisis', iPleaders, April 14, 2020, available at <https://blog.iplayers.in/future-virtual-courts-india-covid-19-crisis/> (Accessed on November 21, 2020)

³ What is Case Information System (CIS), available at https://calcuttahighcourt.gov.in/downloads/ecourt_files/cis3/What_is_CIS.pdf (Accessed on November 21, 2020)

⁴ Brief on eCourts Project, available at http://www.wbja.nic.in/wbja_adm/files/Brief%20on%20e-courts%20Project.pdf (Accessed on November 21, 2020)

to better resource management.⁵The idea of paperless courts was also introduced by the Supreme Court in 2017, with the first paperless court being presided over by the Chief Justice of the Hon'ble Delhi High Court.⁶ In June this year, the Hon'ble Supreme Court followed suit.⁷ Last year also saw the coming up of virtual courts at Faridabad for dealing with the traffic challan cases of the state, making the disposal of such cases easier.⁸The facility of e-filing, initially conceived in the year 2007, has also received a boost during the ongoing pandemic.⁹

ADVANTAGES OF VIRTUAL COURTS

Looking at the above initiatives, it is evident that our judiciary has realized that technology is the way forward, and for good reason. The application of technology to the judicial process has numerous advantages. By enabling the lawyers and the litigants to participate in the court process from the comfort of their homes or offices, it has significantly cut down on the time and expenses for travel.¹⁰By shifting to digital mode, proceedings have become more cost-effective and environment-friendly, with negligible use of paper. With the electronic filing of cases possible, lawyers and litigants no longer have to stand in long queues waiting for their turn. A lower cost of litigation has the potential to improve access to justice. Smart case management has reduced the possibility of Passovers and adjournments which are considered as the major causes of delay in reaching the conclusion of any case. Such virtual courts may also prove to be useful for those witnesses who are apprehensive about their security, while making any statement against the other party.

⁵'What is National Judicial Data Grid?', The Hans India, September 21, 2015, available at <https://www.thehansindia.com/posts/index/Education-and-Careers/2015-09-21/What-is-National-Judicial-Data-Grid/176876> (Accessed on November 21, 2020)

⁶ Anit Mukherjee, 'Establish a Paperless Court System in India to Ensure Speedy Resolution of Cases', cogitASIA, March 5, 2020, available at <http://www.cogitasia.com/establish-a-paperless-court-system-in-india-to-ensure-speedy-resolution-of-cases/#:~:text=The%20Supreme%20Court%20introduced%20a,Courts%20expected%20to%20follow%20suit.> (Accessed on November 22, 2020)

⁷ Bhadra Sinha, 'No paper files, all case records on laptops – Supreme Court holds first paperless proceedings', ThePrint, June 1, 2020, available at <https://theprint.in/judiciary/no-paper-files-all-case-records-on-laptops-supreme-court-holds-first-paperless-proceedings/433505/> (Accessed on November 22, 2020)

⁸ Supra note 2

⁹ Soni Mishra, 'Supreme Court unveils e-filing module to facilitate online filing of cases', TheWeek, May 15, 2020, available at <https://www.theweek.in/news/india/2020/05/15/supreme-court-unveils-e-filing-module-to-facilitate-online-filin.html> (Accessed on November 22, 2020)

¹⁰'Virtual Courts and way forward', IAS Gatewayy, April 9, 2020, available at <https://iasgatewayy.com/virtual-courts-and-way-forward/> (Accessed on November 22, 2020)

Free from the interruptions and trappings of a physical court, the virtual courts can also take up a more number of cases in a day, and thus, can help in reducing the backlog of cases. In fact, it was observed by a three-judge Bench of the Supreme Court that if administered properly, a virtual court can hear up to 40 cases in a single day.¹¹ These benefits of online courts also seem to have been realized by the Parliamentary Standing Committee, which has recommended the continuation of virtual courts even after the pandemic.¹² Overall, it would not be wrong to say that online courts have contributed to making the process of law easier and convenient.

CHALLENGES

While virtual courts are definitely the need of the hour and a step in the right direction, one should not turn a blind eye to its shortcomings and the challenges posed by it. Online proceedings may be of tremendous help and convenience to the stakeholders involved. But this would be true only if everyone has access to Internet in the first place. It is pertinent to mention here that in January 2020, 'Access to Internet' was declared as a fundamental right by the Hon'ble Apex Court.¹³ Earlier, in a 2017 judgment, Kerala High Court had also referred to it as a 'basic human right'.¹⁴ However, statistics reveal that as of 2017, a staggering 72% of the Indian population did not have access to Internet. Added to this, is the uneven distribution of the Internet connections among the urban and rural areas. Even with respect to those who can access Internet, the speed required to take part in the online proceedings is there with a very few number of subscribers.¹⁵ As per Article 39A of the Constitution of India, every individual has the right of access to justice, irrespective of his/her financial capacity. With the virtual courts gradually

