

E-Courts: Indian Supreme Court Moves at the Speed of Thought!



Author
Payel Chatterjee and Pratibha Jain*

While participating in one of the virtual hearings recently before Supreme Court we experienced firsthand the mammoth task of dispensing justice virtually that our Courts are undertaking during this challenging time. More than 85 days into the lock-down and some of the major cities in India continue to operate under severe restrictions. The period of lockdowns and social distancing restrictions has seen a rise in crimes against women, domestic violence cases, issues related to rent payments during lockdown and hurdles faced by the migrant labourers across the country which need redress. As rightly put by Justice Sikri, “a lockdown cannot result in locking courts altogether.”⁹ The time is ripe for legal professionals to work vigorously towards providing ac-

cess to justice, including access to courts, to the needy and vulnerable. The Supreme Court and other High Courts have led the way by example. On the positive side, we have e-courts, e-arbitrations, e-filings and virtual hearings. The Indian judiciary began hearings through video-conferencing in the Supreme Court and High Courts within two days of lock-down,¹⁰ thus leading the way by example. Justice D.Y. Chandrachud heading the Supreme Court’s E-Committee during the e-inauguration of virtual courts aptly highlighted that the unexpected arrival of the COVID-19 pandemic has “*given an opportunity to place the technological infrastructure of Indian judiciary on a robust basis. The question today is not whether we should adopt technology but how well do we*

* Pratibha Jain and Payel Chatterjee are lawyers with Nishith Desai Associates. Pratibha is a Partner with the Regulatory Team and heads the firm’s Delhi office and Payel heads the firm’s European Practice and is a senior member of the International Litigation and Investigations Practice.

⁹ Meghna Mishra and Sumit Malhotra, Covid-19, an inflection point for digitization of the Indian legal system, Published in the Daily Guardian and available at <https://thedailyguardian.com/covid-19-an-inflection-point-for-digitisation-of-the-indian-legal-system/>, last accessed on June 6, 2020.

¹⁰ Virtual courts system is pathetic, justice not being done: SC Bar body chief Dushyant Dave, Published in the Print, Available at <https://theprint.in/judiciary/virtual-courts-system-is-pathetic-justice-not-being-done-sc-bar-body-chief-dushyant-dave/437864/>, last accessed on June 9, 2020

*adopt technology.”*¹¹

It is undeniable that the steps taken in the last few months are a clear reflection of the intent of the judiciary to dispense justice irrespective of the hardships involved and the technological infrastructure available. The Supreme Court also laid down guidelines and standard operating procedures to be followed to ensure a seamless process.

Law and Order: An Essential Service

Justice delivery system is an essential service. The central and state government through various notifications and office orders introduced new guidelines/rules and opened several sectors considered essential for the public. Surprisingly, law firms and courts did not feature in that list. This only added to the list of pending cases across courts, India has been infamously known for. Access to justice forms the basic core function. The enforcement of lockdown across the country came as a challenge for litigants from an access to justice perspective. Indian courts have more than 30 million pending cases and the sudden lockdown only added to that number. The inordinate delays during lockdown prompted several senior lawyers from the Bombay High Court to raise the issue in early May 2020 with suggestions for full functioning of the courts and preparatory measures to ensure resumption of physical hearings at the earliest possible date. The open letter suggested set of measures and guidelines to improve and streamline the process.

The thinking around usage of ‘virtual courts’ have

been in existence for long in India but not implemented. The E-Courts Project was conceptualized based on the “National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005” by the Supreme Court of India to ensure efficient, time-bound, citizen centric services delivery; development and installation of decision support systems in courts, and to enhance judicial productivity, both qualitatively & quantitatively.¹² It is during these troubled and testing times, that lawyers, judges and litigants finally opened to the possibility of it and adopted long pending solutions to its advantage. The need today is to ensure that citizens are aware of technology and understand how to use and gain familiarity with the technology, especially the marginalized community. They need to be equipped to ensure access to justice is imparted in its true sense.

What does “Access to Justice” entail?

Access to justice is a basic principle of the rule of law¹³ and a historic fundamental right conferred by common law. Every citizen has a right of unimpeded access to a court.¹⁴ However, access to justice is not restricted to approaching courts of law but also quality of justice imparted, independence of the judges, rendering legal aid, filing of public interest litigation. Access to court is dependent upon payment of court fees and the assistance of lawyers in most cases.¹⁵ In the absence of a system where the judiciary does not come forward to remove impediments to access to justice, the fundamental right is defeated and ceases to be an independent judicial system. The

¹¹ Place judiciary’s tech infra on robust basis: Justice Chandrachud, Published in the Outlook India, Available at <https://www.outlookindia.com/newscroll/place-judiciarys-tech-infra-on-robust-basis-justice-chandrachud/1833391>, last accessed on June 15, 2020

¹² https://services.ecourts.gov.in/ecourtindia_v6/static/about-us.php, last visited on 4 June 2020

¹³ Raymond v. Honey: 1983 AC 1 (1982 (1) All ER 756)

¹⁴ Steyn LJ in R v. Secretary of State for Home Dept, ex p Leech 1993 (4) All ER 539 (CA)

¹⁵ As emphasized by Mr. M.C. Setalvad, Chairman of the first law Commission in his Report on Legal Aid, 1958.