¹¹'One virtual court can hear 40 cases in a day through video conferencing :Supreme Court', ThePrint, May 18, 2020, available at <https://theprint.in/judiciary/one-virtual-court-can-hear-40-cases-a-day-through-video-conferencing-supreme-court/424464/> (Accessed on November 22, 2020)

¹²Neelam Pandey & Bhadra Sinha, 'Let virtual courts continue after pandemic, they are safer & faster, parliamentary panel says', ThePrint, September 11, 2020, available at <https://theprint.in/judiciary/let-virtual-courts-continue-after-pandemic-they-are-safer-faster-parliamentary-panel-says/500442/> (Accessed on November 23, 2020)

¹³Prabhash Dutta, 'Internet access a fundamental right, Supreme Court makes it official: Article 19 explained', India Today, January 10, 2020, available at <https://www.indiatoday.in/news-analysis/story/internet-access-fundamental-right-supreme-court-makes-official-article-19-explained-1635662-2020-01-10>(Accessed on November 23, 2020)

¹⁴'Access to Internet is a basic right, says Kerala High Court', The Hindu, September 20, 2019, available at <https://www.thehindu.com/sci-tech/technology/internet/access-to-internet-is-a-basic-right-says-kerala-high-court/article29462339.ece> (Accessed on November 23, 2020)

¹⁵Aarati Krishnan, 'How many Indians have Internet?', The Hindu, March 27, 2017, available at <https://www.thehindu.com/business/how-many-indians-have-internet/article17668272.ece> (Accessed on November 23, 2020)

becoming a part of the ‘new normal’, if nothing is done to address this concern, then access to justice would end up becoming a right for the privileged and virtual courts a handicap for the underprivileged. This will have the effect of depriving poor litigants and lawyers of their rights and livelihood respectively. Further, there are several lawyers, judges and court staff who despite having the requisite infrastructure, may not be familiar with the newer technologies. Their digital literacy needs to be taken care of, so as to derive maximum benefit of the technological advancements.¹⁶

One of the major challenges posed by the virtual courts is the fact that it is opposed to the sacrosanct principle of ‘open courts’. The ‘open court principle’ is envisaged in Article 145(4) of the Constitution. Reference to the same can also be found in Section 153B of the Code of Civil Procedure, 1908 and Section 327 of the Code of Criminal Procedure, 1973. Besides judges, court staff, counsels and concerned parties, journalists and general public also have an equal right to observe the court proceedings. Making the courts open to the public aids in ensuring the transparency of the proceedings and automatically acts as a check on any possible misuse or abuse of power.¹⁷ In fact, the Supreme Court has itself observed the same in the case of Naresh Shridhar Mirajkar & Ors. V State of Maharashtra & Ors.¹⁸, wherein it stated that public hearing of cases is integral for maintaining objectivity and impartiality in the administration of justice. This was reaffirmed in the recent landmark case of Swapnil Tripathi v Supreme Court of India¹⁹, wherein it was held that live streaming of court proceedings in majority of the cases would be in public interest.

Not only is it the duty of the Courts to abide by this principle, it is also a right of the general public under Article 19(1)(a) to receive information.²⁰ While journalists have been given access to the virtual courts in certain important cases to enable them to report the same²¹, there are

¹⁶ Manjunath Kakkalameeli, ‘Virtual Courts v Physical Courts, Its feasibility and legality’, LatestLaws.com, June 29, 2020, available at <https://www.latestlaws.com/articles/virtual-court-versus-physical-court-its-feasibility-legality/> (Accessed on November 23, 2020)

¹⁷ P.K.Dubey, ‘Virtual Courts:A sustainable option’, BarandBench, April 12, 2020, available at <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option> (Accessed on November 24, 2020)

¹⁸ Naresh Shridhar Mirajkar & Ors. v State of Maharashtra & Ors, 1966 SCR (3) 744, p. no.754

¹⁹ Swapnil Tripathi v Supreme Court of India, (2018) 10 SCC 639, para 21

²⁰ Rintu Biju, ‘Open Data policy required to make courts more accessible and accountable’, BarandBench, December 1, 2019, available at <https://www.barandbench.com/news/open-data-policy-required-to-make-courts-more-accessible-and-accountable-vidhi-report> (Accessed on November 24, 2020)

²¹ Arijit Prasad, ‘Virtual Courts: Can they replace open court hearings?’, LawStreetIndia, June 19, 2020, available at <http://www.lawstreetindia.com/experts/column?sid=410> (Accessed on November 24, 2020)

several other stakeholders, for instance, law students who are missing out on the opportunity to observe and learn from the court proceedings amidst this pandemic. Although it is understandable that the shift from the physical courts to virtual courts has been sudden for the judiciary as well, the principle of ‘open court’, which serves as a foundation of an accountable judiciary, cannot be sacrificed at any cost. Perhaps inspiration can be taken from the Corona virus Act 2020 of the United Kingdom, which provides for broadcasting of the proceedings by making the link available to more members of the general public.²²

One of the most essential steps in any trial is the recording of evidence. According to the directions of the Supreme Court, virtual courts are primarily being used for hearing arguments in trial and appellate cases. Recording of evidence is not to be done using video conferencing, except with the consent of both the parties.²³ This is another problematic area. Often in trials, cross-examination is used as a tool to discern the truth, where along with the statement being given by witness, his/her gestures, facial expressions, promptness in answering all play a very important role. With the coming in of virtual courts, it will become difficult for the judge and the opposite counsel to gauge the body language of the witness. It can further increase the possibility of false deposition by witnesses.²⁴

Then, there are cyber security concerns. With the hearings being conducted online, chances of cybercrimes have increased. Litigants may not be completely comfortable revealing any personal or relevant financial information, which may be compromised and make them the target of identity theft. Besides, other sensitive and confidential information, for example, trade secrets, are also at a risk of being revealed and misused for gain.²⁵ In the lockdown, with majority of people working from their homes, the lines between personal and professional life are slowly becoming blurred. Several instances of improper conduct of lawyers have been reported, be it

²² Dilion Eustace, ‘COVID-19:Virtual Courtrooms trialed’, ICLG.com, April 6, 2020, available at <https://iclg.com/briefing/11993-covid-19-virtual-courtrooms-trialed> (Accessed on November 24, 2020)

²³ Kingshuk Banerjee & Preeti Sahai, ‘Virtual Courts in India’, Lexology, April 20, 2020, available at <https://www.lexology.com/library/detail.aspx?g=5e264a78-7b02-499e-9fb3-ee2aa9fa13fa#:~:text=Till%20such%20time%20as%20the,with%20the%20parties%27%20mutual%20consent> (Accessed on November 24, 2020)

²⁴ Supra note 15

²⁵ Supra note 10

indecent dressing or indulging in vices.²⁶ Though virtual courts is a comparatively new concept, the legal professionals need to understand that the same code of conduct and etiquette is to be followed in an online hearing as they would have in a physical hearing. Then only can the decorum of the Court be maintained.

At the beginning of the lockdown, the Courts took up only extremely urgent cases. Hearing being restricted only to a certain category of cases was a cause of anguish for several lawyers and litigants. With no express description of what falls under ‘extremely urgent cases’, the listing of cases by the registry was also marred by controversy. With the passage of time and a better grip on technology and infrastructure, Supreme Court resumed hearing of miscellaneous and regular cases.²⁷ Different High Courts and district courts have also started hearing non-urgent matters, which had been delayed for a long time.²⁸ Physical hearings have also been resumed in a graded manner since September 2020.²⁹

CONCLUSION

Physical courts, containing the element of human interaction, are fundamental to the entire judicial process. They cannot be substituted by the virtual courts. At the same time, it is important to reap the abovementioned benefits of virtual courts. This can be done by using virtual courts for certain specific kind of cases like traffic violations, tax matters etc. In this way, a healthy balance can be struck between the two.

²⁶ Vikash Aiyappa, ‘Lawyer appears while lying in bed during virtual hearing’, OneIndia, June 21, 2020, available at <https://www.oneindia.com/india/lawyer-appears-while-lying-on-bed-during-virtual-hearing-3108233.html> (Accessed on November 25, 2020)

²⁷ Kanu Sarda, ‘Supreme court to start hearing miscellaneous as well as regular matters from July 13’, The New Indian Express, July 12, 2020, available at <https://www.newindianexpress.com/thesundaystandard/2020/jul/12/supreme-court-to-start-hearing-miscellaneous-and-regular-matters-from-july-13-2168520.html#:~:text=NEW%20DELHI%3A%20From%20July%2013,bringing%20some%20respite%20to%20lawyers.&text=The%20Supreme%20Court%20suspended%20the, followed%20by%20subordinate%20courts%20also.> (Accessed on November 25, 2020)

²⁸ Punjab, Haryana, Chandigarh: HC allows lower courts to hear non-urgent cases’, The Indian Express, June 10, 2020, available at <https://indianexpress.com/article/cities/chandigarh/punjab-haryana-chandigarh-hc-allows-lower-courts-to-hear-non-urgent-cases/> (Accessed on November 25, 2020)

²⁹ Soibam Rocky Singh, ‘High Court to partially resume physical hearing from September 1 on trial basis’, The Hindu, August 18, 2020, available at <https://www.thehindu.com/news/cities/Delhi/high-court-to-partially-resume-physical-hearing-from-september-1-on-trial-basis/article32388462.ece> (Accessed on November 25, 2020)

But to avail the benefits of virtual courts also, a lot of improvement must be made. Infrastructure must be bettered and any concerns with respect to technology must be looked into. Efforts for the same must be inclusive and take into account the views and interests of all stakeholders. Whatever be the mode of hearing, Courts must ensure the transparency and accountability of proceedings and strive to provide relief to the litigants. Then only will the legal system be able to discharge its functions in the true sense.