Constitution of India has incorporated the concept within Article 14 which guarantees equality before law and equal protection of laws. This was further incorporated in Article 21 through judicial precedents. India can proudly claim to impart “access to justice” through several judicial precedents and established that courts in India do not exist for the few, by the few or of the few.¹⁶

Justice Gita Mittal shared her experiences during a webinar, and stated that courts have (i) suo moto filed public interest litigation in times of COVID-19 to provide reliefs to citizens stranded in foreign jurisdiction, (ii) suo moto taken cognizance of rights of prisoners in jails and set up committees to consider release of prisoners on interim bail or parole; (iii) addressed the plight of migrant labourers considering the travel restrictions and granted them basic amenities; (iv) allowed e-visitation rights to family members of prisoners (famously known as “E-Mulaqat” in Jammu and Kashmir); (v) provided legal aid and (vi) attempted to educate people about use of technology and providing e-connectivity amongst others. The steps taken by Indian Courts in these aspects have been far reaching and is truly an example of going above and beyond, without overstepping the bounds of the separation of powers and intruding into the executive branch’s powers and to ensure that “access to justice’ is provided rather than simply ‘access to courts’.

Virtual Court-Rooms, E-filings and Video Conferencing

Times are changing and post lockdown we will all

embrace a ‘new normal’. COVID-19 has compelled us to look for innovation within existing structures rather than completely reinventing the wheel. Potential for virtual hearings have been there for a long time but criticized and shunned on various grounds including technical glitches, privacy issues, outcome and participant experiences, but their positive impact is quite visible today. The Supreme Court has gone a step forward and prescribed guidelines on pleadings, submissions and arguments. The Indian system has been known for bulky pleadings. With the new rules in place we will see the advantages of having crisp arguments and submissions placed prior to the hearing.

The digital transformation has given the necessary impetus to enhancement of justice. One of the biggest upsides to the virtual system has been the ability of litigants and their lawyers to file cases sitting at their homes (even in remote districts and cities) and not wait for courts to re-open thereby ensuring the hurdle of travel restrictions is of no consequence. While the developments and reforms need to be applauded, they still require much support from various quarters to make it plausibly functional. There are several issues that practice of virtual hearing raise that need to be addressed:

- How to ensure that procedural rights of parties are not impinged on due to a virtual hearing. For example, what happens in cases with too many parties and everyone is trying to put forth their point-it can be very easy for the Court to mute one party, or an argument can be lost due to technical glitches.

¹⁶ Justice A.K.Ganguly, Access to Justice, Cuttack Conference, ILI Golden Jubilee 1956-2006, Available on http://14.139.60.114:8080/jspui/bitstream/123456789/1023/1/019_Access%20to%20Justice.pdf, last accessed on 8 June 2020.

► Virtual hearings in the higher courts have been implemented but what about trial courts? Change always begins at the ground level, so the focus needs to be shifted to the trial and lower courts for imparting justice.

► What mechanisms should be put in place to address issues relating to privacy, live streaming and recording of arguments. The judges across several high courts have raised objections to recording of hearings on grounds of confidentiality. This raises the need to have stricter data protection laws and stress on importance of confidentiality.

► Technical glitches due to internet and bandwidth issues, leading to disconnection and parties exiting from the virtual court-rooms can lead to orders being passed without hearing the respective counsels. Filing petitions for recall of orders due to inability to make submissions owing to technical glitches are already before Supreme Court.

Despite the above challenges, the Supreme Court has rightly seized the opportunity and resolved issued to the best of possibilities available in these difficult times and is improving with each passing day. Technology is no longer an alternative but a necessary part of the new way of life. The Supreme Court has not restricted its outreach only through embracing technology but also directed the central and respective state governments to provide transport, adequate food, shelter free of costs to the migrant labourers. This is yet another example of the Indian judiciary coming to the forefront and coming to the aid of the underprivileged during the pandemic. The Chief Justice of India paved the way forward for the future, announcing on May 18,

2020 that e-courts are here to stay and the ‘new normal’ would be a combination of both. The journey has been fascinating, yet there is a long way to go for the judiciary to make justice accessible to all litigants across different parts of the country. We conclude with Robert Frost’s lines:

*“...The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep...”*